"Pre-Negotiation" Counseling: An Alternative Model

Paul R. Tremblay, Boston College Law School

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"PRE-NEGOTIATION" COUNSELING: AN ALTERNATIVE MODEL

PAUL R. TREMBLAY*

This Article describes a strategy for counseling clients in settings not covered by the models found in most lawyering skills textbooks. The conventional counseling models found in the leading clinical texts assume an array of available options among which a client must choose. Those models effectively suggest strategies to assist a client to make the most informed and faithful choice among those available alternatives. A very different counseling experience, though, occurs when a lawyer and client must ascertain a client's authority to settle, or the client's bottom line, before any such array of alternative avenues has emerged. The usual models not only do not fit this kind of "pre-negotiation" counseling, but their prescriptions can interfere with the effectiveness of that effort. This Article, reflecting the experiences of several clinical teachers at Boston College Law School over many years, offers a blueprint for organizing the pre-negotiation counseling meeting, and contrasts this model with the conventional counseling models. The Article also defends its alternative model against some possible criticisms.

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"Marta, tomorrow I have my meeting with your tenant's lawyer. I'm sure we'll talk about possible settlement terms. What I wanted to do in our meeting today is to see what kind of authority you want to give me to negotiate with her. We also need to consider whether we might make an initial offer to start the process rolling."

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* Clinical Professor, Boston College Law School. While I have typed the words here, the ideas I express arose from a collaboration among my early colleagues at Boston College Law School's civil clinical program: Alexis Anderson, Carol Liebman, Bob Smith and Mark Spiegel. I thank them for their contributions to this counseling model. I also thank David Binder and Paul Bergman for their frank discussions with me about the counseling strategies outlined here, and the participants at the UCLA/University of London Sixth Annual International Clinical Conference at Lake Arrowhead, California, for their reactions to this paper. Boston College Law School's Alumni Fund contributed generous financial support for this project, and Ben Forsdick, Boston College Law School Class of 2008, provided helpful research assistance to me. Any errors found in this Article are, of course, entirely Mark Spiegel's.
I. INTRODUCTION

One of the most basic skills taught in law school clinics, and in simulation courses, is counseling. It is one of the most important elements of good lawyering,¹ and it is a skill which can be taught, and taught through the use of models.²

Every lawyering skills book available includes instruction about effective counseling.³ But when we review the available models for counseling, we see a very interesting phenomenon: The texts explore in considerable detail the techniques and strategies involved in coun-

¹ See American Bar Association Section on Legal Education and Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) (1992)(referred to conventionally and hereafter as MacCrate Report). The MacCrate Report develops a Statement of Fundamental Lawyering Skills and Professional Values. Id. at 135-223. The sixth skill on its list is “Counseling,” described as “one of the fundamental skills required for competent legal practice.” Id. at 176-84.

² I use the term “model” here to capture a prominent phenomenon in clinical education, and in particular in the skills training pedagogy within clinical education—the development of prescriptive devices to guide lawyers’ behaviors in a preferred, but not rigid, structure. A model represents an effort to suggest a workable scheme of lawyering actions intended to accomplish a certain goal, grounded in some theories about the psychology of human relations. The Binder and Price books pioneered the idea of developing explicit models for interviewing and counseling, with suggested steps and orders of proceeding. See David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (1977); David A. Binder, Paul Bergman & Susan C. Price, Lawyers as Counselors: A Client-Centered Approach (1990); David A. Binder, Paul Bergman, Susan C. Price & Paul R. Tremblay, Lawyers as Counselors: A Client-Centered Approach (2d ed. 2004)[hereafter Lawyers as Counselors 2004]. The books’ use of preordained schemas, which a lawyer might follow as an orientation to a new skill, has no doubt accounted for their great popularity. At the same time, the “step-by-step” quality of their models has invited some criticism. See, e.g., Peter Margulies, Re-Framing Empathy in Clinical Legal Education, 5 Clinical L. Rev. 605, 608 (1999)(noting technical quality of schematic proposals in 1990 version of Lawyers as Counselors); Ann Shalleck, Constructions of the Client within Legal Education, 45 Stan. L. Rev. 1731, 1742-48 (1993)(seeing some rigidity and inattentiveness to differences among clients in 1990 version of Lawyers as Counselors). If those criticisms have had any validity, the 2004 edition of Lawyers as Counselors has responded to them by emphasizing the need for flexibility in using its models. See Lawyers as Counselors 2004, supra, at 12-13; see also David A. Binder, Paul Bergman, Susan Price, Paul R. Tremblay, Susan Gillig & Larry Farmer, Teachers Manual to Accompany Lawyers as Counselors: A Client-Centered Approach, Second Edition 2-3 (2004).

saling clients about making defined choices among a finite set of discrete, available options. The choices might be binary ("you take the offer, or we go to trial"), or the choices might be more than two ("we can draft you a straightforward will, or instead put most of your property into a life estate, or alternatively you could create a living trust, or maybe you'll want to do an irrevocable trust"), but the ultimate goal of the counseling considered in the skills texts is to assist a client to decide satisfactorily among some identifiable alternatives.\footnote{The authorities just noted generally approach counseling in this way. See, e.g., BASTRESS & HARBAUGH, supra note 2, at 235-82 (describing process for client to make decision among several identified and competing alternatives); COCHRAN ET AL., supra note 2, at 148-55 (same); HEGLAND, supra note 2, at 265-72 (same); SHAFFER & ELKINS, supra note 2, at 189-90 (less model- and technique-driven, but still using examples of discrete choices). The most interesting text on this score is Essential Lawyering Skills. See KRIEGER & NEUMANN, supra note 2. In their chapters on counseling, Krieger and Neumann focus on developing separable "options" and comparing them, just as the other texts do. Id., at 231-42. But later, in their chapter on negotiation skills, the authors address in limited fashion the question of preparing a client in advance of a negotiation. The authors suggest, "Before the negotiation, ask the client to decide how much authority to settle she will give you." Id. at 293. Their book does not, however, develop a process for asking this question effectively. The purpose of this Article is to outline and explore precisely such a process.} The existing counseling models suggest protocols and meeting structures with that comparative, choice-between-a-finite-number-of-alternatives end in mind.

Much of client counseling is precisely that kind of activity. But a substantial part of client counseling does not involve choosing among a small number of discrete alternatives. Often, a lawyer must meet with a client not to review options on the table, but to anticipate future negotiations and to create new options. By definition, there are no preexisting alternatives to choose between or among, because the bargaining has not yet begun. But a client meeting is still necessary, in order to determine what kind of authority the client will give to the lawyer to negotiate—that is, to determine what kinds of offers or demands to make or accept. It is still a counseling meeting, although a different kind of counseling meeting.

This Article will refer to this special kind of counseling as "pre-negotiation counseling."\footnote{In our clinics at Boston College Law School, we have for years referred to this kind of skill as "no-offer counseling," because the students are counseling clients without any offer on the table.} It is an awkward phrase, perhaps, but it does capture the moment in time when this kind of meeting will occur. We might refer to this activity as "authority counseling," but that phrase seems a bit narrow given the goals of this endeavor.\footnote{One significant goal, as we shall see, of this alternative type of counseling is to learn from a client what authority he will approve for a settlement package. But that is not its only goal. The lawyer and the client may also use this meeting to decide what kind of offers or demands to make in a negotiation, what kind of style to invoke, and similar matters. For}
counseling tied directly to negotiation, but it is separate from the negotiation process because it involves a meeting between the lawyer and the client to determine what the client wishes to occur. Many of the same considerations will apply in this process as within the standard models, but not all will apply. In several respects pre-negotiation counseling will be distinctly different from the standard model. It therefore seems important to offer an alternative model for pre-negotiation counseling. At Boston College Law School, we have used this alternative model for close to 20 years, and it has become a common and accepted distinction for the faculty and for the students. This Article shares our thinking about the alternative model. It compares this model to what one might identify as the pioneering and "standard" model of client counseling, that developed in *Lawyers as Counselors* and its predecessors. After it describes the model and its variation from the conventional "decisional" model, the Article then explores, and addresses, some criticisms of this kind of counseling.

II. How the Pre-Negotiation Counseling Model Differs from the Conventional Counseling Model

The model we have developed differs from that developed in the *Lawyers as Counselors* book in the following ways. Each difference listed here is elaborated upon later in this Article.

