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HOW LAWYERS NEGOTIATE

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by

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CERTIFICATE OF AUTHORSHIP/ORIGINALITY

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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ABSTRACT

Negotiation literature identifies three principal theories of negotiation confusingly complicated by the wide variety of names that have been applied to them.

The distributive theory (also called *value-claiming, competitive, adversarial* and *hard bargaining*) regards all gains as made at the other party's expense.

The *cooperative* theory (also known as *coordinative* and *soft bargaining*) regards concessions as a way to capitalize on the opponent's desire for a fair outcome.

The *integrative* theory (also known as *value-creating, problem-solving, win-win* and *principled negotiation*) involves joint attempts to reconcile the parties' interests so as to benefit both.

Despite the vast amount of literature on negotiation theory, none of these theories is lawyer-specific. Only Williams and Schneider have (separately) undertaken empirical research in an attempt to demonstrate how lawyers negotiate, as perceived by other lawyers (peer review). Their research found that in 60% of the cases they surveyed, US lawyers perceived other US lawyers as behaving consistently with cooperative negotiation theory.

These studies do not permit conclusions to be drawn as to how a different cohort, namely clients and other non-lawyers, evaluate their experiences with lawyers in negotiation because the perceptions of clients may differ from the perceptions of lawyers.

This review of the literature and the demonstrated lack of relevant data confirm the important contribution that can be made to our understanding of how lawyers negotiate by collecting valid, independent, objective data to identify the role of negotiation in lawyers' work, the experiences of clients and other non-lawyers engaged in negotiation with lawyers and their levels of satisfaction or dissatisfaction with the process and its outcomes.

The original research conducted for this thesis therefore studied how those with whom and for whom lawyers negotiate evaluate lawyers in negotiation.

The results indicate that clients and other non-lawyers perceive NSW lawyers' negotiation behaviour as more consistent with the competitive theory of negotiation than with other theories.

The behavioural profiles of lawyers, ascertained through MBTI and DISC analysis, were compared with those of the general population, showing that lawyers have a distinct behavioural profile which may be used to explain how their behaviour is likely to be perceived by others. In apparent contradiction of the findings of Williams and Schneider, the MBTI research revealed a competitive, task focused pattern of behaviour inconsistent with building effective working relationships.

Focus groups comprising clients, staff and lawyers in management and general counsel roles were asked to identify the characteristics of lawyers in negotiation. The results were consistent with the MBTI and DISC research results and enabled ten characteristics of lawyers in negotiation to be identified. These focus group outcomes showed lawyers to be committed to achieving good outcomes for their clients but to be engaged in a range of behaviour which their non-lawyer constituency perceived as impeding good outcomes.

A study of the training regime for student lawyers indicates that undergraduate training regimes are inadequate and do not provide law students with opportunities to develop an understanding of negotiation theory and practice and to enhance their skills.

It is concluded that lawyers and clients may have different perceptions of lawyers' negotiation behaviour; that there is no clear relationship between negotiation theory and how lawyers negotiate; and that experience of the cohort with and for whom lawyers negotiate may be more readily explained by behavioural theory than by negotiation theory.

CHAPTER 1: INTRODUCTION

1.1 Setting the scene: Negotiation as a key element of lawyers' work

> *"Ours is an age of negotiation. The fixed positions and solid values of the past seem to be giving way, and new rules, roles, and relations have to be worked out. The hard lines and easy cognitive recognition systems of the Cold War have first multiplied and then melted, revealing the necessity ... of talking things over and out.... Negotiation becomes not a transition but a way of life."*[1]

> *"Like it or not, you are a negotiator. Negotiation is a fact of life...everyone negotiates something everyday. Like Moliere's Monsieur Jaudain, who was delighted to learn that he had been speaking prose all his life, people negotiate even when they don't think of themselves as doing so. Negotiation is a basic means of getting what you want from others. It is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.*
>
> *More and more occasions require negotiation: conflict is a growth industry. Everyone wants to participate in decisions that affect them; fewer and fewer people will accept decisions dictated by someone else. People differ, and they use negotiation to handle their differences. Whether in business, government, or the family, people reach most decisions through negotiation."*[2]

> *"The fact is that we all negotiate! In fact it is impossible not to negotiate! Every day we are in situations where we must coordinate our preferences with those of others, influence other people to our way of thinking, or resolve potential conflict."*[3]

As an important feature of daily life, negotiation is an element of all human interaction. It is therefore not surprising that negotiation should also comprise a significant part of the work undertaken by lawyers. It follows that the effectiveness of lawyers as negotiators is a legitimate topic for study and review.

In devising the framework for this research, the assumption has been made that negotiation is an integral and basic part of every lawyer's work and a key element in the success or lack of success that all lawyers experience in their professional activities - whether supervising and managing staff, dealing with clients' affairs, interacting with

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1 Zartman, IW (ed) *The 50% Solution,* New Haven, CT, Yale University Press pp.2,3 cited in Putnam, LL and Roloff, ME (ed) *Communication and Negotiation,* Newbury Park, Sage Publications, Inc. 1992 at page 1

2. Fisher, R and Ury, W *Getting to Yes - Negotiating Agreement Without Giving In*, London, Hutchinson Business, 1986 Introduction at page xi

3. Lewicki, RJ, Saunders, DM and Minton, JW *Negotiation - Readings, Exercises and Cases*, 3rd edition, Boston, Irwin/ McGraw-Hill, 1999 at page 2

professional colleagues, external advisers and associates, contracting with suppliers or engaging in advocacy in the courts.

Many texts by legal academics and practitioners reinforce this assumption. Illinois State Bar practitioners Mark and Rick Schoenfield begin their 1988 text on legal negotiations as follows:

> *"Most lawyers recognise the importance of negotiation in their lives. They spend a substantial part of their professional time negotiating. In addition, like everyone else, they also negotiate in their personal lives. An attorney's real effectiveness as a professional is heavily influenced by his or her negotiating skill, or lack of it. How he or she is perceived by other clients and other lawyers is greatly affected by this skill or the lack of it. Most matters, whether they are transactional or adversarial, are resolved by negotiation."*[4]

Gerard Nierenberg, an American lawyer who has published seven texts on negotiation, asserts:

> *"Your success in life depends upon your success as a negotiator."*[5]

Queensland authors Nadja Spegel, Bernadette Rogers and Ross Buckley, whose experience spans many fields, including private practice and academia, note that:

> *"Lawyers quite possibly spend more time negotiating than on any other activity."*[6]

In similar vein, Charles Craver, the Merrifield Research Professor of Law at George Washington University, prefaced his negotiation text with the acknowledgement:

> *"..most legal practitioners use their negotiating skills more frequently than their other lawyering talents.."*[7]

Professors Goldberg, Sander and Rogers articulate similar sentiments about the role of negotiation in human interaction in general and in legal practice in particular:

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4 Schoenfield, MK and RM *Legal Negotiations – Getting Maximum Results,* Colorado Springs, Colo, Shepard's/McGraw-Hill 1998 at page 1

5 Nierenberg, GI *The Complete Negotiator,* New York, Nierenberg & Zief, 1986 at page 11. In his introduction Nierenberg describes his earlier text – *The Art of Negotiating,* New York, Pocket Books, 1984 – as *'the first book to treat negotiation as a process – one that can be learned.'*

6 Spegel, NM, Rogers B and Buckley RP *Negotiation: Theory and Techniques,* Sydney, Butterworths, 1998 at page ix

7 Craver, CB *Effective Legal Negotiation and Settlement,* 3rd edition, Charlottesville, Va, Michie, 1997 at page xi

> *"Negotiation – communication for the purpose of persuasion – is the pre-eminent mode of dispute resolution. We negotiate with our friends about where to eat dinner, with our spouses about who will do the household chores, with our children about what time they will go to bed. For most lawyers negotiation is a major part of their professional duties. Of those disputes that come into a lawyer's office, the vast majority are resolved by negotiation rather than litigation. Lawyers also spend substantial amounts of time negotiating a wide variety of contracts and other transactional arrangements."*[8]

The Australian Law Reform Commission notes that:

> *"Lawyer brokered negotiation has always played a part in resolving disputes and lawyers play a key role in ensuring clients can make 'informed' decisions about the merits of their disputes."*[9]

This assumption that negotiation is an integral and basic part of every lawyer's work was tested throughout the (qualitative) focus group research conducted for this thesis and has been validated by the focus group outcomes.

1.2 Thesis objectives

This thesis does not address the role of lawyers in resolving disputes nor their value or effectiveness in that role. Nor does this thesis seek to investigate what lawyers do when they negotiate. That research has already been attempted.

The literature review in Chapter 2 reveals an absence of empirical data about the effectiveness of lawyers in negotiation, viewed from the perspective of the non-lawyers with whom and for whom lawyers negotiate. The only significant empirical work in the field is the research by Williams[10], as updated by Schneider[11], which studies how lawyers themselves evaluate the experience of negotiating with other lawyers. The need

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8 Goldberg, SB, Sander, FEA and Rogers, NH *Dispute Resolution: Negotiation, Mediation and Other Processes,* 2nd edition, Boston, Little Brown and Company, 1992 at page 17

9 Australian Law Reform Commission *Review of the Adversarial System of Litigation, ADR - Its Role in Federal Dispute Resolution*, Canberra, Australian Government Publishing Service, June 1998 (Issues Paper 25) at page 155

10 Williams, GR *Legal Negotiation and Settlement*, St Paul, Minn, West Publishing Company, 1983; Burton, L Farmer, L Gee, E Johnson, L & Williams, GR, Feminist theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles (1991) *Journal of Dispute Resolution* 199-257.

11 Schneider, A K Perception, Reputation and Reality (Summer 2000) *American Bar Association Dispute Resolution Magazine* 24-28; Schneider, AK Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style (Spring 2002) 7 *Harvard Negotiation Law Review* 143-233

for more empirical research in this field has been acknowledged, particularly in investigating negotiation between lawyers and their clients.[12]

The original research which has been conducted for the purposes of this thesis is intended to go some way towards meeting that need. This thesis examines how non-lawyers, for whom and with whom lawyers negotiate, evaluate that experience. It is suggested that the results may be useful to the legal profession in deciding how to deliver legal services.

With this in mind, the objectives of this thesis are to isolate and scrutinise negotiation as a key element of lawyers' work; to review the experiences of clients and others who interact with lawyers in negotiation and their degree of satisfaction with that interaction; to identify the behavioural characteristics which lawyers bring to the negotiation process; and to draw tentative conclusions as to a possible model for the further development of negotiation skills in lawyers, designed to enhance the outcomes and experiences of those for whom and with whom lawyers negotiate.

External, objective data are provided to demonstrate to lawyers how effective they are presently perceived to be in negotiations, from the viewpoint of their constituency. There is thus provided, for the first time, a solid factual, as distinct from theoretical, foundation for any consideration as to how lawyers might do things differently and better, as they explore the opportunities (to which reference is made in the literature review) that have been identified for them by Wade[13], Gilson[14] and Mnookin[15]. Based on the research conducted for this thesis, it is suggested that the process of negotiation may be a good, practical starting point towards the goal of accurately portraying the legal profession as service-oriented, innovative and progressive in helping clients to achieve better outcomes, thereby enhancing the opportunities for lawyers to be seen by clients as a valued resource.

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12 Gilson, RJ and Mnookin, RH Disputing Through Agents: Cooperation and Conflict between Lawyers in Litigation (1994) 94 *Columbia Law Review* 509-564

13 see for example Wade, JH In Search of New Conflict Management Processes: The Lawyers as Macro and Micro Diagnostic Problem Solver (1995) 10 *Australian Family Lawyer* Part I 23-29, Wade, JH Mediation - The Terminological Debate (1994) 5 *Australian Dispute Resolution Journal* 204-209, Wade, JH Expanding the Concept of "Legal" Knowledge (yet again): Some Strategies for Reopening Deadlocked Negotiation (2000) 11 *Australasian Dispute Resolution Journal* 25-38, Wade, JH Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients make Better Decisions (2001) 13 *Bond Law Review* 462-485 at page 463 and Wade, JH Representing Clients at Mediation and Negotiation (2000) *Bond University Dispute Resolution Centre* 180

14 see for example Gilson, RJ and Mnookin, RH, Disputing Through Agents: Cooperative and Conflict between Lawyers in Litigation op. cit.

15 see for example Mnookin, RH, Peppet, SR and Tulumello, AS *Beyond Winning: Negotiating To Create Value in Deals and Disputes,* Cambridge, Massachusetts, Harvard University Press, 2000

By pointing to negotiation as a possible way by which lawyers might improve the repertoire of services and benefits they bring to their clients, it is hoped that this thesis may make a constructive contribution towards enhancing consumer confidence in the legal profession. This is of particular importance in an environment of increased competition[16] and

deregulation[17], in which:

> *"The scarcity of serious empirical studies of the legal profession has contributed to the maintenance of the mystique which surrounds the work of lawyers, and as such has prevented the profession from making the positive adjustments in its work and organization that other professions and society have felt to be essential."*[18]

In summary, this thesis connects the theoretical and the anecdotal evidence about the effectiveness of lawyers in negotiation, provides hard evidence about how lawyers negotiate (based on the experiences and perspective of those for whom and with whom lawyers negotiate) and relies on this evidence as a basis for postulating a strategy for lawyers to do things differently and better in the future.

1.3 A working definition of negotiation

The word 'negotiation' stems from the Latin verb *negotiari* which means 'to carry on business'. It is derived from the words *neg* (not) and *otrum* (ease/leisure).[19] For present purposes, it is useful to review the surprisingly wide and disparate range of definitions of negotiation.

One well known definition describes what its authors consider to be the most distinctive characteristics of negotiation, namely:

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16 Martin P *Understanding and Coping with Rapid Change in the Legal Profession*, Law Society of New South Wales Monograph, 1994 pp.27-29

17 The most significant elements of deregulation in New South Wales have come from the amendments to the Legal Profession Act 1987 (NSW), which removed fixed scales of costs in most areas of practice and created the requirement for costs agreements, to disclose to clients the basis on which fees will be charged. See the Legal Profession Reform Act 1993 (NSW) and the Legal Profession Reform Act 1996 (NSW) which replaced Part 11 of the Legal Profession Act 1987 (NSW)

18. Tomasic, R *Introduction in Understanding Lawyers: Perspectives on the Legal Profession in Australia,* Law in Society Series, Sydney, Law Foundation of New South Wales and George Allen & Unwin, 1978 cited in Zariski, A Lawyers and Dispute Resolution: What do they think and know (and think they know)? - Finding out through Survey Research (1997) 4(2) *E-Law* at page 2.

19. Hendon, D, Hendon, R and Herbig P *Cross Cultural Business Negotiations*, Westport, Conn, Quorum Books, 1996 at page 1

"1. There are two or more parties - two or more individuals, groups, or organisations. Although we can "negotiate" with ourselves [in this context] negotiation [is] an interpersonal *or* intergroup *process....*

2. There is a conflict of interest between two or more parties; that is, what one wants is not necessarily what the other wants, and the parties must search for a way to resolve the conflict .....

3. The parties negotiate because they think they can use some form of influence to get a better deal instead of simply taking what the other side will voluntarily give them or let them have. Negotiation is largely a voluntary process. It is a strategy pursued by choice; seldom are we required to negotiate...
4. The parties, at least for the moment, prefer to search for agreement rather than fight openly, have one side capitulate, permanently break off contact, or take their disputes to a higher authority to resolve them. Negotiation occurs when there is no fixed or established set of rules, procedures, or systems for resolving the conflict, or when the parties prefer to work outside of the systems to invent their own solution to the conflict....

5. When we negotiate, we expect give and take. We expect that both sides will modify or give in somewhat on their opening statements, requests or demands. Although the parties may not give in initially and may argue strenuously for what they want and push the other side for concessions, usually both sides must modify their positions and move toward the other..... truly creative negotiations may not require compromise because the parties can invent a solution that meets the objectives of all sides.

6. Successful negotiation involves the management of the intangibles *as well as the resolution of the* tangibles *(e.g the price and terms of agreement). Some examples of intangibles include .. the need to look good to the people you represent ... [and] the fear of setting precedent in the negotiations. Intangible factors can have an enormous influence on negotiation processes and outcomes and need to be managed proactively during negotiations..."*[20]

This definition is enhanced by the same authors in their more recent text which adds:

"A negotiation situation is one in which

1. *Two or more parties must make a decision about their interdependent goals and objectives.*
2. *The parties are committed to peaceful means for resolving their dispute.*
3. *There is no clear or established method or procedure for making the decision."*[21]

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20. Lewicki, RJ, Saunders, DM and Minton, JW *Essentials of Negotiation*, Boston, Irwin/McGraw-Hill, 1997 at page 4
21. Lewicki, RJ, Saunders, DM and Minton, JW *Negotiation - Readings, Exercises and Cases* op. cit. at page 1

Several academics and practitioners have attributed to negotiation the characteristic of operation in an environment in which there is conflict. Although negotiation is undoubtedly useful and is frequently used in situations of conflict, language has been used in negotiation texts which could lead to this characteristic being treated as a limitation.

For example, in identifying their four key elements of negotiation, Lax and Sebenius, in common with many others, include *'some perceived conflict'*.[22] Likewise, the Centre for Dispute Resolution at UTS defines negotiation as:

> *"a process for resolving conflict between two or more parties whereby both or all confer to achieve agreement."*[23]

Christopher Moore, a partner in the Center for Dispute Resolution in Denver Colorado, which has trained a generation of mediators from many jurisdictions, defines negotiation as a process which operates in an environment of conflicting interests:

> *"Negotiation is a bargaining relationship between parties who have a perceived or actual conflict of interest. The participants voluntarily join in a temporary relationship designed to educate each other about their needs and interests, to exchange specific resources, or to resolve one or more intangible issues."*[24]

Yet another definition, with a Machiavellian flavour, comes from an international context:

> *"negotiation is a process in which explicit proposals are put forward ostensibly for the purpose of reaching agreement on an exchange or on the realisation of a common interest where conflicting interests are present."*[25]

It is submitted that these definitions have a serious flaw – they make the assumption that negotiation occurs only where parties are involved in conflict. Clearly this is not correct. There are many examples of negotiations where there is no conflict whatsoever. Certainly negotiation has an effective role to play in the resolution of conflict, but it is of much broader application.

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22 Lax, DA and Sebenius, JK *The Manager as Negotiator,* New York, The Free Press, 1986 at page 7.

23. Centre for Dispute Resolution, *Dispute Resolution Spring 1998 Course Notes*, Faculty of Law, University of Technology Sydney.

24 Moore, CW *The Mediation Process,* San Francisco, Jossey-Bass Publishers, 1987 at page 6.

25. Iklé, FC *How Nations Negotiate*, New York, Harper & Row, 1964 at page 3.

Some authors and negotiation theorists have sought to avoid this issue by adopting a different definition of conflict. For example, Mendenhall explains:

> *"I will use "conflict" throughout this paper in its wider meaning of an opposition of interests, and not in its more limited meaning of an open fight or struggle."*[26]

Mendenhall draws heavily on the work of Raiffa[27] and interprets Raiffa's language so as to include 'conflict'[28]. However Raiffa's work in the field began with the notion of a 'contract embellisher', operating in circumstances in which Raiffa does not refer to conflict at all.[29]

Several dictionary definitions fail to support the notion that conflict does have this 'wider' meaning. The Webster definition relied on by Mendenhall[30] shows the Latin derivation to be *conflictus,* the act of striking together, from *confligere,* to strike together, the primary meaning of the noun being fight, battle or war.

The Macquarie Dictionary similarly shows the noun *conflict* to be a

> *"battle or struggle, especially a prolonged struggle; strife; controversy; a quarrel or discord of action, feeling or effect; antagonism, as of interests or principles, from the Latin struck together."*[31]

Even if conflict be ascribed to Mendenhall's meaning, there are countless examples of negotiation occurring in circumstances in which there is no opposition of interests whatsoever.

Other Alternative Dispute Resolution authors and practitioners, in seeking to encourage acceptance of ADR and recognition of its value, have made reference to negotiation solely in the context of ADR. There is a risk that this approach may appear (consciously or inadvertently) to subsume negotiation into the field of ADR and attribute to it characteristics which could be seen unnecessarily to confine its application

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26 Mendenhall RW Post-Settlement Agreements: Agreeing to make Resolutions Efficient (1996) *Journal of Dispute Resolution* 81-113 at page 81 footnote 2

27 Raiffa, H *The Art and Science of Negotiation,* Cambridge, Mass, The Belknap Press of Harvard University Press, 1982

28 Mendenhall, RW Post-Settlement Agreements: Agreeing to make Resolutions Efficient op. cit. at page 99

29 Raiffa, H *The Art and Science of Negotiation* op. cit. at page 221

30 Mendenhall, RW Post-Settlement Agreements: Agreeing to make Resolutions Efficient op. cit. at page 81 footnote 1

31 *Macquarie Concise Dictionary*, 3rd edition, Macquarie University, 2004 at page 233

to that field. For example, the Australian Law Reform Commission, in its ADR issues paper, does not define negotiation but makes reference to it only in the context of ADR:

> *"Negotiation has been a long-term mechanism for resolving disputes."*[32]

> *"Within ADR processes such as negotiation or mediation, there are varied practices...The processes can be mapped on a continuum from the least to the most adjudicative processes as follows,*
>
> - *Negotiation*
> - *Mediation*
> - *Neutral Evaluation*
> - *Conciliation*
> - *Expert advice and assessment*
> - *Arbitration."*[33]

Professor Tania Sourdin, Professor of Law and Dispute Resolution at La Trobe University, has further expanded this concept and presented it in her chart of the ADR continuum, which is reproduced in Chapter 2. [34]

It is the author's contention that attempts to create a place in which negotiation 'fits' are unnecessary and could be misleading. While negotiation certainly has a significant and valuable role to play in ADR (most succinctly demonstrated by the powerful yet not entirely definitive expression '*assisted negotiation*', which is often used to define mediation), it is a primary process which stands alone. It does not require the support of the ADR framework to give it form and context. It is a fully formed process worthy of independent study which, in one manifestation, occupies a useful place in the ADR continuum.

Accordingly, it is important to resist the temptation to define negotiation by reference either to conflict or to the facilitative arm of ADR processes. Whilst it certainly plays an appropriate role in both situations, it should be recognised as a significant stand-alone process, with applications far beyond the world of conflict and ADR and which can be used effectively in circumstances in which no conflict (by any definition) can be observed.

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32 Australian Law Reform Commission *Review of the Adversarial System of Litigation, ADR – Its Role in Federal Dispute Resolution,* op. cit. at page 24

33 ibid at page 23

34 Sourdin, T *Alternative Dispute Resolution,* Pyrmont, NSW, LawBook Company, 2002

For this reason, it is suggested that less restrictive definitions may be more appropriate. These include the Macquarie Dictionary definition of *negotiation* as:

> *"mutual discussion and arrangement of the terms of a transaction or agreement."*[35]

Perhaps the simplest and most flexible definition is *'communication for the purpose of persuasion'*[36] and it is this definition which has been adopted for the purposes of this thesis.

1.4 What is lawyers' work?

Various writers have struggled with a definition of lawyers' work. In his attempt to ask and answer the question – 'What do lawyers' do?' – Professor John Wade acknowledges the difficulty. After consideration of the commonly suggested concept of problem-solver, Wade emerges with the concept of the twin roles of conflict manager and transaction manager as demonstrated below:

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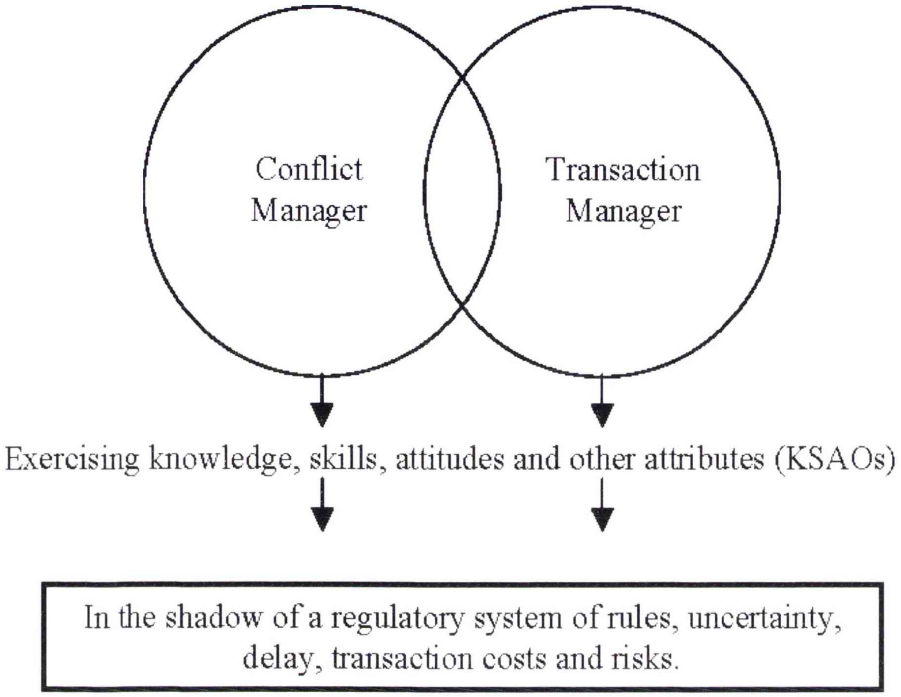
35. *Macquarie Concise Dictionary* op. cit. at page 767.

36. Goldberg, SB, Sander, FEA and Rogers, NH *Dispute Resolution: Negotiation, Mediation, and Other Processes*, op. cit. at page 17

The Twin Roles of "Lawyers"



Taken from John Wade, *Expanding the Concept of "Legal" Knowledge (Yet Again): Some Strategies for Reopening Deadlocked Negotiation (2000)*, Australasian Dispute Resolution Journal 26

The author approached the research for thesis upon the premise that negotiation is unarguably part of lawyers' work because it is something undertaken by everyone constantly as part of normal human interaction. It seemed unthinkable that it could be otherwise. Anselm Strauss in his text on negotiations[37] notes that:

> *"negotiation has generally stood for one of the possible means of 'getting this accomplished' when parties need to deal with each other to get those things done.... Negotiation is not merely one specific human activity or process of importance, primarily because it appears in particular relationships (diplomacy, labour relations, business transactions, and so on), but is of such major importance in human affairs that its study brings us to the heart of studying social order."*

37. Strauss, A *Negotiations - Varieties, Contexts, Processes and Social Order*, San Francisco, Jossey-Bass, 1978 at pages 234 and 235

The *Legal Profession Act 1987(NSW)*, which governs the behaviour of lawyers practising in New South Wales, does not provide a comprehensive definition of lawyers' work. Section 48E(1) provides a definition of general legal work and probate work as follows:

> *"'general legal work' means the work involved in drawing, filling up (sic) or preparing an instrument or other document that:*
>
> *(i) is a Will or other testamentary instrument; or*
> *(ii) creates, regulates or affects rights between parties (or purports to do so); or*
> *(iii) affects real or personal property; or*
> *(iv) relates to a legal proceeding.*
>
> *'Probate Work' means the work involved in:*
>
> *(v) taking instructions for a grant of probate or letters of administration; or*
> *(vi) drawing or preparing papers on which to found or oppose a grant of probate or letters of administration."*

This definition on its face fails to include many of the day-to-day activities in which lawyers regularly engage in the pursuit of their clients' affairs. However, it is clear that many of the tasks embraced by the definition will involve, as an important element, a negotiation of some kind with the client; with other lawyers; with officials and public officers; with the Court and with Court officials.

A broad range of texts on negotiation theory and training makes it plain that there is a clear and acceptable assumption that negotiation is an integral part of what lawyers do. For example, Professor Carrie Menkel-Meadow's early work, which is widely endorsed and has been a significant influence on the thinking about ADR processes, proceeds on this assumption.[38]

The Australian Law Reform Commission agrees.[39]

Further, it is clear from Williams' original text on the tactical and procedural steps which lawyers take during negotiation[40] that the entire publication is devoted to the outcome of this assumption. Other texts perpetuate the assumption:

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38 see Menkel-Meadow, C Toward Another View of Legal Negotiation: The Structure of Problem Solving (1984) 31 *UCLA Law Review* 754-832

39 see, for example, Australian Law Reform Commission *Review of the Adversarial System of Litigation, ADR – Its Role in Federal Dispute Resolution,* op. cit.

40. Williams, GR *Legal Negotiation and Settlement* op. cit.

> *"nor is negotiation important to lawyers only in the context of litigation. Lawyers spend a fair amount of their time in areas such as contractual and commercial transactions, more typical perhaps of normal commercial negotiations, where they are engaged in a form of "rule-making" or "private legislation" creation ... or in negotiation arising from previous private-rule making... A strong element of negotiating activity is likely in other areas of legal practice such as family disputes, planning applications, and so on."*[41]

To date, as revealed by the literature review, there are few studies of lawyers in negotiation. Some work has been done for practical legal training courses[42] and the work of Williams provides interesting analysis of successful negotiation outcomes and the procedures used to accomplish them. Those studies that have been done have focussed on academic analysis of how much negotiation occurs and on differences in approach or technique in different areas of legal practice. This thesis does add to that body of work. Whilst that work provides important insight, it leaves unexplored a very significant issue - namely how the negotiations which lawyers undertake as an integral part of their work are perceived and evaluated by those for whom they are undertaken.

None of the focus groups described in Chapter 5 had any difficulty in determining that, in their view, negotiation is an activity in which lawyers customarily engage as part of the day-to-day conduct of their practices.

The scope and purpose of this thesis now having been introduced, there follows in Chapter 2 a literature review, which, by way of setting the scene generally, first examines the history and development of negotiation theory and practice and then considers the role which negotiation plays in lawyers' work.

Chapter 3 outlines the Research Objectives and the Methodology and provides an explanation of how the research, both qualitative and quantitative, was planned and implemented.

Chapter 4 presents the quantitative data obtained using behavioural analysis. It first explains the characteristics of the analytical tools and then records how these tools were

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41. Mackie, KJ (ed) *A Handbook of Dispute Resolution: ADR in action*, London, Routledge and Sweet & Maxwell, 1991 at page 75

42. Nelson J, assisted by Stewart, PE *New Directions in Practical Legal Training in the 90's: An Evaluation of the Curriculum of the College of Law's PLT Course and its Relevance to Student's Work Experiences in Practice*, a Research Project Conducted on behalf of the College of Law, (St Leonards, NSW) Centre for Publication and Information, College of Law, c1988 and also Professors Pearce, D, Campbell, E and Harding, D *Commonwealth Tertiary Education Commission, Australian Law Schools: A Summary*, Canberra, AGPS, 1986

used to identify the behavioural preferences of lawyers. By comparing the results obtained for lawyers with the characteristics of various population samples, the Chapter concludes with the identification of the 'lawyer type.'

Chapter 5 presents the qualitative data obtained from conducting the focus group research. It explains how focus groups were selected, conducted and recorded and articulates the characteristics of lawyers in negotiation which the focus groups identified.

Chapter 6 investigates the training in negotiation which lawyers in Australia receive and discusses the current debate about what legal training should provide. It concludes with some suggestions regarding the direction of future training.

Chapter 7 draws together the themes of this thesis and presents its principal conclusions.

CHAPTER 2: LITERATURE REVIEW

There is a considerable body of work available on the theory and practice of negotiation for negotiators in general and for lawyers in particular. There is also a smaller body of work which analyses and, in some cases, provides empirical evidence of the characteristics manifested by lawyers in negotiation. This literature review surveys the current state of negotiation theory and practice and the currently available empirical evidence about the role of lawyers in negotiation. This evidence is shown to be limited to the perspective provided by peers and colleagues in the profession.

2.1 Negotiation theory and practice

Negotiating is as old as human behaviour. Writers, scholars and practitioners have been observing and commenting on it for centuries. Howard Raiffa's influential text[43] lists 101 relevant authors in the field, the earliest publication being dated 1716. Many more have been added since the publication of Raiffa's text in 1982.

Before providing a summary of the trends in the development of negotiation theory, with particular reference to the authors and the texts that have been most enduring in their influence, it is convenient first to identify the various negotiation theories to be found in the literature.

2.1.1 Behavioural, Normative and Prescriptive Analyses

An initial distinction may be drawn between the behavioural, normative and prescriptive analyses of negotiations.

> *"Good descriptive analyses lead to good predictions of actual behaviour. Descriptive work is a highly empirical and clinical activity that falls squarely in the province of the social sciences concerned with individual behaviour".*[44]

Normative analyses explore how negotiations should be conducted by coherent, rational people, uninfluenced by cognitive concerns.

> *"The hallmarks of such normative analyses are coherence and rationality, which are usually captured in terms of precisely specified desiderata or axioms. Applied mathematicians and mathematical economists dominate the normative decision-making scene. Its advocates don't believe that people actually act that*

43 Raiffa, H *The Art and Science of Negotiation,* op. cit.

44 Raiffa, H *Negotiation Analysis, The Science and Art of Collaborative Decision Making,* The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2002 at page 8.

way but feel that perhaps they should. Few steps are taken to suggest how mere mortals might try to act in accordance with these rational axioms in everyday life. The theories are very elegant.

The vast majority of economics and game theory has a normative complexion. To add in descriptive realities makes life too complicated. Normative theories are sometimes used as first-order approximations of real world, empirical behaviour. But empirical veracity is sacrificed on the altar of theoretical parsimony".[45]

Prescriptive analyses postulate how negotiations could be improved.

"In seeking to craft useful theory, prescriptive analyses are not concerned with conceptual ideas and techniques that are useful for idealized, mythical, super-rational, de-psychologized automata. Instead, prescriptive proposals must be useful for real people - warts and all".[46]

2.1.2 The Three Principal Theories of Negotiation

These very different approaches to negotiation analysis have given rise to three principal theories of negotiation, a situation which is complicated and confused by the application of more than one name to the same theory. These are the *distributive* theory (also known as *value-claiming, competitive, adversarial* and *hard positional bargaining*), the *cooperative* theory *(*also known as *coordinative* and *soft positional bargaining)* and the *integrative* theory (also known as *value-creating, problem-solving, win-win* and *principled negotiation*).[47]

2.1.2.1 The Distributive Theory

According to the distributive theory, the negotiator's 'opponent' may be forced to a settlement favourable to the negotiator by convincing the 'opponent' that her case is not as strong as previously thought. The basic premise is that all one's own gains are obtained at the other party's expense. Negotiation behaviour is designed to unnerve the 'opponent' and undermine her confidence in her case.

"Competitive negotiators expect similar behaviour from their opponents and therefore mistrust them". [48]

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45 ibid at pages 8-9

46 ibid at page 9

47 Some writers equate cooperative with integrative negotiation, thus proposing only two major theories (distributive and integrative). Principled negotiation theory, however, draws a clear distinction between all three.

48 Gifford, DG A Context-Based Theory of Strategy Selection in Legal Negotiation (1985) 46:41 *Ohio State Law Journal* at page 48

Tactics include a high initial demand, limited disclosure, few and small concessions, threats and arguments and apparent commitment to positions.

2.1.2.2 The Cooperative Theory

According to the cooperative theory, the negotiator seeks an agreement that is fair and equitable to both parties and a relationship built on trust. The basic premise is that concessions are valued as an affirmative negotiating technique designed to capitalize on the opponent's desire to reach a fair and just agreement.

Tactics include initiating concessions in order to encourage the other party to reciprocate ungrudgingly and making a moderate opening bid favourable to the negotiator and barely acceptable to the other side; then seeking, as a 'fair' outcome, to split the difference between each party's opening bids.

2.1.2.3 The Integrative Theory

According to the integrative theory, the negotiators attempt to reconcile their interests to provide benefits to both. This is usually associated with situations in which the parties' interests are not directly opposed. Principled negotiation is said to go beyond integrative theory in important ways[49] in framing each issue as a joint search for objective criteria; being open to reason as to which standards are most appropriate; and never yielding to pressure, only to principle.

Tactics include separating the people from the problem; focusing on interests, not positions; brainstorming many options before committing; and insisting the result be based on some objective standard.

2.1.3 Development of the Field of Negotiation

In describing the development of the field of negotiation (which she associates with the broader field of conflict resolution) Professor Nolan-Haley, Professor of Law and Director of the Conflict Resolution and ADR Program at Fordham University School of Law, New York, writes:

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49 ibid at page 55

> *"The historian's short version of this story would go something like this: Toward the middle of the last century, there emerged a new field of study that concentrated on the phenomena of conflict and its resolution. For over fifty years, a tremendous amount of research by cultural anthropologists, philosophers, psychologists and sociologists, on the nature and social psychology of conflict, and various methods of dispute processing, established the foundational structure for the field. The infusion of ideas from labour and industrial relations, game theory and decision analysis, international relations and management, helped scholars to "build" a rich field of study ....."*[50]

The contribution of modern authors, who have been scrutinising and writing about negotiation from the 1960s onwards, is twofold. First, they have moved the focus of negotiation theory from the subject matter of the negotiation (the content – for example, negotiation and the law of the sea) to how negotiation is conducted (the process). This focus on process is reflected in a considerable body of work, in which there is further differentiation between work which focuses on strategy (why things are done) and work which focuses on tactics (how things are done).

In the analysis which follows, the strategic and the tactical are identified and considered together within the analysis of the 'process' teachings.

To obtain an overview of the different contributions, it is useful to identify three different sources – the social scientists, the business schools and the lawyers. Whilst each of these groups provided material for the world at large, the influence of a particular field of endeavour is apparent in the work.

2.1.3.1 The Social Scientists

The social scientists have contributed negotiation materials which focus on behaviour. Professor Strauss, an important influence on the development of current practices in qualitative research, viewed negotiation in its social setting and saw its analysis as a means of extrapolating behavioural consequences.[51]

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50 Nolan-Haley J New Problem-Solving Scholarship: An Historical Tale with a Happy Ending (2003) 19 *Negotiation Journal* 169-182 at page 170

51 see Strauss, A *Negotiations – Varieties, Contexts, Processes and Social Order* op. cit.

Professor Tannen analysed disputes from a linguistic perspective and, using a range of different research, sought to demonstrate that the way in which communications are made has a significant impact on the creation and resolution of disputes.[52]

Putnam and Roloff, both Professors of Communication, presented an excellent overview of the social science contribution in their text, which contains the negotiation contributions of eighteen social scientists and considers the impact on the negotiation process of both the content and the form of communication.[53] As the authors themselves acknowledge, these materials are very useful, since:

> *"no volume exists to describe and synthesize the conceptual perspectives that communication scholars bring to the study of negotiation. These perspectives employ a different language and different ways of seeing negotiations than do studies in cognate fields of social psychology, political science, anthropology, sociology, organizational behaviour, economics and law. Although communication scholars are not uniform in their approaches to negotiation nor do they have a monopoly on social interaction research, their perspectives, rooted in communication and rhetorical theory, distinguish them from scholars outside the field."*

Another important contributor in the field is Dr. Edward de Bono, responsible for the development of lateral thinking. Although not written as a text on the whole field of negotiation, his work[54] provides guidance to mapping the 'terrain' of a dispute and then using lateral thinking tools to generate alternative solutions.

In summary, as is to be expected, the work of the social scientists combines the strategic and the tactical, with behavioural research underpinning the strategy and informing the tactics designed to implement the strategy.

2.1.3.2 The Business Schools

The Business Schools have been the source of quite different material on negotiation. The influence of the business model and of economic rationalism on their work is apparent, as is organisational behaviour and human resource management. Much of the work reflects the use of Game Theory and Probability Analysis as tools for identifying

52 see, for example, Tannen, D *That's Not What I Meant! – How conversational style makes or breaks your relations with others,* London, Virago Press, 1992 and Tannen, D *The Argument Culture – Changing The Way We Argue And Debate,* London, Virago Press, 1998

53 Putnam, LL and Roloff, ME (ed) *Communication and Negotiation,* Newbury Park, Sage Publications, Inc. 1992 at page ix

54 De Bono, E *Conflicts – A Better Way to Resolve Them,* London, Penguin Books, 1991

and predicting patterns of negotiating behaviour. The Harvard Business School has been a rich source of this material.

One of the most influential of the business school authors, Professor Howard Raiffa, brought to the field academic qualifications in mathematics, followed by a doctorate involving mathematical research into game theory. With Dr. Lax and Professor Sebenius, he became a founder of the Negotiation Roundtable at the Harvard Business School. As a result of his work, combining decision analysis with game theory, he developed a program on competitive decision making, using his students in what he described as a kind of negotiation laboratory.[55]

His particular contribution to the field is significant because, while considerably influenced by game theory and probability analysis, Raiffa recognised that these tools alone were insufficient to underpin negotiation theory. He added new tools, which he recognised would enhance the outcomes of effective negotiators. Overall the significance of his contribution was twofold.

First, he demonstrated that it is the process of analysis which unlocks the value in negotiation theory.

> *"There are beautiful theories of the negotiation process that explain, to a first approximation, how negotiators do behave or should behave. But, as in the theory of the firm, these theories are not operational; and, in spite of them, all too often no systematic analysis, or even partial analysis, is employed in practice.... The need is not for the creation of new analytical techniques specially designed for the negotiation process, but rather for the creative use of analytical thinking that exploits simple existing techniques."*[56]

Secondly, he demonstrated that a number of different ideas, which had not previously been seen to coexist, had relationships to one another and could operate in a complementary fashion to assist in developing an analytical approach to negotiation. In doing this, he moved the Business School theorists away from their dependence on game theory and played an important role in the development of negotiation theory as an iterative process rather than as a contest between the negotiation theorists demanding an either/or approach. He acknowledged the influence of his interaction with, amongst others, David Lax and Jim Sebenius, Roger Fisher, William Ury and Frank E A Sander,

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55 see Raiffa, H *The Art and Science of Negotiation* op. cit pages 1-6 for an overview of the factors influencing the development of his ideas

56 ibid at page 360

all of whom have made distinguished contributions in the field of negotiation and dispute resolution.

