

**PROFESSORS HEUMANN AND HYMAN DISCUSS RESEARCH FINDINGS  
ON SETTLEMENT IN NEW JERSEY**  
by Gary Tolchinsky

*CNCR Associate Jonathan Hyman, Professor of Law at Rutgers Law School, and his colleague, Milton Heumann, Professor of Political Science at Rutgers University, presented a paper on "Negotiation Methods and Litigation in New Jersey: You Can't Always Get What You Want," in July, 1993, at the International Conference on Lawyers and Lawyering in the United Kingdom. The paper was based upon their research on civil settlement practices in New Jersey, some of which has been discussed in the Winter 1993 [Vol. 6, No. 1] issue of CNCR News. The paper focused on their study of the settlement of nonmatrimonial civil disputes in the law and chancery courts, based on responses to a questionnaire to lawyers and judges, interviews with lawyers, and observations of settlement conferences. The authors also discussed their findings in an article published in a special Supplement to the **New Jersey Law Journal** on alternative dispute resolution [August 16, 1993]. The following article summarizes some of their findings.*

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Central to Heumann and Hyman's research was a distinction between what the authors called "positional" methods of settling cases as opposed to "problem solving" methods. Positional methods are described as follows:

"...[T]he negotiators stake out bargaining positions. Negotiation consists of one or more moves and countermoves in which the parties may grant concessions to the other party, and seek agreement by the reciprocal exchange of positions until an agreement is reached or the matter is resolved in some other way."

In contrast, the problem solving approach is:

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

Hyman and Heumann then discuss the striking difference between what lawyers say they do, as opposed to the type of settlement practices they say they want. Statistical data from the research includes the following findings:

- The mean response indicated that the positional method was used entirely or almost entirely in 71 % of the cases.
- The mean response indicated that the problem solving method was used entirely or almost entirely in 16% of the cases.
- 61% of the respondents thought that problem solving negotiation should be used more than it is now. Thirty-five percent thought that it should be used about the same as it is used now, and 4% thought that it should be used less.

- 47% of the respondents thought that positional bargaining should be used *less* than it now is. Forty-nine percent thought that it should be used about the same, and 4% thought it should be used more.

In light of these responses, the authors then spend time discussing the incongruity between attorney attitudes and actual practices. As they continue:

“The strategic structure of the negotiation relationship itself, the habits of lawyers, their lack of a problem-solving vocabulary, and the time and attention needed for problem solving negotiation, all seem to play a part. The usual theoretical descriptions of negotiation are less useful in explaining the discrepancy than we had expected them to be. Instead, we have found that habit and language provide a more persuasive framework for understanding settlement negotiation. Although we think these concepts provide more explanatory power, they are limited by their generality and imprecision.”

In discussing one case involving an automobile accident, for example, the authors note that a stalemate resulted without the parties having tried to “think through what the real world interests of the plaintiff were, and what effect they might have on the terms of the settlement. Instead, both the lawyer and the judge turned to positional matters, calculating what the net recovery of the plaintiff might be as a way to justify a larger settlement demand, and trying to increase the perceived likelihood of a large award...”

In discussing the judge's role in this case, the authors noted his focus on the positional approach:

“The judge's interest in finding out settlement positions, rather than exploring . . . problems, was consistent with the style in which he conducted most of his settlement conferences. This judge made extensive use of the technique of caucusing separately with the lawyers for each side, and using the caucuses to discover settlement numbers . . . This judge was such a consistent exemplar of this method that we dubbed his style 'matchmaker.' Through caucusing with each side, asking each to disclose their negotiation positions in confidence, he sought to determine whether the parties could be matched in agreement. To get on with that work, he had little interest in, or need to learn about, the personal underlying interests of the parties.”

Also of interest from the study are findings which raise ethical concerns, as lawyers engage in a sort of dance regarding their positions in order to achieve the best settlement, which sometimes makes directness and honesty difficult. For example, lawyers may find that a forthright statement of their “bottom line” is taken simply as a negotiation gambit, and that their adversaries expect further concessions later in the process. This may cause attorneys to exaggerate demands and “under offer” at the outset. As the authors wonder, “When is the line crossed between effective negotiation practices and lying?”

In addition, the world of positional settlement creates its own language as a sort of short-hand for different types of cases. “Slip and fall” cases are “flop” cases; “poor” injury cases are simple “sprains and strains,” and terms such as “hand in machine,” “good injuries,” and “wrist drop” are used—the last term referring to a plaintiff injured by a misplaced intravenous needle.