First, the goal of the meeting is very different in pre-negotiation counseling. No longer is the goal to learn a client’s preference or choice when faced with a few discrete alternatives. Instead, the primary goal of the meeting is to learn what a client’s bottom line will be, at least provisionally. Other possible goals of this kind of meeting include deciding upon an appropriate opening offer in an upcoming ne-

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7 Thus, a student preparing for a meeting with a client will regularly assess whether the meeting is conventional counseling from the *Lawyers as Counselors* model, see supra note 2, or instead "pre-negotiation" counseling taught via a handout in the clinical program.

negotiation, or assessing values and preferences in preparation for a problem-solving, integrative negotiation.

Second, the order of discussion of the client’s alternatives will be different. In the conventional model, the lawyer is indifferent about the order in which various alternatives are discussed, and deliberately so, in order to maintain a neutral presentation. In pre-negotiation counseling, a particular order is required. The lawyer must first describe the “default” setting, so that a client can appreciate new alternatives that will be developed in the meeting. By “default,” we refer to whatever state of affairs will exist in the absence of a negotiated agreement—what Fisher and Ury refer to as a BATNA (Best Alternative to a Negotiated Agreement). Discussion of new alternatives cannot precede discussion of the default setting.

Third, the use of comparisons is more subtle and more infrequent in the pre-negotiation counseling model. As we see more fully below, a comparison between generic alternatives (say, “trial” versus “settlement”) will be fruitless in this setting, because a concept like “settlement” encompasses an entire range of very good possibilities and very bad possibilities. The comparisons will come, but only when the lawyer has moved to consider possible acceptable settlements.

Fourth, once the lawyer has obtained an acceptable settlement idea from a client, our model encourages her to press her client to see if a less favorable settlement package would be unacceptable. That act of pressing ultimately reveals her client’s “bottom line” authority (sometimes referred to as a “walkaway point” or “reservation point”). Accomplishing this inquiry is a delicate matter, as we will see. Whether lawyers should in fact try to identify a client’s true “bottom line” is a complicated question explored below.

III. AN EXAMPLE OF PRE-NEGOTIATION COUNSELING

To make this special kind of counseling more vivid, I will develop

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9 See Lawyers as Counselors 2004, supra note 2, at 309.
11 MELISSA L. NELKIN, UNDERSTANDING NEGOTIATION 60 (2001)(“A plaintiff’s or seller’s walkaway point is the least that party will agree to accept in settlement; a defendant’s or buyer’s walkaway point is the most the party will agree to pay. For a lawyer, the client’s walkaway point also marks the outer limit of the lawyer’s authority to reach a negotiated agreement on behalf of her client.”)(italics in original). A walkaway point is sometimes referred to as a “reservation point.” See, e.g., Richard Birke & Craig R. Fox, Psychological Principles in Negotiating Civil Settlements, 4 HARV. NEGO. L. REV. 1, 15 (1999)(“A reservation point is defined as the point at which a negotiator is indifferent between settlement and no settlement.”); Russell Korobkin, Michael Moffitt & Nancy Welsh, The Law of Bargaining, 87 MARQ. L. REV. 839, 840 (2004).
12 See text accompanying Part V.C.3 infra.
the model using a simplified example of a distributive negotiation whose focus is on damages measured in dollars. Use of a linear, positional negotiation example permits us to understand the impetus underlying the model developed here, and how it differs from the conventional model described above. As I develop later in Part V-D, however, the insights generating this model apply as well to less linear or positional problem-solving negotiations. In all negotiation settings, whether distributive or integrative, a lawyer must understand the limits and the contours of her client’s authority. Consider, then, the following lawyering story:

You represent Lynn Girton, who was involved in an automobile accident three years ago in Westwood, California. Lynn was traveling eastbound on Pico Boulevard on a late November afternoon when she approached the intersection of Westwood Boulevard, where she had a green light. As she proceeded through the intersection, she was hit head on by Steven Dolinko, who attempted a left hand turn from the westbound Pico Boulevard to southbound Westwood. Dolinko claimed that he did not see Lynn’s car because of the glare of the setting sun. Lynn suffered documented back and shoulder injuries, and a minor but persistent (and less clinically documented) head injury.

You sued Dolinko, who has disputed damages but not liability. Dolinko’s lawyer is Alison Dolovich. Discovery is complete. The case is about three months from trial. Your assessment is that if the case went to trial, Lynn has the following odds of recovery:

- 30% of $250,000 (the insurance policy limit),
- 40% of $100,000, and
- 30% of $50,000.

The Superior Court judge has scheduled a settlement conference for early next week. You have invited Lynn in for a meeting to prepare for the conference, which of course will involve some efforts at negotiation.

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13 “Distributive” negotiations represent those interactions “in which there is a pure conflict of interest between the parties: most often, the parties are deciding how to divide a fixed quantity of resources between them.” Donald G. Gifford, Legal Negotiation: Theory and Applications 15 (1989). See also G. Nicholas Herman, Jean M. Cary & Joseph E. Kennedy, Legal Counseling and Negotiation: A Practical Approach 152 (2001)(also referring to this kind of bargaining as “adversarial”); Gerald B. Wetlaufer, The Limits of Integrative Bargaining, 85 Geo. L.J. 369, 370 (1996).


15 Careful readers will note that I have stolen this story directly from the superb trial advocacy text developed by three UCLA School of Law faculty members. See Albert Moore, Paul Bergman & David A. Binder, Trial Advocacy: Inference, Arguments and Techniques 35 (1996).
IV. THE PROCESS OF PRE-NEGOTIATION COUNSELING

A. Describe the Goal of the Meeting

This stage of the pre-negotiation counseling model is the same as in the counseling model described in Lawyers as Counselors or similar texts.\textsuperscript{16} The first part of your meeting will be dedicated to explaining the process that will occur, and your commitment to client-centeredness. You will explain that your goal is to obtain some settlement authority from your client, and to explore, when appropriate, what the limit of that authority will be—in other words, what the least favorable acceptable settlement package would look like. That package will then represent your client’s “bottom line” or “reservation point.”\textsuperscript{17}

In the Lynn Girton case, you might introduce this meeting with the following:

\textit{You:} “Lynn, as I told you in the e-mail I sent, Judge Saxe has set up what she calls a settlement conference for next Tuesday. I’ll go, and Alison Dolovich will go, but you won’t need to be there. We’ll meet with the judge, who will see if she can help us settle the case. We don’t have to settle. You have every right to have this case tried in Judge Saxe’s court. But Judge Saxe will try her best to get the case settled. That’s the way courts work. She has too much work on her docket, and each case she can settle is a case that goes away for her. But she’ll respect our decision if we do not agree to a settlement.

“Our meeting today is meant for us to explore the idea of settlement, and to see, if the case were to settle, what you might look for. What I’d really like to know today is what your ‘bottom line’ would be, so I’ll know where to stop if we get pushed.”

\textit{Lynn:} “Our complaint asked for $500,000. So are we thinking in that range? I’ll be open to settle if we’re thinking about that kind of number.”

\textit{You:} “Of course. That would be a great settlement. But, as we discussed when we filed the complaint, I shot high in that pleading, just to be safe. I now think the case is not worth nearly that much, and I’ll tell you why in a moment. But before we talk about the numbers, I need to remind you that whether we settle at all, or what number you authorize me to settle for, either way it is your decision. I’m with you whether you want to settle quickly or hold out for trial. This is your case, and I’ll do what you want.

“But this will all make sense only if you understand how strong a case you have. Let me go over that before we talk about any ideas


\textsuperscript{17} See Korobkin, \textit{supra} note 14, at 1794.
about possible settlements.”

In this introduction you explain in general what your goal of the meeting is, and remind the client about the fact that any decision will be based on her preferences, not yours. This is especially important in pre-negotiation counseling, for, as you will see soon, the latter stages of this kind of meeting may look like you are trying to talk your client down as you press to ensure an accurate bottom line.

This dialogue also raises a few other important issues. Lynn here immediately thinks that her case is worth more than it is worth in fact, because of your strategic bluff in the complaint. This kind of misunderstanding is common, and should remind you of the importance of explaining to your client any bluff or similar favorable public posturing about the case. Her reference to $500,000 also shows the importance of describing the “default” option early on (here, the trial), so the client has the correct benchmark for her consideration of realistic settlements.

The above dialogue may also have raised this question in your mind as you read it: If Lynn somehow gives you a bottom line at the end of the day (“I’ll take no less than $75,000; otherwise, to trial we go”), she might believe that you will therefore settle her case on Tuesday for $75,000. That fear would be quite misplaced, unless you are a pretty inept lawyer, but it is a natural one. With a bottom line of $75,000 you still might settle her case for $250,000 if you are a good negotiator (and/or if your opponent is not). You might end up settling for $75,000 (that’s the whole purpose of learning the bottom line), but you will do everything in your power to get more.