A significant example of this iterative and integrative approach is the manner in which Raiffa deals with distributive and integrated bargaining. Unlike the usual business school focus on distributive bargaining (which assumes a fixed pie and a winner and loser) his work also addresses integrative bargaining (where parties can collaborate to increase the pie before it is divided) and provides useful case studies to assist the reader in recognising how each model operates.

Another example, as indicated from Raiffa's use of the expression 'art and science', is the manner in which he marries the rigour of objective scientific investigation and mathematical analysis with his advice regarding negotiation behaviour, including his often quoted material about what he describes as 'The Negotiation Dance'.[57]

A further example can be found in Raiffa's analysis of the strategic aspects of final-offer arbitration (often called baseball arbitration), which he uses to demonstrate the role of influence in third party interventions, acknowledging the economic theory work of Chatterjee[58] on his thinking.

Since publishing his first text, Raiffa has demonstrated an increasing focus on value creation particularly in pursuing the process of joint gains. First developed in his initial text, the idea of a 'contract embellisher' was developed by Raiffa as a neutral third party intervenor who reviews an agreement (after the parties have negotiated the best possible agreement they can) with the goal of identifying further potential joint gains.[59] He continued to develop this idea in his work on post-settlement settlements[60] (in which the 'contract embellisher' became the 'analytical intervenor'[61]) and this has provided a ripe field for the continuing development of negotiation theory in post settlement value creation[62] with a strong emphasis on the use of mathematical models to demonstrate

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57 ibid at page 128. 'The Negotiation Dance' is the description Raiffa gives to the pattern of concessions made between parties during the course of a negotiation

58 Kalyan Chatterjee was another graduate of the Harvard Business School whose 1979 doctoral dissertation – *Interactive Decision Problems with Differential Information* is acknowledged by Raiffa as a basis for his discussion of differing probability distributions. see ibid at page 111

59 ibid at page 221

60 Raiffa, H Post-Settlement Settlements (1985) 1 *Negotiation Journal* 9-12

61 ibid pages 9-10

62 see, for example Roth, AE Some Additional Thoughts on Post-Settlement Settlements (1985) 1 *Negotiation Journal* 245-247, Bazerman, MH et al Post-Settlement Settlements in Two-Party Negotiations (1987) 3 *Negotiation Journal* 283-292 and Mendenhall, RW Post-Settlement Agreements: Agreeing to make Resolutions Efficient op. cit.

efficiency. Raiffa continues to be an influential contributor in this field of ideas and practical examples from his own experiences.[63]

Lax and Sebenius provide another example of the contribution of the Business Schools.[64] With Raiffa, these Harvard Business School alumni were co-founders of the Negotiation Roundtable of the Harvard Business School. They were also contemporaries of Professor Roger Fisher and others from the Harvard Faculty Seminar on Negotiation, whose influence they acknowledge. With backgrounds in economics and statistics, these authors built on the same game theory principles as Raiffa and applied them to the development of negotiation analysis as it related to the job of a manager. One of their goals was to translate the specialised language and formal traditions of game theory, economics and statistics in a non-technical manner that was accessible to those not numerically literate. They also articulated the concepts of 'value claiming'[65] and 'value creation'[66] which have become widely accepted as describing the competitive and cooperative behaviour of negotiators.

In explaining these concepts, Lax and Sebenius noted that:

> *"Negotiators and analysts tend to fall into two groups that are guided by warring conceptions of the bargaining process. In the left hand corner are the "value creators" and in the right hand corner are the "value claimers". Value creators tend to believe that, above all, successful negotiators must be inventive and cooperative enough to devise an agreement that yields considerable gain to each party, relative to no-agreement possibilities..."*[67]

This is the essence of the win/win approach to negotiation.

> *"Value claimers, on the other hand, tend to see this drive for joint gain as naïve and weak minded. For them, negotiation is hard, tough bargaining..... At the heart of this adversarial approach is an image of a negotiation with a winner and a loser: "We are dividing a pie of fixed size and every slice I give to you is a slice I do not get"..."*[68]

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63 see, for examples, his chapter entitled 'The Neutral Analyst: Helping Partners to Reach Better Solutions' contributed to Hall, L (ed) *Negotiation: Strategies for Mutual Gain: The Basic Seminar of the Program on Negotiation,* Harvard Law School, 1993 at page 14 and Raiffa, H, *Negotiation Analysis, The Science and Art of Collaborative Decision Making, op. cit.*

64 Lax, DA and Sebenius, JK *The Manager as Negotiator* op. cit.

65 ibid at chapter 6

66 ibid at chapter 5

67 ibid at page 32

68 ibid at pages 32-33

This is the essence of the win/lose approach.

In articulating how they saw the interaction between value claiming and value creation, Lax and Sebenius gave new form to the older concepts of distributive and integrative bargaining and described the negotiators' dilemma as being:

> *"The overall choice of how to negotiate, whether to emphasize moves that create value or claim it [with] implications beyond single encounters. The Negotiator's Dilemma we discussed has a larger social counterpart. Without choices that keep creative actions from being driven out, this larger social game tends toward an equilibrium where everyone claims [value], engages constantly in behaviour that distorts information, and worse."*[69]

Their analysis of the relationship between these two concepts provides a constructive lesson for negotiators, who need to recognise that:

> *"Both of these images of negotiation are incomplete and inadequate. Value creating and value claiming are linked parts of a negotiation. Both processes are present. No matter how much creative problem solving enlarges the pie, it must still be divided; value that has been created must be claimed. And, if the pie is not enlarged, there will be less to divide; there is more value to be claimed if one has helped to create it first. An essential tension in negotiation exists between cooperative moves to create value and competitive moves to claim it."*[70]

The authors, like Raiffa, were also influenced by (and at times critical of [71]) elements of the Harvard Negotiation Program and they incorporate into their work the concepts of interests and of developing joint gains through recognising and devising Pareto possibilities.[72] Their explanation that value creating and value claiming are inter-related is a persuasive answer to the criticisms of principled negotiation which appear later in this thesis.

Their work on Three-Dimensional Negotiations[73]demonstrates the continuing development of their ideas. They add extra depth to their negotiation theory by identifying three different dimensions to negotiation. The first dimension, which they

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69 ibid at page 153

70 ibid at page 33

71 ibid at pages 107 and 155

72 Vilfredo Pareto, the Italian mathematician, devised a mathematical demonstration of the opportunity for mutual gain through a process in which each party can investigate the opportunity of making the deal better for itself without making it worse for the other party. His application of the concept of efficiency to economic theory has led to the use of the term 'Pareto optimal' to refer to efficient settlements.

73 see Lax D.A and Sebenius J.K Dealcrafting: The Substance of Three-Dimensional Negotiations (2002) 18 *Negotiation Journal* 1 at pages-5-29

explain has dominated the approach to the subject, is the **process** of what happens at the negotiation table. The second dimension they call 'dealcrafting' – an exercise which moves the focus from process to **substance** with the goal of creating joint gains. The authors focus on this second dimension in their paper but also take the opportunity to identify a third dimension. Their '3-D perspective' reintroduces value creating in a new and enhanced guise. They explain:

> *"The standard two-dimensional negotiation – balancing substance and process issues, no matter how cleverly – may not always be enough. We propose a third dimension of negotiation, negotiating away from the table, to change the perceived game itself. The great insight of the 3-D negotiators is that, once the parties are engaged at the bargaining table in a face-to-face process of creating and claiming value over a given agenda, much of the die is cast... .If 1-D and 2-D negotiators focus on the tactics of playing the game well at the table, 3-D negotiators focus on the strategy of designing the game and changing it advantageously, often away from the table."*[74]

The contribution of the Business Schools was continued in the work of Professors Lewicki, Saunders and Minton.[75] These Business School Professors provide a catholic selection of readings in the field of negotiation, which draw together all fields – social scientists, business schools and lawyers – and represent a good overview of the present state of negotiation theory.

Professor Max Bazerman of the Harvard Business School, having majored in organizational psychology in his undergraduate degree, identified five cognitive limitations or biases that inhibit optimal implementation of prescriptive principles that negotiators can use to be more effective, such as those identified by Fisher and Ury and by Raiffa, namely:

(i) faced with an objectively identical situation, negotiators respond differently to questions framed in terms of losses versus gains;

(ii) negotiators intuitively tend to assume a fixed pie and thus adopt a distributive approach in cases where joint problem solving (the integrative approach) could enlarge the pie before it is divided;

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74 ibid. at page 8

75 Lewicki, RJ Saunders, DM and Minton JW *Negotiation: Readings, Exercises and Cases* op. cit. which extended their work in *Essentials of Negotiation* op. cit.

(iii) decision-makers tend to commit added resources to a previously chosen unsuccessful course of action because of a non-rational belief there is "too much invested to quit";

(iv) negotiators tend to be overconfident that their positions will prevail if they do not "give in"; and

(v) in the bargaining context, asymmetry of information can lead to the "winner's curse", in which the other side's acceptance of an offer may indicate (too late) that it should not have been made.[76]

2.1.3.3 The Lawyers

Lawyers are the third group identified as key contributors to negotiation theory. There have been many contributions in this field from legal scholars and practising lawyers, both by way of general texts dealing with the theory and process of negotiation and by way of texts designed to guide lawyers and others through the process of legal negotiation.

One of the earliest contributors of legal negotiation strategy was Gerard Nierenberg, a New York lawyer, who established The Negotiation Institute in 1966 at the time when Raiffa was developing the course that he was to teach at the Harvard Business School as 'Competitive Decision Making'.[77] Nierenberg's original text,[78] first published in 1968, proposed an approach very different from the mathematically based and game theory influenced work produced by the business school academics. Although his text pays attention to both strategy and tactics, it is his strategic approach which is of most significance, following a range of legal writing on negotiation tactics, which were primarily devoted to building tough litigators rather than creating good outcomes.

With a background as a trial attorney, Nierenberg developed some important principles as a result of his observation and analysis of a number of negotiations. Like the social scientists, he first observed that knowledge of human behaviour is essential to any negotiator. Like Raiffa, he saw the value of identification and analysis of the needs of

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76 Bazerman, MH Negotiator Judgement, A Critical Look at Rationality Assumption, (1983) 27 (2) *American Behavioral Scientist* 211-228

77 see Raiffa, H *The Art and Science of Negotiation* op. cit at acknowledgements

78 Nierenberg, GI *The Art of Negotiating* op. cit.

the parties, from which strategy and tactics to meet them could be devised. As he further developed his ideas,[79] in his 1973 text[80] and through later texts, he propounded many concepts which subsequently achieved significance as key elements in the Harvard Negotiation Program. These included the concepts of cooperative negotiation[81], dealing with assumptions[82] and engaging in a preparation process which included creative alternatives.[83] He also devoted a chapter to needs[84], which can be seen as the precursor to the notion of interests.

Michael Meltsner and Philip Schrag, writing at the same time[85], present a good example of the many tactics-based negotiation texts based on positional bargaining. (Many authors have reflected on the significance and role of positional bargaining as a negotiating tool.[86]) Holding out positional bargaining as an example of a negotiating style which is difficult to overcome,[87] their text investigates the use of 20 tactics divided into preparatory, initial and general, which range from the conservative[88] to the devious.[89]

From the Harvard Negotiation Program came the theory of negotiation strategy described in 'Getting to Yes'.[90] From origins in the Law School rather than the Business School, this negotiation method is known by various names – *'principled'*, *'win-win'*, *'integrative'* and *'problem-solving'*. Of course the concept of principled negotiation was not new. Mary Parker Follet, an early twentieth century scholar of the nature of conflict, is often credited with being the earliest advocate of principled

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79 in further editions of his first text and in other publications including Nierenberg, GI *The Art of Creative Thinking,* New York, Simon & Schuster, 1982; Nierenberg, GI *Meta-Talk,* New York, Simon & Schuster, 1981; Nierenberg, GI *The Complete Negotiator* op. cit.

80 Nierenberg, GI *Fundamentals of Negotiation,* New York, Hawthorn, 1973

81 Nierenberg, GI *The Complete Negotiator* op. cit. at pages 217-223

82 ibid at chapter 5

83 ibid at pages 188-193

84 ibid at chapter 7 which drew on general need theory including Maslow's hierarchy of needs

85 see Melstner,M and Schrag, PG Negotiation Tactics for Legal Services Lawyers (1989) 23 (7) *Clearinghouse Review* 858-861

86 see, for example Menkel-Meadow, C Toward Another View of Legal Negotiation: The Structure Of Problem Solving op. cit.; Boulle, L *Mediation: Principles, Process, Practice,* Sydney Butterworths, 1996 at page 47 noted *"In secular societies the traditional approach to negotiation is called positional bargaining. This is associated with situations where the parties make extreme opening claims and attempt to persuade, coerce or trick the other side to move closer to their initial position".*

87 for example Goldberg, SB, Sander, FEA and Rogers, NH *Dispute Resolution: Negotiation, Mediation, and Other Processes* op. cit. at page 37 refer to ' a Meltsner and Schrag "tough" negotiator'.

88 such as tactic number 4 – *'Know the facts thoroughly'* – Melstner, M and Schrag, PG Negotiation Tactics for Legal Services Lawyers op. cit. at page 260

89 tactic number 14 – *'Appear irrational where it seems helpful'* ibid at page 262

90 Fisher, R and Ury, W *Getting to Yes - Negotiating Agreement Without Giving In* op. cit.

negotiation.[91] It is her story of the readers in the library[92], where the solution demonstrated the earliest example of win/win which appears (unfortunately unacknowledged) in Fisher and Ury's text.[93] Other writers and scholars have continued her theme.[94] However it is probably fair to say that none have done so in such an influential and enduring fashion as Fisher and Ury. Their text describes the five main elements of their theory of principled negotiation as follows:

Separate the people from the problem

This requires negotiators to focus their attention on attacking the problem, not each other, whilst building effective working relationships. Personal and emotional elements will be dealt with more effectively if they are not bound up with the substantive issues.

Focus on interests, not positions

A clear rejection of the tradition of positional bargaining, this element requires negotiators to move from 'what' the parties say they want to 'why' they say they want them, as a way of seeking to uncover mutual interests, which may be satisfied by agreement. This represents a significant shift from the traditional focus in legal negotiation, namely on who is right and who is wrong - often giving rise to disputes about the facts and legal rights - to a focus on what is a good outcome for the parties.

Invent options for mutual gain

This moves the parties from distributive bargaining, which accepts the apparent limited size of the pie, to a creative process of jointly brainstorming a shared problem, which seeks to enlarge the pie before distribution.

Insist on using objective criteria

This introduces the concept of legitimacy, allowing parties the opportunity to resolve issues such as price and value (and to justify their agreements to their constituencies) by reference to external, objective standards of fairness.

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91 Menkel-Meadow, C, Mothers and Fathers of invention: The intellectual founders of ADR, 2000 *Ohio State Journal on Dispute Resolution* 16 (1) at pages 1 and 4-13 According to Menkel-Meadow, Follett was the earliest author to articulate the concept of integration as a means of dealing with conflict noting *'She urged integration as a process where new solutions would emerge from parties trying to meet their desires without the compromise of having to give up something'* at page 8

92 In her story one student, seeking fresh air, wanted the window open; the other, seeking to prevent his papers blowing about, wanted the window closed. The win/win solution saw the window in the adjoining room opened to provide fresh air without a breeze.

93 Menkel-Meadow, C, Mothers and Fathers of invention: The intellectual founders of ADR op. cit. at page 8 and also see Fisher, R and Ury, W *Getting to Yes – Negotiating Agreement Without Giving In* op. cit. 1986 at page 41

94 for example the discussion of the work of Nierenberg and de Bono above makes reference to this

Know your best alternative to a negotiated agreement (BATNA) (and estimate theirs)
Before arriving at the negotiation table, parties are encouraged to identify the range of alternative outcomes they can obtain for themselves away from the table. The best of these, the BATNA, is the criterion against which all potential agreements at the negotiation table must be reviewed, so as have confidence in the decision either to agree or to walk away.

Not all authors and commentators agree that there are five elements. For example Spegal, Rogers and Buckley[95] identify a:

> *"four-part approach...*
> - *separate the people from the problem;*
> - *focus on interests not positions;*
> - *generate a variety of options before deciding what to do; and*
> - *insist that the result be based on some objective standard."*

These authors do not include the element of alternatives here as has been done in the author's analysis above.

Boulle[96] says:

> *"There are four defining features of this model:*
> *(a) People issues should be dealt with separately from substantive issues....*
> *(b) Parties in negotiation should focus not on their positions, but on the needs and interests which underlie those positions...*
> *(c) Parties in negotiation should consider a wide range of options before coming to a settlement and should attempt to select those settlement options which satisfy their mutual interests....*
> *(d) Negotiation should occur independently of the subjective wills of the parties and, wherever possible, in terms of objective criteria."*

Boulle also does not include 'alternatives' as a separate feature but chooses to include it in his discussion of objective criteria in his feature (d). In contrast, Goldberg, Sander and Rogers[97] identify the five elements the author has noted in the text above.

95 Spegel, NM, Rogers, B and Buckley, RP *Negotiation Theory and Techniques*op.cit at page 23

96 Boulle, L *Mediation: Principles, Process, Practice* op. cit at pages 50-51

97 Goldberg, SB, Sanders, FEA and Rogers, NH *Dispute Resolution: Negotiation, Mediation and Other Processes* op. cit. at page 36

The theory of principled negotiation continues to be developed through its teaching at the Harvard Law School in graduate, post graduate and summer school programs and in the work of the Harvard Negotiation Research Project.[98] However despite its influence and wide acceptance, it has faced serious criticism, principally from those who consider naïve and wrong the assertion that principled negotiation produces substantially more effective results than positional bargaining in every situation. One of the most consistently quoted critiques[99] explains:

> *"My principal criticism of the book is that it seems to overlook the ultimate hard bargaining. Had the authors stated that they were dividing the negotiation process in two and were dealing with only part of it, that omission would be excusable. That is not what they have done. Rather they seem to assume that a clever negotiator can make any negotiation into problem solving and thus completely avoid the difficult distribution ... To my mind this is naïve. By so distorting the reality, they detract from their powerful and central theses."*

Other academics and practitioners have agreed. Lax and Sebenius, whilst themselves influenced by and having influence on the Harvard Law School material consider the role of shared interests in their discussion of value creation and make a substantial criticism:

> *"But, in all negotiations....realizing benefits and avoiding the costs of alternatives are minimal "shared interests"...Emphasising this fact can certainly generate empathy. Yet used in this way, as it very frequently is, "common" or "shared" interest is an empty phrase implying nothing other than that the parties are in a negotiation. As such, this usage would apply even to parties whose interests were diametrically opposed."*[100]

Later, in describing and attempting to resolve the tension between value creating and value claiming, they offer the following criticism of what they call 'the Win-Win Philosophy':

> *"A second popular school of thought eliminates the tension in an equally myopic way: it convinces followers that there is no claiming. Negotiators who adopt the "win-win philosophy" and search creatively for joint gains hope to forestall*

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98 The author has been fortunate to experience the iterative development of these materials through attending the Basic and Advanced Negotiation courses delivered as part of the Harvard Law School Summer School Program together with the pilot course on gender and negotiation which became the basis for Sheila Heen and Doug Stone's work on *Difficult Conversations: How to Discuss What Matters Most,* London, England, Penguin Group, 1999. The author was a teaching fellow at the Harvard Law School summer school in 1991 and has assisted Professor Roger Fisher and his team in teaching the program on several occasions in Australia.

99 White, J The Pros and Cons of "Getting to Yes" (1984) 34 *Journal of Legal Education* 115-124

100 Lax, DA and Sebenius, JK *The Manager as Negotiator* op. cit. at pages 106-107

claiming and divisiveness by pretending or, actually believing, that claiming does not exist. Of course, wily practitioners may find that when negotiating with true believers, this philosophy provides the opportunity for remarkable joint gain: tremendous claiming with no hard feelings, since true believers' blinders can prevent the recognition of properly disguised claiming tactics."[101]

Boulle writes of Fisher and Ury's principles that:

"*Despite the apparent simplicity of these principles, they are deeply profound. They have had a strong influence on contemporary thinking about negotiation, and in the mediation movement.*"[102]

but he also notes that principled negotiation has shortcomings as well as strengths. After analysing both he concludes:

"the problem-solving approach to negotiation will be appropriate in some, but not all, situations. Where negotiations take place between strangers with no future relationship, where there is only a single issue, such as price, to be bargained over, and where the transaction costs of considering interests and options are high, positional bargaining might be the more appropriate approach."[103]

'Getting Past No'[104] (which continues the iterative development of the principled negotiation theories of 'Getting to Yes') develops tactics designed to meet some of the criticisms of the earlier work, in particular the criticism that principled negotiation is only effective where the parties are willing to engage in it. This text deals with engagement of those who do not want to cooperate by developing a five-step breakthrough negotiation method as follows:

step one - *Don't React: Go to the balcony*

This step builds an independent model of behaviour. In response to an attack, instead of attacking or reacting in return, going to the balcony is the tool that enables the negotiator to detach mentally from the negotiation and suspend reaction, preferably by taking a break.

"The first thing you need to do in a negotiation is not to control the other person's behaviour but to control your own. Suspend your natural reaction by naming the game. Then buy yourself time to think. Use the time to keep your

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101 ibid at page 155

102 Boulle, L *Mediation: Principles, Process, Practice* op. cit. at page 51

103 ibid at page 52

104 Ury, WL *Getting Past No – Negotiating with Difficult People,* New York, Bantam Books, 1993

eyes on the prize ... Instead of getting mad or getting even, concentrate on getting what you want. That is what going to the balcony is all about."[105]

step two – *Don't Argue: Step to their side*

Instead of giving in, disarm by listening, acknowledgement and agreement.

> " *...it is hard to attack someone who is suddenly on your side. And the most important, it puts you and your opponent side by side – just where you want to be in order to engage in problem-solving negotiation."*[106]

step three – *Don't Reject : Reframe*

By taking whatever the difficult negotiator says, reframing it as an attempt to deal with the problem and by asking problem-solving questions, the game can be changed.

step four – *Don't Push : Build them a golden bridge*

Having set the stage for reaching agreement, one must bridge the gap between the interests of the respective parties:

> *"Building a golden bridge means making it easier for the other side to surmount the four common obstacles to agreement. It means actively involving them in devising a solution so that it becomes their idea, not just yours. It means satisfying their unmet interests. It means helping them save face; and it means making the process of negotiation as easy as possible."*[107]

step five – *Don't Escalate: Use Power to Educate*

This promotes reality testing of the difficult negotiator's stance through questioning, education and demonstration of the power of the BATNA:

> *"Overcoming the power paradox means making it easier for the other side to say yes at the same time that you make it harder for them to say no. ...Treat the exercise of power as an integral part of the problem-solving negotiation. Use power to bring the other side to the table. Instead of seeking victory, aim for mutual satisfaction. Use power to bring them to their senses, not to their knees."*[108]

These tools have strengthened the principled negotiation model. However it is apparent that they still do not deal directly with the distributive bargaining issues. This debate continues.

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105 ibid at page 51

106 ibid at page 55

107 ibid at page 110

108 ibid at page 132

One recent contribution to the field goes a long way towards developing a model of value-creating which answers a number of the criticisms of the principled negotiation model. As the text reveals, authors Robert Mnookin, (Williston Professor of Law at Harvard Law School, Head of the Harvard Negotiation Program and Director of the Harvard Negotiation Research Project) and two of his former students Peppet and Tulumello were influenced by the authors of 'Getting to Yes' and also by Raiffa. The Lax and Sebenius text 'The Manager as Negotiator' inspired the focus of this work on the lawyer as negotiator.[109] In drawing together the different features and strengths of the business schools, the lawyers and the social scientists, this text provides guidance about what works and is a model of collaborative thinking and action. It avoids Professor John Burton's criticism of simply transferring concepts from other disciplines. Instead it satisfies the requirements of his model of the 'a-disciplinary approach' namely:

> *"a synthesis that goes beyond separate disciplines, beyond interaction between separate disciplines. An a-disciplinary approach accepts no boundaries of knowledge."*[110]

2.1.4 The Australian Texts

A feature of the Australian texts in this field is that most have been developed in a conflict resolution context, although there are also some dedicated negotiation texts. A common feature of these, as in other jurisdictions, is an industry-based approach which, as a consequence, tends to focus more on tactics than on the development of distinctive theories of negotiation.[111] An outstanding Australian text by Spegal, Rogers and Buckley, whilst designed for law students, has a more general application.[112] Providing a good overview of negotiation theory, they also use tools drawn from communication theory (most particularly the mind map) to enhance learning and to model effective communication techniques. They also consider the opposing styles of principled and

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109 Mnookin, RH, Peppet, SR and Tulumello, AS *Beyond Winning: Negotiating To Create Value in Deals and Disputes* op. cit. see Preface page xi

110 see a general discussion of the theories of conflict and conflict resolution of Professor Burton contained in Tillett, G *Resolving Conflict: A Practical Approach,* South Melbourne, Oxford University Press, 1999 at the Appendix page 222-228

111 see for example McCarthy, P *Developing Negotiating Skills and Behaviour,* CCH Australia 1989 (negotiating in industrial relations), and Hawkins, L, Hudson, M, and Cornall, R *The Legal Negotiator,* Melbourne, Longman Professional 1991

112 Spegel NM, Rogers B and Buckley RP *Negotiation: Theory and Techniques* op. cit.

positional negotiation and devise a '*constructive approach*'[113], which guides negotiators in '*recognising the different strategies and using the best one in each situation*'.[114]

The Australian conflict resolution texts also make contributions that are relevant to the field of negotiation. Astor and Chinkin's original work[115] and subsequent update[116] provide a scholarly narration of the development of the field of dispute resolution in Australia, which includes a section on negotiation. Professor Laurence Boulle, who succeeded Professor Astor as Chair of NADRAC[117] has contributed an academic text[118] and a skills handbook[119] on mediation which reflect his range of experience as Professor of Law at Bond University and experience in mediation practice and training.

The publication of his text in local editions in New Zealand, South Africa, Singapore, Canada and the United Kingdom reflects the fact that Australian academics and practitioners in the field of ADR have achieved significant recognition and earned the opportunity to influence the ongoing development of the field. Whilst not a text on negotiation, his academic text makes three useful contributions to the field of negotiation. First, he draws on the work of Anstey[120] to acknowledge the widely different traditions of negotiation resulting from a range of influences, which include matters such as philosophy, religion and community values, and provides a visual representation of what he calls the five paradigm negotiation situations: concessional, problem-solving, distributive, avoidance and positional.[121]

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113 ibid. at chapter 2

114 ibid at page 20

115 Astor, H and Chinkin, CM *Dispute Resolution in Australia* Sydney, Butterworths, 1992

116 Astor, H and Chinkin, CM *Dispute Resolution in Australia,* 2nd edition, Sydney, Butterworths, 2002

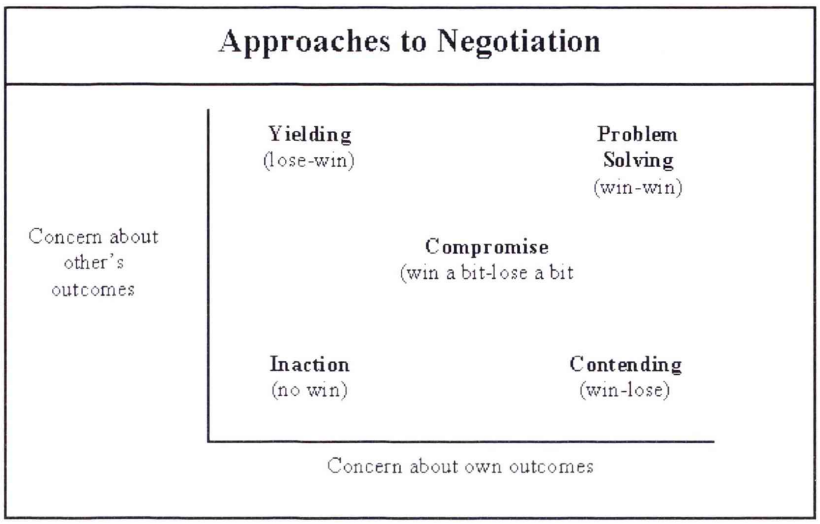
117 The National Alternative Dispute Resolution Advisory Council '*an independent advisory council charged with providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision*' see www.nadrac.gov.au

118 Boulle, L *Mediation: Principles, Process, Practice* op. cit

119 Boulle, L *Mediation: Skills and Techniques,* Sydney, Butterworths, 2001

120 Anstey, M *Negotiating Conflict: Insights and Skills for Negotiators and Peacemakers,* Kenwyn, South Africa, Juta & Co, 1991

121 Boulle, L *Mediation: Principles, Process, Practice* op. cit. at page 47



Secondly he provides a useful analysis of principled and positional negotiation and a balanced assessment of the strengths and weaknesses of each.[122] Finally he provides a very useful analysis of the relationship between negotiation and mediation to demonstrate how '*mediation differs qualitatively from other negotiations*'.[123]

Professor Sourdin has also made a significant contribution to the field[124]. Although presented as an ADR text, negotiation receives some individual attention in her introductory chapter by way of a short description of the development of negotiation theory. In this she indicates that the rich history of development has created an identifiable field with a variety of theorists.[125]

Not surprisingly, since her text is entitled 'Alternative Dispute Resolution' Professor Sourdin presents negotiation as part of the facilitative processes in a continuum of processes that moves from facilitative, through advisory to determinative. Drawing on the Mediation Abacus, a tool which has proved extremely valuable to ADR teachers and practitioners,[126] she maps the ADR continuum as follows:[127]

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122 ibid at pages 49-52

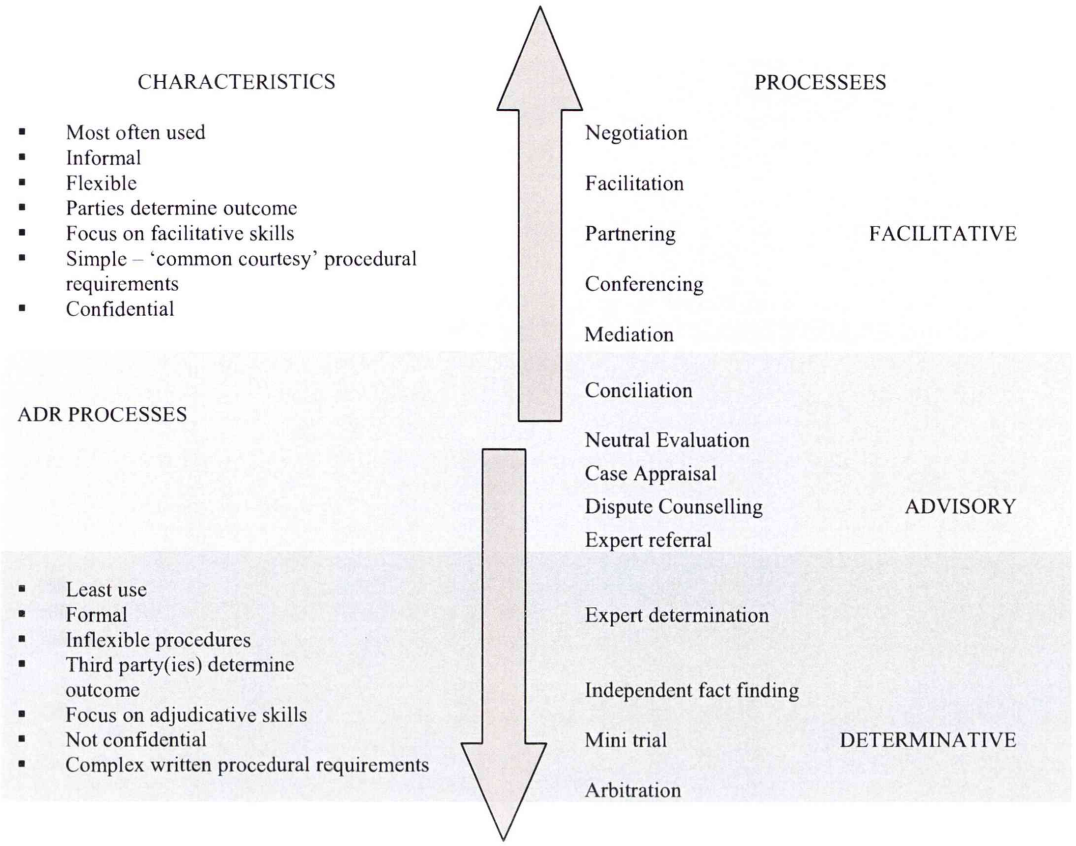
123 ibid at pages 65-67

124 Sourdin, T *Alternative Dispute Resolution* op. cit.

125 ibid at page 7

126 developed by Laurence Boulle, Susan Gribben and John Wade, it is reproduced in many ADR texts – see, for example, Wade, JH Mediation – The Terminological Debate op. cit.

127 Sourdin, T *Alternative Dispute Resolution* op. cit. at page 18



Sourdin also offers a useful commentary on the role of lawyers in negotiation and on the issues of ethics and good faith, which are considered in Chapter 3 of this thesis.

Dr Gregory Tillett, himself a former member of NADRAC, has also provided a text on the broader field of conflict resolution[128]. Providing an analytical approach to the nature of conflict, it offers basic principles and practical strategies. The text is worthy of mention because Tillett proposes a concept of and role for negotiation which, on its face, is significantly different from the traditional view. He suggests:

> *"Negotiation can be, and often is, a part of conflict resolution, but it is important not to identify negotiation with conflict resolution. A conflict can be resolved without negotiation.* ***In most conflicts, the resolution is a necessary prerequisite to effective negotiation****; participants who are in conflict, who oppose and distrust each other, do not have a good basis for a negotiation. Until there is at least a minimum level of resolution of the relationship between them, negotiation may be frustrating and ineffectual."*[129](emphasis added)

One possible interpretation of the highlighted passage is that the resolution of conflict is not a suitable topic for negotiation. This is somewhat startling especially since Tillett

128 Tillett, G *Resolving Conflict: A Practical Approach* op. cit.

129 ibid at page 68

notes earlier that most people resolve most of their conflicts through collaborative problem solving (which includes negotiation).[130]

Tillett distinguishes between problems, disputes and conflicts but throughout the book uses the term 'conflict' generically to include all three (unless otherwise specified)[131]. Perhaps the highlighted passage should be taken as meaning that particular issues arising out of the underlying conflict (disputes) may not be negotiated effectively until the underlying conflict has been addressed. However this still leaves uncertain whether Tillett considers that underlying conflicts may be addressed effectively by negotiation.

Overall, a study of the Australian authors and their contributions reveals a wealth of analysis of applications and principles but their significant new contributions to the field have been in the context of alternative dispute resolution (ADR) rather than in the particular field of negotiation. Australia has not yet produced theories and strategies of negotiation which sit with the work of authors and academics such as Raiffa, Lax, Sebenius, Fisher, Ury and Mnookin.

Apart from the development of negotiation theory and practice described above, there has been a further development, which has coincided with the development of the field of ADR. Some of the flavour of this emerges from the discussion of key texts above, in which negotiation appears and is given relevance as a primary dispute resolution tool. This has had the effect of presenting negotiation as if it were two different processes – one operating within a rule-making or transactional context and the other within the framework of dispute resolution.[132] This presentation of negotiation as a process with two separate faces, which do not interact or influence each other, has not found favour with all commentators. Menkel-Meadow notes the separation and appears to see value in the drawing together of the two faces. Whilst acknowledging that:

> *"transactional or rulemaking negotiation may be sufficiently different from dispute resolution to require a different conceptual framework."*

she makes the point that

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130 ibid at page 63

131 ibid at page 7

132 An early articulation of this separation may be found in Eisenberg, M Private Ordering Through Negotiation: Dispute Settlement and Rulemaking (1976) 89 *Harvard Law Review* 637. Professors Astor and Chinkin also acknowledge this separation in the most recent edition of their text: Astor, H and Chinkin, CM *Dispute Resolution in Australia* op. cit.

"transactional negotiation more often employs a problem-solving technique and dispute resolution negotiations may benefit from the application of transactional models to settling disputes."[133]

This is supported by Boulle, who has coined the term *'transactional mediation'* to cover those circumstances in which mediation[134] can be useful in the transactional context.[135]

It could be suggested that another way to deal with the issue of the apparently separate faces of negotiation is to recognise that rule-making negotiation, in which a public authority is involved (known as 'reg-neg') is a readily identifiable field of endeavour with a long history.[136] However, many of the remaining faces of transactional negotiation – such as the negotiation of private agreements – are susceptible to and benefit from the same kind of process which is effective in ADR.

2.2 Lawyers and negotiation

The study of lawyers at work is not novel.

One of the earliest texts on lawyers and negotiation[137] is the result of a study by Professor Gerald Williams commenced in 1976 and published in 1983. He sent out surveys to 1,000 lawyers in the Phoenix area in the United States, questioning them about their most recent negotiation experience with another lawyer. 308 lawyers responded to his survey request. Those surveyed were asked to rate the lawyer on the other side using three sets of scales which, when completed, produced subjective evaluations of perceived negotiating behaviour and its effectiveness. The results produced two clusters of behaviour which Williams identified as 'cooperative' and 'competitive'. Close to 60% of all cooperative negotiators and 25% of competitive negotiators were rated as effective by their peers. The cooperative style was identified as the one most recently encountered in 224 of the 308 responses.[138]

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133 Menkel-Meadow, C Towards Another View of Legal Negotiation: The Structure of Problem Solving op. cit. at n.6

134 and by definition negotiation given Boulle's analysis of the role of mediator as *'facilitator of the parties' negotiations'* see Boulle, L *Mediation: Skills and Techniques* op. cit. at page 143

135 see Boulle, L *Mediation: Principles, Process, Practice* op. cit. at page 13

136 see generally Astor, H and Chinkin CM *Dispute Resolution in Australia* op. cit at page 106-107

137 Williams, GR *Legal Negotiation and Settlement* op. cit.. This work was updated in a further survey conducted in the same area in 1985. See Burton, L Farmer, L Gee, E Johnson, L & Williams, GR, Feminist theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles op. cit. Professor Andrea Kupfer Schneider, to whose work reference is made below, says of the Williams study *'it is still the premier empirical study of negotiation styles and effectiveness. It has been cited in every major negotiation and ADR textbook'* – see Schneider, AK Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style op. cit. at page 149.

138 ibid at pages 15-46

In 1986 Professor John S. Murray proposed three 'realistic' standards by which to evaluate theory: a reasonably accurate description of the reality for which it is being presented; a useful description of the factors important to the person needing to take action; and a consistently good outcome achieved by the competent user.[139] He noted the many different negotiation theories and models from commentators representing separate disciplines and compared and contrasted the competitive and problem-solving theories of negotiation, claiming that most negotiators, "*particularly lawyers*", exhibit one or other of those two distinct behavioural patterns.[140]

Having examined those patterns and the basic assumptions underlying them, Murray explained how those approaches affect the behaviour of negotiators, pointing to the strengths and "*downside risks*" of each approach and suggesting that actions intended to decrease or eliminate those risks would lead a competitive negotiator to become more problem-solving in orientation, while leading the problem-solving negotiator to strengthen problem-solving skills, not to change basic negotiating behaviour: '*The theories are in this way asymmetrical*'.[141]

Contrary to the view that there are two exclusive and competing theories that explain negotiation behaviour, Murray suggested that as attempts are made to improve negotiator performance, the problem-solving theory becomes dominant, a result incompatible with the conclusion of Williams' empirical studies of negotiator effectiveness but:

> *"the difficulty of defining and measuring effectiveness is widely recognized".*[142]

He concluded that only the problem-solving theory satisfies all three standards for a general theory.

Twenty years after publication of Williams' work, his research was updated by Professor Andrea Kupfer Schneider who surveyed 2500 lawyers in Milwaukee and Chicago. Of the 727 responses, 690 were the subject of her reported research.[143] In introducing her study, in the Summer 2000 American Bar Association Dispute Resolution Magazine, Professor Schneider endorsed a commentary which identified the

139 Murray, JS Understanding Competing Theories of Negotiation (1986) April *Negotiation Journal* at pages 179-186

140 ibid at page180

141 ibid at page185

142 ibid at page186

143 Schneider, A K Perception, Reputation and Reality op. cit. at pages 24-28. A significantly expanded analysis of her study appears in the Harvard Negotiation Law Review noted above.

'appalling portrayal of lawyers in the movies' and noted that this *'portrayal of bad lawyers coincides with a precipitous drop in the prestige of lawyers over the past two decades'.*[144] One of the goals of her study, given the apparent increasing public reaction against lawyers, was to investigate whether lawyers' perceptions of the negotiation behaviour of other lawyers had changed.

The more detailed account of her work, published two years later, expanded the discussion of her objectives. These included an intention to update the Williams study *'to reflect current terminology and usage, making its results more persuasive to a contemporary audience'.*[145]

Professor Schneider carefully addressed the criticisms that had been made of Williams' work. She noted that the timing of its publication occurred:

> *"just as the ADR movement began to explode in the U.S. The publications of' Getting to Yes'*[146] *and 'Toward Another View of Legal Negotiation'*[147] *crystallized academic negotiation theory by promoting a problem-solving method of negotiation. Would the growing popularity of ADR and problem-solving approaches in Law Schools and legal practice change the negotiation behaviour of lawyers and how other lawyers perceived them?"*[148]

To undertake her empirical study of negotiation skills, Professor Schneider adopted a cluster analysis similar to that of Williams. However, she was concerned by what she saw as 'label confusion'[149] which she identified as an outcome of a growing number of texts focussing on negotiation strategy and negotiation behaviour. As examples she contrasted Williams' use of the terms *'co-operative'* and *'competitive'* with Menkel-Meadow's use of *'problem-solving'* and *'adversarial'*; Lax and Sebenius[150] terminology of *'value-creating'* and *'value-claiming'* and Fisher and Ury's[151] expressions *'hard bargainer,'* *'soft bargainer'* and *'principled bargainer'*, amongst others.