At the outset of their article, Hyman and Heumann note that the past decade has seen a greater amount of theoretical discussion of negotiation than actual field research. While valuable for the authors' insights about settlement, the article also contains the type of "real world" data and information from actual behavior that can help illuminate both the opportunities and obstacles for those who wish to see conflict resolution become more widely practiced by lawyers on behalf of their clients.

In their comments in the *New Jersey Law Journal*, the authors are optimistic about systemic change, but cautious about the effect any one lawyer can have on the system:

"Our study did not point to any clear reasons why lawyers, who by-and-large run the settlement system, do not practice settlement methods as they would like. We suspect that the best explanation is habit—a rote perpetuation of the local legal culture—rather than some tragic flaw in the process of negotiation itself. But habits can change. The discrepancy between the negotiation process they actually use suggests that New Jersey is ripe for change, if only lawyers could find the right steps on the road to change.

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"Perhaps the most intriguing question to grow out of our research looks to the future. We may be at the forward edge of a sea change in the practice of law. Dissatisfaction with settlement practices is so widespread, and lawyers seem to be so aware of problem solving as an alternative to positional negotiation, that the time maybe ripe for a substantial change in the way settlement negotiation occurs...

"Until the system of settlement changes in significant ways, however, it will be difficult for individual lawyers to implement many changes themselves. If they want to use more problem-solving methods, they will have to work at the margin, trying when they can to use techniques more attuned to the interests of the parties and the crafting of win-win agreements ...[S]mall changes at the margin can produce great success, even if they do not change the nature of the game."

For more information about the study, contact Jonathan Hyman, Rutgers University Law School, Newark, New Jersey or CNCR.

**WHY NEGOTIATIONS FAIL:  
AN EXPLORATION OF BARRIERS TO THE RESOLUTION OF CONFLICT  
by Robert H. Mnookin**

*(The following are excerpts from an article published in **The Ohio State Journal of Dispute Resolution**, Volume 8, Number 2, 1993. Professor Mnookin is the Samuel Williston Professor of Law at Harvard Law School and Chair of the Steering Committee of Harvard's Program on Negotiation. The remarks were initially delivered as the 1992 Schwartz Lecture on Dispute Resolution at The Ohio State University College of Law.)*

Each of [the barriers to the negotiated resolution of conflict] reflect somewhat different theoretical perspectives on negotiation and dispute resolution. The first barrier is a *strategic barrier*, which...relates to an underlying dilemma inherent in the negotiation process. Every negotiation characteristically involves a tension between: (a) discovering shared interests and maximizing joint gains, and (b) maximizing one's own gains where more for one side will necessarily mean less for the other. The second barrier arises as a result of the *principal/agent* problem. In many disputes, principals do not negotiate on their own behalf, but instead act through agents who may have somewhat different incentives than their principles...The third barrier is *cognitive*, and relates to how the human mind processes information, especially in evaluating risks and uncertainty...The fourth and final barrier, "*reactive devaluation*..." relates to the fact that bargaining is an interactive social process in which each party is constantly drawing inferences about the intentions, motives and good faith of the other.

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First, let us consider the strategic barrier. To the extent that a neutral third party is trusted by both sides, the neutral may be able to induce the parties to reveal information about their underlying interests, needs, priorities, and aspirations that they would not disclose to their adversary. This information may permit a trusted mediator to help the parties enlarge the pie in circumstances where the parties acting alone could not... A skilled mediator can often get parties to move beyond political posturing and recrimination about past wrongs and to instead consider possible gains from a fair resolution of the dispute.

A mediator can also help overcome barriers posed by principal/agent problems. A mediator may bring clients themselves to the table, and help them understand their shared interest in minimizing legal fees and costs in circumstances where the lawyers themselves might not be doing so...

A mediator can also promote dispute resolution by helping overcome cognitive barriers. Through a variety of processes, a mediator can often help each side understand the power of the case from the other side's perspective. Moreover, by reframing the dispute and suggesting a resolution that avoids blame and stresses the positive aspects of a resolution, a mediator may be able to lessen the effects of loss aversion...

With respect to the fourth barrier, reactive devaluation, mediators can play an important and quite obvious role. Reactive devaluation can often be sidestepped if the source of a proposal is neutral—not one of the parties...This helps both parties...accept as sensible a proposal that they might have rejected if it had come directly from their adversary.