You therefore need to assure your client of the difference between understanding her bottom line and crafting your settlement goals. You might explain the distinction in the first stage described here, but our judgment is that this explanation will have more meaning if saved until later in the meeting. Our reason for postponing the discussion is grounded in the client’s need for some context for the discussion of that difference, and that context is likely to be in place later in the meeting, after you and the client have explored some concrete possible authority points.

18 For many reasons, including potential publicity and negotiating leverage, a plaintiff’s lawyer may often wish to assert a claim for the maximum damages in the complaint, if the jurisdiction permits dollar amounts to be pleaded. See THOMAS A. MAUET, PRETRIAL 129 (5th ed. 2002). But unsupported damage claims may be unethical, see MODEL RULES OF PROFESSIONAL CONDUCT (2003) R. 1.3; Fed. R. Civ. Pro. R. 11, and are tactically dangerous, as we see in the text’s dialogue. See ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 119-20 (4th ed. 2000).

19 Indeed, Lynn might fear that $75,000 would be your opening offer on Tuesday. See Part III-E infra.
B. Describe the "Default" Option—Here, the Trial

After you have introduced the meeting, you cannot proceed to any pre-negotiation counseling until you have explained to Lynn her trial options. In this case example, trial is the default path. If Lynn declines to settle, or demands too much in settlement and deadlocks, her case will proceed to trial. Everything she considers today will compare to the trial. She should only settle if a settlement is more attractive to her than trial.

So, unlike the counseling described in *Lawyers as Counselors*, here you will not offer Lynn a choice regarding which option to discuss first. Discussing settlement before discussing trial would be meaningless (except in the most generic sense—that is, what a "settlement" is). You will tell Lynn that she needs to understand her trial option before you can together consider settlements.

Aside from not offering your client a choice, this part of the meeting will look very much like the counseling from the standard model. You will explain what will happen if you go to trial, with considerable detail. You might start like this:

"Let me go right to the trial and what that would look like for you. If you really like the trial opportunity, you will be very uninterested in any settlement, unless Alison offers us everything we're looking for, which I can assure you she won't. So here's what trial will mean for you. First, it will probably start in late April, and last 3-4 days. You will miss work for those days, but you have told me you can use personal days so you don't lose any salary. You will win the case, I am quite sure, but you will not win $500,000. Here are my predictions about your chances before a jury in Judge Saxe's court. You have a 30% chance of winning the most we can hope for, which is $250,000. You also have a 40% chance . . ."

You then proceed to explain her most likely, best likely, and worst likely chances at trial, just as you would if you were asking Lynn to decide between trial and an offer made by Alison Dolovich. Your conversation with Lynn would also describe the affective, logistical, and emotional implications of the case's proceeding to trial, including Lynn's feelings about testifying, the implications for her family life,

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21 I must note here but elide a question that the reader may encounter at this point: How can a lawyer ever predict this assuredly the odds of winning and losing at trial? That is indeed an intriguing question, but all counseling models—whether conventional or pre-negotiation—assume some predictive abilities on the part of lawyers. We will not visit that question here, but will assume that lawyers have the ability in some fashion to make such predictions. On the related question of using actual numbers to describe the chances of events happening, see *Lawyers as Counselors* 2004, supra note 2, at 306-08; *Krieger & Newmann*, supra note 2, at 234 ("[i]t would be better to avoid predicting in percentage terms").
the effect, if any, on her employment, and the like.\textsuperscript{22}

Note one further difference between this part of your counseling and counseling Lynn in the standard fashion about an offer on the table. In the latter setting, you can, and should, characterize her most, best, and worst likely chances as advantages or disadvantages, relative to the offer on the table.\textsuperscript{23} Here, there are no such things yet as advantages or disadvantages, because there is nothing to compare to. The odds are just that, chances of winning.

\textit{C. Explore One Hypothetical Settlement Package}

After you have described trial so that Lynn understands exactly what she’s in for, you must then proceed to consider what settlement package, if any, might be preferable to the trial package you have just described. In short, your inquiry with Lynn at this stage and the next is this: “Given what we’ve just discussed, what settlement, if any, would be more attractive than trial?” In this stage, you must get some concrete proposal onto the table to make that inquiry meaningful. Without some sample proposal, your client cannot assess how attractive any settlement package might be for her.

There are two ways to accomplish this task of finding a concrete proposal to begin with. The first, and preferred, is for you to elicit from your client a potential settlement package that she thinks would be more satisfactory than trial. Your job then, as we see in the next section, is to test to see if that proposed package is indeed better than trial, after it is thoroughly vetted. Having your client suggest a package is obviously more in concert with your client-centered aims. If Lynn tells you that, given the uncertainties you have just discussed, she would be happy accepting a certain deal, you can be comfortable that this is really her choice.

The obvious, and indeed inherent, downside to offering this choice to your client is the powerful incentive for her to choose a very favorable, and perhaps unrealistic, settlement package. For example, after you have described her most, best, and worst likely trial chances to her, Lynn might say something like this:

“There’s a lot of riskiness to going to trial, and that makes me a bit anxious. So what settlement would be better than trial? What if Dolinko paid me $250,000? That would be better than trial.”

This is, of course, an unrealistic proposal ($250,000 is the best case

\textsuperscript{22} In your description of the trial option (as contrasted with the assessment of that option), you would cover everything suggested by the Binder et. al. model in its stage focusing on understanding the alternatives. \textit{See Lawyers as Counselors} 2004, \textit{supra} note 2, at 304-22.

\textsuperscript{23} \textit{See id.} at 400-14.
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scenario), and perhaps an exaggerated example. But the point is made: Asking your client to tell you what settlement might seem better than trial is likely to elicit a rather one-sided deal. This is not a fatal problem, however. As we see in the next section, you will simply move your client down to less favorable packages. The loss is in your time and hers.

The alternative approach, which is not the preferred one, but still has a lot to say for it, is for you to throw out a middle-range settlement package to test its acceptability. If the package you imagine would be OK, then you move to less attractive deals as you seek a bottom line. If your imagined deal would not be acceptable, you move to more attractive packages. So, under this alternative approach you might say something like this:

"Lynn, as I said, we need to see what settlement package, if any, would be better to you than going to trial. I suggest we begin by my throwing out a sample settlement, one that I think we could get Alison to agree to, just to see if this might look good to you. The fact that I mention this does not mean that I think it would be a good deal for you. That's for us to figure out together, based on what you tell me about your desires and priorities. But here's my thought: What if the judge suggested that we settle by Dolinko paying you $110,000, with a confidentiality provision, all payable within 7 days after we sign papers. The $110,000 is more than the $100,000 mid-range option at trial but far less than your best shot of $250,000. Let's explore that package to see if you would take that deal if Alison offered it, or if you would turn it down."

The disadvantage of this alternative way of proceeding is apparent: No matter how much you distance yourself from it, your proposal will look like one that you support. By choosing a "reasonable" settlement package, you probably have influenced your client a bit about what settlements are seen by the world as realistic. Perhaps you want to influence your client in this way, lest she think too favorably of her chances; but we'll all agree it is not entirely "client-centered."

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24 You might diminish this risk (although perhaps not eliminate it) by including a "preparatory explanation" in which you remind your client of the goal of the meeting—learning her preferences—and of your role in achieving those preferences regardless of where they lead.

25 There is much social science evidence supporting the "self-serving bias," which operates to cause people to have overly optimistic views about their own cases. See, e.g., Linda Babcock, George Lowenstein, Samuel Issacharoff & Colin Camerer, Biased Judgments of Fairness in Bargaining, 85 AM. ECON. REV. 1337 (1995); George Lowenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, Self-Serving Assessments of Fairness in Pretrial Bargaining, 22 J. LEGAL STUDIES 135 (1993).

26 In crafting this model, we have made every effort to adhere to the Binder at al. principle of neutrality as a hallmark of client-centered counseling. See Binder & Price, supra note 2, at 166-74; Dinerstein, Client Centered Counseling, supra note 8, at 577-84.
In any event, the critical task of this stage is to get some concrete proposal out on the table. The pre-negotiation counseling process cannot proceed unless you have some specific, if hypothetical, alternative (to the default or BATNA) with which to begin.

D. Assessing the Acceptability of the Proposed Settlement Package

Once you have identified a possible settlement, your next stage is to test whether that package would indeed be preferable to trial. You accomplish this in precisely the same way that you would counsel your client in a conventional, choose-among-a-few-alternatives context, using the standard models. You carefully compare the consequences, and their advantages and disadvantages, of each option to see which the client would select if this choice were indeed before her.