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144 ibid at page 24

145 Schneider, AK Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style op. cit. at page 152

146 Fisher, R and Ury, W *Getting to Yes – Negotiating Agreement Without Giving In* op. cit.

147 Menkel-Meadow, C Towards Another View of Legal Negotiation: The Structure of Problem Solving op. cit.

148 Schneider, AK Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style op. cit. at page 151

149 ibid at page 151

150 Lax, DA and Sebenius, JK Dealcrafting: The Substance of Three-Dimensional Negotiations op. cit.

151 Fisher, R and Ury, W *Getting to Yes – Negotiating Agreement Without Giving In* op. cit.

Having explained how label confusion arose, Schneider sought to avoid it by changing the cluster names she selected from '*cooperative*' and '*competitive*' to '*problem-solving*' and '*adversarial*'. She explained that in the 20 years since the Williams study:

> ""*cooperative" seems acquiescent, willing to concede in order to get along. "Cooperative" also suggests a willingness to split the pie rather than focus on making it larger. Perhaps not in 1982, but clearly by now, lawyers look at the label "cooperative" and fear becoming the worst kind of doormat.*"

Professor Schneider argued that the adjectives she selected for her cluster names more closely represented labels in current use in the negotiation literature.[152]

As part of her study, Schneider also sought to add some elements not included in the Williams study, which were intended to overcome criticisms that the measurements were too subjective. These included a self-evaluation section (designed to counter the criticism that attorneys were most approving of those who shared their own negotiating characteristics) and a section designed to identify the negotiation training and ADR experience of the participants as a means of identifying possible self-selection issues and external influences.

Schneider's findings reveal the changes which have occurred since the Williams study. In particular she notes:

> *"As adversarial negotiators have gotten more extreme over the past 25 years, they also have become both nastier and less effective... It appears that the declining public perception of lawyers is also reflected in a decline in the way lawyers view each other. Fewer lawyers are viewed as effective by their peers and more lawyers are viewed negatively."*[153]

Other useful studies of negotiation look more generally at the characteristics of successful negotiators but their focus has tended to be directed to characteristics in particular fields of negotiation[154] and not on the role of lawyers in negotiation.

The work of Williams, as updated by Schneider, remains the principal study of lawyers in negotiation, drawing its data from the entire field of negotiation. Because negotiation

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152. Schneider, AK Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style op. cit. at page 25

153. ibid at page 28

154 see, for example, the work of the Huthwaite Research Group Limited which has been researching Industrial Relations negotiators since 1968 as reported in Lewicki, RJ, Saunders, DM and Minton, JW *Negotiation – Readings, Exercises and Cases* op. cit. at pages 341-353

is treated as a field of endeavour in its own right, which spans the entire range of activities in which lawyers engage, it is impossible to determine from the research to what kinds of negotiation the evaluating lawyers are referring. Accordingly, the reader is given access to information drawn from across the whole range of lawyers' activities. This is very different from other writings about lawyers' negotiating behaviour, much of which, as already mentioned, suggests that lawyers' negotiation is restricted to disputes and should therefore be scrutinised within the confines of the dispute resolution process and be related to litigation and pre-litigation environments. As has already been suggested *'communication for the purposes of persuasion'* [155] is a far more useful definition of negotiation which presents a more accurate reflection of the role which negotiation plays in the work that lawyers perform.

However, in the context of the dispute resolution process, there has been continuing debate and analysis about the role which lawyers can and do play.

For example, in 1994, Professors Gilson and Mnookin published their analysis of the negotiation behaviour of lawyers and their influence on the dispute resolution process.[156] The authors reflect on the *"level of noise' about lawyers' behaviour'.*[157] Instead of endorsing the notion of the lawyer as *'purveyor of needless conflict',* the authors intended their analysis to offer a conceptual foundation for the alternative perspective that:

> *"lawyers may allow clients to cooperate in circumstances when their clients could not do so on their own...using basic notions drawn from game theory and agency theory."*[158]

The basis for this analysis was the notion that lawyers develop reputations and that it may be a valuable asset to develop a reputation as a cooperative problem-solver. Their message was:

> *"the relationship between opposing lawyers and their capacity to establish credible reputations for cooperation have profound implications for dispute resolution."*[159]

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155 Goldberg, SB, Sander, FEA and Rogers, NH *Dispute Resolution: Negotiation, Mediation and Other Processes* op. cit. at page 7

156. Gilson, RJ and Mnookin, RH Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation op. cit.

157 ibid at 564 and in endnote 8 where the authors provide a substantial list of material which reflects the level of debate about the role lawyers play in facilitating or obstructing the resolution of legal claims

158 ibid at page 512

159 ibid at page 564

The authors conclude with the acknowledgement that their analysis lacks supporting empirical data and suggest that there is a need for empirical research.[160]

Similarly Professor Wade, writing about a model of 'the lawyer as a professional problem solver'[161] sees value in what lawyers have to offer as *'professional helpers'* and reflects that there is:

> *"a world of conflict which never comes near the office of a professional helper, let alone near to the offices of the traditional legal profession. Lawyers, as curative conflict managers, are consulted in relation to a tiny proportion of planetary conflict."*[162]

Wade issues a challenge to lawyers to:

> *"invest considerable time, effort, creativity and money in developing a style of professional practice around a diagnostic problem solving model."*[163]

In a further article, which builds on his theme of encouraging lawyers to invest in skills which will help clients to make wise decisions, Wade notes:

> *"Lawyers sometimes become part of the problem, rather than part of a solution for clients."*[164]

In reaching this conclusion, Wade uses, as an example, research reported in 2000[165] in which 40 of *'the most employed commercial mediators in Australia'* identified common unhelpful negotiation behaviours of lawyers.

The importance of the recommendations made by Gilson, Mnookin and Wade needs to be recognised. Lawyers have the opportunity to provide valuable services in existing and new fields of endeavour. The role of lawyers as creative problem solvers, which these authors have identified, is an important one, which lawyers ought to be well suited to fulfil. It is therefore appropriate to encourage lawyers and their constituency to

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160 ibid at pages 564-566

161 Wade, JH In Search of New Conflict Management Processes: The Lawyer as Macro and Micro Diagnostic Problem Solver op. cit. at pages 25-38

162 ibid at page 23

163 ibid at page 23

164 Wade, JH Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients make Better Decisions op. cit. at page 463

165 Wade, JH Representing Clients at Mediation and Negotiation op. cit.

appreciate the value of lawyers in this role. But it is also important to question the assumption that this value-adding role can be achieved through investment in skills training alone.

Further, whilst the studies by Williams and Schneider have produced important data about how lawyers perceive and rate the negotiating behaviour of their professional peers, the research hitherto has been silent about the perceptions and evaluation of those for whom the negotiations were conducted. Although it is valuable to analyse how lawyers experience their interactions with each other, a study ***of*** lawyers ***by*** lawyers fails to identify and consider the relevance of experiences and perceptions of the other members of the lawyers' constituency, which includes clients, staff, suppliers and other non-legal professionals.

Collecting these experiences and perceptions is important, not merely to add to 'the level of noise' about lawyers' behaviour,[166] but as a preliminary to determining how lawyers might maximise their performance in the fields in which they practise; what barriers to entry into new fields lawyers might encounter and how these barriers might be overcome. This is precisely the approach adopted by Professor Wade in his work on systematic risk analysis.[167] He uses his anecdotal experience and the research noted above to identify some of the weaknesses of lawyers' behaviour (and of their clients) and uses this information as a base for proposing what lawyers might do differently and better – in this case, how they could help their clients to make better decisions. This approach fits well with the model of continuous lifelong learning which some of the most persuasive ADR academics and practitioners consistently present.[168]

Other studies available, (of which there are few), such as the LawCover study of causes of claims in Australia against lawyers, confirm an environment of dissatisfaction but provide no analysis of what is happening nor of how things might be different. The LawCover research into the causes of claims reveals that poor communication is considered to be the root cause of claims in approximately fifty percent of cases (a statistic which has remained stable from 1987 until the present time) as is demonstrated by the two following charts (provided by LawCover).

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166 as described by Gilson and Mnookin ibid at page 564

167 Wade JH, Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients Make Better Decisions op cit.

168 see, for example: Menkel-Meadow, C Lawyer Negotiations: Theories and Realities – What We Learn from Mediation (1993) 56 *Modern Law Review* 361-379 and Wade, JH Lawyers and Mediators: What Each Needs to Learn From and About Each Other (1991) 2 *Australian Dispute Resolution Journal* 159

Chart 1 - Causes of LawCover Claims 1987 - 1997

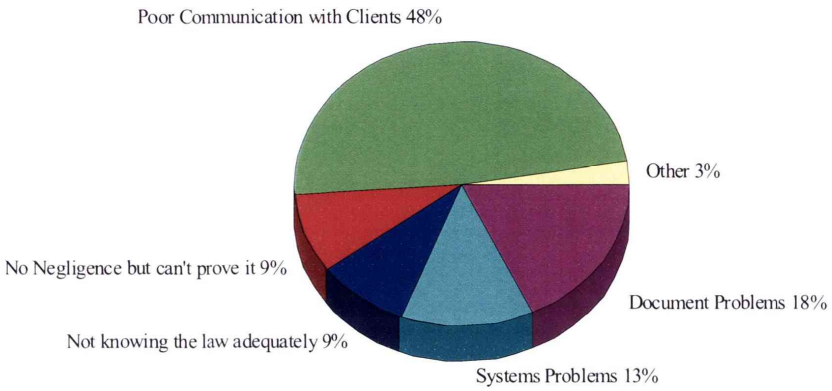
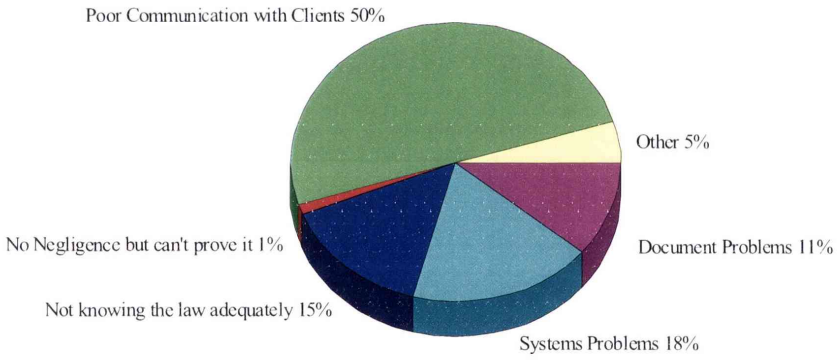


Chart 2 - Causes of LawCover Claims 1 July 1999 to 30 June 2000



On the footing that negotiation may be defined as '*communication for the purpose of persuasion*',[169] the LawCover data provide a compelling reason to conduct original research into the perception of clients and others as to how lawyers negotiate.

Information and evidence about how lawyers behave in a technical sense is available, as noted above. What has not been readily available is information about how they behave in an experiential sense, as judged by those with whom and for whom they negotiate.

Just as Professor Wade's experience has provided him with useful data to inform his analysis and recommendations for change,[170] so the experience gained by the present

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169 Goldberg, SB Sander, FEA and Rogers, NH *Dispute Resolution: Negotiation, Mediation and Other Processes* op. cit.

170 see, for example, Wade, JH Systematic Risk Analysis For Negotiators And Litigators: How to Help Clients Make Better Decisions op. cit. at page 462

author since she commenced consulting to the legal profession in 1978 has provided significant anecdotal evidence of the importance of negotiation as a key element of lawyers' work; of how lawyers and their clients experience the negotiation process; and of the opportunities for building better client relationships and improving outcomes through better negotiation processes.[171]

This detailed review of negotiation theory and practice is intended to set the scene for the chapters which follow. An understanding of the theory of negotiation and the history of its development should provide the framework which demonstrates the significance of the practical issues raised during the focus group research.

2.3 Discussion

Three principal theories of negotiation have been identified, confusingly complicated by a wide variety of names that have been applied to them.

The distributive theory (also called *value-claiming, competitive, adversarial* and *hard bargaining*) regards all gains as made at the other party's expense. Negotiation behaviour is designed to undermine the opponent's confidence. Tactics include a high initial demand, limited disclosure, few and small concessions, threats and arguments and apparent commitment to positions.

The *cooperative* theory (also known as *coordinative* and *soft bargaining*) regards concessions as a way to capitalize on the opponent's desire for a fair outcome. The negotiator seeks an outcome that is fair and equitable to both parties and a relationship based on trust. Tactics include initiating concessions to encourage ungrudging reciprocation and seeking, as a 'fair' outcome, to split the difference between each party's opening bids.

The *integrative* theory (also known as *value-creating, problem-solving, win-win* and *principled negotiation*) involves joint attempts to reconcile the parties' interests so as to benefit both. Tactics include separating the people from the problem; focusing on interests, not positions; brainstorming options before deciding; and insisting the result be based on some objective standard of legitimacy.

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171. The author has drawn heavily throughout this thesis upon her experience since 1978 in consulting to approximately two thousand law firms. That experience has provided her with an unique body of information and a particular insight into the challenges facing the profession. A copy of her Curriculum Vitae appears as Appendix 5.

Despite the vast amount of literature on negotiation theory, none of these theories is lawyer-specific.

Only Williams and Schneider have (separately) undertaken empirical research in an attempt to demonstrate how lawyers negotiate, as perceived by other lawyers (peer review). Their research demonstrated a preference by lawyers for behaviour consistent with cooperative negotiation theory. It would be inappropriate to draw from these studies conclusions as to how clients and other non-lawyers evaluate the experiences they have with lawyers in negotiations because the perceptions of clients may differ from the perceptions of lawyers.

This review of the literature and the demonstrated lack of relevant data confirm the important contribution that can be made to our understanding of how lawyers negotiate by collecting valid, independent, objective data to identify the role of negotiation in lawyers' work; the experiences of clients and other non-lawyers engaged in negotiation with lawyers and their levels of satisfaction or dissatisfaction with the process and its outcomes. As Gilson and Mnookin acknowledge, there is a need to conduct further empirical research '*devoted to understanding what lawyers really do*'.[172]

This should add substantially to the body of literature available on the subject and provide a robust basis for the development of recommendations about future behaviour and activities.

This completes the literature review. Chapter 3 outlines the Research Objectives and the Methodology and provides an explanation of how the qualitative and quantitative research was planned and implemented.

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172 Gilson, RJ and Mnookin, RH Disputing Through Agents: Cooperative and Conflict between Lawyers in Litigation op. cit. at pages 564-566

CHAPTER 3: RESEARCH OBJECTIVES AND METHODOLOGY

3.1 Research objectives

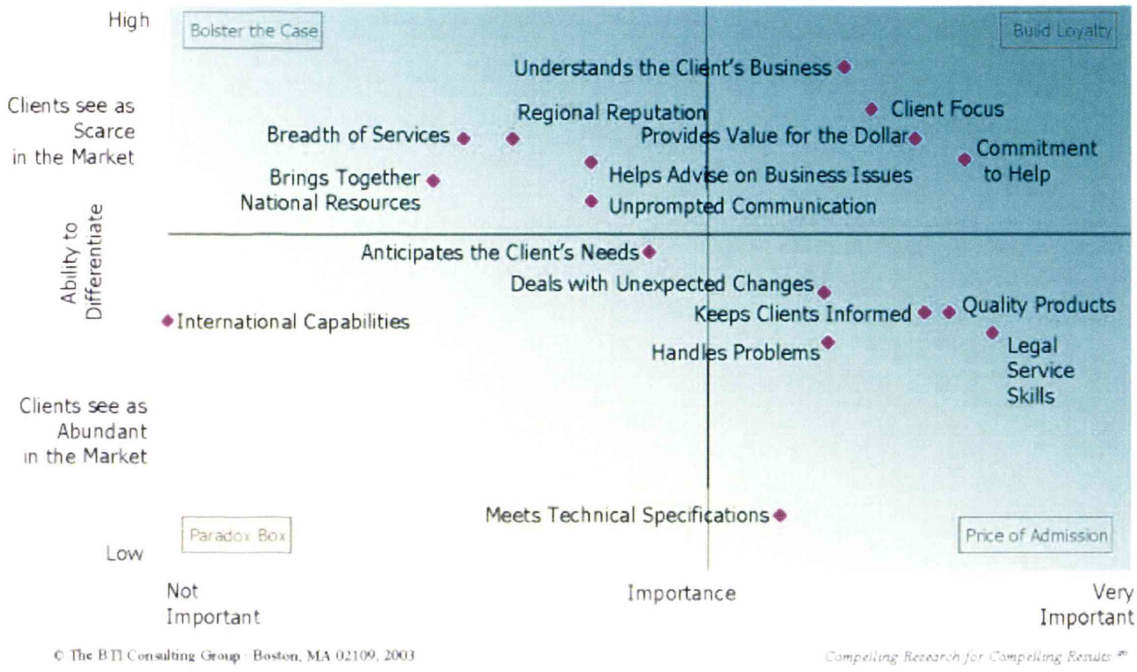
As a result of amendments to the *Legal Profession Act 1997 (NSW)*, since July 31, 1995 lawyers in New South Wales are admitted to practise as Legal Practitioners. Previously lawyers were admitted to practise either as a barrister or as a solicitor. Despite this theoretical fusion of the profession in New South Wales today, lawyers still elect to practise either as a solicitor or as a barrister. Although the research undertaken in this thesis was directed to the work of lawyers practising as solicitors in private law firms in New South Wales, the focus groups included many people experienced in dealing throughout Australia with lawyers and how they negotiate. However, in the absence of a facility within the focus group research for validating an extrapolation of the conclusions reached to Australia as a whole, the scope of the research and its outcomes should be regarded as limited to solicitors in private practice in New South Wales.

A growing emphasis may be observed within the profession on enhancing skills in the delivery of 'black letter' law. The popularity and expansion of the specialist accreditation program of the Law Society of New South Wales and the continuing growth in enrolments for Master of Laws programs by course work are two good examples. Even the requirements for specialist accreditation in mediation (essentially a skill) are substantially 'black letter' law-based.

The importance of technical skills of the highest quality is well recognised, since it is for the highest quality technical skills that clients turn to their lawyers. However, of equal importance to clients is the way in which high quality technical services are delivered. There is a considerable body of evidence that for many clients, the technical competence of their lawyers is assumed and that the most important differentiating factor between individual lawyers and between law firms is the manner in which technical legal services are delivered. This factor also has the greatest impact on clients' level of satisfaction.

Reproduced below is an extract from research presented to the 2003 annual conference of the Australasian Professional Services Marketing Association (APSMA), by BTI Consulting Group, Boston. The research involved 6000 major businesses using law firms in Australia, Asia Pacific and USA. This is one of many studies demonstrating the significance to clients of the manner in which services are delivered.

17 Activities that Drive Superior Client Relationships



The same research also confirmed that clients' most desired improvement from their law firms (apart from demonstrating a better understanding of the clients' businesses) was communication.

With this in mind, the research objectives of this thesis are to provide answers to the following questions:

(i) what is the role of negotiation in lawyers' work?

(ii) what qualities do lawyers bring to the negotiation process?

(iii) what are the experiences of those who observe lawyers negotiating and who engage in negotiation with them, including law students, other lawyers, their staff and their clients?

(iv) how do lawyers acquire their negotiation skills?

(v) how might the experience and the outcomes be enhanced both for lawyers and for those with whom they interact?

It is a common conclusion of those business consultants and marketing consultants who have the opportunity regularly to observe lawyers at work[173] that, despite their focus on achieving success for clients - conventionally called winning - lawyers regularly experience difficulty with the negotiation process. Their 'black letter' law training is not useful in providing guidance for the preparation and communication which are vital to the negotiation process. Thus the collection and analysis of qualitative and quantitative research and the development of constructive recommendations should provide practical and useful support to lawyers as they go about the daily practice of the law. These goals are pursued and developed in the chapters which follow.

3.2 Methodology

3.2.1 Selecting the fields of research

The sparsity of relevant research and the acknowledgement of the potential value of such research[174] make the development of primary research procedures essential. Accordingly, three fields of research were selected, namely:

(i) focus group discussions, to collect qualitative data about the experiences of those for whom and with whom lawyers negotiate;

(ii) examining a statistically significant sample of practising lawyers, to identify their behavioural characteristics so as to determine whether there is a correlation between how lawyers behave and how clients and others in negotiation experience that behaviour; and

(iii) examining a statistically significant sample of undergraduate law students, to determine whether the behavioural characteristics of lawyers are learned as a result of the practising legal environment or are characteristics which law students, as a self selecting group, bring into the profession.

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173. There is an unofficial network of those who work constantly with solicitors in private law firms. They are regular speakers at management fora for lawyers, sitting on Law Society Committees and regularly taking the opportunity to meet on an ad hoc basis and to share information and concerns about the profession. The Law Society of New South Wales draws on them heavily as a resource to provide information about current developments in the profession since there is very little continuing formal research being undertaken other than via the Law Society's annual practising certificates survey.

174 see Gilson, RJ and Mnookin RH Disputing Through Agents: Cooperation and Conflict Between Lawyers In Litigation op. cit at page 564-5: '*Our analysis, however, is limited by the absence of data.... further empirical research devoted to understanding what lawyers really do might usefully explore a variety of empirical questions relating to the reputational markets for lawyers.*'

This Chapter reviews the methodology for the research outlined in (i) above. The methodology and outcomes of behavioural research identified in (ii) and (iii) above are provided in Chapter 4.

3.2.2 Objectives of methodology

This methodology is intended to provide the first objective and statistically reliable data about the experiences of those for whom and with whom lawyers negotiate and to offer the opportunity to consider whether and, if so, how the process of negotiation, when undertaken by lawyers, could be enhanced.

3.2.3 Deficiencies in the methodology

Several deficiencies in the methodology have been identified.

It would have been useful to have determined beforehand the skills and knowledge of negotiation amongst the focus group participants. This is certainly a question to be clarified in further research.

The inclusion of Legal Studies students in the focus groups was not useful. However, this deficiency was noted immediately and further focus groups of students were restricted to postgraduate students with professional, commercial and personal experiences more likely to have involved interaction with lawyers. The outcome of the Year 11 Students focus group has been included in this thesis, not because it contributed anything useful to the research outcomes but because, as a properly recorded focus group, it would have been inappropriate to have excluded it from an academic research undertaking.

As mentioned, the methodology for the conduct of the behavioural research is provided in detail in Chapter 4. A review of this research suggests that further behavioural research needs to be conducted. In terms of the students and practitioner groups as a whole, the numbers, whilst statistically significant, are still small. Continuing research is required to improve information about the profiles of the practising legal profession and of law students. It is possible that those prepared to undertake behavioural analysis are themselves a self-selecting group, the characteristics of whose members are not an accurate reflection of the entire cohort. Any changes in the pattern of those profiles would challenge the strategies developed in this thesis.

It has also been suggested that the results of the qualitative research could have been further tested and verified through the use of a triangulated study. Triangulation is a method used by qualitative researchers to validate the outcome of their research. Of the five types of triangulation (data triangulation, investigator triangulation, theory triangulation, methodological triangulation and environmental triangulation)[175] the three which might most readily have been included as part of the research work for this thesis are data, investigator and methodological triangulation.

Data triangulation verifies validity by using different sources of data. This could be achieved by categorising each group or type of stakeholder and including a comparable number of people from each group of stakeholders in the evaluation study. It could be argued that the choice of focus groups for this thesis from a range of subsets of clients and service providers meets most of the requirements of data triangulation.

Investigator triangulation validates the qualitative research by using a team of evaluators who each observe, interview and interpret the data and then compare their findings for consistency. This is an approach which could certainly be used if the work in this thesis were continued.

Methodological triangulation utilises a number of different qualitative or quantitative methods to undertake the particular study. Again, if the research in this thesis is continued it would be possible to utilise quantitative surveys of stakeholder groups to test and verify the focus group research. Methodological triangulation may also refer to the process of combining qualitative, quantitative and literature based research, to assist in ensuring that when qualitative or quantitative research is reported, it is linked to themes that have emerged or that are under reported in the literature. Given the lack of any studies hitherto of how lawyers negotiate from the perspective of clients and other non-lawyers with and for whom they negotiate, the results of the author's research may be most closely linked to those of Williams and Schneider, who studied how lawyers perceived other lawyers in negotiation.

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175 A useful description of triangulation and its various forms is contained in publication number FC6014 of the Department of Family, Youth and Community Sciences, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida by Lisa A. Guion Ed.D., assistant professor in the above department.

3.2.4 Setting research parameters and developing research methodology

A review of numerous research projects on peripheral issues[176] has demonstrated that a feature of research projects to date has been the almost exclusive reliance on quantitative research.

The personal experience of the author is that quantitative research alone, based as it is primarily on questionnaires, delivers very two dimensional information. The data more often appear to represent the researchers' expectations and classifications of the results, without allowing for information which does not meet the researchers' key assumptions.

The scrutiny and revision of the preliminary goals for this research project led to two conclusions.

The first was that, in order to produce meaningful results within a manageable timeframe, the process design would necessarily involve confining the scope of the research to a limited number of areas and to pursue these in depth. In practical terms this meant restricting the lawyers studied to those in private practice as solicitors, rather than risk spreading the research data too thin by including studies of the behaviour and experience of barristers, corporate lawyers and government lawyers.

The second was that it would be necessary to engage in both qualitative and quantitative research in order to ensure that the outcome and recommendations reflect the experience of others in their interaction with lawyers in the negotiation process.

The key areas of research identified were:

3.2.5 Qualitative research

As has already been explained, much of the research data identified in this and related fields has been produced by quantitative research. This involves developing and administering a questionnaire to a wide audience, which is required to tick boxes, circle answers and apply ratings. The information thus obtained is then consolidated and rated scores are produced.

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176. Dr Meltz, Director of Postgraduate Studies at the University of Technology Sydney (as he then was) was kind enough to spend time reviewing with the author other research projects which seemed possibly to be of some relevance but which turned out to be unrelated. Professor Frank E.A. Sander at Harvard Law School was kind enough to consult his own research library and to consult with negotiation practitioners at Harvard University in an attempt to identify research projects which might be relevant. Surprisingly, this produced nothing.

However, in seeking to examine how lawyers behave, particularly through the experiences of clients and others with whom lawyers interact, research which included qualitative elements appeared likely to produce much richer findings than those reached by means of statistical procedures or other means of quantification.

Close examination of the advantages and disadvantages of qualitative and quantitative methods through a number of respected texts supports the conclusion that, in situations of this kind, it is legitimate to use qualitative research. Strauss and Corbin, in their pre-eminent text on qualitative research, note that:

> "*most research projects and researchers,.... place their emphasis on one form or another*[177] *partly out of conviction, but also because of training and the nature of the problem studied.*"[178]

The development of the methodology for undertaking this research has been heavily influenced by the work which has been done on Grounded Theory, particularly the work of Strauss & Corbin and the work of Glaser & Strauss in their early text, 'The Discovery of Grounded Theory'.[179] Based on the experience of leading social scientists, who have taught and practised qualitative analysis, these texts provide a powerful argument for building theory and developing critical analysis through qualitative research. A peculiar difficulty of quantitative research, which is heavily based on collection of data by questionnaire and pre-determined observation, is the need to determine in advance the detail of the questions to be answered. The efficient collation of quantitative data requires simple 'yes', 'no' or numerical answers which are drawn from a limited range of possibilities. The researcher must therefore decide in advance from what answers research candidates may choose and then collate their chosen answers.

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177. that is, place their emphasis on either qualitative or quantitative methods

178. Strauss, A and Corbin, J *Basics of Qualitative Research: Grounded Theory Procedures and Techniques*, Newbury Park, Calif, Sage Publications, 1990 at page 18. At page 19, Strauss and Corbin note that there are many valid reasons for doing qualitative research including "*the conviction of the researcher based upon research experience.....Another reason is the nature of the research problem. Some areas of study naturally lend themselves more to qualitative types of research, for instance, research that attempts to uncover the nature of persons' experience with a phenomenon, like illness, religious conversion or addiction. Qualitative methods can be used to uncover and understand what lies behind any phenomena about which little is yet known. It can be used to gain novel and fresh slants on things about which little is already known. Also, qualitative methods can give the intricate details of phenomena which are difficult to convey with quantitative methods.*"

179. Glaser, B and Strauss, A *The Discovery of Grounded Theory: Strategies for Qualitative Research*, Chicago, Aldine Pub. Co., 1967 referred to in Strauss, A and Corbin, J ibid at page 21

By contrast, Grounded Theory is based on the notion that one must '*get out into the field*'[180] if one wants to understand what is really happening. Grounded Theory takes account of:

> *"the active role of persons in shaping the world they live in... and has an emphasis on change and process."*[181]

A significant goal in preparing this thesis was to find a method of research which would provide structure and guidance, not only in finding the answers, but in shaping and refining the questions which needed to be asked. Further research in Grounded Theory also suggested that all the author's professional and life experience to date[182] had provided her with 'theoretical sensitivity', that is:

> *"the attribute of having insight, the ability to give meaning to data, the capacity to understand, and capability to separate the pertinent from that which isn't. ....It is theoretical sensitivity that allows one to develop a theory that is grounded, conceptually dense, and well integrated - and to do this more quickly than if this sensitivity were lacking."* [183]

Thus theoretical sensitivity is necessarily derived from the background that the analyst brings to the research. This comes from a number of sources:

Literature

As Strauss & Corbin point out, undertaking a broad literature search and:

> *"having some familiarity with these publications, you have a rich background of information that 'sensitises' you to what is going on with the phenomenon you are studying."*[184]

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180. Strauss, A and Corbin, J ibid at page 24

181. ibid at page 25

182. see Appendix 5, containing the author's Curriculum Vitae and the details of her professional experience

183. Strauss, A and Corbin, J *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* op. cit. at page 47

184. ibid at page 42

Professional Experience

Strauss & Corbin suggest that years of practice in a particular field can provide the researcher with an understanding of the particular conditions which apply in that field and what might happen under certain conditions. This knowledge enables the researcher to understand the particular research situation and to do so more quickly and with a greater insight than someone who has not practised in the field.

Personal Experience

This also provides a source of theoretical sensitivity and can help the researcher to understand the experiences of others and to gain insight faster than a researcher with no personal experience.

There also needs to be an awareness, however, that there is a risk that the training and experience which one brings to the process will also have developed prejudices and pre-dispositions to certain research outcomes. The question is:

> *"How are we to become sufficiently free of biases and unrecognised or unexplored assumptions to produce a valid and reliable theory?"*[185]

Accordingly, throughout the years in which this thesis was planned and implemented, considerable care was taken to follow the processes recommended by Strauss & Corbin namely:

> *"(1) Periodically step back and ask: 'What is going on here? Does what I think I see fit the reality of the data?'."*[186]

It is therefore important to ask:

> *"Am I making assumptions about what is going on that are not substantiated by the data and am I seeing what I want to see?"*

This precaution is vital. Accordingly, as a safeguard against the researcher's temptation to take charge of and direct the focus groups, participants were asked, at the end of each focus group session, to identify the key elements discussed and to state whether they had been appropriately recorded.

The focus group outcomes summarised in Appendix 1 reflect this.

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185. Seyle, H *The Stress of Life*, New York, McGraw-Hill, 1956 paraphrased by Strauss, A and Corbin, J ibid at page 44

186. Strauss, A and Corbin, J ibid at page 44.

This group approval helped to maintain the objectivity of the process and to keep it as free as possible from external influences, in particular the author's own assumptions and expectations.

> *"(2) Maintaining an attitude of scepticism."*[187]

In this study much of the research was experiential - that is, tracking the experiences which individuals had of the negotiation behaviour of lawyers. This is not something that could be questioned or challenged by empirical research, in the sense that if individuals experienced particular difficulties or outcomes with the negotiation process, these experiences remained, even if one were able to demonstrate that the experience was quite different from what was intended, or even from the experience of others in the same situation. So it was not possible to test people's recollected experiences against actual data.

One way of testing the experiences, however, which appeared to become an important part of the research process, was to ask individuals to provide their own data in order to explain why they viewed the experiences as they did and to ascertain the assumptions underlying the description of their experiences.

> *"(3) Follow the research procedures.*
>
> *The data collection and analytic procedures are designed to give rigor (sic) to a study. At the same time they help you to break through biases, and lead you to examine at least some of your assumptions that might otherwise affect an unrealistic reading of the data. There is a reason for alternating between collecting and analysing data. Not only does this allow sampling on the basis of concepts emerging as relevant to that particular research situation, but it furthers verification of hypotheses while they are being developed."*[188]

Although the material from the first two focus groups conducted was useless, they provided practical confirmation of the need to be rigorous in developing a consistent, reliable process for data collection. The steps taken to develop and refine the focus group process described below proved invaluable. The process meant that, although focus group sessions occurred in many different locations and circumstances, there was a consistent way of directing the sessions so as to produce comparable outcomes

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187. ibid at page 45

188. ibid at pages 45 and 46

without the author ever expressing a personal opinion or sharing expectations or assumptions. Concentrating on process kept the recording behaviour consistent even when events occurred which were surprising or which had the potential to derail the session.

The research procedures adopted involved separating data collection from data analysis. Despite Strauss and Corbin recommending an alternation between collecting and analysing data, it was essential to keep these two processes separate for this particular piece of research in order to avoid the very significant risk that immediate data analysis might allow the author's views, wittingly or unwittingly, to influence the outcomes.

In the result, the process was valid. Separating data collection from analysis undoubtedly enhanced the focus group sessions and the power of the research findings.

3.2.6 Selecting focus groups and identifying processes

To some extent the selection of focus groups was restricted to groups to which reasonable access could be obtained through personal acquaintance and business experience. Neither the time nor the financial resources were available to investigate groups outside New South Wales nor to access the entire community in general. As mentioned, many participants had Australia-wide experience of lawyers negotiating. In light of this, it was initially considered that the conclusions drawn might be applied beyond New South Wales. However it is acknowledged that, without further research, this is not a proper conclusion.

A wide circle of business colleagues collaborated generously to help identify groups. In discussions with them and in private review of the groups selected, it does appear that they are sufficiently broad in their category and number to present a valid cross section of groups with influential views.

It will be evident that the largest numbers of those attending focus groups were in the category of clients or postgraduate students. In the light of Grounded Theory and qualitative research practice, this appears to be acceptable. The earliest drafts of the project goals for the preparation of this process noted that a key objective was to identify those factors which impeded lawyers from operating as effectively as possible. It does not seem to be a bar that the groups from whom views were sought were identified and used in opportunistic circumstances. The only way to gather together most of the groups was in conjunction with other projects that were being pursued.

Some groups of clients were being interviewed as part of a post mortem of a particular legal transaction that the parties had asked the author to conduct or permitted her to attend. This opportunistic element by which the groups were gathered does not detract in any way from the validity of the data collected.

Two other categories were also included in the focus groups in order to provide a different aspect of the negotiation experience. These were people who worked with and for lawyers (either as employees or as external providers of services to lawyers) and postgraduate students of the negotiation process who, whilst having limited experience of lawyers themselves, had clearly turned their minds to lawyers' responsibilities and the kinds of behaviour which lawyers should demonstrate. These students were senior students of academic maturity, who were returning to study after some years' experience in business life. As the focus groups progressed, it became clear that this group had considerable personal experience of interacting with lawyers and was able to provide valuable data.

The first attempt at conducting a focus group was with a group of negotiation students in 1996. Although the author had participated in focus group research over some years and was very familiar with the theory of research techniques, she had not undertaken this kind of research before. This research was also outside the experience of her thesis supervisors and of others she consulted within the Law School. As a consequence, this focus group was not conducted effectively and neither was the second attempt, made a short time later. These focus groups have not been recorded but are mentioned here for reasons of completeness. Although the material from these two groups was discarded, these discussions became a useful learning tool to refine the process. Accordingly, it should be noted that the group identified in Appendix 1 as Focus Group 1 is actually the third to have been conducted, the first two having been discarded. Three important lessons were learned from these first two unsuccessful attempts:

Each focus group required a clear introduction to the author's objectives.
It was clear that the opportunistic approach to gathering the groups meant that most of the focus groups would have some kind of time limit imposed on them. This meant there was no time for 'chit chat'. It was necessary to avoid long questions about how the idea for the thesis had been developed and prevent a general gossip session developing. It was found that the best approach was to read to the group or hand out (according to the circumstances) the objectives contained in Chapter 1, Section 1.2 above. It was then explained to the participants that the available time would be

devoted to gathering qualitative data from them of their experiences of lawyers in negotiation.

The balance between structure and consistency on the one hand and valid, uninfluenced group process on the other needed individual attention in each focus group.

Imposing tight controls on the groups was not theoretically sound yet sufficient consistency between the groups was required to enable the data from all of them to be combined in a meaningful way. It was essential to be able to compare 'apples with apples'.

This problem was solved by developing three questions which were woven into most of the group processes namely:

- what are the main elements of lawyers' work?
- is negotiation part of lawyers' work? and
- what are the characteristics of how lawyers negotiate?

Because each question followed from the question before, they seemed to accompany the flow of group discussion naturally without constraining the direction of contributions. This provided a consistency and reliability to the qualitative research which would otherwise have been lacking.

Of course this was not possible in every case because of the particular views of group members. For example, members of focus group 22, Law Firm Managing Partners, were completely uninterested in considering what were the main elements of lawyers' work. It would have been unnecessarily intrusive and contrary to the objective of gathering data to engage in an argument about what the group was prepared to do. There was a real danger it would have sidetracked the whole process. It was necessary to be particularly careful with this group since they came with the apprehension that they would be encouraged to engage in 'lawyer-bashing' which was quite against their interests. By allowing the discussion to flow freely it was possible to establish easily that the group considered negotiation to be part of lawyers' work and then to have the participants produce their own list of the characteristics of lawyers in negotiation.

The Year 11 Legal Studies students also had very different interests and experiences and did not fit neatly into a process of structured questions. It was very difficult to engage them in a process which was so far removed from their usual experiences. Their

lack of experience of interaction with lawyers meant that they could not be expected to provide a meaningful answer to the last question, however the way they took control over the process produced a most interesting reflection of the assumption many of us make about lawyers and their professional responsibility.

This focus group also needs some further explanation. The objective as originally developed included the intention to conduct focus groups with law students. The Year 11 Legal Studies Group was encountered opportunistically and was included in the focus groups as a prelude to recruiting further groups of law students. However, whilst the observations of the group were an interesting reflection of social perceptions of lawyers' behaviour, it was apparent that the group lacked sufficient experience of interaction with lawyers to provide reliable data. Accordingly, whilst the focus group discussion was properly conducted and recorded and a summary appears in Appendix 1 for reasons of completeness, it was apparent that law students would not be a useful group to include in the study because of their inexperience. Accordingly, no further school or undergraduate university students were included in the research. Instead the student focus groups were conducted with postgraduate students.

As will be seen from the focus group summaries, the intent of the questions, if not their strict form, is nevertheless addressed consistently throughout the sessions and the data are remarkably cohesive and comparable.

The apprehensions of focus group members need to be identified and resolved early

The negotiation students in the first two abortive - and hence, as explained, not reported - groups expressed strong concerns about confidentiality. This had not been anticipated and for this reason the seriousness of these concerns was not immediately appreciated. The group members resented (quite properly) being questioned about their concerns and this inhibited the development of group dynamics and a sense of rapport with the author and her objectives. She was seen as not being respectful of their wish for complete anonymity. As a result, no record of these two meetings was kept and the rough notes were left behind for those two groups to destroy.

In light of this experience, in every one of the following twenty-four focus groups that are recorded, the group members were asked to identify any concerns they might have with the process. This proved to be a vital step, which quickly identified as highly sensitive issues the need for confidentiality and the need for nothing personally

identifiable to be recorded.[189] Most groups were happy to accept a personal reassurance but some groups contained members who were unwilling to proceed unless promised the right to approve the focus group summary. This occurred in groups 3, 22 and 23.

A detailed analysis of the outcome of the qualitative research is contained in Chapters 4 and 5 and detailed summaries appear as Appendix 1. As mentioned, the first two abortive group sessions were not recorded and are not included.

The Research Objectives and Methodology having been explained, Chapter 4, which follows, presents the quantitative data obtained by means of behavioural analysis. It first explains the characteristics of the analytical tools and then records how these were used to identify the behavioural preferences of lawyers. By comparing the results for lawyers with the characteristics of various population samples, the Chapter concludes with the identification of the 'lawyer type.'

189. Concerns about confidentiality were expressed in every group except focus group 4 (Year 11 Legal Studies students).

CHAPTER 4: WHAT DO LAWYERS BRING TO THE PROCESS OF NEGOTIATION? - SOME OBJECTIVE DATA

4.1 Introduction

There are many things that lawyers do well. The educational requirements of intending law students simply to secure entry to law schools indicate that lawyers are drawn from among the most academically proficient in the country. There are many individuals practising in the profession, serving in adjudicative roles and furthering the cause of rigorous debate and learning in academia whose achievements the community has every reason to admire and respect.

However the relationship between lawyers and their constituency is worthy of scrutiny for several reasons.

First, there is far from universal admiration of the role which lawyers play, particularly in the resolution of disputes. This is acknowledged in many writings. Professors Gilson and Mnookin, in crafting their case for the constructive role which lawyers might play in the resolution of disputes, note that:

> *"...lawyers have long been considered to have a special influence on how litigation is conducted, even if there has been no consensus on whether lawyers dampen or exacerbate conflict in litigation. Today, the dominant popular view is that lawyers magnify the inherent divisiveness of dispute resolution. According to this vision, litigators rarely cooperate to resolve disputes efficiently. Instead, shielded by a professional ideology that is said to require zealous advocacy, they endlessly and wastefully fight in ways that enrich themselves but rarely advantage the clients."*[190]

Professor Wade notes that:

> *"Discussion and reform is often muddled by unthinking and anecdotal lawyer bashing; by the triumphal rhetoric of new process zealots; and by embarrassing defensive rhetoric from senior lawyers. From one perspective, histories of the legal profession and of legal education have been histories of aged males opposing any kind of change."*[191]

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190 Gilson, RJ and Mnookin, RH Disputing Through Agents: Cooperation and Conflict between Lawyers in Litigation op. cit at pages 510-511

191 Wade, JH In Search of New Conflict Management Processes: The Lawyer as Macro and Micro Diagnostic Problem Solver op. cit.