You perform this analysis regardless of whether you or your client has imagined the sample settlement. So, if Lynn suggests a possible settlement that she believes would be better than trial, you do not simply accept that judgment and move on. Doing so would be tantamount to accepting the decision of a client whose mind was made up before careful counseling. Instead, you acknowledge her attraction but ask for her to think it through:

"So your sense is that a deal where Dolinko paid you $175,000 would be better than going to trial. I agree with you that an offer like that seems like a very good one compared to trial, but let's take a moment to think it through, just to be sure. Let me stress, though, that I have no idea whether we could ever get that kind of deal from Alison, but that doesn't matter for now. So let's compare that settlement with trial. Recall that the trial option gives you about a 30% chance of getting $250,000, and the settlement package you propose eliminates that chance. That's its disadvantage. On the plus side, of course, you would get more money than your 70% of the chances at trial. Let's see if we can identify other advantages and disadvantages. What advantages do you see with proceeding to trial, compared to a settlement for $175,000?"

Two other observations about this process. First, with a relatively favorable settlement package, like the $175,000 deal Lynn has imagined, you need spend less time than you might otherwise to test it against trial. Second, with a completely frivolous self-serving settlement package, you need spend no time at all comparing it to trial. So:

"I have no doubt at all that you would accept a settlement of

27 See LAWYERS AS COUNSELORS 2004, supra note 2, at 397-99, 437-44.
$250,000 instead of going to trial. That would be so unbelievably good that we'd just jump at it. But it is so unbelievably good that there's no way we'd ever get a deal like that. Let me see how you might react to a less favorable proposal . . . ."

E. Moving On to Less Favorable (or More Favorable) Packages

We have now approached the most difficult and sensitive part of pre-negotiation counseling. In order to have some sense of your client's bottom line, even if it is a provisional bottom line, you cannot end your discussion with the first imagined settlement. You must continue to explore other packages, either less favorable (if the client has accepted the first imagined deal) or more favorable (if she has rejected the first one). In each instance, the risk will be great that you will look like you want the client to settle at some point (as you will see in a moment), and your challenge is to accomplish this inquiry while remaining neutral in your client's eyes. I offer some suggestions about accomplishing this goal.

1) Moving to Less Favorable Deals

Let's say that Lynn agrees, after some advantage/disadvantage consideration, that she would accept the $175,000 offer if it were on the table. (We expect that most economically rational clients focused on financial interests would accept that offer given the risks of trial in Lynn's case.28) You cannot leave your meeting with her until you know whether she would accept something less favorable. Perhaps she won't, but you need to know that. Therefore, your next responsibility is to move the discussion down to a less generous package to assess whether that package would also be acceptable to Lynn. Again, you are disinterested about whether she would accept a lower number or not. Your only job here is to understand what her choice would be.

You do so by explaining that you need to know what to do if a less favorable deal is the only one available. So, you say something like this:

"So if I can get a deal for $175,000 or more, we'll take it. That helps me. What I need to know from here, though, is whether you would take a different deal, one that's less generous. What if the best deal that Alison was willing to offer was $150,000, take-it-or-leave-it? We need to figure out whether you would take that, or whether you

28 If Lynn's goal were purely to maximize her economic return through this negotiation, the $175,000 package is a good bet. Lynn has a 40% chance at trial of recovering $100,000, and a 30% chance of recovering $50,000, so the odds are that she will end up with less than $175,000 if the case proceeds to trial. The economic value of her trial option, as described here, is $130,000 (30% of $250,000, plus 40% of $100,000, plus 30% of $50,000).
would go to trial. So let's imagine: $150,000 offer, versus having your trial. I'll remind you again, as I will a lot, that either one is perfectly fine with me, but I need to know which would be your choice. Which do you want to discuss first? . . .”

And, if Lynn agrees (as she very well might) that $150,000 is not a bad settlement of this case, you cannot stop there. You need to keep moving the conversation downwards:

“OK. Now I'm going to be a bit of a pest. I need to see if you would take something less than $150,000 if it were the best deal ever on the table. In doing this I do not want to communicate that I think you should accept something less, but I need to know whether I should take, or reject, a lesser offer. I'll do either one once you give me my marching orders. So let's try a lower number. What if Alison's final offer were $100,000? Let's compare a $100,000 settlement offer, on the table now, to your having a trial. . . .”

And, if Lynn decides that she would accept $100,000, you must again suggest a lower figure, until you reach a point where Lynn concludes that she would prefer trial to the suggested package. That spot is her bottom line.

As emphasized above, Lynn needs to understand that her reservation point or bottom line is not the same as your opening offer to the defendant's lawyer. There is a critical difference between one’s opening offer and one’s reservation point, and the counseling process must ensure that Lynn recognizes that distinction. You might use an explanation like the following to avoid any misunderstanding about that point:

“It looks like my marching orders are to get you the most I can from Alison, but not to accept less than $100,000, at least given what we know now. I want to remind you, though, that our agreeing on my authority limit as $100,000 does not mean that I will walk in and offer to settle the case for that amount. Not even close. You and I both believe that the case should settle for a lot more than $100,000, and I'll bet Alison does as well. My opening offer, which we'll discuss in a moment, will be considerably higher than your bottom line, and my job is to keep Alison from knowing what your bottom line in fact is.”

2) Moving to More Favorable Deals

If Lynn originally rejects a suggested settlement, you cannot end your meeting. You then must explore more favorable packages until you find one, if any, which she would prefer to trial. The above process takes place in reverse.

29 See text accompanying note 19 supra.
So, imagine that, to begin the process, you suggested a hypothetical deal where Alison offered to settle for $110,000. After exploring the plusses and minuses of that settlement versus trial, Lynn says she would not accept that figure—she would go to trial if that were the best settlement available. That’s exactly what you need to know. You then test to see if any better settlement would work. You can do this in one of two ways. One is to suggest a marginally better deal, to see if that package is preferable to trial:

“So I gotcha. If $110,00 was the best deal that I could get from Alison on Tuesday, I will say no. That helps. But let me stay with this idea a bit more. What if Alison were to offer $125,000? Let’s replay the process we just went through, now comparing an imagined offer of $125,000 to the trial. How does a $125,000 deal strike you?”

The progression moves forward to increasingly more favorable deals until Lynn finds one (if at all) that is better than trial. Once you reach a favorable settlement moving up, you can then stop. (You can be assured that Lynn will always take a better deal than the lowest one she has accepted.)

The other way to proceed is to move way up after Lynn has rejected a hypothetical deal, to see if she is open to settling if the terms are generous enough. If she likes the very favorable deal, then you move downward to see where, between the deal she liked and the deal she did not, her minimum authority lies. So with this idea you might say something like this:

“So I gotcha. If $110,00 was the best deal that I could get from Alison on Tuesday, I will say no. That helps. But let me stay with this idea a bit more. What if Alison were to offer $175,000? I don’t think she would offer anything that high, but if she did, what would you think?”

If Lynn says “yes” to $175,000, you then move down from $175,000 to determine where, between $110,000 (which she would not take) and $175,000 (which she would take), her bottom line rests.

3) **Suggestions for Effectively Pressing for Higher or Lower Deals**

A few moments consideration of the above processes will lead you to realize the following ideas about doing this process well:

- You need to use your judgment about how large your jumps will be. In theory, you could test Lynn’s reactions to $174,999, then $174,998, then $174,997 after she has agreed to a deal for $175,000. But you will not do so. You want this process to be realistic and not tedious for your client (or you). You will exercise your best professional judgment in offering marginally better (or worse) deals.
As you discuss progressively better (or worse) possible settlements, you will not have to repeat the consequences of the trial option. So, after you have explored a beginning $110,000 hypothetical offer with Lynn, and assuming she has rejected that deal, you can discuss a better offer (say, $125,000) without very much replication of the implications of trial. What looks in theory like a series of repeated choose-among-a-few-alternatives counseling meetings in fact is much more fluid after you have had one careful comparison of plusses and minuses of trial versus a sample settlement.

Because you need to move a client downward from a very favorable imagined settlement, you can now see better the disadvantage of working with an unrealistically high offer proposed by a client. You should still ask your client for the first imagined settlement, and hope that she is somewhere in the ballpark of realistic deals; but if she is not, you might wish to move her downward considerably toward a plausible imagined deal.