Professor Schneider, in her major work updating the 1976 study by Professor Williams,[192] undertook research which identified two distinct types of lawyer/negotiators – problem-solving and adversarial. She took pains to note that her research revealed that:

> *"both types of negotiators want to serve their clients well. Maximizing the settlement for the client and seeing the client's needs were met are goals for both groups of negotiators [and] ...both showed an emphasis on ethical behaviour."*

In describing what had led her to undertake the research, Professor Schneider notes the '*precipitous drop in the prestige of lawyers over the past two decades*'.[193] Part of the challenge of her research was to investigate the apparent disparity between the intention of lawyers to serve their clients well and the public perception that they often did not do so.

Professor Wade, whilst a strong advocate of how lawyers can bring value to the dispute resolution process, also acknowledges the difficulties. In reviewing the concept of lawyers as problem solvers he notes that:

> *"some professionals clearly become part of the problem rather than part of the solution."*[194]

Spegal, Rogers and Buckley note that:

> *"Much recent 'lawyer bashing' is misconceived. However, some of the criticism is well founded. That there has been cause for criticism should not be surprising – few professionals are trained at university in as few of the skills which professional practice will demand as are lawyers. A traditional curriculum focuses upon the learning of a body of law together with legal research and analytical skills. However, the practice of law requires, in addition, quite sophisticated skills in interviewing, communicating, drafting, advocacy, practice management and negotiation."*[195]

Moore also notes some concerns and a desire for further research.

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192 Schneider, AK Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style op. cit. at page 143

193 Schneider, AK Perception, Reputation and Reality *American Bar Association Dispute Resolution Magazine* op. cit. at pages 24

194 Wade, J Expanding the Concept of 'Legal' Knowledge (Yet Again): Some Strategies for Reopening Deadlocked Negotiations op. cit. at page 25

195 Spegel, NM, Rogers, B and Buckley, RP *Negotiation: Theory and Techniques* op. cit at preface

> *"Lawyers who participate in negotiations as representatives of clients and who negotiate on their behalf may create special problems for mediators. While many lawyers have a co-operative style and are experienced in interest-based bargaining, others are familiar only with hard-line positional bargaining... Lawyers are generally trained to develop a case for a particular solution or position and may couch settlement options in terms of right and wrong solutions or options that can be answered in a yes or no fashion. Negotiation depends on co-operative and integrative decisions rather than either/or options for success. The different demands of litigation and negotiation often strain the lawyer's role in mediation."*[196]

The second reason for pursuing a review of the relationship between lawyers and their constituency is as a means to enhance lawyers' opportunities to serve their clients well. If one accepts that lawyers do want to serve their clients well, as identified by Professor Schneider, then it is valid to investigate the clients' perception of the experience (with 'client' being interpreted in the broadest sense to mean stakeholders). This is the only way to promote an environment in which there is no disparity between what lawyers intend and what clients experience.

This is the same process the pursuit of which has been seen as valid and valuable in measuring litigants satisfaction with ADR processes. See, for example the Justice Research Centre study[197] and the UK National Consumer Council study which the ALRC accepted to inform its view of possible changes in community expectations. In the same ALRC report the question is posed:

> *"Should there be particular practice rules that more clearly and explicitly define and regulate negotiation practices and the responsibilities of lawyers acting for parties within ADR processes?"*[198]

A proper answer to this question requires empirical research of satisfaction levels of parties with the conduct of lawyers in the negotiation process. The primary research undertaken in this thesis should assist the ALRC to resolve this issue.

A career which has included working with lawyers since 1978 as a teacher, trainer and strategic planner, including exposure to close to two thousand law firms,[199] has led the

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196 Moore, CW *The Mediation Process* op. cit. at page 108

197 Australian Law Reform Commission *Review of the Adversarial System of Litigation, ADR – Its Role in Federal Dispute Resolution* op. cit at page 160

198 ibid. at page 159

199. The Curriculum Vitae which appears as Appendix 5 gives details of the circumstances in which this experience has been obtained.

author to conclude that there are many characteristics which lawyers seem to share as a group:

- a dedication to an outcome which is in the best interests of the client;
- a respect for the duty to the court;
- a commitment to ethical behaviour;
- a recognition of the need to assist those who have difficulty obtaining access to legal services;
- a strong attachment to the status quo and a dislike of change;[200]
- a focus on current issues and experiences and a lack of interest in planning for the future;
- a focus on the operational rather than the strategic and a particular concern with the fine detail rather than with concepts;
- an unwillingness to confront and deal directly with difficulties;
- a preference for written rather than oral communication;
- a value system which ranks the technical lawyering skills and the pursuit of process above everything else;
- an unwillingness to be managed and to be accountable; and
- a reluctance to invest time and effort in the acquisition of 'soft' skills such as communication, supervision and negotiation.

These personal conclusions are supported by the experiences of those interacting consistently with lawyers. Interviews were conducted with Mark Richardson, Chief Executive Officer of the Law Society of NSW, Margaret Conners, Manager, Risk Management Services at LawCover (as she then was), and Neville Carter, Managing Director of The College of Law. The draft of the above list of characteristics was discussed during the interviews and this provided further confirmation of the validity of the characteristics identified above.

Other writers have described their observations. Professor John Wade recounts the result of a recent survey of forty

> *"of the most-employed commercial mediators in Australia [which] recorded the following four most commonly observed unhelpful negotiation behaviours by*

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200. Each year the Practising Certificate Survey of the Law Society of New South Wales continues to reveal that conveyancing remains a dominant and desired legal service in the majority of law firms despite price competition and the entry of non-lawyer competitors which threaten its viability. It appears that law firms would rather retain their conveyancing practices, however risky, than invest in developing less price-sensitive services for which there is a demonstrated demand and for which the market is still far from mature. The 2002 Survey (the most recent available) obtained from the Law Society of New South Wales confirms that this trend continues.

lawyers. Lawyers sometimes became part of the problem rather than part of a solution for clients...

- *A lawyer who has given wildly optimistic advice;*
- *Concentration on legal questions and missing commercial interests;*
- *Lawyers who themselves have become antagonistic/emotionally involved;*
- *'Entrapment' – disputants have invested too much in the conflict."*[201]

He also noted that his anecdotal experience of lawyers in mediations is that:

- *"lawyers often only describe the trilogy of legal risks (delay, cost, uncertainty of judicial decision), and omit personal and business consequences;*
- *lawyers often use vague language such as 'danger', 'no guarantees' 'who knows what a judge will do';*
- *clients have selective deafness even when the risks are described orally;*
- *lawyers rarely set out risks in precise, one-page written form – but rather use long rambling opinions, or just anecdotal conversations."*

Numbers of the traits identified by the author and others appear likely to inhibit the achievement of the best results in a range of activities including negotiation. For example, a strong attachment to the status quo encourages lawyers to ask '*how did I solve this problem last time?'* or *'what sort of precedent can I find for this problem?'*. Whilst prior learning and experience are always valuable, sometimes an attachment to doing things as they have been done for other clients in the past, especially where the outcomes were satisfactory, prevents lawyers from asking '*what does this particular client wish to achieve on this occasion?'* and *'how can I do what is necessary to obtain a good outcome for this particular client?'*. Lawyers may thus fail to identify differences between the problem they solved previously and the present problem and differences between the attitude and characteristics of the present client and those of previous clients in a similar situation.

Similarly a focus on current issues and experiences and a disinterest in planning for the future, coupled with a preference for tasks and projects rather than relationships, encourage lawyers to negotiate very firmly over how things should be done and to lose sight of the need to appreciate and meet the strategic interests of the client and of the need for the client to have relationships which extend beyond the life of the current transaction. A dislike of conflict in the lawyers' own workplace[202] and a preference for

201 Wade, JH Representing Clients at Mediation and Negotiation op. cit. as reported in Wade, JH Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients Make Better Decisions op.cit at page 464

202. see Chapter 5 - 5.5.2 (viii)

written communication can lead to formality and obfuscation. It can lead to communication which suits the deliverer but not necessarily the receiver and thus convey an impression to clients of formality and detachment rather than collaborative participation in the process.[203]

Although the author was confident that these observations are accurate, it was important to test and challenge these observations, to determine whether they would be endorsed in more formal and objective ways or whether, in fact, objective research would prove them to be founded on false assumptions.

Accordingly objective data were collected using both qualitative and quantitative research and by collecting data from two separate sources namely:

4.1.1 Focus group research

The results of the focus group research produced data about the desired outcomes of those who interact and negotiate with lawyers. They also revealed group members' experience of the qualities which lawyers bring to the negotiation process. Summaries of all the focus groups (other than the first two abortive ones, previously mentioned) appear as Appendix 1.

4.1.2 Behavioural analysis

Considerable thought was given to the boundaries which should be set for determining how to select the groups for this research. After wide consultation with other professional colleagues and research students, it was determined that this research should include appropriate behavioural analyses of a statistically significant number of law students and practising lawyers for comparison with known characteristics of the community as a whole. These groups were chosen because of the importance of obtaining data which might indicate whether lawyers are a self-selecting group or self-developing, that is:

(i) are students with a particular set of behavioural characteristics drawn to the study of law and do they then enter the profession with these characteristics?, or

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203. see Chapter 5 - 5.5.2 (i)

(ii) do law students demonstrate a whole range of different behavioural characteristics, which become more homogenous as they are exposed to life as a lawyer?, or

(iii) are the initial observations unfounded and are lawyers simply a microcosm of the range of different behavioural styles observable and identifiable in the community as a whole?

4.2 The tools for behavioural analysis

Spegal, Rogers and Buckley devote a chapter of their text[204] to the role of behaviour in negotiation and the value of recognizing how differences in behaviour play a significant role in communication and negotiation.

> *"Your negotiating style is ultimately an extension of who you are. Personal behaviour patterns are most clearly demonstrated in the way that people communicate. The study of human behaviour has made major contributions to the wealth of information about skills in the fields of communication, persuasion, negotiation and conflict management. The ability to identify behaviors, tactics and strategies of others is integral to successful negotiating."*[205]

In seeking to reframe the concept of 'difficult' people to one of difference, they add:

> *"Each of us is different. Our differences make us individuals, make life interesting and cause us to disagree at times. Very often the difficulty we experience with another person stems from core behavioural differences between two people. Let us start by considering people as being 'different' rather than 'difficult'. In every negotiation there are substantive issues (the problem) and relationship issues (the people). Separating the people from the problem is a fundamental principle of interest-based negotiations. If you do not do this you risk turning the other party into the problem and this will lead to a battle of the wills of an adversarial nature.... The key to effective negotiation lies in our basic approach to others. The term 'difficult' is based on subjective, personal perception. From the other side's perspective* ***you*** *might be the difficult one! On the other hand, the term 'different' reflects a non-judgmental and tolerant approach to the other party as an individual negotiator."*[206]

Spegal, Rogers and Buckley conclude that, by understanding what one brings to the negotiating table and recognizing the behavioural characteristics of others, it is possible to develop an understanding that parties may behave differently whilst seeking to

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204 Spegel, NM, Rogers, B and Buckley, RP *Negotiation: Theory and Techniques* op. cit. at pages 113-135

205 ibid. at page 113

206 ibid at page 114

achieve the same end. With this in mind they propose that a behavioural analysis be undertaken by all negotiators wishing to understand and enhance negotiation outcomes.

Although not the author's initial intention, two different behavioural analyses have been conducted as part of determining answers to the questions posed in 4.1.2 above. These were the DISC analysis and the MBTI, both of which are now explained in some detail.

4.3 Behavioural analysis: The DISC model

4.3.1 Background

The work of Carl Jung [207] has been very influential amongst academics interested in psychological type theory. One of these was Dr William Moulton Marston, whose work in this field was undertaken whilst he was at Harvard University. In 1928 he published 'The Emotions of Normal People' in which he described the theory of DISC that is used today.[208]

Using four of Jung's six psychological functions (thinking, feeling, sensation and intuition) Marston developed four quadrants, each of which describes a behavioural pattern, namely:

- Dominance (D): the drive to overcome opposing forces of inferior perceived strength to the self.
- Influence (I): the attempt to ally forces to ourselves through persuasive means.
- Submission (S): the acquiescence of the self to a perceived allied force.
- Compliance (C): the subordination of the self to a hostile force of superior strength.

In the 1950s, Walter Clarke developed an 'activity vector analysis', which drew on the writings of Marston and which has been continually enhanced in subsequent years. This

207 particularly Jung, CG *Memories, Dreams, Reflections,* London, Collns, 1967 (R&C Winston, Trans) and Jung, CG *Psychological Types, Collected Works* Volume 6, Princeton, NJ, Princeton University Press 1971

208 see generally Bonnstetter BJ, Suiter JI and Widrick, RJ *The Universal Language of DISC:A Reference Manual,* Scottsdale, Ariz, Target Training International Limited, 1993 and Alessandra, T, O'Connor, MJO and VanDyke, J *People Smart,* La Jolla, California, Keynote Publishing Company, 1990 for detailed reference manuals about behavioural styles based on the DISC model.

produced the 'dominant quadrant approach' in which test participants are allocated the characteristics of the quadrant in which their test scores are the highest.[209] In the 1970s, Bill Bonnstetter developed a four quadrant theory and a software generated approach which, by 1987, provided models for lawyers, teambuilders, CEOs and telemarketers. Bonnstetter was convinced that a more reliable analysis was produced when the four quadrants were seen to interact together. His approach (used by the author for the purpose of this thesis) provides a far more detailed model of how an individual is likely to behave in a range of different circumstances, using a scale from zero to one hundred for each characteristic.

A further enhancement introduced by Bonnstetter was the development of a two-graph process which, for each individual, identifies basic behaviour and adapted behaviour. 'Adapted' behaviour is considered to be a modification of one's basic behaviour, reflecting a response to certain circumstances. It is adopted in order to survive or succeed in a particular environment. It is the behaviour shown to others, although under stress or pressure one will revert to one's 'basic' behaviour or 'behaviour of true preference'.[210]

The name DISC is drawn from the first letter of the heading of each quadrant. Some models allocate a slightly different word to each letter and these variants are indicated on the chart.

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209 see generally Alessandra, T, O'Connor, MJO and VanDyke, J *People Smart* ibid

210 This analysis may have been influenced by the work of Maslow, AH as described in *Motivation and Personality,* 3rd edition, New York, Harper & Row, 1987

DISC model

	Introverted	Extroverted	
Task-Oriented	**Controlling (Conscientious)** **Behaviours** Reserved Approaches work Systematically Pays attention to details Focuses attention on immediate task Prefers to stick to established guidelines & practices Likes to plan for change **Needs** High Standards Appreciation Quality work **Fears** Criticism of work Imperfection Not having things adequately explained	**Dominance (Directing)** **Behaviours** Challenges status quo Keen to get things done Resists authority Likes to take the lead Takes action to bring about change **Needs** Results Recognition Challenges **Fears** Challenges to their authority Lack of results from others	Task-Oriented
People-Oriented	**Steadiness (Stabilising)** **Behaviours** Reserved Works well in a team Accommodates others Maintains status quo Recovers slowly from hurt Prefers steady not sudden change **Needs** Security Acceptance Teamwork **Fears** Isolation Standing out as better or worse Unplanned Challenges	**Influencing** **Behaviours** Outgoing Leads by enthusing others Prefers a global approach Steers away from details Acts on impulse Keen to promote change **Needs** Change Acknowledgement New trends and ideas **Fears** Disapproval Stagnation Detailed work	People-Oriented
	Introverted	Extroverted	

Adapted from Spegal, N M, Rogers, B and Buckley, R P, *Negotiation: Theory and Techniques*, Sydney, Reed International Books Australia, 1998 at Page 123

The DISC analysis is the model preferred by Spegal, Rogers and Buckley[211] and was initially the behavioural model selected for this thesis.

The author has been using it for many years with her legal and management clients. Those tested report that they find the results to be useful and reliable. In many circumstances lawyers identify strongly with the results of the analysis and are prepared to use it as a basis for discussions about their business behaviour.

As the work on this thesis progressed however, it became apparent that the primary behavioural analysis tool selected needed to be one which was well known and widely used, sufficiently well established to provide data about general population profiles and accepted by (for example) Universities and professional groups as an accurate and appropriate method of measuring characteristics of groups.

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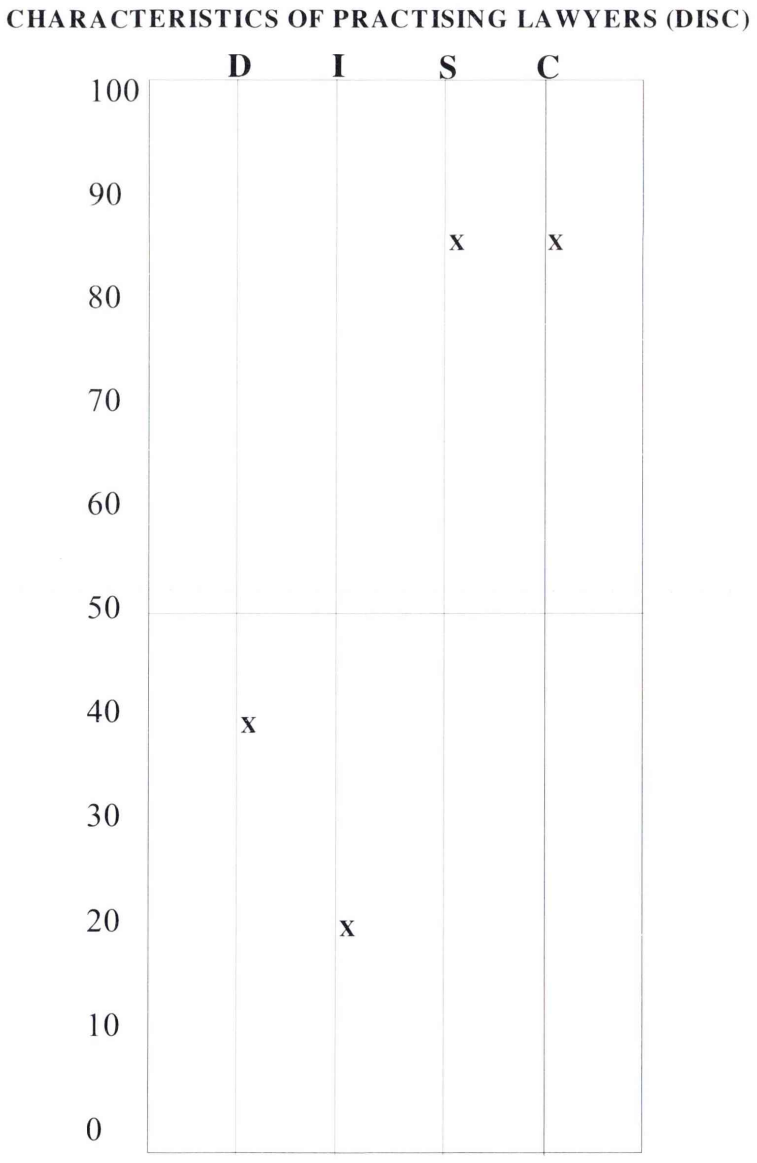
211 Spegel, NM, Rogers, B and Buckley, RP *Negotiation: Theory and* Techniques op. cit. at pages 119-127

Although DISC is widely used, there are insufficient data derived from its use in the general population nor is there empirical evidence of the acceptance of DISC in institutions and in professions.

For these reasons, the DISC analysis has not been adopted in this thesis as the principal behavioural analysis tool. However, over the past five years the author has undertaken or participated in the determination of the DISC profiles of 111 individual practising lawyers.

4.3.2 The characteristics of the DISC lawyer model

Below is a chart based on the 111 profiles undertaken, using Bonnstetter's four quadrant approach.



This compendious profile demonstrates many of the characteristics manifested by individual lawyers according to the Myers-Briggs Type Indicator analysis which is discussed below. It confirms the characteristics noted in the introduction to Chapter 4 and it also confirms the outcomes of the focus group discussions. In particular the following characteristics are relevant:

(i) a low D reflects a task focussed rather than a strategically focussed person who dislikes conflict in the work place and who can be unwilling to communicate true feelings;

(ii) a low I indicates a preference for 'working' rather than 'talking' and for working in an independent fashion rather than in an interactive, consultative and accountable fashion. A low I also leads to a preference for written rather than oral communication;

(iii) a high S indicates a strong preference for status quo and a dislike for change. Again it tends to represent task-based thinking rather than strategic thinking and a micro rather that a macro approach to life and work; and

(iv) a high C represents respect for rules, systems and processes and for precision and order. It also represents a tendency to become lost in the detail rather than being able to strike a balance between the detail and the strategic intent.

Whilst the results of DISC analyses are not submitted as stand-alone data, (and the deficiencies noted in 1.4 above regarding thesis methodology which must be taken into account) they support the results of the MBTI analyses provided below and present consistent information about the lawyer profile. They also support the characteristics of lawyers identified in Chapter 4 and the outcome of focus groups identified in Chapter 5, Section 5.5.

4.4 Behavioural analysis: Myers-Briggs Type Indicator (MBTI)

4.4.1 The Contribution of Carl Jung

The development of the Myers Briggs Type Indicator (MBTI) can be traced back to the work of Carl Jung, a German psychiatrist. Jung's work has been credited with making a significant contribution to the understanding of mental health and the influences which affect the development of conscious behaviour. The collection of his work published in 1967[212] reflects Jung's interest in the development of the personality through his own analysis and with the influence of the 'Interpretation of Dreams'[213], the work of Sigmund Freud. Freud remained a mentor for Jung and a supporter of his work until their significant disagreement and parting in 1913 which followed Jung's increasing criticism of a number of Freud's theories.

In September 1891, Jung delivered a paper at a psychoanalytical congress entitled '*A contribution to the study of psychological types*'.[214] It is probably the work for which he has become best known and it was his first public statement about his theories of personality types. Following the presentation of his paper, he continued to develop the material it contained, focusing on identifying criteria which could provide the explanation for what he considered to be the very obvious, recurring differences which could be observed in the way in which people behave.

As finally refined, his work produced six criteria, being three pairs of bipolar dichotomous characteristics, which he believed could be used to discover the personality characteristics of any person. The first two criteria he called the two attitude types, which he named introversion and extroversion and described as representing the source of an individual's energy. He believed the extroverted personality draws energy from interaction with the external world, the principal focus of such a personality. On the other hand, the introverted personality chooses to withdraw into the inner world. For such a personality, individual personal energy is devoted to and refreshed by the internal experience.

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212 see generally Jung, CG *Memories, Dreams, Reflections* op. cit.

213 Freud, S *The Interpretation of Dreams,* London, Penguin Books, 1990 (James Strachey, Trans).

214 see generally Jung, CG *Psychological Types, Collected Works* op. cit..

To these criteria Jung added two pairs which he described as functional criteria. The first of these were the criteria of sensing and intuition, which relate to how a person takes in information. The sensing criterion is demonstrated in a person who takes in information in a factual and realistic way, using the five senses. The intuition criterion is demonstrated in a person who takes in information in an holistic way, using the sixth sense - considering the possibilities of what the information represents rather than the factual information revealed by the five senses.

The second pair of Jung's functional criteria were the criteria of thinking and feeling which may be applied to the ways in which individuals process the information they have taken in and make decisions about it. The thinking criterion relates to processing information and making decisions on the basis of concepts and formal ideas on a linear and logical basis. The feeling criterion relates to processing information and making decisions on the basis of the value or worth of the information and how acceptable or unacceptable it feels.

The real power of Jung's work is often misunderstood. His goal was not to classify people or to devise processes that would allow people to be labeled and classified. His goal was to develop critical thinking and evaluation tools which would promote an understanding of how others see things and what influences them to behave as they do. In other words, he was developing thinking and understanding tools which might enhance respect for and acceptance of the reasonableness of the behaviour of others and the ability to understand why and how the behaviour of individuals interacts. Jung's most significant contribution might be described as developing the tools to promote a better understanding of and respect for the differences in human behaviour.

4.4.2 The Development of the Myers-Briggs Type Indicator from Jung's Theory of Preferences

The Myers-Briggs Type Indicator Instrument was developed by Isabel Briggs Myers and her mother, Katharine Cook Briggs. Their aim was to create a tool to indicate, validate, and put to practical use Jung's work on psychological types. Briggs' early interest in psychological type theory and the influence of Jung's work on her were

revealed in an article published in 1928 in which she began to refine four postulated personality types.[215] World War II is said to have prompted Myers to perceive the value of a psychological instrument that has as its foundation the understanding and appreciation of human differences. She researched and developed the Indicator over the next four decades.[216]

The first MBTI manual was published in 1962, the product of collaboration between Briggs and Myers. Following Briggs' death in 1968, Myers and Mary McCaulley, a Professor of clinical psychology, founded The Center for Applications of Psychological Type ("CAPT"), a vehicle for continuing testing and research of the MBTI. This collaboration resulted in a second MBTI Manual, co-authored by McCaulley and Myers. The Center calls the MBTI:

> *"the most widely used and highly respected personality inventory of all time. The Myers-Briggs Type Indicator® (MBTI®) instrument, now taken by at least two million people each year-and translated into sixteen languages-was developed over a period of more than forty years, progressing from Isabel Myers' dining room to a cottage industry, to the prestigious Educational Testing Service, and to its current publisher, CPP, Inc."*[217]

4.4.3 Building Acceptance - Uses of the MBTI in Law and Order Occupations

Significant difficulties were faced in obtaining sponsorship for and acceptance of the reliability and validity of data produced by the MBTI. This may have been related to the fact that it was based on the work of a psychoanalyst whose most famous work includes the science of word associations and dream theory. John Ross, an Australian working in the field of psychometrics, who collaborated with Myers on the reliability and validity of data for the MBTI, made this comment when the first MBTI Manual had not long been released:

> *"a veil of suspicion hangs about it. It had an unorthodox origin, it is wedded to a somewhat unfashionable theory, and the enthusiasm it has aroused in some people has provoked stern opposition in others."*[218]

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215 see Hartzler, M *Myers-Briggs Type Indicator History: People, Issues and Challenges, Australian Perspectives*, Australian Council for Educational Research, 1992 at page 1.

216 see www.capt.org generally for a detailed history of the indicator and of its development

217 see www.capt.org/mbti

218 Saunders, F *Katharine and Isabel: Mother's Light, Daughter's Journey*, Palo Alto, CA, Consulting Psychologists Press 1991 at page 134

Validation was a big issue.

> *"Significant efforts were invested in validation. Most of the early samples were high school students from Pennsylvania and Massachusetts and College students, including over 3,600 medical students. Later [Briggs Myers] was able to get a sample of 10,000 nurses. As more people began to learn about the MBTI, more Universities started to use it. Beginning in 1947 Professor MacKinnon, who was researching creativity, gave it to his students at Berkeley. It is here that some Australians were introduced to the MBTI."*[219]

The MBTI is now used to support many investigative training and development processes in law and order occupations and this has added to its acceptance and reputation. For example, in 1992 Larry Richard, a lawyer who is president of a Philadelphia firm which provides management consulting services to the legal profession, conducted a national survey of lawyers using the MBTI. Responses were obtained from 3,014 practising lawyers.[220]

In 1984 the California Center for Judicial Education (CJER) designed a course to help Judges examine their decision making styles and to support them in their enhancement. The MBTI was selected as the tool used to undertake the evaluation. In recording the process, Judge John W Kennedy Jnr., a member of the CJER Facility, noted that:

> *"the MBTI has long been considered useful in team building, management, marriage counselling and job placement. In the judicial context it has been found to have unique applications to Judges handling family and juvenile law and has been used specifically in judicial education programs targeted to those groups. During the past 10 years I have administered the MBTI to more that 1,300 Judges across the United States in dozens of judicial training programs that I have taught."* [221]

Numbers of Universities use the MBTI as a way to understand law student behaviour and to identify which students may require what kinds of resources and experience certain results. Barbara J. Gilchrist, an adjunct professor at St Louis University of Law, records the value of the MBTI as a tool for clinical legal education:

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219 Hartzler, M *Myers-Briggs Type Indicator History: People, Issues and Challenges* op. cit. at page 20.

220 see Richard, L The Lawyer Types - How your Personality affects your Practice, (1993) 79 (July), *American Bar Association Journal* 74-78

221 Kennedy, Jnr JW Personality Type and Judicial Decision Making (1998) 37 (3) *Judges Journal* 4-10 at page 5.

> *"the MBTI offers a useful tool for understanding human behaviour and a structure through which the clinician may make a meaningful contribution to their students' future lawyering behaviour."*[222]

The Myers-Briggs Type Indicator has been established and has credibility as an occupational predictor in the 'law and order' professions generally.[223]

It is used successfully in careers counselling and professional development in Australia and America within organisations such as the Police Department and in law firms. Examples are Dr Larry Richards of Philadelphia, Pennsylvania, USA, whose company Lawgistics@ offers two programs: '*Career Counselling Exclusively for Attorneys*' and '*Improving the Practice of Law*', and Daniel Oppenheim of Oppenheim & Associates in San Francisco, California, USA.

The author has been retained in a number of Australian private law firms and Government legal units in which MBTI has been employed as a useful tool in career path planning and professional development.

In the academic world, MBTI is applied extensively in teaching negotiation to law students[224]
and to business management students[225]. In addition, it is used in counselling law students as to appropriate subject choices for law degrees.[226] In the world of corporate law, it is used in team-building and personal assessment in large law practices across America.[227]

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222 Gilchrist, BJ The Myers-Briggs Type Indicator as a Tool for Clinical Legal Education, (1991) 10 *St Louis University Public Law Review* 601-613 at page 613.

223 for example, see www.capt.org/mbti, Appendix D, in Myers, IB & McCaulley, MH *Manual: A Guide to the Development and Use of the Myers-Briggs Type Indicator*, 1985 at pages.243-292 and the *Myers-Briggs type indicator atlas of type tables - 1989 supplement*

224 for example, in Honolulu, USA at the University of Hawaii Law School; and by Professor Don Peters at the University of Florida Law School, Gainsville

225 for example, by Professor Stanley Glaser, Macquarie University Graduate School of Management, Ryde, NSW

226 for example, by Dr Martha Peters at the University of Florida Law School, Gainsville, USA

227 for example, by Dr Larry Richards, 'Lawgistics', Philadelphia Pa and Ms Susan Bell, Washington DC, USA. as noted in McGuiness, M, Izard, J and McCrossin, P (ed) *Myers-Briggs Type Indicator - Australian Perspectives*, Hawthorn, Vic, Australian Council for Education Research, 1992

4.4.4 MBTI Results

The four pairs of characteristics identified in the MBTI represent 16 personality types. Reproduced below is a simple summary of these taken from www.capt.org/mbti.[228]

Summary of the Sixteen Types

ISTJ

For ISTJs the dominant quality in their lives is an abiding sense of responsibility for doing what needs to be done in the here-and-now. Their realism, organizing abilities, and command of the facts lead to their completing tasks thoroughly and with great attention to detail. Logical pragmatists at heart, ISTJs make decisions based on their experience and with an eye to efficiency in all things. ISTJs are intensely committed to people and to the organizations of which they are a part; they take their work seriously and believe others should do so as well.

ISFJ

For ISFJs the dominant quality in their lives is an abiding respect and sense of personal responsibility for doing what needs to be done in the here-and-now. Actions that are of practical help to others are of particular importance to ISFJs. Their realism, organizing abilities, and command of the facts lead to their thorough attention in completing tasks. ISFJs bring an aura of quiet warmth, caring, and dependability to all that they do; they take their work seriously and believe others should do so as well.

INFJ

For INFJs the dominant quality in their lives is their attention to the inner world of possibilities, ideas, and symbols. Knowing by way of insight is paramount for INFJs, and they often manifest a deep concern for people and relationships as well. INFJs often have deep interests in creative expression as well as issues of spirituality and human development. While the energy and attention of INFJs are naturally drawn to the inner world of ideas and insights, what people often first encounter with INFJs is their drive for closure and for the application of their ideas to people's concerns.

INTJ

For INTJs the dominant force in their lives is their attention to the inner world of possibilities, symbols, abstractions, images, and thoughts. Insight in conjunction with logical analysis is the essence of their approach to the world; they think systemically.

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228 for a detailed explanation see Briggs Myers, I *Introduction to Type,* Palo Alto, CA, Consulting Psychologists Press, 1990

Ideas are the substance of life for INTJs and they have a driving need to understand, to know, and to demonstrate competence in their areas of interest. INTJs inherently trust their insights, and with their task-orientation will work intensely to make their visions into realities.

ISTP

For ISTPs the driving force in their lives is to understand how things and phenomena in the real world work so they can make the best and most effective use of them. ISTPs are logical and realistic people, and they are natural troubleshooters. When not actively solving a problem, ISTPs are quiet and analytical observers of their environment, and they naturally look for the underlying sense to any facts they have gathered. ISTPs do often pursue variety and even excitement in their hands-on experiences. Although they do have a spontaneous, even playful side, what people often first encounter with them is their detached pragmatism.

ISFP

For ISFPs the dominant quality in their lives is a deep-felt caring for living things, combined with a quietly playful and sometimes adventurous approach to life and all its experiences. ISFPs typically show their caring in very practical ways, since they often prefer action to words. Their warmth and concern are generally not expressed openly, and what people often first encounter with ISFPs is their quiet adaptability, realism, and 'free spirit' spontaneity.

INFP

For INFPs the dominant quality in their lives is a deep-felt caring and idealism about people. They experience this intense caring most often in their relationships with others, but they may also experience it around ideas, projects, or any involvement they see as important. INFPs are often skilled communicators, and they are naturally drawn to ideas that embody a concern for human potential. INFPs live in the inner world of values and ideals, but what people often first encounter with the INFP in the outer world is their adaptability and concern for possibilities.

INTP

For INTPs the driving force in their lives is to understand whatever phenomenon is the focus of their attention. They want to make sense of the world -- as a concept -- and they often enjoy opportunities to be creative. INTPs are logical, analytical, and detached in their approach to the world; they naturally question and critique ideas and events as they strive for understanding. INTPs usually have little need to control the

outer world, or to bring order to it, and they often appear very flexible and adaptable in their lifestyle.

ESTP

For ESTPs the dominant quality in their lives is their enthusiastic attention to the outer world of hands-on and real-life experiences. ESTPs are excited by continuous involvement in new activities and in the pursuit of new challenges. ESTPs tend to be logical and analytical in their approach to life, and they have an acute sense of how objects, events, and people in the world work. ESTPs are typically energetic and adaptable realists, who prefer to experience and accept life rather than to judge or organize it.

ESFP

For ESFPs the dominant quality in their lives is their enthusiastic attention to the outer world of hands-on and real-life experiences. ESFPs are excited by continuous involvement in new activities and new relationships. ESFPs also have a deep concern for people, and they show their caring in warm and pragmatic gestures of helping. ESFPs are typically energetic and adaptable realists, who prefer to experience and accept life rather than to judge or organize it.

ENFP

For ENFPs the dominant quality in their lives is their attention to the outer world of possibilities; they are excited by continuous involvement in anything new, whether it be new ideas, new people, or new activities. Though ENFPs thrive on what is possible and what is new, they also experience a deep concern for people as well. Thus, they are especially interested in possibilities for people. ENFPs are typically energetic, enthusiastic people who lead spontaneous and adaptable lives.

ENTP

For ENTPs the driving quality in their lives is their attention to the outer world of possibilities; they are excited by continuous involvement in anything new, whether it be new ideas, new people, or new activities. They look for patterns and meaning in the world, and they often have a deep need to analyze, to understand, and to know the nature of things. ENTPs are typically energetic, enthusiastic people who lead spontaneous and adaptable lives.

ESTJ

For ESTJs the driving force in their lives is their need to analyze and bring into logical

order the outer world of events, people, and things. ESTJs like to organize anything that comes into their domain, and they will work energetically to complete tasks so they can quickly move from one to the next. Sensing orients their thinking to current facts and realities, and thus gives their thinking a pragmatic quality. ESTJs take their responsibilities seriously and believe others should do so as well.

ESFJ

For ESFJs the dominant quality in their lives is an active and intense caring about people and a strong desire to bring harmony into their relationships. ESFJs bring an aura of warmth to all that they do, and they naturally move into action to help others, to organize the world around them, and to get things done. Sensing orients their feeling to current facts and realities, and thus gives their feeling a hands-on pragmatic quality. ESFJs take their work seriously and believe others should as well.

ENFJ

For ENFJs the dominant quality in their lives is an active and intense caring about people and a strong desire to bring harmony into their relationships. ENFJs are openly expressive and empathic people who bring an aura of warmth to all that they do. Intuition orients their feeling to the new and to the possible, thus ENFJs often enjoy working to manifest a humanitarian vision, or helping others develop their potential. ENFJs naturally and conscientiously move into action to care for others, to organize the world around them, and to get things done.

ENTJ

For ENTJs the driving force in their lives is their need to analyze and bring into logical order the outer world of events, people, and things. ENTJs are natural leaders who build conceptual models that serve as plans for strategic action. Intuition orients their thinking to the future, and gives their thinking an abstract quality. ENTJs will actively pursue and direct others in the pursuit of goals they have set, and they prefer a world that is structured and organized.

The Australian Psychologists Press, a major trainer and distributor of MBTI processes in Australia, makes the claim on its website[229] that the MBTI is the most widely used behavioural analysis tool in the world today, administered to two million people annually. It is used widely in Australia by government, professional service firms, financial institutions and other corporations. There is a great deal of published data

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229 see www.austpsychpress.com.au

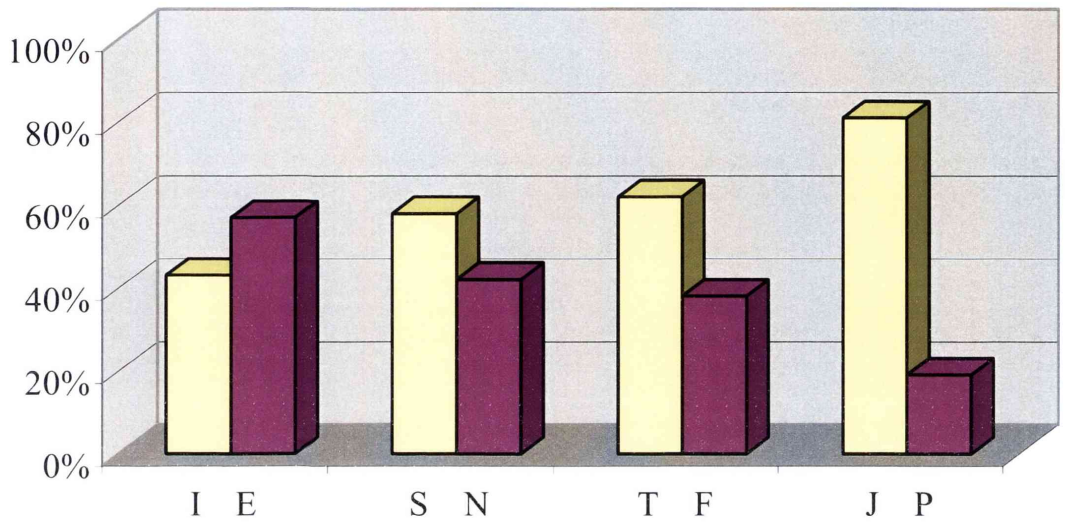
available which provides benchmarks of the behavioural characteristics of a range of cohorts including lawyers. This is the reason why MBTI was chosen as the principal behavioural analysis tool for this thesis. An overview of the most relevant pieces of research and their comparison with the work undertaken for this thesis appears below.

As mentioned, in conducting the MBTI for this thesis two different groups were chosen, namely undergraduate law students and practising lawyers. The goal was to determine whether the same sets of characteristics were observable in practising lawyers as in undergraduate lawyers. One of the possibilities considered was that law students might be a self-selecting group with the range of characteristics likely to suit them for a career as practising lawyers. If true, this would mean that the same characteristics would also be likely to be observed in the practising profession in approximately the same proportions.

Another possibility was that law students might present the same behavioural characteristics as the broad community. If so and if these characteristics are different from those of practising lawyers, this outcome might be explained by the facts that the study of law does not encourage all law students to practise law and that some students choose not to enter the practising profession.

These possibilities pointed to the need to conduct testing to determine whether either and, if so, which was likely to be correct. To this end 150 undergraduate lawyers were tested with the MBTI over a period of three years. These were undergraduates in the Faculty of Law at the University of New South Wales who intended to graduate with an LL.B. The results appear below.

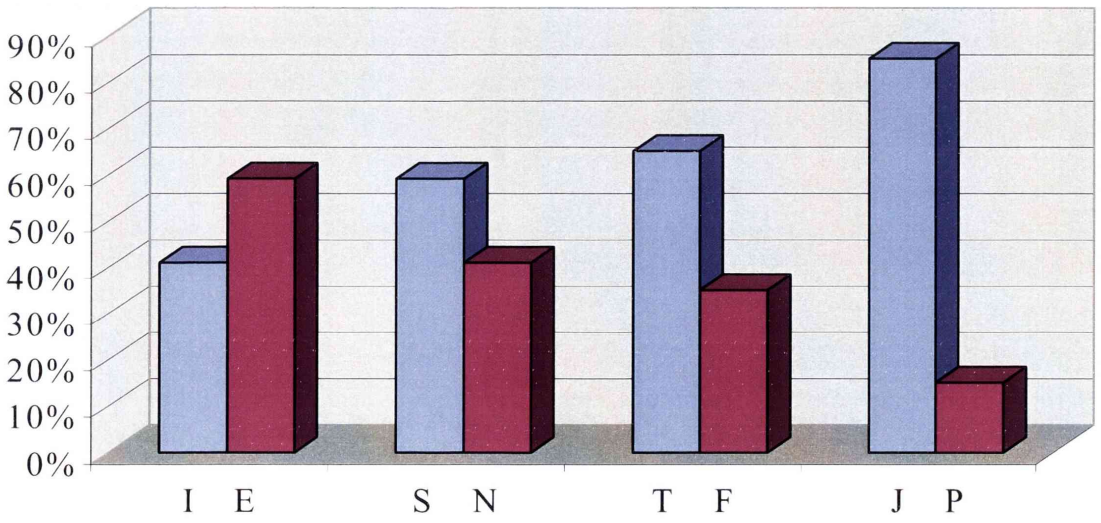
Chart 1 - Characteristics of Australian Undergranduate Lawyers (150 Participants)



I = 43%	S = 58%	T = 62%	J = 81%
E = 57%	N = 42%	F = 38%	P = 19%

150 practising lawyers from a range of different practice areas and different ages and genders were also tested with the MBTI over a period of five years. The results appear below.