Your client’s “final” bottom line will always be a rough estimate, in two senses. First, if Lynn says she will accept no less than $150,000, she probably will accept $149,500, but you will not push that point, lest she strangle you. And second (and related to that), most often the bottom line you obtain is provisional, because you can usually recounsel Lynn if you are about to deadlock. For instance, if Alison offers $146,200 as her absolute final offer, you probably will have the opportunity to telephone or to meet again with Lynn to confirm that you should reject that offer.

Finally, we stress the importance of your reminding your client early and often that your testing for better or worse settlements, and your advising her that some settlements are unrealistic, does not mean that you want her to change her mind about what she wants. Your sole goal is to make sure you do not accept an settlement that she would not want, nor reject one that she would in fact prefer. Beyond that, you’ll go with her wherever she wants.

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30 This is generally, but not universally, true. As the case progresses, at some point you will need to have some clear authority on which you can accept or reject final offers. At some point, in some settings, you may have to make a binding decision without your client nearby.
F. The Relationship Between Pre-Negotiation Counseling and the Negotiation Process

This Article does not cover negotiation skills, but I must wrap up this description of pre-negotiation counseling by noting some important negotiation strategy issues that are implicit in this counseling skill.

When you meet with your client to obtain settlement authority, you are counseling her, in the sense that you are learning from her what her preferences are, by comparing different alternatives, albeit hypothetical ones. But you are also deep into negotiation strategy thinking, and your meeting with your client is as much about how you will negotiate as about what your client ultimately wants. I list here some considerations for you to incorporate into your pre-negotiation counseling meeting and your planning for it. I note that these ideas will have relevance in all kinds of negotiations, whether litigation-based or transactional, distributive or integrative, as we see below.31

First, as we saw above, obtaining some sensible bottom-line authority from your client does not mean that you will use that authority for your opening offer. While few things are firmly true in strategic law practice, it is accepted dogma that you do not make your bottom line your first offer.32 Also, in a related point, if you end up settling at your bottom line after a lot of negotiating in which you made demands or offers that were far more favorable to your client's bottom line, you can't always say that you have succeeded. Getting a deal within your client's authority range is not the same thing, necessarily, as getting a good deal.33

Second, there may be some situations where you will negotiate with an opposing lawyer or party before you have done any pre-negotiation counseling. This would be unusual, of course, but it is not unheard of. You could not settle in that negotiation, of course (you

31 See text accompanying notes 57-66 infra.
32 OK, I'll admit that there is a school of negotiating called "Boulwarism," named after a man named Boulware who apparently negotiated for General Electric this way, in which a negotiator makes just one offer, and refuses to budge from it. See, e.g., ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 215 (2000); Jonathan R. Cohen, When People Are the Means: Negotiating with Respect, 14 GEO. J. LEGAL ETHICS 739, 763 (2001) ("[O]ne problem with Boulwarism from an ethical viewpoint is the lack of voice it allows the other party in the bargaining process. Beginning the bargaining process by insisting upon and committing to a 'take-it-or-leave-it' offer allows the other party virtually no role in the dialogue."). In Boulwarism one might say that your bottom line and your opening offer are the same. But trust me, unless you are one feisty lawyer, or have a case with enormous leverage, you won't regularly do well with a pure Boulware strategy.
33 Our experience teaching students and new lawyers has been that novices tend to conflate getting an acceptable deal with getting a good deal. Many times that will be true, of course, but there is no firm relationship between the two.
would have no authority to do so), but you could learn a great deal about the other side’s power, strategy, and weaknesses. If the other side has performed its pre-negotiation counseling, and makes a demand or offer, you can then counsel your client about that discrete proposal in the fashion described in the conventional models. If neither side has done any pre-negotiation counseling, then nobody can make any offers or demands or proposals, of course.

Third, let me emphasize the last parenthetical sentence of the previous paragraph. You cannot make a first offer if you have not had a pre-negotiation counseling meeting with your client. If you run into the emerging literature, grounded in cognitive psychology, holding that those who make more favorable initial proposals tend to do better, you will want to be prepared to make an opening proposal if you believe your case’s strategy calls for it. You cannot do so if you have not met with your client to learn her authority. Consider: If you negotiated Lynn’s case with Alison before meeting with Lynn, and made what seemed like a safe opening demand of $160,000, and Alison somehow agreed to it, you run the risk that Lynn will tell you later that she would not authorize settlement at that figure. Having made the offer, you may not be able to renege by saying that your client will not agree to the terms you proposed.

Fourth, there is a fine tension between learning your client’s true bottom line and giving you confidence to negotiate strongly. The less you know about your client’s willingness to accept a lower figure, the better you may be able to negotiate. This is a critical insight about the interplay of the pre-negotiation counseling process and negotiation strategy, and one which invites a critique of pre-negotiation counseling which we will visit below.

Here’s a brief example of this point. Let’s assume you have a pre-negotiation counseling meeting with Lynn, who tells you (after some serious conversation) that she would accept a $150,000 settlement if

34 One of the puzzling aspects of the standard counseling texts is that they seem to assume this unusual posture—that the other side has made an offer to settle before the lawyer has met with his client. Those texts describe the first counseling meeting as coming after an offer to settle has been received.

35 See Russell Korobkin & Chris Guthrie, Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way, 10 OHIO ST. J. ON Disp. RESOL. 1, 21-22 (1994). This insight, based on experimental research, counters advice in some negotiation texts that warn against high opening offers or demands, fearing that such tactics invite deadlock. See, e.g., GIFFORD, supra note 13, at 109.

36 See, e.g., STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 60 (7th ed. 2005)(lawyer’s apparent authority to settle can bind a client); In re Artha Management, Inc., 91 F.3d 326, 329 (2d Cir. 1996)(“we presume that an attorney-of-record who enters into a settlement agreement, purportedly on behalf of a client, had authority to do so”).

37 See Part V.C.3 infra.
that were the best you could get. If you end the meeting at that point, without pressing her downward, you may be a stronger negotiator with Alison. If Alison offers $140,000, you may confidently say that you have no such authority, and you may through your confidence persuade her that she has to pay $150,000 or above. If, on the other hand, you follow the counseling model suggested here to its logical conclusion, you may learn that Lynn, if really pushed, would accept $125,000 instead of going to trial. After that meeting, you may be a less effective negotiator with Alison, because you cannot honestly and confidently reject lower offers. This statement is true even if you do not accept the Wetlaufer thesis rejecting virtually any form of deception in negotiation.\(^{38}\) Even if you were willing to fib or mislead your partner while negotiating, possessing a lower reservation point means that proposals from the other side are more likely to fall within your range of acceptable settlements, and many observers of negotiation acknowledge the difficulty of holding out for more favorable terms when a proposal fits within your client's authority.\(^{39}\)

You therefore need to use your best judgment in seeking a bot-

\(^{38}\) See Gerald Wetlaufer, *The Ethics of Lying in Negotiation*, 75 *Iowa L. Rev.* 1219, 1233-36 (1990). Wetlaufer's thesis sits at the far end of the honesty/deception continuum in the negotiation ethics scholarship. He argues, persuasively it seems to me, that communicating (explicitly or by carefully chosen implication words) to a negotiation opponent that your client will not accept $140,000 to settle a case when in fact the client would accept $140,000 to settle the case is effectively lying. And lying, Wetlaufer argues, is presumptively and thus almost always impermissible. See *id.* at 1233-36. His thesis has not been embraced by all scholars, however, and especially tends to be rejected by practitioners writing about this topic. See, e.g., Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 *Southwestern L. Rev.* 713, 715-18 (1997) ("The fundamental question is not whether legal negotiators may use misrepresentations to further client interests, but when and about what they may permissibly dissemble . . . . [N]egotiation interactions involve a deceptive process in which a certain amount of ' puffing' and 'embellishment' is expected . . . . Attorneys who believe that no prevarication is ever proper during bargaining encounters place themselves and their clients at a distinct disadvantage, since they permit their less candid opponents to obtain settlements that transcend the terms to which they are objectively entitled."); Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 Rev. Litig. 173, 174-76 (1989).

One need not be a Wetlaufer disciple, though, to suffer some diminution in bargaining power by pressing the pre-negotiation process along the lines suggested by this model. Even if one accepted the ethical propriety of misleading an opponent about your bottom line, we would agree, it seems, that a lawyer whose client really will not accept a certain offer has more posturing capacity than a lawyer whose client would accept that same offer, but whose goal is to mislead the opponent about that fact.