Chart 2 - Characteristics of Australian Practising Lawyers (150 Participants)



I = 41%	S = 59%	T = 65%	J = 85%
E = 59%	N = 41%	F = 35%	P = 15%

4.4.5 The Four Temperaments Approach

In codifying the results of the testing it became apparent that producing statistics based on the sixteen different behavioural types identified by MBTI was cumbersome and might give a poor indication of trend. In order to produce more useful characteristics, the simplified codification developed by Keirsey and Bates was also used.[230] The work of Keirsey and Bates has been used widely in large studies of behavioural types, for example in the Australian Perspectives Material.[231]

Keirsey and Bates did considerable work relating the sixteen behavioural types developed by the MBTI to the four temperaments approach, which Briggs had adapted in her earlier work from the Jungian analysis. The value of the four temperaments approach is that it allows each of the sixteen behavioural analyses to be allocated to one of four groups, which share some general identifiable characteristics. It also allows research to focus on a smaller range of more significant qualities. Latemore[232] devised a chart showing clearly the key characteristics of the four groupings.

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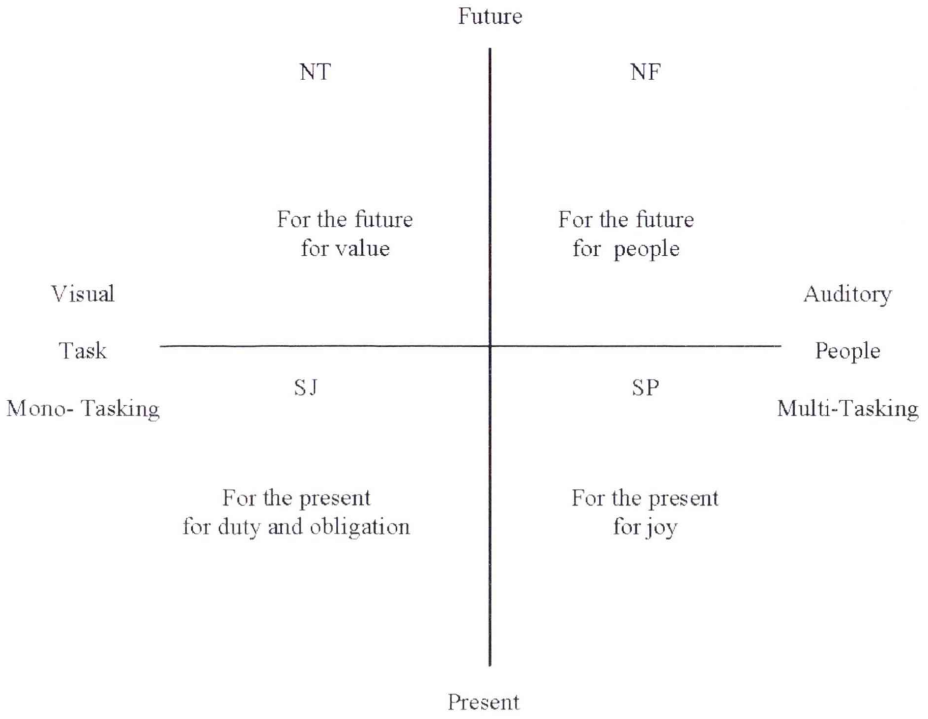
230. Keirsey, D and Bates, M *Please Understand Me - Character and Temperament Types*, 4th edition, Del Mar, Calif, Prometheus Nemesis Book Company, 1984

231. McGuinness, M, Izard, J and McCrossin, P (ed) *Myers-Briggs Type Indicator - Australian Perspectives* op. cit. at page 149.

232. Latemore, G *Temperament and Culture: Mapping Organisational Culture* contained in McGuinness, M, Izard, J and McCrossin, P ibid at page 150

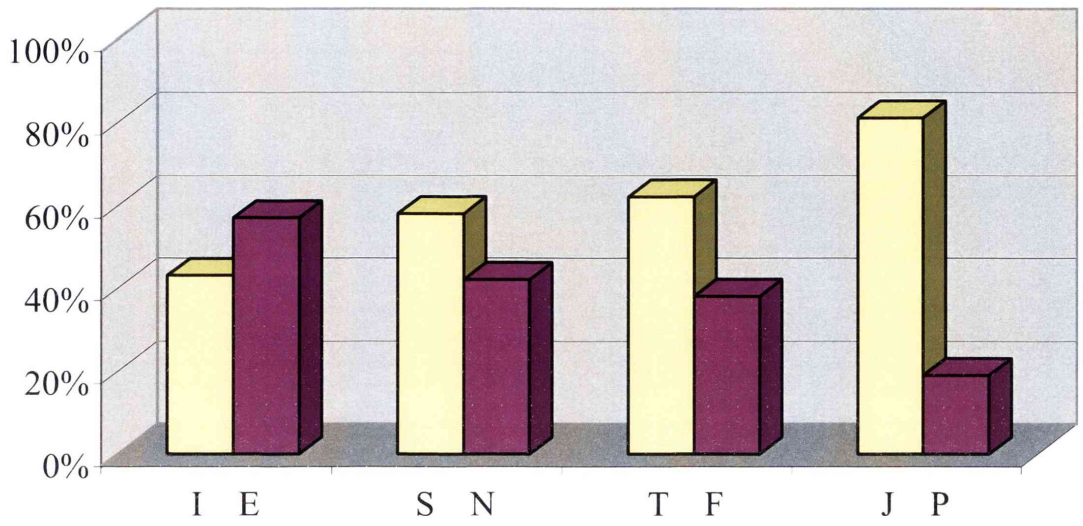
Latemore Chart



Of particular value in the Keirsey approach is the relevance of the key characteristics, which can be identified in each of the four groups. Most particularly it is useful to be able to categorise groups according to whether they are task focussed or relationship focussed and whether they are present focussed or future focussed. When considered in relation to the focus group outcomes the ability to make these comparisons is particularly useful.

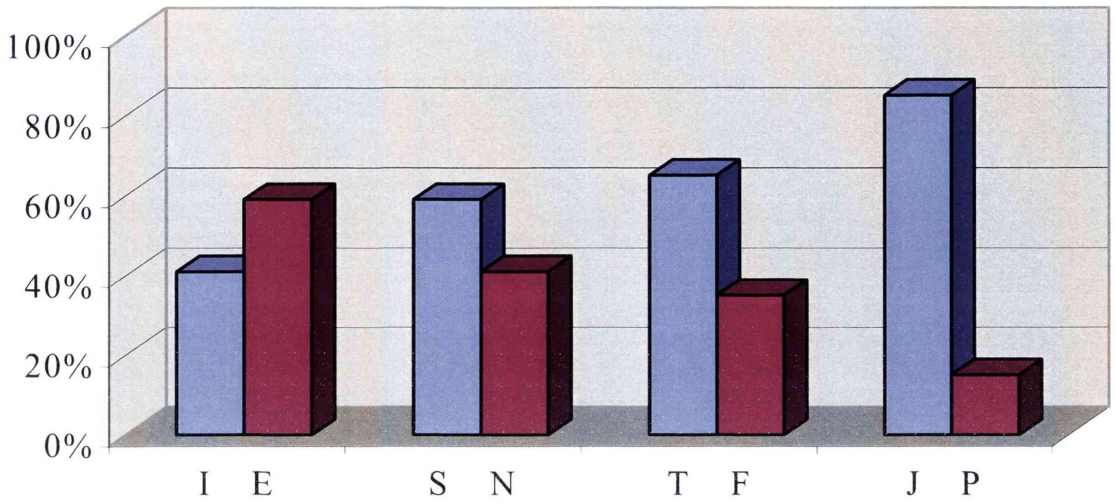
With this in mind, chart 1 and 2 are reproduced below as charts 1A and 1B showing both the MBTI analysis and the Kiersey analysis.

Chart 1A - Characteristics of Australian Undergranduate Lawyers (150 Participants)



Kiersey	MBTI			
NT = 25%	I = 43%	S = 58%	T = 62%	J = 81%
NF = 17%	E = 57%	N = 42%	F = 38%	P = 19%
SJ = 55%				
SP = 3%				

Chart 1B - Characteristics of Australian Practising Lawyers (150 Participants)



Kiersey		MBTI		
NT = 23%	I = 41%	S = 59%	T = 65%	J = 85%
NF = 19%	E = 59%	N = 41%	F = 35%	P = 15%
SJ = 58%				
SP = 0%				

4.5 Summary of MBTI results

4.5.1 Comparison of undergraduate lawyers with the general population.

In summary, the MBTI results of practising and undergraduate lawyers demonstrate two very important trends.

The commonly accepted statistics for MBTI characteristics in the Australian population appear in Moss' Handbook.[233] A chart of the Australian population and distribution appears below.

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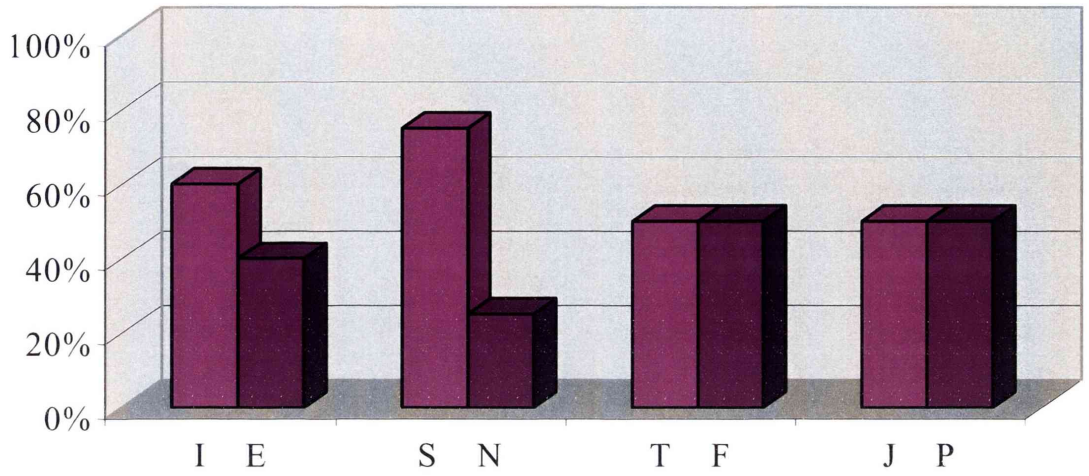
233. General Australian Population Statistics. Extracted from Moss SJ, *Introducing Type: An Australian Handbook on Jungian Type Theory and the Myers-Briggs Indicators,* Brisbane Queensland DMP Publications 1991 at pages 4-7. These are the most recent available statistics for the general Australian population.

Chart 3 - Characteristics of Australian Population and Distribution



I = 60% S = 75% T = 50% J = 50%

E = 40% N = 25% F = 50% P = 50%

The chart for Australian undergraduate lawyers appears as Chart 1 – Characteristics of Australian Undergraduate Lawyers (150 Participants) above.

These charts reveal considerable differences between the profiles of undergraduate lawyers and of the general population. The most important of these are:

(i) Extroversion (E) -v- Introversion (I)

In the law students the E and I ratios were reversed, that is, the general population shows a preponderance of I characteristics (60%) and the population of undergraduate lawyers shows a preponderance of E characteristics (57%). In percentage terms however the differences do not appear to be significant.

(ii) Sensing (S) -v- Intuition (N)

Here the difference was more significant. The undergraduate lawyers contained a larger number of N responses (42%), compared with the general population in which only one in four (25%) records an N indicator.

(iii) Thinking (T) -v- Feeling (F)

These indicators measure characteristics which are evenly divided in the general population, that is, 50% T and 50% F. Here, the disparity between the two groups is even more noticeable. Compared with the 50% ratio in the general population, undergraduate lawyers have only a 38% recording of the feeling indicator and they have a 62% recording of the thinking indicator.

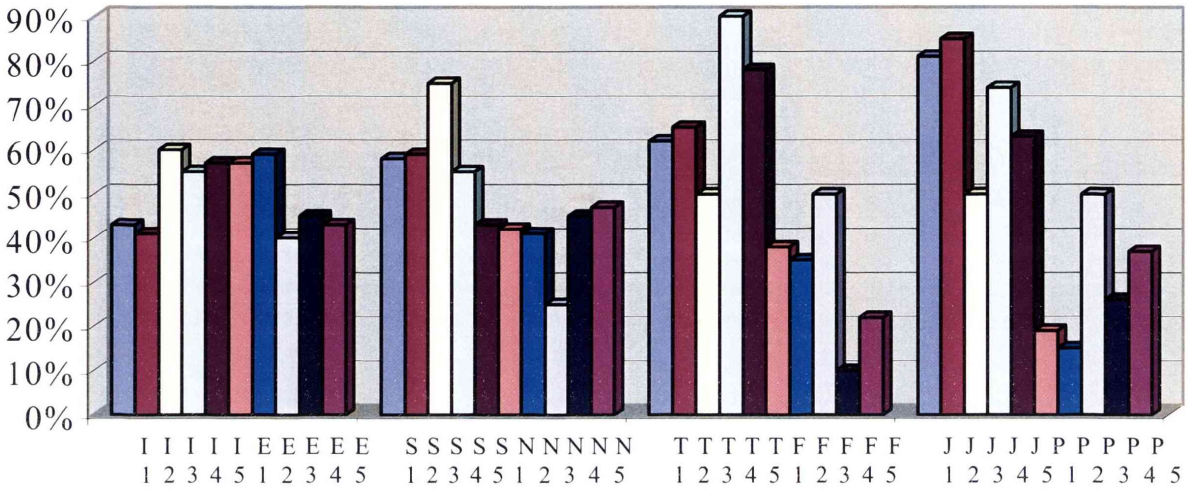
(iv) Judging (J) -v- Perceiving (P)

It is in the judging and perceiving indicators that the differences become most significant. The general population shows 50% J and 50% P. However, the undergraduate legal population identifies only 19% as having P characteristics whilst 81% have the J characteristic. This is a substantial difference.

4.5.2 Comparison of practising lawyers with the general population

Chart 4 also compares the characteristics of undergraduate and practising lawyers with the general population.

Chart 4 - Characteristics of Practising and Undergraduate Lawyers in Australia Compared with General Population , Managers and American Practising Lawyers



$I_1 = 43\%$ $E_1 = 57\%$	$S_1 = 58\%$ $N_1 = 42\%$	$T_1 = 62\%$ $F_1 = 38\%$	$J_1 = 81\%$ $P_1 = 19\%$
$I_2 = 41\%$ $E_2 = 59\%$	$S_2 = 59\%$ $N_2 = 41\%$	$T_2 = 65\%$ $F_2 = 35\%$	$J_2 = 85\%$ $P_2 = 15\%$
$I_3 = 60\%$ $E_3 = 40\%$	$S_3 = 75\%$ $N_3 = 25\%$	$T_3 = 50\%$ $F_3 = 50\%$	$J_3 = 50\%$ $P_3 = 50\%$
$I_4 = 55\%$ $E_4 = 45\%$	$S_4 = 55\%$ $N_4 = 45\%$	$T_4 = 90\%$ $F_4 = 10\%$	$J_4 = 74\%$ $P_4 = 26\%$
$I_5 = 57\%$ $E_5 = 43\%$	$S_5 = 43\%$ $N_5 = 47\%$	$T_5 = 78\%$ $F_5 = 22\%$	$J_5 = 63\%$ $P_5 = 37\%$

Key: 1 Undergraduate Lawyers 2 Practising Lawyers 3 General Population 4 Australian Managers 5 American Practising Lawyers

(i) Extroversion (E) -v- Introversion (I)

E and I are still reversed for practising lawyers and the disparity is also not great. In the general population 40% can expect to identify for E and 60% for I. In the practising lawyer population it is the reverse, namely 59% E and 41% I.

(ii) Sensing (S) -v- Intuition (N)

The general population shows a dominance of S (75%) with 25% recording N whilst in practising lawyers the sensing indicator is 59% and the intuition indicator as high as 41%, a significant difference.

(iii) Thinking (T) -v- Feeling (F)

Again the disparity in thinking and feeling is significant. The general population records these indicators in equal numbers (50%) whilst practising lawyers record the thinking indicator at 65% and the feeling indicator at 35%.

(iv) Judging (J) -v- Perceiving (P)

As with undergraduate lawyers, the greatest disparity exists with these indicators. The general population registers a 50% indicator for each, whereas in practising lawyers the judging indicator rises to 85% and the perceiving indicator falls to 15%.

4.5.3 Comparison with other MBTI research

One of the reasons why the MBTI was selected for this research as the preferred behavioural analysis tool was its broad acceptance in universities and in published studies as an analytical tool. Gordon Lawrence in his 1984 text[234] identified over one hundred research studies of learning styles involving the MBTI.

In particular there are five other useful studies, which are relevant for their scrutiny of the MBTI profiles of lawyers and law students in the United States. These studies add confidence to the validity of using the MBTI indicator and provide interesting and useful data about the profile of the profession in the USA. The relevance of these studies is noted as follows:

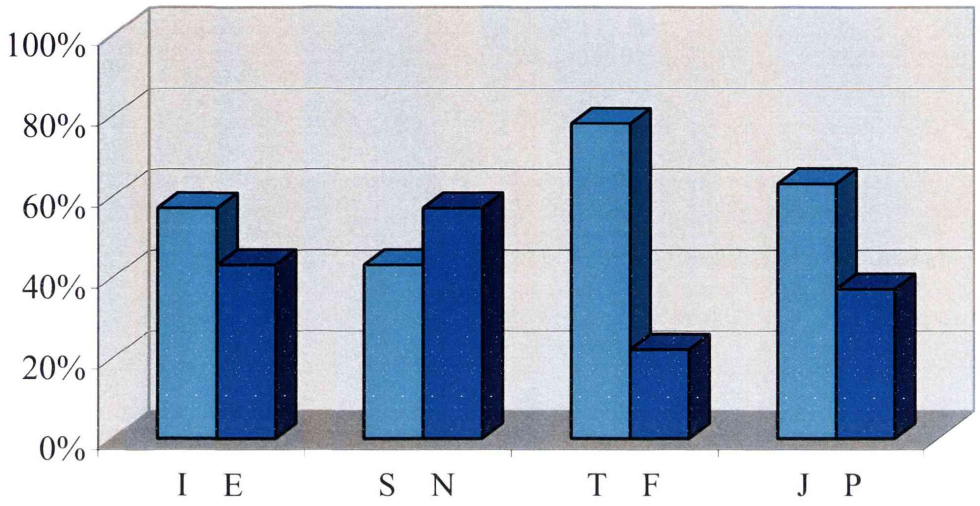
(i) Larry Richard, an American lawyer turned management consultant, conducted a study of 3,014 practising attorneys[235] across the United

234. Lawrence, G A Synthesis of Learning Style Research Involving the MBTI (1984) 8 *J Psychol.* Type 2, 2 cited in Randall, VR The Myers-Briggs Type Indicator, First Year Law Students and Performance (1995) 26 *Cumberland Law Review* 63-110 at page 75

235. Richard, L The Lawyers Types - How your Personality affects your Practice op. cit.

States in 1992. This is the largest study of practising lawyers the author has been able to find and it produced the following results:

Chart 5 - Characteristics of American Practising Lawyers (3,014 Participants)



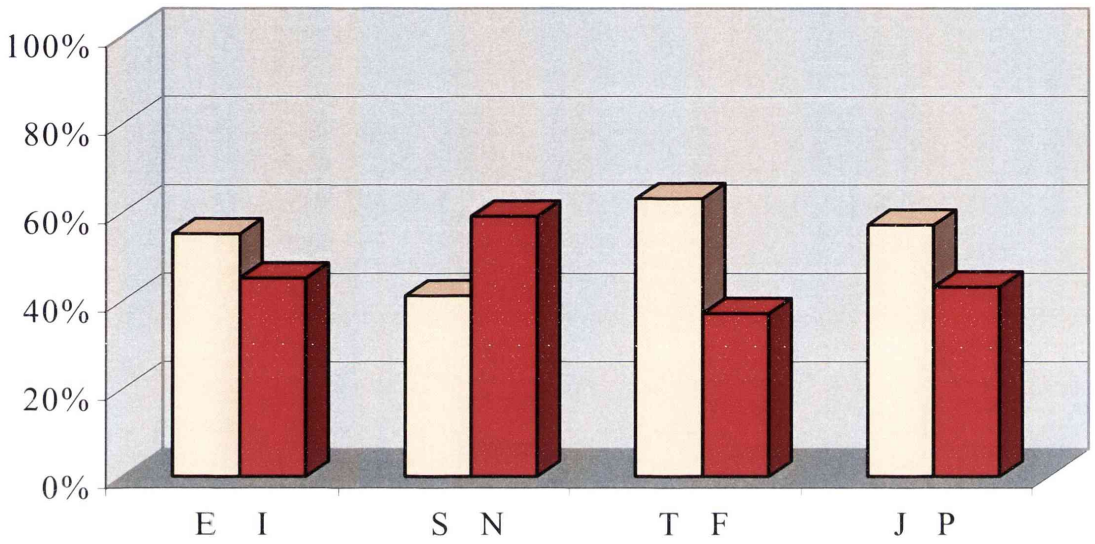
I = 57%	S = 43%	T = 78%	J = 63%
E = 43%	N = 57%	F = 22%	P = 37%

Extracted from Richard L, How Your Personality Affects Your Practice – The Lawyer Types, (1993) 79 (July), *ABA Journal 74-78*

The goal of the study was to help American lawyers understand why they behave as they do and why they experience the results they experience. (This research does not provide details about how the respondents tested using the four temperaments approach). The data in Chart 5 have also been included in Chart 4, showing a comparison between practising and undergraduate lawyers and the general population in Australia. The American research indicates that TJ are the dominant characteristics for American lawyers, as they are for Australian lawyers. However, the S and N are reversed for American lawyers. This means that the INTJ is the dominant behavioural style amongst practising US attorneys in comparison with the ESTJ, the dominant style in Australia.

(ii) In the mid 1960s Natter undertook a survey of 2,248 law students from five different law schools.[236] This research showed the law student profile as follows:

Chart 6 - Characteristics of Undergraduate Lawyers from 5 Different Schools (2,248 Participants)



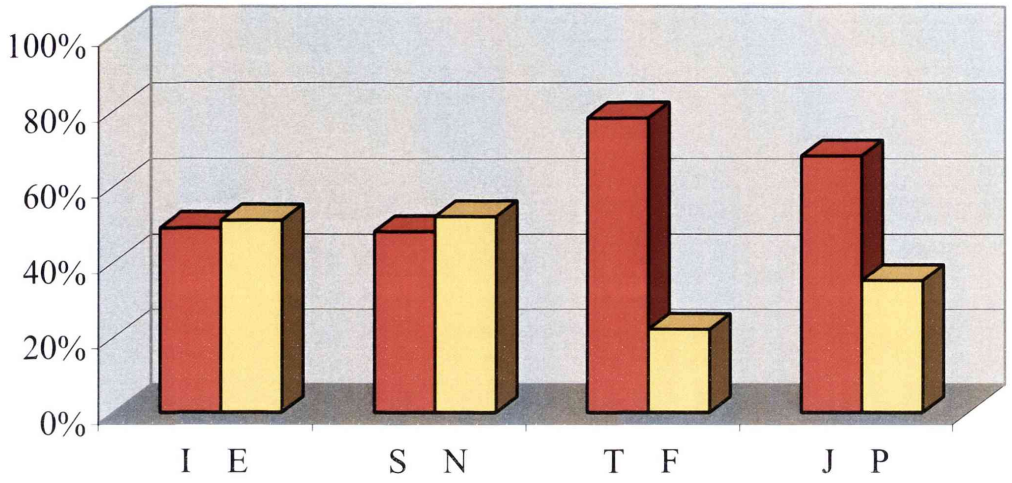
I = 45%	S = 41%	T =63%	J = 57%
E = 55%	N = 59%	F = 37%	P = 43%

These data demonstrate the same trends as data collected by Vernellia Randall and published in 1995.[237] Her study of 154 first year law students in America produced the following results:-

236. this is discussed in Peters, D and Peters, MM Maybe that's why I do that: Psychological Type Theory: the Myers-Briggs type indicator and learning legal interviewing (1990) 35 *New York Law School Review* 169-198. [This article at page 178 reports the Natter data which appears in Natter, *The Human Factor: Psychological Type in Legal Education*, (1981) 3 Res. in Psychological Type 55, 56 (1981)]

237. Randall, VR The Myers-Briggs Type Indicator, First Year Law Students and Performance op. cit.

Chart 7 - Characteristics of American 1st Year Law Students (154 Participants)



I = 49%	S = 48%	T = 78%	J = 68%
E = 51%	N = 52%	F = 22%	P = 35%

Extracted from Randall VR, The Myers-Briggs Indicator, First Year Law Students and Performance, (1995) 26, *Cumberland Law Review 68-74*

There is some variation in percentages between the two studies. However, again the dominant behavioural profile for undergraduate law students is ENTJ.

The interesting difference between all the US studies (that is, the two studies of law students and the study of practising lawyers) is that the I and E are reversed. Practising lawyers present with a dominance of the introversion characteristic and undergraduate law students present with a dominance of the extroversion characteristic. However, the difference is only a few percentage points and may not be statistically significant.

(iii) Another useful study was undertaken by His Honour John W. Kennedy, Jr., Presiding Judge of the San Bernadino County Trial Courts, San Bernadino, California.[238] The judge administered the MBTI to 1,302 Judges and noted the following results:-

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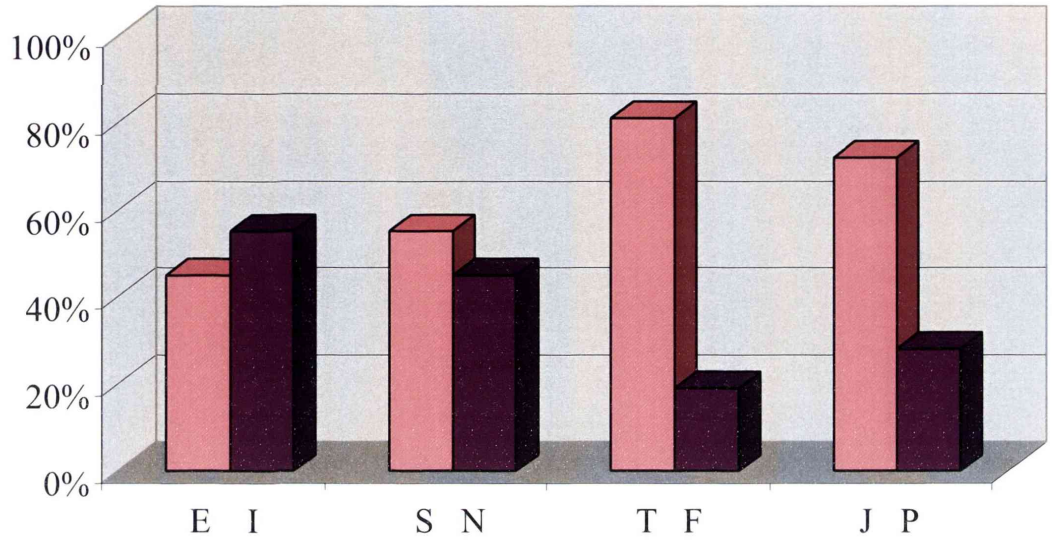
238. Kennedy, Jr JW Personality Type and Judicial Decision Making op. cit.

Chart 8 - Characterisitics of American Judges (1,302 Participants)



I = 55%	S = 55%	T = 81%	J = 72%
E = 45%	N = 45%	F = 19%	P = 28%

The judge drew on the MBTI to provide insight about those qualities which enhance judicial behaviour. As with the other data referred to above, the T and the J are dominant, indeed even more dominant than in the other groups of lawyers studied. The E and I scores mirror those of undergraduate lawyers, although again the differences are probably not statistically significant. The S and the N are also reversed in practising judges and it is unclear whether this is a manifestation of self-selection or another difference which is not statistically significant.

(iv) The final data which add an interesting point of comparison are data produced by James Guthrie at the Australian Management College, Mt Eliza.[239] Guthrie reviewed 2,288 managers to whom the college has provided training. 88% of these are Australian and 12% from Pacific Rim countries, including North America. The data are as follows:

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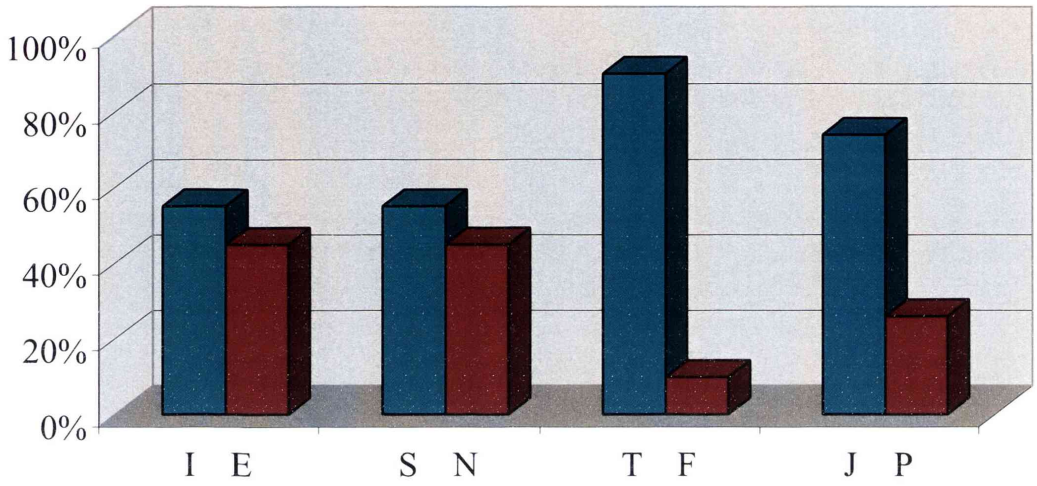
239. Guthrie, J The Myers-Briggs Type Indicator at The Australian Management College Mt Eliza (1993) 13 (2) *The Practising Manager* 11-18.

Chart 9 - Characteristics of Australian Managers at the Australian Management college Mt Eliza (2,288 Participants)



Kiersey	MBTI			
NT = 39%	I = 55%	S = 55%	T = 90%	J = 74%
NF = 7%	E = 45%	N = 45%	F = 10%	P = 26%
SJ = 45%				
SP = 9%				

Extracted from Guthrie J, The Myers-Briggs Type Indicator at the Australian Management College Mt Eliza, (1993) 13(2), *The Practising Manager, 11-18*

The manager profile shows the same STJ pattern as practising lawyers in Australia. However the I and the E are reversed. Studies of managers' business communication style and learning behaviour reflect some of the same criticisms and commentary as this thesis suggests apply to practising lawyers.[240]

240. Comments throughout regarding the deficiencies of managers in Australia have already been referred to in Karpin, D (Chair) *Enterprising Nation: Industry Taskforce on Leadership and Management Skills*, Canberra, Australian Government Publishing Service, April 1995 - see volumes I and II generally.

4.6 What conclusions may be drawn from the MBTI results?

There are two main conclusions, each of which is significant to understanding how lawyers behave and to explaining and validating the observations which those who interact with lawyers make of them.

4.6.1 Characteristics of undergraduate lawyers and practising lawyers

The characteristics of undergraduate lawyers and practising lawyers in Australia are very similar. Given that the sample for each group was 150, it is not surprising that there are some variations, however they are small. This suggests strongly that the characteristics of lawyers are not characteristics developed by them during their practising lives, but indeed are characteristics which they bring with them into the practising profession. Clearly an area for further research, it is possible that students selecting law as a career have clear indicators of the behaviour or characteristics they identify as likely to be necessary for them to be successful and they make correct choices about their appropriateness for the career.

4.6.2 Comparison between the general population, undergraduates and practising lawyers

The most dramatic result of this research is the distinct difference revealed between the profile of the general population and the profiles of undergraduate and practising lawyers. The comparison between lawyers and the general population can be made in two ways.

(i) The four temperament approach outlined in Chapter 4, Section 4.4 shows significant differences between the general population and the profiles of practising and undergraduate lawyers. The chart below illustrates this.[241]

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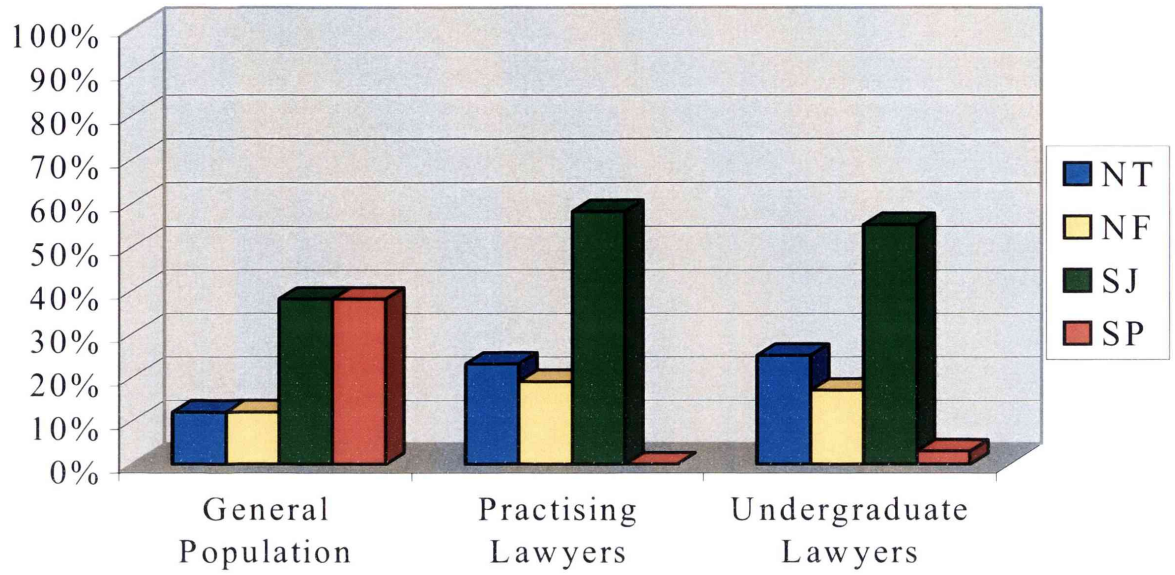
241. The distribution of the four temperaments in the general population is drawn from Moss, SJ *Introducing type: An Australian handbook on Jungian type theory and the Myers-Briggs type indicator* op. cit. See Chart 3.

Chart 10 - The Four Temperaments



	General Population	Practising Lawyers	Undergraduate Lawyers
NT	12%	23%	25%
NF	12%	19%	17%
SJ	38%	58%	55%
SP	38%	0%	3%

This demonstrates clearly that of the four temperament groups, the dominant temperament for lawyers (both undergraduate and practising) is the SJ group. By comparison, the general population does not have a single dominant group. The dominant role is shared equally between the SJ and the SP groups. Interestingly, the SP group is not evident in any numbers in the lawyer population at all.

(ii) The second comparison which can be made is just as striking. It is clear from the spread of characteristics in the general population that there is no single dominant profile although Chart 3 demonstrates the dominance of the I and the S characteristics over the E and the F. This means the general population demonstrates a dominance of introversion and of

sensing; in other words, present and task focussed rather than people focussed.

By comparison, for undergraduate and practising lawyers there is a clear dominant profile, the ESTJ grouping. An overview of the characteristics of all sixteen types can be found in the principal text.[242]

4.7 The 'lawyer type'

The MBTI results, identified by behavioural type and by the four temperaments, clearly identify a lawyer profile. They reinforce and complement the characteristics identified in the DISC. Added together, the MBTI and DISC results present a profile, the consistent characteristics of which are:

- present focussed - that is, a focus on managing a particular project or a particular task in an operational sense rather than focussing on the future in terms of having a 'helicopter' view of life in which the big picture can be scrutinised. This is sometimes expressed as a micro rather than a macro approach to life and work with a tendency to become lost in the details rather than being able to strike a balance between the detail and the big picture;
- a strong sense of duty and obligation;
- a strong sense of value for rules, systems, processes, boundaries and authority with a preference for the status quo and a dislike for change; and
- a focus on tasks rather than on people with a preference for 'working' rather than 'talking'.

A number of these affirm the characteristics already identified in Chapter 4, as the author's own observations of the characteristics which lawyers share as a group.

The qualitative research work with focus groups recorded in Chapter 5, further reinforces many of the behavioural characteristics identified by quantitative MBTI research. This strong correlation is important because it permits conclusions to be drawn about how lawyers behave. Since part of this thesis makes suggestions as to how

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242 for a detailed explanation see Briggs Myers, I *Introduction to type* op. cit.

lawyers might choose to change their behaviour, it is important to begin with accurate data about how lawyers behave now.

In summary, the combination of analyses provided by both DISC and MBTI delivers solid and consistent evidence of how lawyers behave and constitutes a reliable basis for the development of suggestions as to lawyers' future behaviour.

The quantitative research data having been presented and analysed, Chapter 5 which follows presents the qualitative data obtained from conducting the focus group research. It explains how focus groups were selected, conducted and recorded and articulates the characteristics of lawyers in negotiation which the focus groups identified.

CHAPTER 5: FOCUS GROUP RESEARCH

5.1 Introduction

As has been explained in Chapter 3, a significant proportion of the data selected for this thesis has been obtained through focus group research. The initial identification of groups was lawyers, staff in law firms, law students, clients and judges.

Most of these groups have been covered in this research, but there have been significant changes in emphasis during that period.

5.2 Selecting focus groups

After months of attempts and many postponed meetings, the initial idea of focus groups of judges was eventually abandoned. Individual judges and former judges were certainly generous and allowed themselves to be interviewed so that their individual views could be identified and discussed. In some cases these views have guided the approach adopted.

In the end, however, it was decided that it was far more appropriate to make clients the main focus of attention, since a key goal of the research is to provide a factual foundation upon which solicitors in the private profession might choose to build in dealing effectively with the current crisis of public confidence.

From the individual discussions with judges, it became apparent that the rules of evidence, the role of precedent (including the tradition of the bar and the manner in which judges conduct the day-to-day business in their courts) are most influential upon the behaviour of the lawyers who seek to negotiate there. It was also apparent that because court appearances usually involved barristers and not solicitors, judges are not well equipped to evaluate effectively solicitors' negotiating behaviour.

The remaining groups were retained, but the emphasis was changed. Again, since the area of greatest interest was the constructive interaction between solicitors in private practice and their clients, those focus groups involving clients were given the greatest emphasis and resources.

Finally, a focus group category of Year 11 Legal Studies Students was added. This group was useful because it served as a reminder of the ways in which solicitors are

viewed by those who have little experience in dealing with them. However, the ability of the students to contribute in real life terms was severely hampered by the fact that, even though they were Legal Studies Students, they knew very little about how lawyers negotiate and the skills they bring to the process. Accordingly no further focus groups involving Legal Studies students were conducted and this group was replaced by postgraduate students whose life experiences, including their interaction with lawyers, were more significant.

As explained, the selection of each focus group occurred on a completely opportunistic basis. Many were clients or students who agreed to add a focus group session to other work being undertaken with or for them. The remainder were encountered in educational programs in which the author was participating. This opportunistic element does not detract in any way from the validity of the data collected.

5.3 Identifying focus group processes

This thesis arose from the author's personal views about how lawyers negotiate and the impact this has on those with whom they deal. Accordingly, a pressing concern was to prevent personal views and prejudices from influencing the collection of research data. This may not be entirely possible. Throughout the focus groups, however, considerable care was taken to minimise the author's personal influence over the process.

It was also important to pay attention to the fact that participants in the Focus Groups were busy people who had generously agreed to give their time to share their experiences. In order to make the most of this opportunity and to avoid imposing a contrived schedule and format on the process, a focus group format was developed. This is described in detail in Chapter 3.

In summary, the process was to meet and greet participants; to explain that the purpose of the meeting was to explore their perceptions and experiences of the qualities and characteristics which lawyers bring to the process of negotiation and that, in order to obtain the most creative exchange of ideas, the author would play a role which was as silent as possible and would intervene only when issues such as time constraints meant that there was a risk that the session would end without some of the key questions being pursued. Each group was asked during the discussion to consider three key questions, namely:

(i) what are the main elements of lawyers' work?

(ii) is negotiation part of lawyers' work? and

(iii) what are the characteristics of how lawyers negotiate?

It was explained that whatever other ideas participants wished to share would be valuable and it was for the group to decide the direction in which it wished to take the discussion, provided that some substantive attention was paid to each of these elements.[243]

As a result of this approach, the focus group discussions flowed very freely and gave rise to a surprising range of ideas. On the occasions on which there was an intervention by the author, particular care was taken to ensure the use of open ended questions so as to avoid, as far as possible, giving any indication to the group as to where the discussion might go.

5.4 Recording the focus groups

Having identified a number of suitable groups, the next obstacle encountered was the issue of confidentiality. From the first (aborted) focus group it was apparent that focus group members, or at least some members, were unwilling to participate if the proceedings were tape recorded.