\(^{39}\) See, e.g., G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (1999), quoted in Folberg et al., *supra* note 14, at 86 ("Over a lifetime of negotiating, your results will tend to hover at a point just above this minimum acceptable level. For most reasonable people, the bottom line is the most natural focal point. Disappointment arises if we cannot get the other side to meet our minimum requirements . . . , and satisfaction arises just above that level.").
tom line of authority. Your opportunity to check back with your client before accepting any deal, your confidence in your ability to aim high even when you will be satisfied with low, your skill and experience as a negotiator, and your client's risk aversion all will factor into your choices.

Fifth, and finally, you may (and probably will) use this pre-negotiation counseling meeting to confer with your client about the nature of your opening proposal. I stressed above that your client's bottom authority is not the same thing, by any means, as your opening demand or offer. But choosing an opening demand or offer is a very important strategic judgment, and you often will involve your client in that decision making. If you shoot high, there is some (if perhaps less than conventionally thought) risk of deadlock and loss of credibility. Also, as offers seldom are one-dimensional, but instead consist of a package of terms, you will need some assistance in deciding which terms of your first proposal will be quite favorable and which will appear to be compromises.

V. A Spirited Defense of "Pre-Negotiation" Counseling

Not all scholars agree that lawyers ought to engage in the activity I have labeled "pre-negotiation" counseling. In this Part, I describe the experiential grounding that led my colleagues and me to develop the model, then articulate a critique of the model, and defend the model against that critique, while accepting some of the critique's premises. I also show why, if this model of counseling indeed makes some sense, it will have applicability to transactional and integrative bargaining as well.

A. The Clinical Experiences Leading to the Model's Creation

For as long as I have taught at Boston College Law School, and while teaching at two other law schools, my colleagues and I have taught students counseling skills through the Binder & Price, and then Binder, Bergman & Price, and now Binder, Bergman, Price &

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40 It is risky to end a pre-negotiation counseling session without knowing your client's most accurate bottom line. Using the example in the text, if Alison offers $140,000 and you confidently reject it because you did not finish your counseling process, she might then withdraw the offer when you deadlock. If Lynn would have been very happy with $140,000 (had you checked), your unfinished meeting will have cost her that settlement.

41 See note 35 supra and accompanying text.

42 Before joining the faculty at Boston College, I taught for four semesters at UCLA School of Law. I have also taught a clinical seminar at Harvard Law School.

43 Binder & Price, supra note 2.

44 Binder, Bergman & Price, supra note 2.
Tremblay texts. At Boston College's civil clinical program, for many years we prepared students to enter the clinic by offering them a two-week-long, simulation-based, skills training session. Using a housing or family law hypothetical, we had students perform a simulated interview, counseling session, and then a negotiation with a student representing the "other side." We began, of course, with an initial client interview, for which we taught the Binder & Price and its successor "models," which we found quite useful. Students would then conduct an interview on videotape, which a faculty member would critique.

Our plan was to follow the interview with a counseling simulation, and end with a negotiation. There is much logic to this sequence. But we quickly recognized a conceptual problem with our sequence. In order to counsel a client, the student needed to have some proposal of settlement about which the client might make a decision (the simulations were necessarily litigation-based, given the nature of the clinic). That presumed some negotiation experience, or some genesis of the proposal. If we negotiated before counseling, that presented two problems—the case could settle, in which case the counseling experience would disappear, or the students could negotiate without any authority at all, which diminished considerably the strategic value, if not the realism, of the negotiation.

The solution we arrived at was as elegant as it was foreseeable. The sequence for the training could work comfortably as follows: The students were assigned (1) to interview the client; (2) after some case planning (and assumed fact and law development), to counsel the client about what his or her settlement parameters would be in any negotiation; and (3) to negotiate using some version of the authority obtained in the counseling meeting. That arrangement served as the basis for our training exercises.

But something very interesting occurred, and occurred regularly. We assigned the students to read the counseling chapters of Legal Interviewing and Counseling or Lawyers as Counselors. They would

46 There have been a few semesters at Boston College Law School when we have used a different interviewing and counseling textbook. During those years, however, we have regularly summarized for students the models developed by David Binder and his co-authors, because those models are so helpful and the detailed guidance they provide is not replicated in the other texts.
47 Because our law school has since instituted a required, simulation-based, first-year skills and ethics course, we have reduced our training to one week, eliminating the videotaped simulations and the negotiation. But the sequencing difficulties I am about to describe, see infra notes 48-50 and accompanying text, arose in precisely the same fashion in the first year course, for the same reasons described below.
48 See BINDER & PRICE, supra note 2, at 157-91.
understand the model developed persuasively in those texts—but always, of course, in the context of defined, finite choice among specified alternatives. Students would then keep the model in mind when they met with their client. The planning for the counseling meeting would of course include a careful assessment of the strengths and weaknesses of the client’s litigation case, and the likely outcomes were the case to proceed to trial. Here is a fictional transcript showing what inevitably would happen (with the dialogues simplified enormously for effect):

Student Lawyer (SL): So like I’ve said, you have two basic choices—you can accept the case’s going to trial, or you can settle the case. Which would you like to discuss first?

Client (C): What’s this settlement all about?

SL: [Describes the settlement process a bit.] If you settle, you can get most of what you want, and quickly. Unless, of course, the settlement is for a less favorable package, in which case you won’t.

C: And trial?

SL: [Describes the trial options, per the usual Binder et al. model—chances of winning, likely recoveries, transaction costs, etc.] Now that you have heard about each, what advantages do you see in trial?

C: Well, if I win at trial I get more than if I settle, right?

SL: Right, unless we manage to get a better settlement. Any advantages you see in settlement?

C: Well, if I settle I’ll get more than my usual trial recovery, and more quickly, right?

SL: Sure, unless we happen to get a lower settlement.

C: Well, I suppose I prefer settlement, because I’ll get more money more quickly, on average.

This dialogue is of course a bit of a parody, but frankly not by a huge degree. We have observed students making statements just like in this dialogue, statements that flow from the use of the conventional model in this alternative setting.50

B. The Lack of Fit of the Conventional Model to the Pre-Negotiation Setting

The dialogue above exhibits the problem that we aimed to solve

49 See Binder, Bergman & Price, supra note 2, at 258-308.

50 When the faculty at Boston College Law School introduced a first-year lawyering course, including simulation segments covering interviewing, counseling and negotiation, they experienced precisely the same distortion and difficulty in those simulations.
through the use of this alternative pre-negotiation model. When the student lawyer uses the conventional model in a setting where there is no already defined "settlement" option, the act of comparisons using "neutral" elicitation of advantages and disadvantages is nearly a useless task. Except for testing whether a client has any interest in settlement whatsoever (in which case this meeting is precisely a version of the traditional model of client counseling, with two available choices—explore settlement, or do not explore settlement), the process of weighing advantages or disadvantages of the concept of settling, without having concrete "alternative to trial" options available, is not a productive one.

It should be clear that the goal of the just-described meeting is not to elicit the choice that the hypothetical student lawyer above asks her client in the end—to choose between trial and settlement. The goal of the meeting is to elicit some authority to use in exploring settlement possibilities. Because the traditional model assumes a small array of discrete, pre-existing alternatives, which need to be compared so that one can be chosen, it does not help students or lawyers engage effectively in the "pre-negotiation" counseling process, where they must help clients sort through an almost infinite number of potential settlement positions to identify a range of acceptable ones.

C. A Critique of the Alternative Model

The model proposed here works well for what it intends to accomplish—to learn, before one begins negotiating, what the client's reservation point might be. The critique that we encounter does not necessarily disagree with that assertion. It focuses, instead, on the goal the model aims to achieve—obtaining some authority basis from the client, especially if that authority basis is in the nature of a "bottom line" or "reservation point." The only published objection to that process comes, interestingly enough, from a book with my name on it. In the second edition of Lawyers as Counselors, the authors refer to the process of obtaining authority with the following footnote:

For a discussion about the wisdom of obtaining bottom lines from clients before beginning to negotiate on their behalf, see Jacqueline M. Nolan-Haley, Alternative Dispute Resolution in a Nutshell 31-34 (2001). Also recognize that many clients may not want to give you a bottom line. Consider this comment the authors received from a CEO of a subsidiary of a NYSE company. "It's hard

51 There are, of course, useful benefits in having that conversation, but it is empirically very rare for a client to conclude that he will never even broach the topic of an out-of-court (or -arbitration or -agency, etc.) settlement. Thus, it seems safe to conclude that not a lot of time needs to be spent on this global "any settlement/no settlement ever" question.
to imagine a circumstance early in litigation that would cause me to reveal my bottom line to anybody—my own lawyer included. Several reasons—I probably would not have enough information to have arrived at a 'bottom line,' I wouldn’t trust the lawyer to grind hard enough even if I knew my bottom line (no advantage to me in sharing this information with anybody) and I wouldn’t trust the lawyer to not attempt to add some success fee to my bill if they negotiated a particularly good deal for me (either as hidden hours or through a direct ask). In fact, the only way a lawyer (mine or the other guy’s) will have an idea of my ‘bottom line’ is when I walk away from failed settlement negotiations! Even then, they’ll never be sure it all wasn’t part of the game, if I’ve done my job. I think we all have a role to play in this drama called litigation and I don’t believe that sharing all of the client’s inner thoughts necessarily enhances the attorney’s ability to execute their role. In fact, I’d never be certain I got the best deal possible if I started out divulging my ‘bottom line.”