This instantly raised a problem because the code of ethics under which most researchers operate provides:

> *"Audio tape recordings of every session are routine and mandatory, we believe, even if the analyst has been able to view the groups personally and take notes. Anyone responsible for full analysis must have the opportunity to listen again to the session at leisure, especially to the rich and complexed sections requiring careful interpretation."* [244]

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243. When conducting focus group sessions it is important to think carefully about the appropriate strategy for setting and maintaining the group agenda. Usually the choice is between the 'tunnel' and the 'funnel' approaches. In the funnel approach the moderator initiates discussion by outlining a topic in its broadest sense and then gradually introducing narrower and narrower issues. This produces quite an orderly and predictable approach to issues. Often, when the research is being paid for by an external stake-holder, such as a drug company, it is easier to demonstrate that the relevant issues have been covered.

Personal experience, however, has demonstrated that the tunnel approach, whilst higher risk, produces more robust and three-dimensional results. In this process, one begins a discussion by presenting broad questions and then permitting participants to take the discussion wherever they choose to take it. This assists with the development of a kind of mind map, revealing the impact of the interpretations of participants on the process.

As Goldman, AE and McDonald, SS note, allowing free form to focus group activities involves a higher element of risk: one has no certainty as to where the process may go. This approach provides to participants a strong message that what **they** really think is important and that the moderator is not attempting to influence their responses by closely directing the process. See *The Group Depth Interview: Principles and Practice*, Englewood Cliffs, NJ, Prentice Hall, 1987 at pages 95-96.

244. ibid at page 54

Accordingly, the first two aborted focus groups were opened with a request for permission to tape record the proceedings. The strength of the objection was very surprising and, in several cases, participants said they would leave if the recorder were turned on.

Such a response had not been anticipated and no consideration had been given as to how it should be handled - indeed, on both occasions it generated a lively discussion before the focus group began. It shed new light on the diffidence people have in expressing opinions about matters which might reflect on their jobs, their employers, the educational institution they attend, their teachers and their existing personal or professional relationships. It was also quite apparent that a number of the strong feelings existed as a result of promises of confidentiality, which had been made in the past in other contexts and then not honoured, with the result that participants had been identified to their embarrassment and sometimes to their detriment.

Professional market researchers usually work with participants who are paid to attend, given other benefits and who attend at a venue where there are formal audio and video recording processes, sometimes even two-way mirrors. These were luxuries that were not available in these circumstances and, to continue with the research project, there was an immediate need to make sensible compromises that could be justified without affecting the integrity of the data. Certainly audio tape recordings of the group sessions would have been the best option. This dilemma was discussed with other professionals who have themselves undertaken significant research. Group participants were also asked for suggestions as to how to overcome the problem.

Dr Meltz (at that time head of postgraduate studies at UTS) was consulted on this matter because of the importance of ensuring a proper course was followed. He reminded the author that respecting the privacy and wishes of research subjects was the key element in the ethical standards required of doctoral candidates.

As a result the procedures described in Chapter 3 were developed. The issue of confidentiality was raised at the beginning of every session and each group determined the level of confidentiality it required. This ranged from accepting a personal undertaking of confidentiality from the author to an agreement under which the author provided a draft of the focus group notes to the group for its approval before inclusion in the thesis. No session was tape recorded. Participants' answers to the question: '*what are the main elements of lawyers' work*?' were recorded by the author on butchers paper

or whiteboard or on a notepad which was then shown to the group to confirm the accuracy of the notes made. The same occurred with the summary of the characteristics of lawyers in negotiation.

In further review of this process, Dr Meltz stated that he had no concerns. Further discussion with his successor, Professor Sam Blay, also confirmed that this process was considered acceptable.

In each group meeting, the goal of the author was to be as inconspicuous as possible so as to avoid the temptation to take control of or otherwise inappropriately influence the outcome. Chapter 3 describes the efforts made to establish a balance between structure and consistency on the one hand and valid, uninfluenced group process on the other.

In the end, after reviewing the records of the group sessions captured in this way, it appears that this extra discipline did bring great value to the process. Rather than relying on personal interpretations of what people said during the session, clear confirmation from participants was obtained, before they left, of where the session had led and what the key outcomes were. Accordingly, there appears to be a continuous objectivity in the process which might not have been achieved if the record of the proceedings were reliant on the author's personal interpretations.

5.5 Focus group outcomes

Detailed summaries of the focus groups conducted (excluding the aborted first and second groups) appear as Appendix 1. A close scrutiny of the observations made by focus group participants allows some common themes about lawyers and their conduct whilst negotiating to be identified.

5.5.1 Elements of a good outcome to a negotiation

There are many common themes running through the focus group sessions and the continuing re-enforcement of these common themes adds to the impact and power of the data. During each of the group sessions, comments were made about what members considered to be a good outcome to a negotiation. This was not posed as a formal question but the topic nevertheless arose repeatedly in the conversations.

Accordingly these comments were recorded. The following elements appeared to the members of the focus groups to represent a good outcome to a negotiation:

- communicating effectively with all the parties to the process;
- ensuring that each party is better off than if there were no negotiation;
- getting better than your bottom line and more;
- being able to work together to devise a creative solution;
- being able to walk away if necessary without destroying the relationship; and
- to ensure that each party is happy and can deal with the other party again.

All of the focus groups conducted had no difficulty in concluding that negotiation is an activity conducted by lawyers as part of the day-to-day conduct of their practices. It was clear they saw no value in discussing this issue and they wanted to move on to more contentious matters. Accordingly, further time will not be devoted to this issue.

5.5.2 The characteristics of lawyers in negotiation

A review of the focus group outcomes reveals a number of themes. The most consistent of these (that is, characteristics which were identified by five focus groups or more) have been extracted as the ten most commonly identified characteristics of lawyers in negotiation. These are as follows:

(i) Lawyers have poor communication skills

This characteristic was a theme which appeared and re-appeared and has several strands to it. First, the language of lawyers is seen to be formal and complex with emphasis on written, precise material[245] which can be found to be overwhelming by the uninitiated. Lawyers fail to demonstrate active listening and make assumptions as to what is best for clients rather than listening and questioning what is in their clients' interests. Lawyers are seen to communicate best with other lawyers who perhaps have the same view of the world and share a common preference for a particular communication style.

> *"Lawyers aren't good communicators. I have been working with the HR Manager in one law firm to develop a program on managing client*

245. There are, of course, very good reasons for this, not the least of which are (a) the need for precision in a field fraught with fine distinctions and (b) the increasing need for lawyers to protect themselves from and defend themselves in the event of negligence claims brought by their own clients. Recent high profile litigation such as by the NRMA against its former lawyers over the expression 'free shares' has served to sharpen lawyers' awareness of these risks. See NRMA & Ors v Morgan & Ors [1999] NSWSC 407 and [2000] NSWCA 374. The point made in the focus groups, however, is that this characteristic is perceived as a negative in terms of the way lawyers negotiate.

complaints. I was astonished to hear her say that the most serious problem they have is that when lawyers get a complaint they often deal with it by not replying. They have one partner who had a complaint result in disciplinary proceedings because first he didn't respond to all the client's requests for an explanation (made over many months) and lots of letters and then he didn't respond when the Legal Services Commissioner contacted him either. Finally he had to go and face the music but by then any chance of resolving things amicably was long gone.... And I think to myself perhaps these really intelligent, well educated people won't communicate and negotiate even when it is obviously sensible and useful because they like being in charge - in control - and they hate having to explain themselves. They think that amounts to giving up their status and authority!"[246]

"In all this discussion I do think we need to be fair. I agree that lawyers are hopeless at communication in the way we mean it but we should acknowledge that they do have good technical skills. It is a very competitive industry and they have to work hard to make it. I think they probably negotiate pretty well with one another. You know there are rules and language and procedures and everything and that works well. I am sure they find negotiating with one another OK - it is just that they haven't a clue how to negotiate with other people - including clients - and they don't really enjoy the interaction or find it valuable."[247]

"I'm not sure if lawyers really understand how ordinary people experience things. The kinds of questions they ask and the language they use doesn't always seem to be good for communication. They seem to want to get their point across but they don't always seem to be very good at listening to what is being said."[248]

Sixteen focus groups, namely focus groups 2, 5, 6, 7, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 and 24, identified and commented on this characteristic.

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246. Focus group 7

247. Focus group 7

248. Focus group 4

(ii) Lawyers are positional negotiators:[249]- they pass up the opportunity to negotiate when it would be useful and they are not committed to the early resolution of claims

When the focus group summaries were first completed and the characteristics identified, this item was recorded as three different characteristics. On reflection and further analysis of the focus group discussions, the similarity between these elements justifies their reclassification as a single characteristic described in a variety of ways.

A number of texts assert that negotiations in which all parties achieve the best outcome (often referred to as a win/win outcome) are those in which the interests of the parties are identified and satisfied.

In the simplest terms, positions are what people say they want. Fisher and Ury remind us that many of us tend to fall into the trap of assuming that, because the positions that each of us take are not compatible, the interests which underlie them will be incompatible also:

> *"In many negotiations, however, a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed."* [250]

Interests are the needs and concerns which underlie positions - so positions are revealed by the '*what do you want*?' question and interests by the '*what are your reasons for wanting that*?' or '*why*?' question. Many who work with lawyers regularly continue to observe the difficulty they experience in moving from '*what*' to '*why*'. Part of this, of course, is explained by the fact that the legal system, by continually defining and reassigning the boundaries of justiciable causes of action, tells parties what are the rights and obligations about which they may fight, to which alone the Court will pay attention.

Procedural rules also require the 'fight' to be conducted in a particular way. The form of pleadings, for example, which is intended to clarify with precision the

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249. The difference between positions and interests is a theme which runs through a number of negotiation texts including Acland, AF *A Sudden Outbreak of Common Sense- Managing Conflict Through Mediation*, London, Hutchison Business Books Limited, 1990, De Bono, E *Conflicts - A better Way to Resolve Them* op. cit., Fisher, R and Ury, W *Getting to Yes – Negotiating Agreement Without Giving In* op.cit.

250. Fisher, R and Ury, W ibid at page 43

issues for judicial determination, necessarily requires parties to state their positions. Thus the focus of litigation is on the issues that need to be resolved by the decision which the judge imposes on the parties and which determines which party is right and which is wrong according to law. In consequence of this sovereign function of the Court to determine rights and obligations, the Court has no interest in and does not offer a forum for the identification and satisfaction of the parties' underlying interests. Inevitably only win/lose resolutions occur.

Parties in litigation are thus required to conduct a dispute over what they want because the process is not designed to enable them to find creative options by which their interests may be met.[251] Lawyers as a profession have centuries of experience, tradition and legal education in the conduct of this necessarily positional form of dispute resolution and only very recent experience, virtually no tradition and scarcely any education in the alternative means of dispute resolution designed to achieve agreed outcomes. It is not surprising that lawyers are perceived as positional. Appropriate though such an approach to disputes may be in litigation, numerous participants in the focus groups identified the positional behaviour of lawyers as an impediment to negotiation.

These same participants also noted that the tendency to be positional bargainers went hand in hand with a pattern of passing up the opportunity to negotiate when it would be useful. Participants recognised that this often meant that by the time there was settlement talk, parties had developed hard positions from which they were much less likely to budge.

Focus group participants, such as in focus group 15 (drawn from the litigation area of a major insurance company), extrapolated this further to conclude that the positional bargaining came from the enjoyment of the skirmish and was evidence of a lack of commitment to the early resolution of claims. There is evidence of this concern on a much broader scale. For example, during 2000, three major insurance companies, which issued invitations to tender for the provision of legal services, required participating law firms to provide details of how they would demonstrate a commitment to the early resolution of claims.

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251. One way in which some lawyers, trained in negotiation and mediation techniques, have been of great assistance to their clients since the acceptance in Australia of alternative methods of dispute resolution has been to encourage them to attempt consensual processes either before commencing litigation or after the litigation is on foot. Sometimes the clarification of the issues in litigation helps the parties reach an agreed solution.

Each of the companies, when questioned, confirmed that this requirement flowed from their assessment that lawyers lacked this commitment.[252]

> *"It's really not true to talk about lawyers in the negotiating role because if we're honest, lawyers only negotiate with you when there is no other option. They'd much rather* ***tell*** *us what to do or better still send us a memo to avoid any contact altogether.*
>
> *The lawyers really don't care what we think or what we want. We are there to come running when they snap their fingers and they really prefer situations where things are not negotiable."*[253]
>
> *"I have worked in several other law firms and although the personalities are different, basically lawyers seem to behave the same wherever they are. The most disappointing part is that they don't really see negotiation and communication as vital tools for everyday life."*[254]
>
> *"There are two things to pay attention to when you want to negotiate with a lawyer. First they will never come to the table as their first choice. Their preference is to avoid things altogether or, if pushed, to play hardball. So getting them to the table is really hard."*[255]
>
> *"If negotiation is such a great tool, why don't more lawyers use it!"*[256]
>
> *"Yes, I'd have to agree with you. I do a lot of arbitration work in the building industry and I'm constantly amazed at the matters that come before me where clearly the parties should have been talking about resolving things from day 1. But the lawyers haven't been encouraging it. In fact, despite all the talk about ADR and how it provides great opportunity for the creative resolution of disputes, I don't think lawyers* ***want*** *to resolve claims early. They seem to me to be the ones most suspicious of ADR.*
>
> *I think that's why there have been opportunities for many non-lawyers to break into the mediation field."*[257]

Eighteen focus groups, namely focus groups 1, 2, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22 and 24, identified and commented on this characteristic.

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252. Confidentiality agreements prevent the names of the insurance companies from being revealed. As a consultant to tendering firms, the author was a participant in the questioning process which produced the information that each of the companies considered that without coercion from clients, lawyers lacked a commitment to the early resolution of claims.

253. Focus group 5

254. Focus group 5

255. Focus group 9

256. Focus group 15

257. Focus group 24

(iii) Lawyers are committed to a good outcome for their clients

Throughout a number of focus groups, members expressed a concern that the qualitative research should produce a balanced outcome. Many participants cautioned against getting caught up in a game of 'lawyer-bashing', which was not constructive or accurate.

A comment which was made quite regularly was that it is commonplace to find the media encouraging us all to see lawyers as greedy parasites driven by a desire to get rich on our misfortunes. Group members were keen to distance themselves from this view and commented on the dedication of lawyers to getting a good outcome for their clients. They felt the real problem was that lawyers were such poor communicators that they often were not aware of what the client saw as a good outcome and they pursued a path which represented the lawyers' own assumptions of what a good outcome would be.

> *"I think the first thing to say is that lawyers are very dedicated to getting what they see is a good result for their clients. I know they are a group everyone loves to hate but from my experience they really are committed to doing the best for you."*[258]

> *"If we're going to be fair we should acknowledge that lawyers do a very good job at the things they're supposed to be doing - being lawyers. They have terrific technical skills - they are very focussed. All the things clients retain them to do. It's just that anything that requires a bit of the human touch they are hopeless at."*[259]

> *"If we are balanced about it, it's not all negative. When there is a big, serious fight, you want a blood and guts lawyer in there fighting for you. They've got the discipline and the nerve for a big fight and they enjoy it. It is bad news for us. So we should all stick to what we do best. I'll stay out of their courtroom and they can stay away from my negotiation table."*[260]

> *"I think we need to be careful to be balanced about this because there is a lot of very good advice we depend on them for. We need to give them credit for the fact that they are a really dedicated bunch and they do go all out to be responsive and keep us happy."*[261]

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258. Focus group 12
259. Focus group 16
260. Focus group 17
261. Focus group 18

"Well I work in a state government department and I have had quite a lot of interaction with lawyers over the years - and I agree we need to be balanced. I mean if I'm in really, really serious trouble then the lawyers are probably amongst the first people I'd turn to."[262]

Five focus groups, namely focus groups 12, 16, 17, 23 and 24, identified and commented on this characteristic.

(iv) Power and control are important to lawyers

Numbers of focus group participants reported that their experience of lawyers' negotiating behaviour was that lawyers behaved as if taking control of the process was important to them. For clients who are experienced in the use of lawyers and in transactions involving them, this appeared to impede the working relationship. Commercial clients particularly seem interested in 'partnering' with their lawyers and being their peers and colleagues rather than being controlled and directed by them.

"...when you do get them to the table - they will need to feel in control. They have this superior/power thing. You need to let them think that they have won - that it was all their idea. And whenever you report the outcome of that negotiation, you always give the lawyer the credit for all the good ideas. Never negotiate with a lawyer if you want recognition. You'll be squashed!"[263]

"I think they are very territorial. It's like they have to p...s in every corner of the room and take charge before they can sit down to talk."[264]

"And they do forget it's not their deal - they do try to take over. You couldn't really say they are team spirited. I get the feeling they think we are a bunch of sub-intelligent cowboys who run terrible business risks and only stay out of gaol because some lawyer on a white horse rides up and rescues us."[265]

Thirteen focus groups, namely focus groups 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 18, 20 and 23, identified and commented on this characteristic.

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262. Focus group 24
263. Focus group 9
264. Focus group 10
265. Focus group 20

(v) Lawyers give little or no attention to identifying, developing and building a good working relationship

As Fisher and Brown remind us:

> *"at the outset, we need to clarify what we mean by a 'good' relationship. What each of us wants from a relationship varies greatly. But whether I hope through my relationship with you to gain love, money, security, or something else, we are bound to face conflicting interests, perceptions, and values. Differences are bound to arise. And we will not get what we want unless we can handle these differences. In each of our relationships, whether between individuals, businesses, religious groups, or governments, we should seek to establish and maintain those qualities that will make it a 'good working' relationship - one that is able to deal well with differences."*[266]

It seems that it is important to those negotiating with lawyers that the lawyers invest in developing a good working relationship with them.

> *"I have some clients where the relationship really works well but overall I get the message that the lawyers I work with don't place any value on having a good working relationship with me. I mean, I'll kill myself for my clients - I'm in business for the long term and I invest a lot in making relationships work. But lawyers have this power thing and behave as if they are a bit above that or that we are a bit beneath them. I have no trouble with getting along with the IT Managers or the General Managers - but the lawyers are another matter. I see the lawyers treating their own people the way they treat me so I know I am not imagining it."*[267]

> *"I was surprised to find partnerships so political and bitchy. Perhaps it was just a feature of the two large firms I worked in - maybe smaller firms don't behave like this. But I did find it surprising. They didn't have very healthy working relationships with each other and they would say some pretty amazing thing to the staff which seemed very indiscreet when they were talking about their fellow partners."*[268]

> *"They all talk about relationships but they don't really pay attention to their clients. There is an arrogance about them. They do think they are better than everyone else."*[269]

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266. Fisher, R and Brown, S *Getting Together - Building Relationships As We Negotiate*, New York, Penguin Books, 1989 at page XIII

267. Focus group 8

268. Focus group 11

269. Focus group 16

"Lawyers do have very dysfunctional relationships. Not just in negotiation but in everything. Our printers and our external marketing consultants, our web designers - they all hate the meetings they have with us if the Partners are there. They get treated very badly by the lawyers who seem to enjoy being very difficult and stirring things up."[270]

"And for all their efforts of building good relationships with us, lawyers aren't in the relationship business. Intimacy horrifies them - I think they would rather put their fingers down their throats than have the kind of relationships with their clients that we do."[271]

"We used a lawyer when we sold our business recently. It was a very efficient transaction and the lawyer knew exactly what he was doing. He obviously had a series of set letters that he used in these circumstances and they seemed to work quite well. The only complaint I have is that the lawyer didn't really want to take any responsibility for what was happening in the transaction, and where the relationship between us and the purchaser of the business got a bit sticky, the lawyer was suddenly not around. If negotiation is really part of a lawyer's work, I would have expected the lawyer to play some role in facilitating the relationship between us. It was left to the business agent to get us both together and resolve the problem in a down-to-earth way. Once this was fixed the lawyer was very happy to be back in the transaction. Apart from this, the transaction went very smoothly and I was very happy with the lawyer's work."[272]

This comment by focus group participants seems to be a corollary to item (iv) above which identifies the lawyers' need for power and control.[273]

Nineteen focus groups, namely focus groups 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 22, 23 and 24, identified and commented on this characteristic.

(vi) Lawyers see the issue of risk management differently from their clients

This was a characteristic identified by focus groups containing clients. The clients observed that their lawyers were more concerned about making a mistake or exposing themselves to professional risk than about anything else. The clients

270. Focus group 16

271. Focus group 21

272. Focus group 2

273. It was interesting to note that the greatest degree of satisfaction with working relationships expressed during the focus groups was made in reference to female to female negotiations. The author has not dealt with this in the text, since it is her view that the focus groups did not provide enough data regarding this to allow it to be raised other than anecdotally.

saw that the lawyers were managing their own risks rather than paying their attention to the clients' risk.[274]

The commercial clients expressed it simply. It is the role of the lawyer to identify and warn of the consequences of risk. It is for the clients, however, to determine what their risk appetite and tolerance is in any particular transaction. Lawyers do not have the commercial nous or business experience to take this decision. Accordingly, it is not proper for lawyers to impose a zero risk environment on their clients.

There was a continuing theme that the lawyers' wish to protect themselves from risk was distracting and disappointing for clients.

> *"It really annoys me how conservative lawyers are in 'protecting their arse' - I think it's time they realised that they would be much more valuable if their bums were on the line as much as mine. They seem to jump at shadows and want to withdraw from the deal the minute they feel at risk. I want them to understand what it feels like to carry and manage the level of risk that I do but I haven't managed to get them to that point yet."*[275]

> *"The lawyers think we take big risks and they are very critical of us for not bringing them in earlier, but they are really the last people you want at the negotiation table. It's a pity they don't listen to us when they raise this issue with us - if they would be a bit more respectful of our business nous and experience we could probably be more of a team.*
>
> *I've had a lot of experience as a practising lawyer and I must say that I find it strange that some young kid with a year's experience can give me a lecture about our exposure to risk. Perhaps I have changed now I'm not practising - I'm sure I was never quite so arrogant."*[276]

> *"We go into a deal like this very carefully. We know the business well and we have analysed the risks thoroughly; but the lawyers take quite a different view of the risks - they want us to have an agreement that covers every petty risk they can think of. It's not a very helpful approach really - not very business like."*[277]

> *"I think lawyers get really hooked up on making sure the deal is 100% no risk. But risk is just a part of business life. I'm happy for some lawyer to*

274. As previously mentioned, lawyers have good reason to take steps to protect themselves. However, the perception of focus group participants is that service to the client is less important than self-protection.

275. Focus group 3

276. Focus group 13

277. Focus group 14

confirm my judgement about what the risks are but then it's my decision. Of course I'm not going to take the risk of doing something illegal - that will come back to bite me and the company - but there are lots of other risks I will take because of my experience and judgement about the people I'm dealing with."[278]

"So to some extent we will still be seen as 'nay-sayers'. We have to do it. Compliance is a really serious issue these days and if we let them, some of these guys would still be doing deals with secret commissions and dodgy pricing policies. We have to protect them from themselves in an environment that is very tough."[279]

In fairness to lawyers, they are operating today in an environment in which Law Societies and professional indemnity insurers are devoting more energy and resources than ever before to alerting lawyers to their need for the most closely monitored risk management procedures. For example, entitlement to a full practising certificate (that is, the right to practise as a principal) in New South Wales requires evidence of appropriate risk management training. The increase in professional negligence claims by clients against their lawyers has contributed to this environment. This heightened awareness by lawyers of their risks and the consequences to them must be expected to result in more risk-averse behaviour among lawyers being translated into clients' transactions. The challenge to lawyers is to avoid being perceived to have greater concern about protecting themselves than their clients. This is clearly an area requiring further attention in terms of how matters of risk are communicated to clients.

Eight focus groups, namely focus groups 1, 2, 3, 13, 14, 17, 19 and 21, identified and commented on this characteristic.

(vii) Lawyers have a pattern of argument and dispute - they tend to fight about everything

This is a theme for both private and commercial clients who made numbers of observations about lawyers turning simple negotiations into major disputes over matters which the parties did not see to be particularly important. This may be a failure of judgement on the lawyers' part or it may be a failure by the lawyers in the communication process to explain to the clients the significance of the matter

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278. Focus group 17

279. Focus group 23

in dispute.[280] [281] This comment, variations of which were noted throughout a number of focus groups, is at odds with comments made by staff in law firms who report a 'peace at any price' working environment in which conflict and disagreement are never addressed and where there is no acceptable forum in which staff and proprietors can resolve their difficulties.

> *"If we followed the strict legal advice at all times and handled the negotiations the way our lawyers advise us, we would never keep any staff. So I think I would say that lawyers have difficulty balancing the strict letter of the law with business expediency. They just don't get it and sometimes I wonder what the negotiations they have with their own staff are like."*[282]

> *"I really don't think lawyers are good negotiators at all. I feel that when there's a lawyer acting for me, that it's just one more person I have to fight with in the whole process. Lawyers don't listen, aren't interested and just want things to be over. They seem to have led very sheltered lives and have a very different view of the world from me. I don't feel they are connected to real life at all."*[283]

> *"There have been times when I've deliberately excluded my lawyers from the negotiations or required them to take a back seat because I knew that if I didn't restrain them they'd go for the jugular and everything would be lost. It is great to have lawyers who will fight if they need to but I find them all too ready to get sucked into the adversarial way of doing things even when this doesn't produce the results we want."*[284]

> *"We have quite a number of employed solicitors and I need to spend quite a bit of my time trying to identify problems that are occurring between the lawyers and negotiating their resolution. This is very difficult because while lawyers seem very happy to fight in court and to argue with lawyers in other firms, they seem to hate dealing with internal conflicts. So they never deal with things between themselves and I have*

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280. This may be a facet of the risk management issue and also linked to the comments in item (viii) regarding a lack of understanding about matters that are really important and the matters the client is happy to ignore.

281. Some days after the completion of one of the focus groups a member of the focus group telephoned the author to say that he had been talking over the outcome of the focus group with his wife and reflecting on the fact that his experience was that lawyers turned small issues into big arguments. His wife was in the process of reading the latest book by Deborah Tannen, which had a particular chapter in it about lawyers' behaviour. He sent me a copy of the relevant passage, which includes a case study, which is reproduced in Appendix 4. The key extract from the passage reads:

> *"for my book* Talking from 9 to 5, *I spent time in Companies observing people, interviewing them, and having individuals tape-record their conversations when I wasn't there. The Companies.... were all happy to proceed on the basis of our verbal agreement on certain ground rules.... in several other Companies, however, the people with whom I came to a verbal agreement turned the matter over to Attorneys to draw up a contract stating what we had agreed to. In no case where the matter was referred to Attorneys were we able to come up with an agreement to work together."*

Tannen, D *The Argument Culture - Changing The Way We Argue And Debate*, London, Virago Press, 1998 at page 142

282. Focus group 1

283. Focus group 2

284. Focus group 3

to step in constantly to set up communications to fix things. Otherwise they just pretend there is no problem when they are in public and in private they gossip and complain about each other in quite a destructive way."[285]

"I see lawyers interacting with their staff and their clients all the time and I must say I think they are terrible negotiators. I am sure when they are in court and all dressed up and following pretty strict rules they do OK but in ordinary interaction they are terrible. They use jargon and behave quite dismissively of people and their ideas. They are used to being in charge and being agreed with. They don't want to negotiate - they want to be right!"[286]

"I've never had any experience like that but I do notice that there are times when we have a legal problem when I think we should go in and negotiate but our lawyers try to talk me out of it. I often get advised to 'tough it out' or 'call their bluff' or 'wait and let's see if they're really serious' - and when you're dealing with someone like a regulator who has the power to take a very big stick to your business, then I'd rather sit down early and see if things can be resolved. I think there are lots of opportunities for early resolution of problems by negotiation or some kind of ADR process that the lawyers don't really take advantage of. They leave things far too late to start talking about settlement and resolution. Often by then there is no trust or the relationship has taken such a beating it is hard to get it back on track."[287]

"I don't know if it's born or made in us but there is that argumentative streak. A number of our clients in their feedback sessions have talked about big negotiations where the lawyers were arguing point after point with each other the whole time. What the clients were saying was that it wasn't just the major problem areas that the lawyers were having a go at ... they were squabbling about everything — and since the lawyers didn't always know what was a deal breaker and what wasn't then the arguments were quite often over really trivial issues. The clients saw that as a big weakness and they said it meant they thought hard about including lawyers in their business negotiations because lawyers tended to argue rather than to negotiate. They also said that the fault finding and focus on the negatives also meant that they saw lawyers as people who got in the way of doing a deal."[288]

It is possible, of course, that lawyers managing the affairs of their clients and acting as their advocates and sponsors behave differently during this process of negotiation from the way in which they behave when they are conducting

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285. Focus group 6

286. Focus group 7

287. Focus group 18

288. Focus group 22

negotiations on their own behalf. The significance of this characteristic grows when considered together with the positional bargaining characteristic described in (ii) above. Characteristics (ii) and (vii) do indeed seem to be two faces of the one behaviour. When combined, they add to the power of the observations that lawyers would rather fight than talk; bring an adversarial approach to their clients' transactions and resort to negotiation when all else has failed (and when positions are deeply entrenched) rather than as an early, creative problem-solving tool.

Fourteen focus groups, namely focus groups 1, 2, 3, 6, 7, 11, 14, 15, 16, 17, 18, 20, 21 and 22, identified and commented on this characteristic.

(viii) Lawyers do not bring a strategic approach to the work they do

More than half the focus groups noted that lawyers focus on the micro not the macro. When added to (ii) and (vii) above, this means, for clients, that lawyers do not understand what is a really important issue in a transaction and what is a simple detail; what can be given away at the table and what must be protected at all costs - and without the ability to distinguish, and with poor communication and listening skills, this means that, not knowing what really matters and what is trivial, lawyers fight about everything.

> *"...when the transaction or difficulty is finished they don't initiate ideas about the processes or policies that might help prevent such a problem from arising in the future. It's as if they are only thinking in terms of what's happening today and they are not thinking about things that would be really valuable to me, like how can I plan the ongoing success of my business unit."*[289]

> *"Lawyers have this really annoying habit of choosing form over substance. When the deal was finally negotiated and we had a firm agreement, the lawyers who had done the negotiation brought in others from their firms to help them with the complex drafting. It was a nightmare. Suddenly this really creative, life-saving deal we were all really delighted with began to fall apart in front of our eyes."*[290]

> *"I don't like the assumptions that lawyers make when they are negotiating with me. They assume that I am out to make a killing and that I am really going to rip them off. This seems to lead to very aggressive behaviour which I actually find quite offensive. They can be*

289. Focus group 2

290. Focus group 3

quite bullying I find. It takes a lot of experience not to be intimidated by the way they talk. They will impose all sorts of conditions and requirements on you - just when you think you have met their terms they want another piece of information. I'm in this business for the long term. I want good relationships with my customers. I want them to come back to me for their next upgrade and I want to use their site to make other sales. They don't see any of that. They don't think about business deals in that way. And any concession I give them they seem to see as evidence that I have lots more left in the kitty to bargain with. It's really a very naive approach to business and not very constructive."[291]

"I find it very hard to get their attention. They are really short-term thinkers. I can't get them to look into the distance and see what is coming and prepare for it. So I can jump up and down and say that our debtors have blown out to 150 days and they will look at me blankly or be too busy to see me. Apart from the Managing Partner, no-one at a Partners' Meeting will agree to do anything different. But the minute the cash crisis is here because they wouldn't fix the debtors, they will jump on me from a great height because I let it happen. This short-term thinking seems to colour all their negotiations."[292]

"... and they are so finicky about the tiniest, most irrelevant things. They'll be more concerned about the size of the logo and its position on the page than they will be about the strength of the marketing message. I can talk till I'm blue in the face about what our brand should be and no-one will listen. But if I get the apostrophe wrong - watch out! They are really fine detail people - not interested in the big picture. If they were, they would be able to see and understand all the changes around them and engage in them sensibly."[293]

"You're right - it's a judgment thing I think. I don't think it is just being inexperienced because lots of lawyers do it. Just because they are very experienced lawyers doesn't mean they have business judgement. They see a range of problems and they don't know which ones matter and which ones don't so they make a fuss about them all."[294]

This is very serious for lawyers who want to be consulted regularly and early in their clients' transactions rather than just being brought in at the end to do the paperwork. For the commercial and corporate clients consulted in the focus groups, this characteristic was a clear bar to the greater involvement of lawyers in their businesses.

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291. Focus group 8
292. Focus group 9
293. Focus group 16
294. Focus group 19

This characteristic may also be closely related to the fact that attention to detail is a significant part of a lawyer's role, since lawyers will bear the primary responsibility for transactions and the documentation which records them. This also ties in closely with the high scores for controlling behaviour (that is, attention to detail) discussed in Chapter 4 at Section 4.3.

Eleven focus groups, namely focus groups 1, 2, 3, 8, 9, 12, 14, 16, 19, 20 and 22, identified and commented on this characteristic.

(ix) Lawyer to lawyer negotiation can give the appearance of 'clubbishness'

'The inner circle', 'the club', 'the gentlemen's club' as it was variously called, were expressions used to describe a feeling of exclusion by focus group participants where lawyer-to-lawyer negotiation was observed. Qualified lawyers who are not practising in the private profession but are working as corporate counsel also reported this kind of clannish behaviour.

> *"I haven't seen a lot of lawyers doing negotiation but when I come to think of it, a lot of what they were doing in court was negotiating with the magistrate or the lawyer on the other side or with witnesses they wanted to bring around to their way of seeing things. I agree with the power thing. It does seem like a bit of a closed shop or a club to me. The lawyers and the magistrates all seem to know each other and they have a sort of language of their own. You feel a bit excluded from things and sometimes you wonder if they are speaking in a kind of secret language."*[295]

> *"They are really sure that being a lawyer sets them apart from the rest of us. Their language makes this very plain. They tend to call me and my staff 'non-professional staff' which is a bit of a joke really - I have better tertiary qualifications than most of them! The lawyers club is very much alive and well and it is very excluding. It means they don't get the best out of us because they don't negotiate with us as equals."*[296]

> *"I hate putting people in pigeonholes but lawyers really do have a 'lawyers' way' of doing things that can be very difficult for non-lawyers to deal with. They are a bit like a secret society and until you get a chance to learn some of the rules they operate by, you are at a real disadvantage."*[297]

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295. Focus group 4

296. Focus group 6

297. Focus group 9

> *"Well I think the first thing we see, and we are seeing it in the way our negotiations are stalled now, is that lawyers tend to have a culture that is very excluding. They have been negotiating with us as if the merger is giving up the crown jewels and you can be sure when we are merged they will want everything to be their way. I think all the different qualifications and services our business provides make us very diverse and very accommodating whereas the lawyers seem to value and preserve some kind of model of the exclusive gentleman's club - their stand on women partners is a good example."*[298]

> *"Lawyers have a relationship with each other which is like a club. Anyone who is not in the club is automatically excluded. I think they negotiate well with each other because they see each other as equals who are worthy of the effort required to negotiate."*[299]

Twelve focus groups, namely focus groups 3, 5, 6, 7, 9, 10, 12, 14, 17, 20, 21 and 24, identified and commented on this characteristic.

In fairness to lawyers, whilst not disputing that these experiences occur, these comments may also be a fair description of what might be a lay experience of observing negotiations between a range of technical specialists such as engineers, accountants and doctors, all of whom have particular language, operational processes and methods of problem solving from which the lay person may feel excluded. This is certainly one of the themes of the Karpin Report - a study of the effectiveness of management practices in Australia undertaken in 1994. The report noted the difficulty in:

> *"managing the transition from specialist [technical lawyer] to manager [managing client relationships and managing client projects]. It is possibly one of the most significant moves [a technician] makes in their company... but least supported in terms of advice, training and support."*[300]

(x) Lawyers are 'deal-breakers' not 'deal-makers'

This has been treated as a separate characteristic although in the focus group discussions it was described alongside the characteristics of not being strategic thinkers and of imposing zero risk environments on clients.

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298. Focus group 10

299. Focus group 15

300. Karpin, D (Chair) *Enterprising Nation: Industry Taskforce on Leadership and Management Skills* op.cit. at page 129 and see Volume 1 generally.

Focus group participants, particularly sophisticated commercial clients, spoke with frustration of the lawyers' habit of interpreting the client's question of 'what do you think of this?' as 'what's wrong with this?' It appears that a continuing block to the early involvement of lawyers in commercial negotiations is that the commercial parties see them as 'can't do' people.

> *"The lawyers have it in their hands to ruin things. If they choose to posture or get side-tracked by some old grievance they want to pursue, things can really go off the rails."*[301]

> *"Most of us have found that lawyers are great deal breakers unless you keep them on a tight leash. If you let them get a look in early on they can kill the deal stone dead and you can never resurrect it. They have minds made for detail and they hate agreements in principle. They want to document everything in the finest detail so that nothing can go wrong."*[302]

> *"I agree - lawyers really are 'can't do' people - they focus on small problems and fine details. Sometimes it seems like they are single-mindedly out to wreck the deal."*[303]

> *"I have a lot of difficulty trying to make the lawyers understand what I am trying to do. We are in a very tough market at the moment. There is great price competition. I've got to meet and exceed pretty tough quotas and that means return business. I need strong relationships with the companies I supply to. My experience is that when we bring the lawyers into the negotiation they really don't know how to negotiate. They want to write long letters of advice that never get to the point and they don't want to put the time into getting to know the people we're dealing with. Yet the people make the deal. I've been saved quite a few times when the competition was really strong because my guy I supply knows me and knows I would deliver on time and in good order and I wouldn't whinge or complain over any default notices for him."*[304]

> *"Well we do have a reputation for being 'can't do' people. It is a very common phrase people use about lawyers. I'm not sure that I ever operated like that but I do see it quite often among our panel firms. And the young secondee I've got at present, she does tend to do it. I can see with her it's lack of experience. She can't tell what's a big problem and what's inconsequential so she worries about them all. I couldn't let her go to a meeting of division heads on her own."*[305]

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301. Focus group 3
302. Focus group 13
303. Focus group 17
304. Focus group 17
305. Focus group 19

"The greatest problem for us is that, if we'd let them, they'd all be deal killers. They love finding a problem. They do seem to feel they've achieved some kind of real success if they discover a fatal flaw in the deal. They see any level of risk as unacceptable - they are utterly hooked on a no risk situation and they think their clients should be too. It takes a lot of energy to keep them on track and not let them give in to this instinct. We have to keep reminding them that the clients want the deal - that their job is to find a way to solve problems not to get caught up in them."[306]

"We make it plain to the lawyers when they are wining and dining us. If they want business from us they have to be 'can do' people. I don't mean bending the rules - it's not in anyone's interests to do that - I mean not letting something trivial ruin a deal. They have to have a sense of perspective and remember they are there acting on behalf of the client. They need to be making the process painless and simple for the client - not blocking the transaction with some legal mumbo jumbo that no-one understands and isn't important anyway."[307]

Nine focus groups, namely focus groups 3, 12, 13, 16, 17, 19, 20, 21 and 23, identified and commented on this characteristic.

In the last ten years the author has undertaken five major reviews of the delivery of legal services by in-house legal departments (both government and commercial) and has reviewed the outcomes of hundreds of client satisfaction surveys. One of the most consistent responses from clients (asked what improvements lawyers could make to the delivery of legal services) is that lawyers need to learn to be facilitators and creative problem solvers rather than impediments. Clients find it tedious that they manage to do deals despite their lawyers rather than in collaboration with them.

5.5.3 Some general comments about focus group outcomes

In the eyes of their clients and other non-lawyers, lawyers manifest behaviour more consistent with the distributive than with the cooperative or principled theories of negotiation. This does not necessarily contradict the conclusions of Williams and Schneider that 60% of lawyers negotiate in accordance with the cooperative theory of negotiation because clients' and other non-lawyers' perceptions of lawyers in negotiations may differ from the perceptions lawyers hold of their peers. Indeed, clients'

306. Focus group 21

307. Focus group 21

and other non-lawyers' perception of clubbishness amongst lawyers points to such an explanation.

Despite behaviour consistent with the distributive theory, the experience of the cohort with and for which lawyers negotiate may be more readily explained by behavioural theory than by negotiation theory:

> *"For a plethora of reasons, people rely on their behavioural "intuition" to make decisions rather than following rational prescriptions."* [308]

It is important to be balanced about the focus group outcomes. The focus groups reveal that there are many very satisfactory working relationships between lawyers and their clients and there are many examples of things which lawyers do well. Lawyers certainly deserve credit for this and are to be encouraged for accomplishing these effective outcomes.

It is, however, particularly important to pay attention to negative perceptions expressed in focus group discussions. Whether those negative perceptions be accurate or not, lawyers would do well to recognise that they are genuinely held perceptions. Accordingly, it is better for lawyers to put energy into learning from those perceptions as a means to improving client satisfaction, rather than investing energy in the temptation to be defensive and to harbour feelings of unfairness. There are numerous examples of other data which have been collected which reflect the same concerns. As has already been noted, poor communication skills, which tops the list above, is reported by LawCover as being the principal cause of claims in 50% of cases. A copy of the chart which demonstrates this is reproduced with the permission of LawCover in Chapter 2.

Ms Margaret Conners, Manager, Risk Management Services of LawCover (the role she occupied at the time of the author's interview with her), who has spent considerable energy working to minimise the causes of claims against solicitors, expresses the view that:

> *"practitioners who have poorly developed negotiation skills are those who are more likely to constitute professional negligence statistics in LawCover."*

and that:

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308 Raiffa, H *Negotiation Analysis, The Science and Art of Collaborative Decision Making*, op. cit. at page 33

> *"Lawyers with good negotiation skills [representing lawyers against whom claims have been made] will always get a better outcome for their [lawyer] clients with LawCover."*

LawCover has made a significant investment in ensuring its people are highly trained negotiators and this is a reflection of the view that:

> *"having good negotiation skills (which includes effective communication) is the thing that is likely to have the most positive impact on the resolution of LawCover claims."*[309]

Lawyers have been given, and accept willingly, responsibility for maintaining and developing the rule of law and its proper application to citizens, businesses and government. It is a significant task which requires close attention to legislation, case law and the documents used to regulate a range of activities of day-to-day life. It is not surprising, then, that all of a lawyer's training and sense of responsibility continually emphasise that negotiations be conducted in a formal way and be documented in language which is precise and grammatical. This is the logical extension of justice being done and being seen to be done. For justice to be seen to be done, it must be recorded thoroughly and precisely. This is the model of communication which, through years of study and practice, is deeply ingrained in all lawyers.

Given this background, it is unsurprising that lawyers also bring this approach to the process of communication with their clients. As is shown in greater depth in Chapter 6, it is not currently seen as a prime role of law schools in this country to develop in law students skills necessary for negotiation such as active listening.

Chapter 6 does demonstrate that some law schools are turning their attention to the 'soft' skills. However, where available, these are primarily electives. Other than in a very small number of Universities, 'soft' skills are not included in compulsory subjects and do not form an integral part of the curriculum. This is despite the fact that those engaged in the academic study of communication and in the provision of commercial training in communication constantly remind us that those with whom people seek to communicate pay most attention to how they behave, rather than to what they say or write:

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309. These quotes made with the permission of Ms Conners from an interview with the author on October 28, 1998.

> *"Communication in [negotiation] entails multiple factors, including verbal messages, non-verbal cheers, vocal overtones, information exchange, language, communication media, symbols, and meanings. Strategies and tactics of negotiating, for example, threats, demands and offers, are expressed through verbal messages, gestures and vocal overtones. Negotiators rely on both the content and the function of messages to provide information about proposals as well as reveal clues about their opponents' preferences and interests."*[310]

It is hoped that the continuing work of APLEC on the Competency Standards of Entry Level Lawyers, as described in Chapter 6, will pay increasing attention to the skills involved in communication and negotiation as prerequisites for commencement in legal practice.

Given the deficiency in lawyers' training in communication and given their responsibilities regarding the rule of law, it is also unsurprising that power and control are important to lawyers in the process. Nor is it surprising that personal risk management issues are so high in their minds. Lawyers' professional and business responsibilities have never been so great. Unlike other businesses which are able to gain the protection of limited liability available generally to corporations, lawyers retain an exposure which some might argue goes beyond their means. The schemes to limit the legal liability of lawyers and the legislation permitting the incorporation of legal practices[311] have not provided any significant relief from this.

Accordingly it would seem that the very things which direct and control lawyers' professional responsibilities are those which their clients find distracting and not constructive in lawyers' communication with them.

Some commentators suggest that the culture of argument and dispute may be ascribed to the adversarial system, which underlies much of the training and practice of lawyers' lives. Professor Carrie Menkel-Meadow, in particular, has been a long-term critic of the adversarial system, which in her view fails to serve well either the legal profession or its clients.[312] A theme in Menkel-Meadow's articles is that adversarial responses and instincts are so deep in lawyers that they bring them automatically into the negotiation process.

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310. see Putnam, LL and Roloff, ME Communication and Negotiation (Book Review) (1992) 20 *Sage Annual Reviews of Communications Research* at pages 3-4.

311. see, for example, Legal Profession (Incorporation of Legal Practices) Act 2000 (NSW), Legal Practice Act 1996 (Vic) Pt 10, Legal Practitioners (Incorporation) Act (NT), Legal Profession Act 1993 (Tas) and the 1996 and 2000 Solicitors Limitation of Liability Schemes, Law Society of New South Wales contained in the Professional Standards Act 1994 as amended in 1998.

312. see generally Menkel-Meadow, C, Towards Another View of Legal Negotiation: The Structure of Problem Solving op. cit. and also Menkel-Meadow, C, Lawyer Negotiations: Theories and Realities - What We Learn From Mediation op. cit.

Throughout her book, 'The Argument Culture: Changing the Way We Argue and Debate'[313], Deborah Tannen draws attention to the impact which the adversarial system has on the communication process:

> *"...an illustration in a book by communication theorists shows two people in a small sail boat, holding onto opposite ends of a rope attached to the mast, leaning in opposite directions. As one pulls toward one side of the boat, the other has to lean toward the other side to prevent the boat from capsizing. This prompts the first to lean farther out, and so on, until they are hanging dangerously over opposite edges of the boat. How much better, the authors suggest, for one to let up slightly. To keep the boat balanced, the other person will have to let up too, until both are sitting comfortably in the boat instead of hanging over its side. This image can be a model for change in settling legal disputes. Someone can let up a little instead of everyone getting more and more aggressive. How much safer we all will feel - and be - if we can sit comfortably in the legal boat instead of hanging precariously over its side.*
>
> *In a brief history of the adversary method, Stephan Landsman explains that in Northern Europe during the early Middle Ages "trial by battle" was standard legal procedure; the disputing parties, or "champion" they hired, did literal battle; the victor was then found to be right since divine intervention was believed to determine the outcome of the battle. We have come a long way since trial by battle, but the adversary system retains traces of this epic. When the goal is winning a fight, truth and justice are sometimes lost. Moving away from, or mitigating, the adversary system might take us closer to those goals. It might also restore citizens' faith and trust in our legal system."*[314]

In considering the views of Menkel-Meadow and Tannen, it is important to bear in mind that, no matter how prevalent alternative methods of dispute resolution may become, there will always be a need for society to provide a system (whether it be adversarial, inquisitorial or other) for resolving disputes between those not prepared to 'let up slightly', - who require a determination of rights and obligations according to law (and

313. Tannen, D *The Argument Culture - Changing The Way We Argue And Debate* op.cit. At page 71 Professor Tannen describes how she met Professor Menkel-Meadow to discuss the views expressed about the adversarial system, the way it inhibits a constructive approach to problem solving and how things might be different. Professor Tannen reports:-

"Professor Carrie Menkel-Meadow believes that the best hope is moving away from the adversary system and towards a problem-solving approach that takes into account disputants' underlying needs and how strongly they feel about them. For example, she shows, if two children are arguing over a piece of cake, it may seem self evident that the way to resolve the conflict is to cut the cake and give each child half. But this is not the best solution if one child likes the cake and the other likes the icing. In that case, they would do better with a Jack Sprat solution by which both could get all of the part he or she likes best.

The key to the success of such an approach is giving up the adversarial stance, which assumes that there is a single resource at issue, so either party's gain is the other party's loss. Menkel-Meadow points out that this understanding of compromise is fundamentally adversarial, based on the assumption that both parties will start out by demanding more than they really need of the disputed resource and then split the difference. In this spirit, a basic principle of negotiation is that lawyers should not reveal what their clients really want, because that is perceived as giving the other side too much power."

314. ibid at page 172.

which might, incidentally, clarify the law). Further, the 'without prejudice' rules already afford the very opportunities to '*let up*' or '*move away from the adversarial system*', which these commentators advocate.

It is submitted that one of the problems identified by the research conducted for the purposes of this thesis is that lawyers are not required to be trained in negotiation skills as a pre-requisite to entering practice, and they therefore bring to the process of negotiation an adversarial approach which is not perceived by their clients to be constructive. The need for change is not to the system of administering justice but to the flexibility and versatility of the individual members of the legal profession.

5.6 Other data

Since completing the focus group research the author has become aware of independent research conducted by Linda Julian of Julian Midwinter in 1999. This research was a national attitudinal study of insurers' satisfaction with their lawyers.

A copy of the study summary appears as Appendix 7.

This summary confirms some of the focus group findings noted above. In particular the insurers found that their lawyers most needed to improve:

- *"Pursuing of (sic) early resolution;*
- *Strategisation of cases; and*
- *Communication with claims officers..."*[315]

Immediately prior to the submission of this thesis, Julian Midwinter released the results of its 2003 survey. This is also reproduced at Annexure 7. The results appeared to differ from those of the earlier survey. Whilst early resolution of claims and poor strategisation continue to appear as requiring significant improvement, communication with claims officers no longer rates as an issue.

In an interview with the writer on Friday April 2nd 2004, Ms Julian explained the circumstances behind these data. She noted that the research she had undertaken in 1995, 1997 and 1999 contained serious criticisms of lawyers for their poor communication with claims officers. During that period, the insurance companies concerned had all undertaken at least one major tender which resulted in the shrinking

315. excerpt from 1999 Study: Insurers' Satisfaction With Lawyers - Summary Of Findings by Julian Midwinter & Associates Pty Ltd, reproduced with its consent.

of their panel of law firms. At the same time they had also introduced service level agreements setting strict guidelines for the standards required for the delivery of legal services. Ms Julian is of the view that the combination of these two factors has sent a very serious message to the current providers of legal services that their tenure on panels is dependent on their being prepared to make significant changes to the way in which they deliver services so as to be more 'user friendly' and to communicate more effectively. She sees this as an example of clients with substantial market power and high volumes of interaction with lawyers using their power to force changes in lawyers' behaviour.

This completes the discussion of the focus group research. Chapter 6 which follows contains an investigation into the training which Australian lawyers receive and discusses the current debate about what legal training should provide. It concludes with some suggestions regarding the direction of future training.

CHAPTER 6: THE TRAINING OF LAWYERS IN NEGOTIATION

6.1 Introduction

Chapter 5 provided objective data about the behavioural characteristics of lawyers which they bring with them to the process of negotiation. Two further areas require scrutiny in order to obtain a complete picture of the behaviour of lawyers in negotiation. The first is a review of the training lawyers receive, particularly negotiation training. The second is the collection and evaluation of data about how those for whom and with whom lawyers negotiate experience the process. This chapter analyses the training regime and demonstrates that during the training of lawyers, some attention is given to the teaching and learning of negotiation but it is not effective because it is not compulsory; the courses are of variable quality; there is tension between what Universities want to teach and what the profession values; there is unresolved debate within law schools about whether 'soft' skills such as negotiation are relevant to their task of providing legal training; and because training courses in 'soft' skills, such as negotiation, are expensive to run (since they are interactive, skills-based courses for which class sizes have to be restricted) compared with black letter law courses for which much larger classes are possible. In the environment of economic austerity in which Universities operate, there is understandable pressure to eliminate those courses which are the most expensive to deliver.

In the result, whilst some efforts are being made to teach negotiation skills to law students, it is not enough, it is not well directed and it does not create a commitment to continuous lifelong negotiation skills development.

As long ago as 1983, in seeking improved negotiation outcomes generally, Professor Bazerman called for the explicit development of a planned change effort to improve negotiators' judgment and the quality of their decision-making, requiring receptiveness to change; content to lead to the appropriate change and the incorporation of that change into the negotiator's repertoire so as to ensure the negotiator does not revert to past, comfortable cognitive strategies.[316]

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316 Bazerman, MH Negotiator Judgement, A Critical Look at Rationality Assumption op. cit. at pages 225-226

6.2 The recent history of the legal education debate

The question whether lawyers should be trained in negotiation and, if so, at what point in their development, is part of the wider debate about the training of lawyers generally.

The debate about how and where lawyers should be trained is longstanding. Professor Geoff Monahan and Senior Lecturer Bronwyn Olliffe, academics from the law school at the University of Technology, Sydney note that:

> *"Just like many other aspects in our nation's development, the Australian lawyer evolved more from tradition, reaction and compromise than from a cohesive and logical strategy."*[317]

The Journal of Professional Legal Education, June 1991 edition, provides a useful snapshot of the diversity of views in the debate. In this issue, Gerard Nash[318] poses the question 'Should Law Schools Produce Lawyers?'[319] In pursuing his argument that the role of the law school is to produce practitioners, Nash summarises his view as follows:

> *"Australian Law Schools have moved from basically practitioner oriented institutions to academic institutions, the staff of which has tended, at least in self-perception, to change from lawyers who happen to be academics, to academics who happen to be lawyers.*
>
> *The result has been to create a chasm between practice and theory which a student is expected to cross after graduation. It is time to close the gap to feed practical content back into the LL.B degree so that theory and practice are taught together. The degree should then become the only qualification required for admission to practice."*[320]

In making the distinction between how lawyers choose to apply their talents and how they are trained by law schools Nash makes the following three statements:

> *"(1) the primary function of Australian law schools is to produce lawyers;*
> *(2) a person who knows nothing of the practice of law is not a lawyer; and*

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317 Monahan G and Olliffe B Competency-Based Education and Training for Law Students, 2001 *University of Technology, Sydney, Law Review* UTSLR 14 1-26 at page 14

318 Currently a Queen's Counsel at the Victorian Bar and formerly Professor and Dean, Faculty of Law, Monash University. Nash's experience in the legal education field also includes time spent as a member of the (Victorian) Council of Legal Education, a member of the Legal Education Committee of the Law Council of Australia and a foundation member of the Leo Cussen Institute in Victoria.

319 Nash, G Should Law Schools Produce Lawyers (June 1991) Vol. 9, N0. 1 *The Journal of Professional Legal Education* 27-35

320 ibid at page 27

(3) the LL.B graduate should be an embryo lawyer, not an academic ovum awaiting fertilization in the test tube of experience."[321]

Nash was extremely critical of what he saw as the separation of practice from theory through the development of an academic profession:

> *"as a separate and distinct group of people, largely having different perspectives and different values from those of the practitioner. This has reduced the insight of law schooll (sic) and of law students into the nature of practice, and it has deprived the practitioner of the benefits of the more leisurely, more scholarly and less pragmatic analysis which could assist him in his day to day activities."*[322]

In Nash's view, the development of a significant body of full-time academics had created six identifiable effects:

> "*(a) the general scholarly content of law subjects has improved;*
> *(b) practical insight has disappeared from most law subjects;*
> *(c) most teachers have post-graduate qualifications from overseas universities;*
> *(d) most law teachers have little or no experience of practice;*
> *(e) the size of the legal academic community and the size of the staff of individual law schools is such as to provide a self-contained professional community separate and distinct from the practising profession; and*
> *(f) there has developed a tendency amongst university law teachers to under-estimate the importance of a knowledge of what happens in practice to an understanding of the meaning and impact of case law and statute."*

Nash's arguments continue to be relevant today. Applying his thinking about the development of an academic group, out of touch with the life of practice, may provide the reason why so few universities have chosen to incorporate practice skills into the undergraduate law degree.

In the same issue as Nash's article, Professor Simmonds[323] asks the question – 'What role does a Law School have in Legal Education?'[324] Simmonds takes quite a different view from Nash. He explains that:

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321 ibid at page 27

322 ibid at page 29

323 Foundation Professor of Law at Murdoch University, Western Australia

324 Simmonds R.L Legal Education of Future Professionals in a University (1991) 9 *Journal of Professional Legal Education* 37-43 at page 40

> *"the full-time legal educator takes over from the profession the task that the sheer numbers of students concerned, and the rate of change in the law, made it impossible for part-time instruction by practitioners to provide."*[325]

In developing his argument to justify professional legal education in a university setting he adds:

> *"In my view, professional legal education is justified as a university discipline to the extent of the quality and the quantity of research the staff of the law program produce. This is more than any other part of the justification for university-based professional legal education, such as law school's attention to effective and stimulating teaching of the sort universities are supposed to be about.*
>
> *Putting it slightly differently, law's best claim to status as a university discipline, and the best reason to locate a professional law school in a university, does not rest on what should be the school's commitment to teaching of the sort that raises good questions, rather than displays beautifully organized sets of answers. The law school's position rests on the school's research."*[326]

He concludes by seeking to strengthen his argument for the role of university law schools by adding the value of the ethical dimension which it provides to its students.

> *"A university can most usefully nourish future legal professionals because of the contribution it can make to that ethical dimension. That nourishment comes about because of the appreciation of the underlying issues of justice that a law school's commitment to the university's ethic of research can most usefully foster."*[327]

In his paper, Simmonds was (amongst other things) responding to comments made by the late Professor David Derham, the inaugural Dean of the Law School at Monash University. In his paper delivered to the first national conference on legal education[328] Professor Derham had initially posed the same question about what role the university should fulfil in its role as a legal educator and had used as his model the notion of the 'Master Practitioner' who embodied the best qualities of the practising lawyer.[329] However, despite the rigour of this debate, it is the third article in the same publication

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325 ibid at page 40

326 ibid at page 41

327 ibid at page 42

328 Derham D.P *An overview of Legal Education in Australia* Balmford R (ed) Legal Education in Australia: Proceedings of National Conference Sydney Australian Law Council Foundation 1976 Vol 1, 7-20

329 ibid at page 10

as the Nash and Simmonds work which has been taken up by legal educators and has become the focus of the tertiary legal education debate.

A former judge of the Supreme Court of Victoria, McGarvie was the Governor of Victoria at the time his article (which later became known as the McGarvie Report) was published and had chaired the Victorian Council of Legal Education (VCLE) since 1980. This Council, with the assistance of the Academic Course Appraisal Committee (ACAC), was empowered to determine the requirements of applicants seeking admission to the degree of Bachelor of Laws in Victoria.

It was McGarvie, through his VCLE role, who moved the debate from what should be the role of the university to what basic knowledge and skill should a graduate lawyer be able to demonstrate.

> *"An examination of the function of a degree involves looking at the first part only of the process of producing a lawyer. The typical lawyer develops legal knowledge from commencement at law school, progressively widening, deepening and improving its quality until retirement.*
>
> *The core subjects of the law degree of a university are those which its law school regards as essential legal knowledge for the type or types of graduate it aims to produce."*[330]

Although further elements of his paper went on to recommend a fundamental change of emphasis so as to take into account not only the skills required by 'basic lawyers'[331] but what he called 'system sustainers'[332] This notion extended his view of the role universities should discharge from researching and teaching the law as it is to '*researching and teaching directed to the law and the legal system as they are and as they ought to be if they are to achieve applied justice*'[333] McGarvie's work was very influential and moved the focus of the debate from the strategic issues about the role of the universities to the operational issues of content.

The debate about the role of universities in delivering legal education continues and the question remains unresolved. Indeed in some ways the debate has become more complex. Following the debate as it is played out in the pages of 'The Legal Education Review', the publication of the Australasian Law Teachers Association, it is apparent

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330 McGarvie R E The Function of a Degree: Core Subjects (1991) 9 *Journal of Professional Legal Education* 11-26

331 ibid at page 12

332 ibid at page 17

333 ibid at page 17

that not only have those engaged in the debate failed to reach agreement but that their disagreement extends to what the issues actually are. The ongoing dialogue appears regularly to frame and reframe the issues.

For some protagonists the question is '*what is the purpose of a law school education – is it training for skills or to provide an academic, doctrinal foundation*?' For others the question is '*what is the most useful training that can be provided as the foundation for the practice of law - skills or legal doctrine*?'

Chris Roper, Alliance Director, The College of Law Alliance, has been an observer and participant in this debate as part of the many influential positions he has held in professional legal training.[334] In an interview with the author[335] he noted that part of the difficulty in resolving the issues is that '*what is seen as the issues can change .... part of the reason the debate is still going on is that even the framework on which the issues are being debated is not agreed.*'

A final complication in the debate, in New South Wales at least, arises from the interaction of three factors, namely a proliferation of law schools seeking to differentiate their offerings; the interests of Practical Legal Training (PLT) providers and funding issues. Traditionally, law schools produced graduate lawyers who, prior to entitlement to admission to practise, undertook further PLT. Now, law schools such as the University of Technology Sydney and the University of Wollongong offer PLT within the LLB environment and under the HECS funding arrangements, which may be thought to offer financial, timing and efficiency benefits to law students seeking to qualify for admission to practise. This has created an environment of competition between law schools and PLT providers since the latter operate outside the HECS framework. Students who have not found a law firm employer willing to pay their PLT fees must consider funding in making their choice of PLT provider.

Issues of funding and 'marketing' have created what Monahan and Olliffe call an

> *'ever-changing partnership between law schools and practical legal training (PLT) providers (including providers of 'articles') in producing a pre-admission law graduate. This relationship needs reappraisal given the movement towards*

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334 Christopher Roper AM is the Director of The College of Law Alliance. From 1992 to 2000 he was the director of the Centre for Legal Education at Mallesons Stephen Jaques, Solicitors, Sydney; the Director of The College of Law, Sydney; and the Executive Director of the Leo Cussen Institute, Melbourne.

335 on November 20, 2003

the provision of legal skills tuition and assessment in law degrees and the overall cost of education.'[336]

They note that:

> *"Whatever the end result, the overlap issue needs to be addressed so that pre-education and training of law students is a cohesive and logical one. In other words, the mix (and/or integration) of traditional legal scholarship, legal skills and legal transactions needs to be clearly recognised."*[337]

This debate continues. Professor David Weisbrot, President of the Australian Law Reform Commission and former Dean of the Sydney Law School, stirred the debate in 1999 in Chapter 2 of the Law Reform Commission's Managing Justice Report,[338] which scrutinised the education, training and accountability of lawyers. In opening Law Week in May 2004, Professor Weisbrot reminded his audience that the Managing Justice Report had exposed the teaching of law to be too much 'chalk and talk':[339]

> *'Universities need to focus more on professional ethics, dispute resolution, negotiations, client interviewing, working with teams [and] having a greater identification with client interests... You'd be better off teaching them the people stuff and then teaching them how to do all the legal research they need to do to find the law in every particular context.'*[340]

6.3 Core Subjects

Appendix 2 identifies the 'core subjects' offered by every Australian law school.

The McGarvie Report[341] recommended the adoption nationally of core subjects to be prescribed by State Legal Practice Boards. Following this report, in April 1992 the Law Admissions Consultative Committee (LACC – commonly referred to as the Priestley Committee) made recommendations for uniform admission based upon defined areas of academic legal study. The eleven subjects which are known as the Priestley 11 are indicated by the LACC as the minimum subjects to be undertaken in the education of a

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336 Monahan G and Olliffe B Competency-Based Education and Training for Law Students op. cit. at page 1

337 ibid at page 9

338 see Australian Law Reform Commission *Managing Justice: A Review of the Federal Justice System* , Canberra, Australian Government Publishing Service, 2000 (Report No 89) which built on the work contained in its earlier work – see Australian Law Reform Commission *Review of the Adversarial System of Litigation: Rethinking Legal Education and Training,* Canberra, Australian Government Publishing Service, 1997 (Issues Paper 21) at page 51

339 see the report by Brendan O'Keefe in The Australian, Wednesday 19th May, 2004 at page 34

340 ibid at page 34

341. McGarvie, R E The Function of a Degree: Core Subjects op. cit.

lawyer. As a result of these recommendations they have been adopted by most jurisdictions in Australia including New South Wales.[342]

One would have expected this to result in the adoption by all Australian Universities of a single, consistent set of descriptors for core subjects. However, a survey by the author conducted by correspondence with various law schools has revealed that different language is used to describe subjects which students are required to undertake during their law degree. Whilst all Universities must provide the 'core' subjects for admission to a law degree identified in the McGarvie report, they have felt free to add their own additional, compulsory subjects, thereby creating differences between Universities as to the meaning of 'core subjects'.

For this reason, although the chart in Appendix 2 uses the heading 'core subjects', the content covers subjects which the University identifies as being both core subjects and compulsory subjects. Negotiation and communication are not required for Australian law students, other than in a handful of Universities. Bond University offers communication skills as a compulsory subject and it is taught in an experiential learning fashion. Flinders University offers the subject 'Resolving civil disputes (negotiation)'. This subject is taught more as a 'black letter' law subject within the context of civil litigation rather than as a skills-based course.

The University of Adelaide also requires the completion of negotiation and communication peripherally as part of the legal skills process and the University of Notre Dame includes alternative dispute resolution as a stand-alone subject covering both theory and practice. Although not apparent from the subject descriptions, the University of Western Sydney and the University of Newcastle have both adopted a teaching approach which incorporates the learning and practice of 'soft skills' into the delivery of all core subjects. Finally, the University of Wollongong requires completion of the communication skills subject, an experiential 'how to' program.

It will be seen from Appendix 2 that the information in the chart is not completely up to date. The composition, description and presentation of the syllabus is in a constant state of change for every University and the task of keeping the data completely current is beyond the resources of the author. Further the charts, compiled from University data, do not disclose that the content of each subject may vary widely even within a particular

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342 see Legal Practitioners Transitional Admission Rules 1994 Part 11 division 1 rule 94(1)

semester depending on the number of teachers and the flexibility permitted within the subject definition.

For example, the core subject of Litigation offered by the University of New South Wales in 2001 was delivered to eight different classes by eight different teachers. For some of these classes the author delivered a four-hour programme of her own devising, covering negotiation and dispute resolution. In some other classes, these elements were taught by the allocated lecturer and others did not have these elements taught formally at all. This is a matter entirely within the discretion and control of the particular lecturer. This is an example of what is happening throughout Australia and it is impossible to keep track of the detail.

Overall, the available data demonstrate that the subjects which are compulsory study for students in law schools at university emphasise 'black letter' law rather than the acquisition of the so called 'soft skills' such as negotiation and communication.

As Carr-Gregg noted:

> *"Law schools have largely left unaddressed many of the* ***skills*** *which practising lawyers, law teachers and students have consistently identified as areas of primary concern, including fact gathering and use; interpersonal skills involved in relationships with clients, lawyers and others; effective oral communication and legal drafting."*[343]

She also pointed out that the Pearce Committee:[344]

> *"included 'negotiating' and 'counselling' among the skills which it considered needed better development in law schools."*[345]

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343. Carr-Gregg, S Alternative Dispute Resolution in Practical Legal Training -Too Little, Too Late? (1992) 10 *Journal of Professional Legal Education* 23-41 at page 24

344. Professors Pearce, D, Campbell, E and Harding, D *Commonwealth Tertiary Education Commission, Australian Law Schools: A Summary,* Canberra, AGPS, 1986

345. Carr-Gregg, S Alternative Dispute Resolution in Practical Legal Training – Too Little, Too Late? op. cit. at page 25

6.4 Electives

Whilst most universities do not offer negotiation or its close relation, communication, as a compulsory subject, various law schools are now offering some kind of training in this field as an elective. The chart in Appendix 3 demonstrates that twenty-one Australian universities offer negotiation and/or communication training of some kind to undergraduate law students. However, the consequences of these subjects being offered as electives are that training is a matter of choice for the law student; the subjects may not be available to all students because skills-based learning requires smaller groups and so class sizes may be limited; they are more expensive to deliver and accordingly more of a drain on limited university funds; and because many universities restrict electives to students in the last years of their course, training may not be available to students in their early years of study when the learning might be more valuable.

The information in this chart has become a little dated since the research for this thesis was completed. A major update has not been undertaken. However there are significant indications that in New South Wales there has been little change. For example at the University of New South Wales, undergraduate lawyers' exposure to negotiation is via a one and a half hour session on communication, which is part of a core subject. In-depth exposure is obtained only through the elective of Dispute Resolution (taught by the author). Although this is the second most popular elective offered by the university, it is still an elective provided to fewer than one hundred and twenty students each year.

6.5 Practical legal training

The work of the Pearce Committee also extended to the collection and analysis of data regarding the training offered by practical legal training courses. Whilst negotiation is a subject of some skills training, for example in the PLT Course offered by the College of Law in New South Wales, the survey undertaken by the Pearce Committee found:

> *"44% and 48% respectively believed that legal practice courses did not contribute in these areas."*[346]

Carr-Gregg mentions that the Nelson Survey[347] recorded that most graduates acknowledged their use of negotiating skills and that:

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346. ibid at page 25

"it was one of the worst performed skills at 3 months."[348]

Following the Pearce Report there has been considerable activity both nationally and internationally, reviewing the vocational preparation of legal practitioners. In the United Kingdom, the work culminated in the Report of the Training Committee of the Law Society of England and Wales.[349] The American Bar Association produced the McCrate Report in 1992[350] and Canada produced the Spence Report in 1993.[351] In Australia, the Pearce Report in 1986 was followed by the Nelson Report in 1988[352], the McGarvie Report in 1991 and the Wade Report in 1996.[353]

These reports comprised a body of work which examined what law schools and other training bodies should do to prepare lawyers for practice. They created a momentum which culminated in the delivery of the 1997 Standards produced by the Australasian Professional Legal Education Council (APLEC).[354] APLEC has continued to work on these standards. On 16th February, 2000 it met with the Law Admissions Consultative Committee in a joint working session. In November 2000 APLEC completed the process begun in the joint session. Entitled 'Competency Standards for Entry Level Lawyers', it was released to stakeholders on 11th December, 2000. Endorsed by APLEC, these standards were supported by the Council of Australian Law Deans and were accepted by the Legal Practitioners Admission Board at its meeting in August 2001.[355] The new standards are radically different. In a major change, the standards have moved to a competency focus requiring lawyers to meet competency standards in three areas namely skills, practice areas and values.

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347. Nelson, J assisted by Stewart, PE *New Directions in Practical Legal Training in the 90s: An Evaluation of the Curriculum of the College of Law's PLT Course and its Relevance to Student's Work Experiences in Practice* op. cit. at pages 95 - 97

348. Carr-Gregg, S Alternative Dispute Resolution in Practical Legal Training – Too Little, Too Late? op. cit. at page 28

349. Law Society of England and Wales *Training Tomorrow's Solicitors: Proposals for Change to the Education of Trainee Solicitors* 1990 A Consultation Paper by the Training Committee of the Law Society (unpublished)

350. Report of the Task Force on Law Schools and the Profession: *Narrowing the Gap; Legal Education and Professional Development - An Educational Continuum* July 1992

351. Law Society of Upper Canada *Spence Committee Report* (unpublished) 1989

352. Nelson, J assisted by Stewart, PE *New Directions in Practical Legal Training in the 90s: An Evaluation of the Curriculum of the College of Law's PLT Course and its Relevance to Student's Work Experience in Practice* op. cit.

353. Unpublished paper - Standing Committee of Attorneys General: Report on Legal Profession Admission Requirements 1996

354. Standards for the Vocational Preparation of Australian Legal Practitioners

355 see generally Monahan G and Olliffe B Competency-Based Education and Training for Law Students op. cit.

Within the skills area are four identified skills, namely lawyers' skills (including communication and negotiation); problem solving; work management and business skills; and trust and office accounting.

It is the lawyers' skills section which is relevant to this thesis.
The standard provides that:

> *"An entry level lawyer should be able to demonstrate oral communication skills, legal interviewing skills, advocacy skills, negotiation and dispute resolution skills, and letter writing and legal drafting skills."*[356]

The standard specifies performance criteria for each of these elements. The communication and negotiation elements are presented as follows:

> *"1. Communicating effectively*
> *The lawyer has competently:*
> - *identified the purpose of a proposed communication, the most effective way of making it, an appropriate communication strategy, and the content of the proposed communication.*
> - *presented thoughts, advice, and submissions in a logical, clear, succinct and persuasive manner, having regard to the circumstances and the person or forum to whom the communication is made.*
> - *identified and appropriately dealt with verbal, non-verbal and cross-cultural aspects of the proposed communication.*
> - *taken and follow-up action in accordance with good practice.....*
>
> *4. Negotiating settlements and agreements*
> *[The lawyer has competently]*
> - *prepared the client's case properly having regard to the circumstances and good practice.*
> - *identified the strategy and tactics to be used in negotiations and discussed them with and obtained approval from the client.*
> - *carried out the negotiations effectively having regard to the strategy and tactics adopted, the circumstances of the case and good practice.*
> - *documented any resolution as required by law or good practice and explained it to the client in a way the client can easily understand....."*[357]

It is too early to consider the impact these standards will have. The emphasis on skills rather than tasks is certainly a major step. On first reading, however, it seems that the weakness apparent in the standards is that each institution, while needing to demonstrate that it has met each element of the competency, will be left with the responsibility of

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356 ibid at page 16

357 ibid at page 16-17

deciding how it will interpret the elements of the core competencies. Undoubtedly significant individual interpretations will mean that, as with core subjects, the individual interpretation and content will produce significant variations. Nevertheless, it is certainly a good start.

6.6 Other issues

A further consideration is an issue of what else lawyers learn as part of the pre-admission training they receive. The Australian Law Reform Commission (ALRC) has made some reference to this in several of its publications. In 1997, in its issues paper entitled 'Review of the Adversarial system of litigation: Rethinking legal education and training' it posed the question *'Teaching an adversarial mind-set?'* [358]

In seeking to investigate the notion of the adversarial mind-set and 'thinking like a lawyer' it cites the views of a number of authors [359]who have suggested that:

> *"legal education may expressly or unconsciously teach an adversarial style of lawyering by*
> - *not providing a comparative perspective on the adversarial system by including study of other legal systems and dispute resolution processes*
> - *promoting a court-centred view of the legal system and thereby promoting the adversarial form of trial adopted in Australian courts*
> - *using casebooks and course content which focus on appellate and superior court decisions to teach legal principle*
> - *emphasising rules of law rather than issues of fact*
> - *encouraging mooting as a curricular or extra-curricular form of learning."* [360]

In seeking to provide balance to these views, the ALRC noted that:

> *"There are also indications that law students have very definite ideas about what being a lawyer means before they attend law school. There is strong anecdotal evidence that students' understanding of what it means to be a lawyer comes from other sources of influence: family, peer group, schooling and general community attitudes about lawyering transmitted through popular*

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358 Australian Law Reform Commission *Review of the Adversarial System of Litigation - Rethinking Legal Education and Training* op. cit. at page 51

359 for example Melstner M Feeling Like a Lawyer (1983) 33 *Journal of Legal Education* 624, Wade J, Legal Education in Australia – anomie, angst and excellence (1989) 39 *Australian Legal Education* 39

360 Australian Law Reform Commission *Review of the Adversarial System of Litigation – Rethinking Legal Education and Training* op. cit.at page 51

culture. It may be that an adversarial style of lawyering is something that students bring with them to their first class."[361]

In 2000, the ALRC in its report 'Managing Justice: a review of the federal civil justice system' responded to terms of reference which required it to review '*the significance of legal education and professional training to the legal process'*. In Chapter 2 of its report the ALRC appeared to endorse the impact of legal education on lawyers in ways significantly beyond doctrine and technical skills.[362]

The discussion of the question posed by the ALRC continues – are the law schools teaching an adversarial mind-set? Another possibility is that the behavioural preferences of would-be lawyers means that they self-select into law schools with a pre-disposition to the kinds of behaviours which clients report in Chapter 5 of this thesis, which are then reinforced by an adversarial mind-set or other orientations transmitted through their legal education. This is clearly a matter which warrants further research.

6.7 Other training

The training which lawyers receive once they leave university and enter legal practice also requires consideration. Herminia Ibarra, a prominent American educator specialising in the development of professionals, has undertaken considerable research into the post-admission needs of lawyers, and has traced the development of professionals from neophyte to the most senior members of the profession.

Ibarra notes that developing the commitment of professionals to continuous lifelong learning requires a more thoroughgoing approach to learning than most professional environments generally provide. It is her view that if professionals (such as lawyers) need to develop and enhance the skills necessary to discharge their professional duties effectively, their firms must develop far more effective programs to accomplish this. She suggests that, whilst it is not the current approach of most professional service firms, the best training outcome is achieved when firms actively encourage and assist junior professionals successfully to negotiate 'the leap' to successful senior

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361 ibid.

362 see Australian Law Reform Commission *Managing Justice: A Review of the Federal Justice System* op. cit Chapter 2 Education Training and Accountability

professionals. By identifying how their professionals learn, firms can adopt the most appropriate method of sponsoring this development:

> *"Understanding how junior professionals learn to make the leap to senior positions is useful both for those experiencing the transition and those in a position to help. Indeed, an appreciation of the learning process can help members of both groups more effectively manage what is often a bewildering and frustrating experience. ....A better understanding of this crucial transition can also help senior members of the organization come to grips with their role in it. Knowing how the learning process is experienced by junior professionals can help senior members determine when - and how - to intervene as coaches. It should also prompt some organizations to consider their career development practices and how they manage the metamorphosis that virtually every professional must experience."*[363]

Knowing when and how to intervene as coaches requires the appointment of coaches and mentors to be done well by law firms. At present this is not the case. International practice management consultant David Maister, formerly a professor in the Business School at Harvard, makes this point regularly at training programs which he offers privately to law firms and in his public programs. In Sydney in August 2000 at his public program to promote his publication 'The Trusted Advisor'[364], he noted his experience that professional service firms in general and law firms in particular have difficulty developing good role models of coaching and mentoring. He believes this is because the role is rarely defined clearly; those appointed to the role are often appointed without proper training or evaluation of their skills base; the role usually has to be discharged on top of a full fee budget so it receives no priority; and firms do not behave as if coaching and mentoring are skills that rank equally with attracting clients or generating large fees. Accordingly few people volunteer to act as coaches and mentors.

Neville Carter, the Managing Director of the College of Law (a training provider to lawyers in New South Wales, Queensland and Victoria) shares Ibarra's views, whilst noting that law firms currently do not provide the kind of 'whole of professional life' approach that she advocates.[365] His view is that law firms generally do not invest resources in identifying the most appropriate method of sponsoring the development of their professionals.

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363. Ibarra, H *Taking the Leap: How Professionals Advance*, Boston Graduate School of Business Administration, Harvard University, 1998 at page 2. This paper was prepared in draft and circulated privately. It is cited with the consent of its author.

364. Maister, DH, Green, CH and Galford, RM *The Trusted Advisor*, New York, NY, The Free Press, 2000

365 Mr Carter made these comments in a conversation with the author during a meeting they both attended on December 16th, 2003.

Nevertheless, whatever opportunities lawyers have or do not have to participate in negotiation training during their university years, all Australian lawyers have access to high quality negotiation training during their careers.

For example, the Harvard Negotiation Program, perhaps the best-known and highly respected program of negotiation for lawyers, is widely available in Australia. Versions of it are available privately and through universities such as Macquarie, UTS, UWS and Bond. High quality dispute resolution training is also widely available at universities and through bodies such as LEADR[366] and ACDC.[367]

6.8 General conclusions on current training

Despite the incontrovertible fact that negotiation is something lawyers do constantly as part of their day-to-day professional activities, what the research reveals is that current compulsory requirements of Australian law schools, with their strong focus on 'black letter' law, fail to cater for the significance of negotiation as a basic lawyering skill and fail to ensure that lawyers develop and enhance their negotiation skills in a formal sense throughout undergraduate training.

Based on the analysis of Carr-Gregg and of the Nelson Report, it seems that the negotiation training that is available via PLT and as part of broader CLE offerings is, in Carr-Gregg's words, *'too little, too late'*. The efforts of APLEC and the good intentions of the various PLT courses have not overcome this problem.

This is despite the continuing acknowledgement by lawyers themselves that there is a range of skills which are primary in the effective management of their firms, managing their own work, delivering unique legal functions, dealing with clients and dealing with others. This is demonstrated clearly in the Lawyers' Skills Identification Model developed from a survey of practising lawyers delivered at the 1996 APLEC Conference:[368]

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366. Formerly an acronym for Lawyers Engaged in Alternative Dispute Resolution and now an acronym for Leading Edge Alternative Dispute Resolvers, reflecting the fact that membership is no longer restricted to lawyers, as had been the case since its inception in 1988.

367. Australian Commercial Disputes Centre

368. Lawyers Need More Skills Than Just Legal Skills, *Australian Professional Legal Education Council (APLEC) 1996 Conference Papers*, Volume 1 at pages 293 and 294 International conference at the College of Law in Sydney, NSW 4-8 September, 1996 entitled "Skills Development for Tomorrow's Lawyers: Needs and Strategies"

Skill Category Role	Managing the Firm	Managing own work	Unique Legal Functions	Dealing with Clients	Dealing with Others	Dealing with Home
PRIMARY SKILLS						
Thinking	T	T	T	T	T	T
Integrative/Holistic	T	T	T	T	T	T
Decision Making	T	T	T	T	T	T
Problem Solving	T	T	T	T	T	T
Planning	T	T	T	T	T	T
Learning	T	T	T	T	T	T
Change	T	T	T	T	T	T
Communication	T	T	T	T	T	T
Other Primary	?	?	?	?	?	?
MANAGING IN PRACTICE SKILLS						
Teams	T			T	T	?
Leadership	T			?	T	?
Supervision/Delegation	T			?	?	?
Training Others	T				T	
Other Interpersonal	T			T	T	T
Practice Development	T			T	T	
TQM/Client Centred	T	T		T	T	
Office Management	T	T				
Time Management	T	T		T	T	T
Risk Management	T	T	T	T	T	
Case/Matter Mgmt		T				
Stress Management	T	T		T	T	T
Billing/Costing	T	T		T		

Skill Category Role	Managing the Firm	Managing own work	Unique Legal Functions	Dealing with Clients	Dealing with Others	Dealing with Home
Technology	T	T	T			
Practice Context	?	?	?	T	T	
Other	?	?	?	?	?	?
TECHNICAL LEGAL SKILLS						
Interviewing etc.	T			T	?	T
Drafting			T	T		T
Research			T			T
Advocacy			T			T
Negotiation	T		T	T	T	T
ADR			T	T		T
Other Technical			T			?

T means the skill is potentially important in this role.
? means the skill might be of use in this role.
NB with respect to each skill, remember the experience/expertise dimension.

Extracted from *Lawyers Need More Skills Than Just Legal Skills* taken from APLEC Conference Papers Vol 1 at pages 293-294, International Conference at the College of Law in Sydney, NSW, Australia 4-8 Sept., 1996 Skills Development for Tomorrow's Lawyers: Needs and Strategies

This table identifies a range of primary skills which lawyers regard as most significant across key practice areas. Communication, a most significant element of negotiation, is identified as being significant in every category.