Allow me to separate out each item of this critique, in order to understand its meaning. As I identify each such element, I will offer my response to it.

1) Insufficient Information

The CEO quoted above resists bottom line discussions because, he says, “I probably would not have enough information to have arrived at a ‘bottom line.’” This concern, while legitimate if true, may be the easiest to address. No client should offer his lawyer authority to settle a matter without appreciating the nature of that delegation. If the client truly cannot know enough about his chances, his desires, his values, and the other side’s goals, interests and strategies to make an informed decision, then his lawyer should not ask for such a decision. But the complaint proves too much. If the client cannot know what his authority would be, how can he know whether the other side’s settlement offer (arrived at, presumably, after some discussion between that CEO and her lawyer) is acceptable? There is no more information needed to make an “authority” determination than to make a “settlement” decision. Every counseling model and text assumes, correctly, that a good lawyer can assist a client to make the latter. Those same lawyers can therefore assist a client to make the former.

52 LAWYERS AS COUNSELORS 2004, supra note 2, at 413-14 n.11. As the reader might surmise, not all four authors agreed with this footnote’s sentiment. Such is the nature of compromise in collaborative work. My co-authors respect my good-faith disagreement on this point and have offered their comments to my thoughts in this Article.
2) Trusting the Lawyer

The CEO’s second objection to discussions of his bottom line authority reveals his mistrust of his lawyers. As he says, “I wouldn’t trust the lawyer to grind hard enough even if I knew my bottom line (no advantage to me in sharing this information with anybody) and I wouldn’t trust the lawyer to not attempt to add some success fee to my bill if they negotiated a particularly good deal for me (either as hidden hours or through a direct ask).” This objection is more subtle and needs a more careful response.

Our response cannot be simply to deny his premise—to assure him that lawyers must be trustworthy because their ethical codes and training require it. No, we may assume that this experienced and successful CEO knows what he is saying. There will always be a divergence of interests between lawyers and clients, and effective counseling practices and models have to account for them.\(^5\)

Let me rephrase this objection for what I assume is its intended meaning. The CEO worries that if he reveals his bottom line authority to his lawyer, that lawyer will take advantage of that confession and either a) obtain that result and declare utter success, or b) obtain a better deal than that and proclaim some kind of miracle lawyering skill. Better, the CEO says, to keep his secrets to himself.

The feared scenario just described is not only a reasonable one, but my sense is that some variation of those scenes occurs regularly in practice. Early counseling texts described the lawyer’s process of “cooling out” clients, by downplaying a case’s chances in order to make the lawyer look better.\(^5\) Studies of lawyers working with contingent fee cases have demonstrated the manipulation clients face when lawyer financial interests conflict dramatically with client interests.\(^5\)

Given this legacy of the legal profession, a sophisticated client’s skepticism is not surprising.

The important question, though, is whether those risks of abuse of trust warrant a lawyer’s not asking her client for some authority. That question answers itself. If we understand “pre-negotiation counseling” as a meeting before an expected or upcoming negotiation to learn from the client what range of settlement packages might be ac-

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\(^5\) The CEO’s mistrust is not unheard-of. See, e.g., Deborah L. Rhode, In the Interests of Justice 57-58, 170 (2000); Susan Shapiro, Tangled Loyalties: Conflict of Interest in the Legal Profession 100-03 (2002).


\(^5\) See Shapiro, supra note 53, at 243-46; David Luban, Speculating on Justice: The Ethics and Jurisprudence of the Contingency Fee, in Legal Ethics and Legal Practice 89 (Stephen Parker & Charles Stampford eds. 1995).
ceptable to a client (and the lower end of that range thus becomes, however provisional or flexible, a "bottom line"), it is inconceivable that a lawyer could have a career without conducting those meetings. The only way to avoid a pre-negotiation meeting is for a lawyer to await an explicit offer from the other side, and then to use the traditional "choice" models to assess whether the client will accept or reject the offer. (I must note that, of course, the traditional models may be abused by untrustworthy lawyers in the same way as the pre-negotiation model may be. Indeed, the strong emphasis in Legal Interviewing and Counseling and its successors on neutrality and "client-centeredness" is intended to overcome the divergence between the lawyer's interests and those of the client.\textsuperscript{56}) It is conceivable, I suppose, that a lawyer will choose only to respond to offers coming from the other side, but, as we saw above, that preference places the lawyer's clients at a possible disadvantage, and certainly not all lawyers can operate on that basis, or else no one would ever make a first offer.

Thus, even if we accept that lawyers may exploit the information shared in the pre-negotiation counseling process, that realization cannot serve as a basis for eschewing the process entirely. Instead, for what it's worth, the model must acknowledge those risks and suggest mechanisms to curb them.

3) The Strategic Costs

The third basis for the CEO's wariness is related to the second, and remains the most substantial worry. As he puts in, "In fact, I'd never be certain I got the best deal possible if I started out divulging my 'bottom line.'" Let us characterize this critique as a refinement of that just addressed, and rejected, in the last section.

Here, we need not assume (even if we fear) disloyal or bad-faith lawyers. Instead, the CEO recognizes a telling strategic risk that arises in the pre-negotiation counseling universe. To capture this risk, let me imagine his likely response to our discussion in the last section:

Listen, I'm not saying that I can't meet with my lawyer the day before a negotiation to discuss the case or to tell her what my preferred first offer will be. I'll concede that a meeting like that can be valuable and necessary. What deeply worries me, though, is the part of the conversation that ensues after I've told her what I'll offer as an acceptable package. Your pre-negotiation model tells her to press me backwards, until she finds out where I'll settle and where I'll walk away from the table. Once I've told her that, she's a much

less effective lawyer, because she knows I'll accept something that isn't my preferred outcome. I'd rather mislead her so she can mislead my opponents.

Let me give you a crude example. My company gets sued by some competitor for patent infringement and unfair competition, and they seek $200 million in damages. We litigate and do a ton of discovery, and then my lawyer wants to meet with the plaintiffs' lawyers to see if the case will go away short of trial. I tell her I'm willing to make a generous offer—$30,000,000 if they go way, no questions asked. Would I really, in the end, pay $50,000,00 to avoid a huge bad trial which we might lose? Sure, let's assume I would. But do I want her to know that? No. Once she knows that I'm in the $50 million ballpark, she's doing a whole different negotiation dance. I'll keep that secret to myself, thank you very much.

This made-up comment and story represents the most serious critique of this alternative model of counseling. How does one respond to it?

There are two responses to this legitimate worry. The first is to acknowledge that if the concession which I allowed the CEO to make in this last statement (about the meeting to discern an opening offer) indeed occurs, that step itself shows the need for a different kind of counseling model. The model described here applies to meetings to obtain some opening authority, even if it is not used to press for a final bottom line of authority, but instead develops a more provisional walkaway point.

But there is a more basic response to the CEO's arguments. Consider his crude story. It is possible that the lawyer will attend a high-stakes negotiation with her carefully assessed first offer of $30,000,000, but in a case worth up to $50 million or $100 million, it would be foolhardy for her not to have some fall-back options. Would the CEO settle by paying $35 million? $40 million? Can the lawyer really be totally in the dark about her client's thinking?

It is not an answer to say that the lawyer will simply return to her client and counsel him, in the usual fashion, about each counteroffer; that is, that she will truly attend the meeting with an opening offer, but with no ability to compromise at the table. The world of negotiation is far too fluid, and the participants' time far too scarce, to develop a lawyering practice model based upon successive separate meetings or conversations. No, a good lawyer will want to know not just the CEO's opening offer, but where he'll move if the dynamics of the negotiation are such that the first offer is going nowhere. The effective lawyer will use her negotiation preparation meeting to ask her client whether less favorable offers would be acceptable to him. That conversation, similar to those envisioned earlier in this Article, might
look something like this:

_The lawyer:_ "I now understand, after this discussion we’ve been having, that understanding the risks of litigating this case, you would authorize me to settle the dispute for a payment of $30,000,000. There’s some reasonable chance that I can persuade the other lawyer to accept less than that, and we’ll work together on my strategies and arguments to that end. But we also know that this case could net the plaintiffs up to $100,000,000, so their lawyer may dig in at a figure much higher than $30,000,000. What you and I need to do, then, is to figure out what my response to the lawyer will be if they make a credible demand to settle the case for more than $30,000,000. I’ll hold out if you wish, or I’ll offer more, if you wish. Let’s figure out what you and your company want me to do."

The CEO’s objection, though, suggests a strong message about the lawyer’s use of this process. She must be willing to acknowledge to her client that she may be a less strong lawyer if he gives her greater authority to settle. On the other hand, if he is willing to pay $50 million, that’s probably because the case has some identifiable risks, and if he adopts a short-sighted negotiation strategy he runs the risk that he will deadlock and go to trial with a weak case. We cannot lose sight of the fact that he has made a decision that he would prefer to pay $50,000,000 than go to trial.

The pre-negotiation counseling process can add levels of sophistication intended to address the worries that the CEO has expressed. His lawyer and he could agree very explicitly that, while he’d prefer a $50 million settlement to the prospect of trial, she will not offer a penny over $30 million and will walk away from the table, as a calculated bluff. His lawyer’s explicit understanding of the strategic risks of obtaining authority, and her measures to account for that risk, are the only reasoned method for her practice. Refusing to counsel him about his settlement values is a very short-sighted, and far more risky, way for her to proceed.

**D. The Model’s Fit with Problem-Solving and Transactional Negotiations**

In an effort to introduce the concept of pre-negotiation counseling in a simplified and unambiguous way, this Article used something of a caricature of a real-world negotiation, a straightforward, linear, distributive negotiation over money damages in an auto accident case. The example also envisioned a rather distributive bargaining stance by the plaintiff’s lawyer, implying a series of offers and counteroffers leading to some compromise mid-point where the case would settle.

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57 See text accompanying notes 15-17 _supra_.

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As most readers will acknowledge, negotiations in practice are far richer, more nuanced, and more textured than the example used here. Negotiators often bargain in a non-linear, problem-solving way over non-fungible items, searching to satisfy interests and to achieve mutually beneficial and creative solutions. It is also equally true that many negotiations in practice are transactional rather than litigation-based. The question explored here is whether the idea of pre-negotiation counseling has any applicability to those more fluid and multidimensional settings. The answer to that question is yes.

Consider, first, a problem-solving negotiation, one where the lawyer employs an integrative strategy rather than a distributive strategy. One might imagine the same auto accident dispute used above, but imagining a Fisher & Ury-type negotiator representing the plaintiff. Would that lawyer have any reason to identify a "walkaway point," or a "bottom line," if she were negotiating using a problem-solving strategy? Of course she would. While the notion of a bottom line sounds rigid and mechanical, it is in fact an essential component to any negotiation process, for it represents the least attractive package an actor will accept to avoid the default option, whatever that happens to be. Fisher & Ury employ the concept of a BATNA to remind negotiators that any agreed-upon settlement ought to be preferable to whatever would occur in the absence of the settlement—otherwise, why settle? The pre-negotiation counseling meeting explores with a client the relationship between the client's BATNA and possible settlements. Because there is no reason to think that problem-solving negotiators have less of a need for some authority from their clients when they negotiate, those negotiators can use this model to discern that authority.

Let us return to the Lynn Girton example to develop this point. Imagine that, instead of amassing the most cash for her in a settlement, Lynn's lawyer hopes to explore a more holistic and creative resolution to this dispute. Imagine that she will consider such ideas as an apology, a sliding scale of monthly payments tied to the degree of Lynn's incapacity for work, as well as in-kind coverage of future rehabilitative services. Her negotiating style with Alison Dolovich, the insurance company lawyer, will be open, fluid, brainstorming, and

58 See, e.g., Bastress & Harbaugh, supra note 2, at 374-87; Fisher & Ury, supra note 10, at 56-76; Gifford, supra note 13, at 14-18.
59 By a "Fisher & Ury-type negotiator," I mean a negotiator who is committed to the problem-solving, principled approach to bargaining developed in those authors' book, in contrast to an adversarial, positional negotiator. See Fisher & Ury, supra note 10.
60 Id. at 97-106.
61 See text accompanying notes 15-17 supra.
flexible. But before she walks into the room to negotiate, or before she picks up the telephone to talk to Dolovich, Lynn’s lawyer must have a sense of what package of goods and benefits would be preferable to Lynn to taking her personal injury lawsuit to trial. Using the stages developed above, the lawyer must test Lynn’s reactions to more- or less-valuable packages, to know how to respond to those possibilities, after having ensured that Lynn understands her BATNA. Some package of settlement terms will be less attractive to Lynn than trial (one would assume) and some package of terms will be preferable to trial. Some other package will be acceptable as an initial proposal—for even integrative negotiations must start somewhere.

There is little doubt that the mechanical, moving-up-or-down-the-spectrum quality of the model as described above will fit less well in this kind of setting, but the basic ideas of the model have the same relevance and the same necessity.

Let us now consider the question of transactional negotiations. Up to now the story used to explore the model has been a courtroom story, a dispute that developed into a lawsuit, one that must, and will, be resolved in some fashion. But many negotiations, even those involving lawyers, have nothing at all to do with courts and lawsuits, or even with disputes as such. When a lawyer negotiates a deal, will she have any reason to consider the concept of pre-negotiation counseling? Of course she will.

A transactional negotiation possesses many of the same qualities as a dispute negotiation. The actors may negotiate as adversarials or as problem-solvers, and their strategic planning responsibilities are similar to dispute negotiators. Deal-making lawyers must understand their BATNA, and ought to possess some authority or resistance point when they negotiate. Russell Korobkin uses a simple, fictional transaction in which Esau wishes to purchase Jacob’s catering business to explore the importance of understanding a resistance point (i.e., a


63 See, e.g., KRIEGER & NEUMANN, supra note 2, at 328-29 (discussing making initial offers in problem-solving context). See also BASTRESS & HARBAUGH, supra note 2, at 479-84 (describing problem-solving strategy of brainstorming multiple initial proposals with other negotiator).

64 See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 29-35 (1986)(using dispute and deal examples interchangeably to show basic negotiation concepts and strategies); ROBERT H. MOOKIN, SCOTT R. PEPPEP, & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 224-71 (2000)(same); Korobkin, supra note 14, at 1795 (same).

65 See, e.g., Korobkin, supra note 14, at 1796.
reservation or walkaway point):

For example, if Esau's BATNA is buying another catering business for $190,000 that is identical to Jacob's in terms of quality, earnings potential, and all other factors that are important to Esau, then his RP [resistance point] is $190,000. If Jacob will sell for some amount less than that, Esau will be better off buying Jacob's company than he would be pursuing his best alternative. If Jacob demands more than $190,000, Esau is better off buying the alternative company and not reaching an agreement with Jacob.66

Korobkin's simple transactional example might imply that locating the party's BATNA (here, a business selling for $190,000) is a mechanical, mathematical calculation. In fact, it is anything but that, and would require a complicated, in-depth assessment by the party to understand his resistance point. In instances where a lawyer is performing the negotiation on the client's behalf, that complicated, in-depth assessment will take place in a counseling meeting, and will involve the pre-negotiation counseling strategies developed here. In that respect, there is little difference, for our purposes here, between a dispute negotiation and a transactional negotiation.

VI. Conclusion

The traditional models of client counseling have proven themselves to be elegant devices for assisting lawyers with a common counseling task—making discrete lawyering decisions involving a choice among a limited number of identified alternatives. Those models, however, do not fare well when used in an equally common counseling task—deciding negotiation strategy and ascertaining a client's bottom line or resistance point. This Article has sketched out an alternative model, derived using the insights and elegance of the traditional models, for lawyers to employ in the authority-seeking setting. It is a necessary complement to the established conventions for learning this skill.

At the same time, this Article has attempted to recognize and accommodate the inherent limits of anything calling itself a "model." While it proposes an explicit step-by-step model for pre-negotiation counseling, it concedes that the negotiation and counseling worlds are messy, complex and fluid, and that the proffered model serves at best as an orientation to lawyers for covering several important counseling tasks in preparation for a negotiation.

66 Id.