6.9 The possible direction of future training

Since the research for this thesis was completed, another project has commenced which may make a significant contribution to the field of lawyer-client communication. Commenced in 1998, the Effective Lawyer-Client Communication project (ELCC) was formulated as a pilot program. Its goals were published in 1999.[369]

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369 see Cunningham CD 'Evaluating Effective Lawyer-Client Communication: An International Project Moving from Research to Reform 67 *Fordham Law Review* 1959 (April 1999) reproduced at www.law.gsu.edu/ccunningham/

The pilot was led by Professor Clark Cunningham, then a member of the faculty of Washington University. Cunningham and his colleague Bonnie McElhinny had produced a working paper in 1995 in which they described the design of a research project which would scrutinise the communication between lawyers and their clients.[370] Continuing to develop the ideas in the initial working paper, Cunningham was influenced by the research undertaken in the United States hospital system. He noted:

> *"According to a 1995 survey, virtually all hospitals in the United States have some kind of patient satisfaction measurement in place. In 1994, the United States Joint Commission on Accreditation of Healthcare Organisations...included in its standards a requirement to ensure that an organization 'gathers, assesses, and takes appropriate action on information that relates to the patient's satisfaction with the services provided'....Doctor-patient communication is treated as an important subject for both pedagogy and empirical research in medical education.....*
>
> *Evaluation of the quality of lawyer-client relations in general and communications in particular, is at a far less developed stage than the comparable work in the medical field. Among the notable developments in the medical field are: (1) the insights of sociolinguistic analysis are used to design survey methodology and, in turn, survey results are used to validate or critique the work of sociolinguists; (2) standardized methods are widely used for both sociolinguistic analysis and survey methodology; (3) the insights and methods of this combined research has penetrated deeply into both education and professional practice; (4) empirical measurement of satisfaction is valued and often required by regulators and funders; and (5) databases are formed that permit comparing performance with other professionals.*
>
> *Although the legal field has made some recent progress, to date the various elements that have come together in the medical field have generally remained separate in the legal field. The body of literature using sociolinguistics and other social science approaches to study lawyer-client communications is growing, but that research is almost never correlated with survey data from clients. Client satisfaction surveys, largely conducted by the organized bar and agencies rather than by academics, are not designed using insights from the sociolinguistic research. The topic of lawyer-client communication is increasingly addressed in a proliferation of legal education texts, but the pedagogy is not informed by the social science research."*[371]

In making this analysis Cunningham was also influenced by other research which was being undertaken around the world at the same time. He noted Professor Avrom Sherr's

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370 see Cunningham CD and McElhunny B.S, Taking it to the Streets: Putting Discourse Analysis to the Service of a Public Defender's Office, (1995) 2 *Clinical L.Rev.* 285

371 Cunningham, CD Evaluating Effective Lawyer Client Communication op. cit. at page 2

research on lawyer-client communication, presented at the 1996 APLEC Conference.[372] Professor Sherr, a pioneer of clinical legal education in the United Kingdom, is currently the first appointee to the Woolf Chair in Legal Education at the Institute of Advanced Legal Studies, University of London. His paper provided an extensive analysis of over one hundred client interviews. Sherr's particular interest was in the satisfaction of publicly funded litigants, as a result of which Cunningham noted that '*empirical measurement of satisfaction is valued and often required by regulators and funders*'.[373]

The same APLEC conference also received the work of Livingston Armitage, an Australian management consultant retained to investigate the role of specialist accreditation in enhancing client satisfaction.[374]

Drawing these strands together, Cunningham noted the disconnect between the increasing interest in studying lawyer-client communication and the training of lawyers:

> *"Neither the world of professional practice nor the public funders of legal services rely to any significant degree on either social science analysis or client surveys to retain and evaluate attorneys."*[375]

His proposed solution was a collaboration:

> *"The time is now ripe for leaders of the legal profession, legal educators, and social scientists to combine forces to develop a shared approach to evaluating and improving lawyer-client communication."*[376]

Following the publication of this working paper, Cunningham continued to develop and disseminate his ideas. This culminated in the creation of ELCC, initially as a collaboration between Washington University and the Centre for Legal Education in Australia. It now includes participants from the United States, South Africa, Scotland, Israel, India and the United Kingdom.

In describing the focus of ELCC in 2001,[377] Cunningham explained:

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372 Sherr, A *The Value of Experience in Legal Competence* 1996 1 Skills Development for Tomorrow's Lawyers: Needs and Strategies (Conference Papers) 133 Australasian Professional Legal Education Council

373 Cunningham, CD Evaluating Effective Lawyer Client Communication op. cit. at page 2

374 Armitage, L 'Client Satisfaction with Specialists' Services: Lessons for Legal Educators' 1996 1 Skills Development for Tomorrow's Lawyers: Needs and Strategies (Conference papers) 355 Australasian Professional Legal Education Council

375 Cunningham, CD Evaluating Effective Lawyer Client Communication op. cit. at page 2

376 ibid

> *"The failure of the legal profession to gather data about client satisfaction in a systematic way may be attributable to a widespread assumption among lawyers that clients care primarily about outcomes not process, an assumption inconsistent with growing evidence from social science research that the quality of lawyer-client communication is an extremely important determinant of client satisfaction."*[378]

The research conducted for this thesis complements and confirms Cunningham's analysis of the client perspective.

At present the pilot is being undertaken at the Milton A. Kramer Law Clinic at Case Western Reserve University, with additional sites being sought. As at December 2003, no further information is available as to the outcome of the pilot but the questionnaires and processes may be downloaded from the ELCC website – www.ls.wustl.edu/Communication/.

If this project accomplishes its goals it will develop a methodology for research with broad application. It will lay the groundwork for standard client questionnaires which, in time, could lead to generally applicable benchmarks for what clients value in lawyer-client communication.

Professor Sherr has already been mentioned as an important influence on the ELCC Project. His work has been published in Australia[379] and he has an insider's knowledge of and interest in the legal education debate. His comments made in two different publications highlight the seriousness of this issue. In the first,[380] while noting that '*Legal Education is not a spectator sport'* Professor Sherr argues that:

> *"University Legal Education at a time of enormous change in the legal profession and in legal education itself may have lost its way."*[381]

Writing about a legal education system which shares many similarities with the circumstances described in this Chapter, Professor Sherr questions what direction

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377 see Cunningham, CD *The Client's Perspective on the Initial Interview: A Social Science Approach* reproduced at www.law.gsu.edu/ccunningham

378 ibid at page 2

379 see Sherr, A *The Value of Experience in Legal Competence* op. cit.

380 see Sherr, A *Legal Education, Legal Competence and Little Bo Peep* reproduced at www.ials.sas.ac.uk/research/woolf/inaugpub.htm

381 ibid at page 1

university legal education should be taking. He sees the practising profession becoming less relevant and proscriptive. This is certainly true of Australia. The combination of changes in the career aspirations of law graduates[382] away from conventional legal practice and the fact that from 2005 most practising lawyers in Australia will not be required to be a member of their professional association are key influences on this. One consequence of this identified by Professor Sherr is that:

> *"undergraduate legal education is beginning to look somewhat purposeless, or at least unclear of purpose. Little Bo Peep seems to have lost her sheep and does not know where to find them! Should the education of undergraduate lawyers be looking towards the rest of [academia] for guidance? Should they be looking to the discipline of education more generally for guidance? Will they best be able to provide guidance for themselves from within? Or is the profession still an important model, lodestar, provider of meaning and generator of purpose[?]"*[383]

In considering where the law schools should look for guidance, Professor Sherr considers the influences that might be adopted – from university teaching in general, from the vocational trainers and from the profession – and whilst acknowledging what each has to offer, argues that the university law schools first need to decide the overarching theme of their direction.

His suggested theme is legal competence.

> *"Competence ..... is useful because it has the ability to link all the different elements of legal education from the "nursery" stage of undergraduate legal education, onwards through the vocational stage and the post qualification stages. It is useful not only because it provides practical and intellectual coherence for an entire system, but also because it seems to transcend national and jurisdictional boundaries so as to allow easier transitions between, and harmonisations of, civil and common law approaches."*[384]

He challenges law schools to recognise that they need to understand what the concept of life-long learning for lawyers really means and to take a role in leading the future of legal education within a life-long model.

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382 as tracked, for example, by the Department of Employment, Education, Training and Youth Affairs in the 1998 research report of Australian Law Graduates' Career Destinations see www.dest.gov.au/archive/highered/eippibs/eip98-9/execsum.htm

383 Sherr, A *Legal Education, Legal Competence and Little Bo Peep* op. cit. at page 2

384 ibid at page 10

Professor Sherr advances these arguments in his subsequent work,[385] which considers how legal education '*should reorganise in view of the changes in the profession*'.[386] In this paper, he considers the various roles which modern day practice requires of a lawyer including draftsperson, information officer, specialist technician, advocate, manager and so on. He also notes some new sets of legal concepts arising from changes of law and policy, practice and procedure which may now need to be considered as forming part of the foundation of legal concepts which need to be studied. Finally he notes that the curriculum of the future will also need to take account of the tension between technical specialisation (and the boundaries this creates) and the contemporary requirements of clients for lawyers to take a broader view of transactions and outcomes.

He concludes:

> *"Changes within legal practice mirror changes within society. Professions are undergoing major changes in status, organisation, work patterns and work content. The nature of professions and professionalism is changing. Professions are not accorded the special status of untouchable occupational groups whose word is respected and whose competence is undoubted.... Legal education is far behind in contemplating what changes may be necessary to accommodate what is occurring in the outside world."*[387]

This is borne out in the Australian law schools. Appendix 6 indicates that whilst most Australian universities offer subjects such as civil litigation, evidence and procedure as compulsory requirements, few schools offer electives covering negotiation and communication. Indeed it is only a handful of universities such as Bond University, University of Newcastle, the University of Technology Sydney and the University of Western Sydney whose curricula continually reinforce the process of thinking outside conventional litigation and rights-based processes.

The author does not agree with Carr-Gregg that the economics of legal education mean that this kind of approach is impractical.[388] Having regard to the fact that poor communication with clients was the cause of 48% of claims against solicitors in the period 1987-1997 and has now risen to 50%, finding a way to do things differently and better is a matter of considerable urgency for that particular branch of the legal

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385 Sherr, A *Professional Work, Professional Careers and Legal Education: Educating the Lawyer for 2010* reproduced at www.ials.sas.ac.uk/research/woolf/lawyer2010.htm

386 ibid at page 1

387 ibid at page 11

388. ibid at page 26.

profession. Success in this endeavour is likely to be more cost effective and efficient for the whole community.

Good examples are the curriculum which has been developed at Bond University and the continuing efforts of universities such as UTS to spread the influence of subjects such as dispute resolution and negotiation in a way that influences students' curriculum choices. The Bachelor of Arts degree in Communications Management at UTS, for example, offers an excellent negotiation training program. It would not be a major step to develop a strategic liaison between the Arts and Law faculties so as to enhance and broaden the training offered to university law students.

This completes the analysis of the training in negotiation which Australian lawyers receive and the discussion of the debate about what legal training should provide. Chapter 7 draws together the themes of this thesis and presents four principal conclusions.

CHAPTER 7: CONCLUSIONS

7.1 Introduction

Chapter 1 of this thesis set the scene for the research undertaken by identifying negotiation as a key element of lawyers' work. It referred to negotiation as:

> *'an integral and basic part of every lawyer's work and a key element in the success or lack of success that all lawyers experience in their professional activities...'*[389]

It concluded by noting that there are few studies of lawyers in negotiation. Those studies leave unexplored the issue of how negotiations conducted by lawyers are perceived and evaluated by those for whom they are conducted.

Chapter 2 comprises the literature review. It first examined the history and development of negotiation theory and practice and then considered the role which negotiation plays in lawyers' work. It concluded that there is a considerable body of work available on the theory and practice of negotiation for negotiators in general and for lawyers in particular. There is also a smaller body of work which analyses and, in some cases, provides empirical evidence of the characteristics manifested by lawyers in negotiation. The literature review demonstrated that this evidence is limited to the perspective provided by peers and colleagues in the profession.

Chapter 3 outlined the Research Objectives and the Methodology and provided an explanation of how the qualitative and quantitative research was planned and implemented.

Chapter 4 presented the quantitative data derived from behavioural analysis. It explained the characteristics of the analytical tools and how these were used to identify the behavioural preferences of lawyers. By comparing the results for lawyers with the characteristics of various population samples, the Chapter identified the characteristics of the 'lawyer type', namely present focused (that is, having a focus on managing a particular project or a particular task in an operational sense rather than focusing on the future in terms of having a 'helicopter' view of life in which the big picture can be scrutinized - this is sometimes expressed as a micro rather than a macro approach to life and work, with a tendency to become lost in the details rather than being able to strike a balance between the detail and the big picture); having a strong sense of duty and

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389 see Chapter 1 at 1.1 supra

obligation, a strong sense of value for rules, systems, processes, boundaries and authority, with a preference for the status quo and a dislike for change; and having a focus on tasks rather than on people, with a preference for 'working' rather than 'talking'.

As a corollary to the behavioural research outlined in Chapter 4, Chapter 5 presented the qualitative data derived from focus group research. It explained how focus groups were selected, conducted and recorded and the challenges presented by the process.

Many participants had Australia-wide experience of lawyers negotiating. In light of this, it was initially considered that the conclusions drawn might be applied beyond New South Wales. However it is acknowledged that, without further research, this is not a proper conclusion.

A key objective of the research conducted for this thesis has been to identify factors which impede lawyers from operating as effectively as possible. Although the groups from which views were sought were identified and used in opportunistic circumstances, the only way to gather together most of the groups was in conjunction with other projects that were being pursued. Some groups of clients were being interviewed as part of a post mortem of a particular legal transaction that the parties had asked the author to conduct or permitted her to attend. This opportunistic element by which the groups were gathered does not detract from the validity of the data collected.

Maintaining the balance between structure and consistency on the one hand and valid, uninfluenced group process on the other needed individual attention in each focus group.
Imposing tight controls on the groups was not theoretically sound yet sufficient consistency between the groups was required to enable the data from all of them to be combined in a meaningful way. This problem was solved by developing three questions which were woven into most of the group processes namely:

- what are the main elements of lawyers' work?
- is negotiation part of lawyers' work? and
- what are the characteristics of how lawyers negotiate?

This provided a consistency and reliability to the qualitative research which would otherwise have been lacking.

As will be seen from the focus group summaries, the intent of the questions, if not their strict form, is nevertheless addressed consistently throughout the sessions and the data are remarkably cohesive and comparable.

Chapter 6 surveyed the training in negotiation which lawyers in Australia receive and discussed the current debate about what legal training should provide. It made some suggestions regarding the direction of future training.

The four principal conclusions contained in this Chapter bring together the themes of this thesis. As required by one of the external examiners, the section which contained recommendations for the future, arising from the research conclusions, has been removed.

7.2 Conclusions

The following conclusions may reasonably be drawn from the research conducted for this thesis (both primary and secondary and both qualitative and quantitative) and from the review of current training:

7.2.1 There is no clear relationship between negotiation theory and how lawyers negotiate

Negotiation theory suggests that negotiation behaviour generally is likely to be competitive, cooperative or problem-solving, as those terms are used in this field. The studies by Williams and Schneider suggest that the negotiation behaviour of lawyers is likely to be predominantly cooperative. There have been calls for empirical research in this area by Raiffa[390] and by Gilson and Mnookin[391].

The empirical research conducted for this thesis indicates that, in pursuing their commitment to obtaining a good outcome for their clients, lawyers manifest, in the eyes of their clients and other non-lawyers, behaviour more likely to impede than to promote a good outcome. In light of the cognitive limitations identified by Bazerman[392] that inhibit optimal implementation of prescriptive negotiation principles, it may not be appropriate to draw conclusions linking lawyers' negotiations to any particular

390 Raiffa, H, *Negotiation Analysis, The Science and Art of Collaborative Decision Making,* op.cit. at page 269

391 Gilson, RJ and Mnookin, RH Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation op. cit. at pages 564 - 566

392 Bazerman, MH Negotiator Judgement, A Critical Look at Rationality Assumption, op.cit. at pages 211-228. These limitations are set out in Chapter 2, section 2.1 above

negotiation theory. The experience of the cohort with and for which lawyers negotiate may be more readily explained by behavioural theory than by negotiation theory.

To the extent that lawyers' behaviour may be said to fit within any negotiation theory, it is more consistent with the competitive than with the cooperative or problem-solving theories of negotiation. This appears to contradict the predominant perception of lawyers by their peers as cooperative, as noted by Williams and Schneider.

Since there is no basis upon which to question the similar conclusions of the separate studies, 20 years apart, of Williams and Schneider; since their research and the research conducted for this thesis studied different cohorts; and since MBTI charts 1B, 4 and 5 in Chapter 4 do not suggest a significant difference between solicitors in private practice in New South Wales and the lawyers in those parts of the United States studied by Williams and Schneider, the most likely explanation for the apparent contradiction between their findings and the findings of the author's research is that a perception by clients and other non-lawyers that lawyers negotiate competitively is not inconsistent with a perception by lawyers that other lawyers behave cooperatively. This is supported by non-lawyers' perceptions of 'clubbishness' amongst lawyers.

7.2.2 Those for whom and with whom lawyers negotiate want better experiences from the process of negotiation and communication

The focus group research makes it plain that, in negotiation, lawyers demonstrate a range of behaviours which are perceived by those for whom and with whom they negotiate as creating impediments to a good outcome. Whilst those for whom lawyers negotiate acknowledge that lawyers desire for them good outcomes, they perceive that lawyers do not know what a good outcome for them means nor, in many instances, how to help them achieve it.

These perceptions present a serious challenge to the profession.

From the review of current training the conclusion may properly be drawn that, for most lawyers, whatever skills in negotiation they may be able to demonstrate are not the product of a consistent and well-resourced effort by universities and the providers of practical legal training courses to develop in them the kind of negotiation skills which are likely to enhance their delivery of legal services.

7.2.3 Although the behavioural preferences of lawyers contribute to their success in 'lawyering', they also contribute to their problems with relationships and communication, not only with their clients but with suppliers and their own staff.

The dominant ESTJ profile is likely to lead to negotiation behaviour which has four particular characteristics. It is likely to be task focused rather than relationship focused; concerned with detail, precision and form rather than strategic outcomes; focused on the present rather than the future; and reflective of an acceptance of and reliance on rules, systems and processes which encourage linear thinking and which discourage creative problem solving outside established precedent.

7.2.4 Training regimes are presently inadequate

At present, there is not a continuing, consistent undergraduate and postgraduate training regime to which all lawyers are exposed and which supports them in acquiring, maintaining and continuing to develop effective negotiation skills. Whilst all lawyers in Australia, during their practising careers, do have the opportunity to attend high quality negotiation training programs, they do so as a matter of choice rather than professional requirement and they do not commit to a regime of continuing lifelong learning in these skills.

This situation is further complicated by the continuing debate about the role and focus of legal education as discussed in Chapter 6. The remarks by Professor Weisbrot in his keynote address at the opening of Law Week in 2004[393] in calling for the formation of a national law academy to address curriculum shortfalls have again stirred the debate very recently.

Professor Weisbrot called for the formation of a national law academy to address curriculum shortfalls.

> *'It will be a forum for Australia's leading lawyers, judges and legal academics to talk about the most important issues facing the profession, including legal education'.*[394]

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393 May 2004. See the article by Brendan O'Keefe in The Australian op. cit.

394 ibid

He urged that electives such as negotiation and advocacy be enmeshed into the law school curriculum with the greatest focus of the undergraduate law degree being on people skills.

As a corollary to developing a commitment to life-long learning, as described by Professor Sherr in Chapter 6, and to pursuing the debate prompted by his challenges, universities may need to develop and extend their partnerships with the practising profession. Law Schools may even play a role in partnering law firms to enhance the negotiation and communication skills of developing lawyers.

In addition, if it is desired that practising lawyers be better at negotiating and communicating, it will be necessary to tell them so; to develop some key performance indicators (KPIs) against which their behaviour will be measured; to find them mentors who can model the appropriate skills for them; to measure their behaviour regularly; to provide them with the results and to reward the behaviour which meets or exceeds the KPIs.

The work of Ibarra discussed in Chapter 6, supports this approach:

> *"Promotion to partner, or its equivalent, is a rite of passage that requires the junior professional to successfully navigate a critical, and sometimes overwhelming, transition. Now, in addition to being technically proficient, junior professionals must demonstrate a capacity to become fully responsible for creating and maintaining client relationships. As they leave behind their roles as project leaders - managing consulting engagements or financial transactions, for example - they must develop a new set of skills, competencies, and even professional attitudes."*[395]

Ibarra argues that the most effective learning of skills (which include negotiation skills together with all the other skills involved in managing effective professional relationships) is based on effective role modelling.

> *"My findings were clear: regardless of which approach is taken, juniors who have more role models and who seek a broader array of elements to learn from them are more likely to find effective, plausible and appealing exemplars of new behaviors."*[396]

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395. Ibarra, H *Taking the Leap: How Professionals Advance*, op. cit at page 1

396. ibid at page 7

With appropriate formal training, proper encouragement from the firm and proper identification by the firm of those lawyers whose negotiation skills are validated and endorsed by clients and others, developing lawyers will have the opportunity to adopt the role modelling strategy most successful for them.

It is also necessary to teach lawyers that in communication and negotiation, measurement needs to include measurement of the satisfaction levels of those with whom and for whom they negotiate. Lawyer to lawyer measurement provides neither enough data nor the right data. The goal is not to ensure that lawyers have negotiated well with other lawyers but to ensure that they can negotiate well with everyone.

In adopting Ibarra's recommendations about the important role which can be played by coaches and mentors, it must be noted that the role will be successful only if coaches and mentors are drawn from those who are themselves validated as successful negotiators and communicators. The best people will be those whom staff and clients identify as having the most effective skills. Unless firms give this role to their most skilled people, juniors will learn nothing or the wrong thing.

By well planned and continuous attention to professional development, law firms can have a profound effect on the negotiation skills which their professionals develop.

7.2.5 Regulators and other providers have a significant interest in how lawyers negotiate and communicate

The work of organisations such as LawCover and the Legal Services Commission, with their powers to encourage and compel lawyers to change their behaviour, is focusing attention on the impact of consumer dissatisfaction on the legal profession.

The statistics they provide, the premiums they charge and the penalties they impose are already affecting how lawyers conduct their businesses and direct their behaviour. For example, LawCover's Bruce McDermott credits the premium discount offered to firms whose lawyers undertake risk management training as having a significant impact on enrolments and on changes to lawyers' risk management behaviour, particularly in client engagement.

7.2.6 The goal

All these influences may together enhance the profession's commitment to continuous lifelong learning. Commitment to this kind of lifelong learning may serve to prompt

practising lawyers to refocus and enhance their behaviour so that future focus group participants will report that lawyers are skilled negotiators, knowing when to talk and when to fight; committed to developing effective working relationships both internally and externally; distinguished by their commitment to collaborative, team-focussed business behaviour; 'can-do' people; able to grasp the big picture and the fine detail and able to discern what the balance should be; able to demonstrate a broad repertoire of negotiation and communication skills; able to choose the most effective of these in any given circumstances; and committed to transferring these skills to those professionals for whom they are responsible.

APPENDICES

APPENDIX 1. Focus Group Summaries

Focus Group 1 - Post Graduate Negotiation Students: Non-Lawyers (No. 1)

1. Background

As explained in Chapter 3, this is in fact the third focus group to have been conducted, the first two having been discarded. This was the first of several focus groups held with students of negotiation at the end of their training period. They were a mix of graduate certificate and masters students from a number of faculties and tertiary institutions. They had not received previous formal training in negotiation. There were nine non-lawyers and seven lawyers in the group overall.

The focus group comprised seven of the non-lawyer participants (two chose not to participate). They were all mature age students who were in full or part-time employment.

The group began with a general discussion of negotiation and their negotiation experiences. As a group they considered themselves to be quite experienced negotiators and they had been interested in negotiation training to allow them to be more thoughtful about the skills they had and to develop more effective skills. There was some discussion of the course they had just undertaken. It was then explained to them that the purpose of the focus group was to enable the writer to obtain some qualitative data about their perceptions of lawyers in negotiation.

2. What are the main elements of lawyers' work?

After this discussion the group was asked to consider what they would identify as the main elements of lawyers' work. After considerable discussion and quite vigorous argument they agreed to the following list:

- representing clients in and out of court - being good advocates;
- knowing and applying the law within proper ethical boundaries;

- communicating with clients and providing them with sensible solutions to their problems;
- guiding clients through transactions and processes which had legal consequences; and
- drawing appropriate, valid and enforceable documentation to record legal transactions.

3. Is negotiation part of lawyers' work?

Their attention was drawn to the fact that negotiation did not appear on the list and the group was asked what they thought about the role of negotiation in lawyers' work. There was some surprise expressed about the question:

> *"I think it goes without saying that negotiation is part of what we all do all the time. I don't think it is something special for lawyers. It's something that I just consider is part of the package."*

> *"Of course negotiation is part of what lawyers do - but I think it is a mistake to separate it out as a distinct role. Lawyers need to use negotiation skills all the time whether they are presenting in court or giving advice to a client."*

> *"Negotiation is a given. It shouldn't be treated as a category on its own although I do think it should be recognised as being very important."*

> *"Perhaps we should be prepared to reconsider the list we put together. We did identify communication as a separate role and I think that if we see it as a separate role then maybe we should acknowledge that negotiation is too. Communication is something we do all the time, just like negotiation, and it runs through everything that lawyers have to do. I think we should add negotiation to the list."*

> *"Let's not spend a lot of time debating this. We all agree that negotiation is part of lawyers' work and that is all we really have to decide. Let's move on...."*

The group was then asked whether, given that they were happy to include negotiation within the daily tasks of a lawyer, could it be assumed that they all considered that it was important for lawyers to be skilled negotiators? There was unanimous agreement.

The group was then asked to give consideration to the characteristics of lawyers in negotiation.

4. What are the characteristics of how lawyers negotiate?

The group began to discuss legal transactions in which they had been involved:

> *"I haven't had a lot of business experience with lawyers but in my personal life I have had a number of dealings which were not completely satisfactory. The course we have been doing this week has helped me to get a bit clearer about analysing what happened.*
>
> *My divorce and property settlement was a pretty terrible time for me. When I think about it, there was a lot of negotiation involved - not just the negotiation over custody and property which mainly happened between the lawyers. I was pretty upset and emotional at the time so I wasn't really focussing on the mechanics of what was happening but now that part is receding I can be a bit more objective in looking back at what happened.*
>
> *I'm not sure if family lawyers are different, maybe they are. I think there are a lot more women and maybe there are some gender differences. I know that's not what this session is about but I think you need to consider that maybe people's negotiating styles are more influenced by their gender and their personality than by whether they are lawyers or not.*
>
> *I think there were a number of different negotiations in which my lawyer was involved; the negotiation with me, the negotiation with my husband's lawyer and the negotiation with the judge. The negotiations with me were difficult, I was very emotional and not very reasonable. Throughout all the negotiations, there were some characteristics I observed fairly consistently. They were:*
>
> *First - a lot of effort went into ensuring the communication was clear. I was always asked if I understood what was being discussed and what was in the documents. I do think this avoided a lot of complications.*
>
> *Second - I felt consulted about what was going on but I felt very restricted about what could happen in the process. The way the law is and the process works, it is the lawyers and the court running things. I was not in control. I thought that the negotiation process excluded me and it made me feel a bit powerless at times. I found it distressing to be encouraged to step aside from agreement I had made with my husband on the basis that I had settled for much less than the court would be likely to award me. I felt there was a constant negotiation with me to be tougher and more demanding which completely failed to take account of my very strong interest in maintaining a good working relationship with my husband. I have a good education and I have good family resources so I think I handled things comparatively well. It must be very hard for people who have few resources.*
>
> *Finally - when the lawyers were negotiating with each other it was quite a performance. They were quite positional and they looked a bit as if they were playing a game they had played quite often before. I think the way they handled the negotiation discouraged us from behaving cooperatively even though I think*

it would have been the best thing to do and I would not have felt it was such an ordeal. I think as a result my husband became very suspicious of me and fought about things that otherwise we could have agreed on relatively amicably. I got more than I had originally agreed to but the cost was high. I wouldn't do it again."

"Our company regularly uses one particular law firm to handle our employment contracts and to vet and document various business transactions such as contracts with our suppliers. We use several different lawyers in the firm and we get good service from them. I have been engaged in quite a few of the negotiations and I have been in a good position to see how they negotiate. I think there are some negotiation characteristics that they share although I do agree that their individual personalities also probably have a lot to do with how they negotiate."

"I think there are two characteristics in particular that I have seen through several transactions. The first is to focus on what the law is and to use this as the basis of their negotiations with us and with lawyers on the other side. Of course it is important to us to enter into agreements that are enforceable but there are other things that are important too. We want to have good relationships with our staff and to have them feel that we value and respect the contribution they make to the business. This is particularly relevant for our IT staff who we have often attracted away from other businesses and who cost a lot of money in recruitment and training fees. If we followed the strict legal advice at all times and handled the negotiations the way our lawyers advise us, we would never keep any staff. So I think I would say that lawyers have difficulty balancing the strict letter of the law with business expediency. They just don't get it and sometimes I wonder what the negotiations they have with their own staff are like."

"The second characteristic I notice, and this is closely related to the first, is that they get very tied up with small details and they see things quite narrowly. I also noticed this very clearly in the lawyers who were doing this course with us. They did seem to have a very narrow view of negotiations and felt the need to reach agreement quite quickly. They didn't seem interested or at ease pursuing creative options and they seemed to focus on getting the negotiation completed in terms that would be easy to fulfil - say, with an emphasis on payment and other terms and conditions - rather than being willing to dig deeper to get at the real interests of the parties."

Other members of the group added further anecdotes which built upon the characteristics discussed above, in the end, they agreed on a list of characteristics of lawyers negotiating behaviour which they felt summed up their experiences, namely:

- lawyers are very risk averse and see that this is an appropriate position for their clients to take in negotiating agreements regardless of commercial realities;

- lawyers readily fall into the role of positional bargainers and seem reluctant to consider the long term interests of the parties;
- the adversarial role is one which lawyers fall into naturally - they follow this in preference to negotiation even when it is likely to put a transaction at risk;
- efficiency is very important to lawyers - deadlines and time sheets drive what they do. There is little time to consider more creative outcomes; and
- lawyers are traditionalists and they like agreements which follow precedent - they like to negotiate agreements in terms and conditions they feel comfortable and familiar with rather than to risk a new approach.

They agreed that there must certainly be a range of different behaviours among lawyers and that they were not really qualified to make absolute judgements about how lawyers negotiate. They did return to the point that they saw effective negotiation skills as basic to the delivery of the best legal advice and they were keen to see lawyers participating in negotiation training as undergraduates and continuing with this training throughout their careers.

Focus Group 2 - Postgraduate Negotiation Students: Non-Lawyers (No. 2)

1. Background

This is the second of several focus groups held with students of negotiation at the end of their training period. They were a mix of graduate certificate and masters students from a number of faculties and tertiary institutions. They were not lawyers and they had not received previous formal training in negotiation. There were fourteen non-lawyers and five lawyers in the group overall. The fourteen non-lawyers all agreed to participate in the focus group.

All focus group participants were mature aged students who were in full or part-time employment. The lawyers did not participate in the focus group.

The group began with a general discussion of negotiation and then their negotiation experiences. As a group they were all of the view that they were experienced negotiators in the sense that negotiation was something that was required of them in their daily business and personal lives. There was some discussion of the course they had just undertaken, and it was explained to them that the purpose of the focus group was to enable the writer to obtain some qualitative data about their perceptions of lawyers in negotiation.

2. What are the main elements of lawyers' work?

After this discussion the group was asked to consider what they would identify as the elements of lawyers' work. There was quite a vigorous discussion about this. Finally they agreed to adopt the following list:

- knowing the law and advising clients what it is and how it should be applied;
- acting for clients in and out of court as advocates and advisers;
- communicating effectively and regularly with clients and providing them with sensible, effective solutions to their problems;

- guiding clients through transactions and processes which have legal consequences; and
- drawing appropriate, valid and enforceable documentation to record legal transactions.

As with the previous focus group, their attention was drawn to the fact that negotiation did not appear amongst this list of activities and the group was asked what they thought about the role of negotiation in lawyers' work.

3. Is negotiation part of lawyers' work?

The group agreed that they felt it went without saying that negotiation is something that we all do all the time, and it is only to be expected that this is part of lawyers' work. However, they did acknowledge that there were times when lawyers will be paid specifically to negotiate something on behalf of a client, but they felt that this was part of the general run of lawyers' work and not a separate and different task and role.

> *"I have used lawyers on a number of occasions and I certainly think negotiation is part of what lawyers do. However, if I simply wanted an effective professional negotiator, I think a lawyer is the last person I would think of and probably the last person I would turn to. I think lawyers negotiate OK in terms of their professional competence that is, things like documents and transactions, but I don't think about them as professional negotiators in that sense."*

> *"My experience of lawyers is that they are really very bad negotiators. This is principally because as I can see, as a result of my training in the course, lawyers are very focussed on positions and what the law will allow. In lots of cases this is simply not relevant to what is a satisfying outcome for the parties and pays no attention to what we really want. I think it is not surprising that in many situations what the lawyers do just deals with the symptoms that appear and underlying problems hang around and at times can blow up."*

> *"I think lawyers use language that makes negotiation difficult. It is ok when they are negotiating and communicating lawyer to lawyer, but when I have been involved in discussions and negotiations with lawyers I have felt very excluded. I don't know whether it is that they are being patronising or whether they simply think that all people talk like that. But the language they choose causes me problems and sometimes I keep quiet rather than looking stupid."*

"I think lawyers like to be in charge. I don't think they are flexible and I think they like to take control of what is happening. I think this is probably one of the reasons why they aren't very successful negotiators because they are more concerned with winning and taking charge than with listening to what the client really wants and making sure the client gets it."

"Lawyers seem to talk efficiency and money all the time. Certainly I think that efficiency is important and I don't want to pay my lawyer too much, but many of the things that are of concern to me have nothing to do with money at all. I've seen as part of this training that often the things we fight about that seem to do with money, are really to do with value and having things recognised."

"I really don't think lawyers are good negotiators at all. I feel that when there's a lawyer acting for me, that it's just one more person I have to fight with in the whole process. Lawyers don't listen, aren't interested and just want things to be over. They seem to have led very sheltered lives and have a very different view of the world from me. I don't feel they are connected to real life at all."

The group then shared anecdotes about experiences they have had in which they have used lawyers.

"We used a lawyer when we sold our business recently. It was a very efficient transaction and the lawyer knew exactly what he was doing. He obviously had a series of set letters that he used in these circumstances and they seemed to work quite well. The only complaint I have is that the lawyer didn't really want to take any responsibility for what was happening in the transaction, and where the relationship between us and the purchaser of the business got a bit sticky, the lawyer was suddenly not around. If negotiation is really part of a lawyer's work, I would have expected the lawyer to play some role in facilitating the relationship between us. It was left to the business agent to get us both together and resolve the problem in a down-to-earth way. Once this was fixed the lawyer was very happy to be back in the transaction. Apart from this, the transaction went very smoothly and I was very happy with the lawyer's work."

"I have only used a lawyer for a simple conveyancing transaction and for making my will and I think lawyers get a bit caught up in their own little world. They use words and expressions which really are a bit silly and foolish and they seem to want to use set phrases and provisions rather than think about what's really right for me. Nothing that the lawyers did caused any difficulties or problems and I am not critical of the way they handle a transaction, but I think at times there was poor communication with me and my husband. There wasn't really much opportunity for negotiation but I felt that on a number of occasions the lawyer was making it plain that in fact some things were not negotiable. By that I mean that I was summoned to the office to sign documents and to bring certain things to the lawyers and there was not much time to negotiate the timing

and other things so that my convenience could be taken into account. I felt the lawyer was really organising things according to his own convenience."

"We used a lawyer to handle a case for us when my husband's brother challenged his father's will. This was a very messy and difficult piece of litigation and because the estate was small it was obvious right from the beginning that all this was going to do was to eat up the money in the estate and not leave anything for us. Our lawyer told us we had two choices, we could either fight or we could give up and let things go. He said that we might be better just to let things go because there was not much money in the estate. I now realize there are a number of other things that might have been suggested and in particular, I think mediation would probably have been a very good way for us to sort out the family relationships which were at the bottom of the whole thing. The lawyer was very fair about the fee and he really did all that he could to keep the costs down for us, but the real issue was not about resolving a legal matter but about finding out where the problem came from and solving that. This really highlights to me what we've been learning in the negotiation course which is the difference between positions and interest. I now see very clearly that my lawyer was focused on positions and particularly the legal positions which the court would recognise. If lawyers are going to be useful in transactions like this, it would be very helpful if they had negotiation training and could understand what the interests of parties were."

"I think I am quite a sophisticated user of legal services. I manage a business unit and I use a range of external advisers including lawyers and accountants. I find that the lawyers are quite good at doing what they are told but I don't find that they use any initiative and part of my job is to keep a team well managed and under control. One of the things I do find disappointing now that I have been using some of the lawyers for some time, is that they are not good at helping me to decide what the initial problem is, and when the transaction or difficulty is finished they don't initiate ideas about the processes or policies that might help such a problem from arising in the future. It's as if they are only thinking in terms of what's happening today and they are not thinking about things that would be really valuable to me, like how can I plan the ongoing success of my business unit."

4. What are the characteristics of how lawyers negotiate?

Other members of the group added further anecdotes, which built upon the characteristics discussed above. In the end they agreed on a list of characteristics of lawyers' negotiating behaviour as follows:-

- lawyers don't like to take decisions for clients and don't like to play a major role in helping clients to manage the commercial decisions they have to face;
- lawyers are very focussed on positions and appear not to have any training about the difference between positions and interests;
- this leads lawyers to the position where they are short-term thinkers and they are not thinking long term about what will happen;
- lawyers focus on small details and have difficulty looking at the big picture; and
- lawyers do not seem to have good natural or learned communication skills, which is probably one of the most serious difficulties in handling negotiation.

As with the first focus group, members agreed that there was a range of different behaviour that was experienced and one of the key points was that it was time for lawyers, and those who trained them, to see effective negotiation skills as being basic to the delivery of best legal advice.

Focus Group 3 - Commercial Clients Post Mortem

1. Background

This focus group comprised sophisticated commercial clients who were long-time users of legal services. They agreed to share their experiences of how lawyers negotiate via the medium of a post mortem of a recent large transaction in which they had all been involved. Accordingly, this focus group used a different process from that used in other groups in order to meet the interests of those participating

The transaction was complex. It involved the development of a major commercial site. The parties were:

- the owners of the site;
- the developer of the site;
- the building company;
- the lead financier and underwriting financiers including a consortium of 6 banks;
- the lessee of the development; and
- the sub-lessee of the development.

Not all of the parties were part of the initial negotiations and the developer and financiers changed several times during the transaction. Parties entering and leaving were a major complication in the transaction.

The transaction had been running since 1991 and it had hit many snags. On a number of occasions it was close to being abandoned only to be rescued at the last minute. The deal that was finally done was completely unrecognisable from the initial negotiations.

The transaction occurred in two main parts - the negotiation of the deal and the documentation of the agreement. The commercial difficulty of the deal was worsened by the fact that each of the key players in the transaction had disparate and sometimes opposing interests and for each of them a good outcome was measured very differently.

2. The interests of the parties

To understand clearly the role which negotiation played in the process it is useful to have some understanding of what these differing interests of the parties were.

2.1 The owners

The site owners were foreign nationals. They had other local assets but no money and were being chased by the Council for rates arrears. Their first attempt at developing the site had fallen through not long after the first concrete pour, leaving an unsightly hole in the ground. The site was dangerous and a continuing public liability risk. The site was difficult to develop because of its shape and geological problems so it was virtually impossible to sell. Furthermore, since the development that had begun and been aborted, the Council had increased the rates substantially, claiming that the property value had substantially increased. This was adding greatly to the owners' debt.

The interests of the owners were:

- avoiding problems with the Council ;
- preserving their other local assets;
- finding another developer willing to take the financial responsibility for developing the site; and
- preserving their reputation in Australia so that they could pursue other business ventures here.

2.2 The developer

The interests of the developer were:

- keeping the benefit of the development approval, which was due to lapse;
- recouping funds contributed to the joint venture with the former developer (which went bust);
- maintaining their local reputation as a successful developer;
- getting the benefit of the time and management resources already invested in producing the development plan; and
- finding a banker willing to underwrite the project.

2.3 The building company

The interests of the building company were:

- maintaining a good relationship with developer so that other projects can proceed;
- keeping the benefit of the development approval, which was due to lapse;
- maintaining a good relationship with the Council;
- maintaining a good relationship with their funding authority; and
- encouraging the funding authority to share some of the risks of the transaction.

2.4 The lead financier

The interests of the lead financier were:

- reducing their risk exposure to zero;
- providing a risk management regime which would allow them to withdraw immediately if the risk profile changed;
- maintaining the existing relationship with the developer;
- protecting its reputation in the marketplace;
- maintaining a good relationship with the underwriting financiers; and
- managing the financial project effectively.

2.5 The lessee

The interests of the lessee of the development were:

- developing a successful property which opens on time and with a full house;
- finding ways to share the business risk with other parties;
- being seen as a successful developer and so attract other development opportunities;
- maintaining a good relationship with financiers;
- avoiding penalties and cancellations as a result of late completion; and
- maintaining the reputation and brand name of all their development properties.

2.6 The sub-lessee

The interests of the sub-lessee of the development were:

- opening on time and to maintain a full house;
- maintaining a good relationship with the lessee so that other projects become available;
- developing a good reputation in the marketplace; and
- developing a risk profile which provides access to low cost finance.

3. Is negotiation part of lawyers' work?

As has already been explained, the transaction was in two parts. The first part involved the negotiation of an agreement between all the parties. Everyone at the post mortem agreed that negotiation is an integral part of lawyers' work.

This generated significant discussion. Key elements of their answers were:

> *"Most definitely. The way the lawyers handle the negotiations can have a most significant effect on how and if the transaction proceeds. The lawyers have it in their hands to ruin things. If they choose to posture or get side-tracked by some old grievance they want to pursue, things can really go off the rails."*

> *"There have been times when I've deliberately excluded my lawyers from the negotiations or required them to take a back seat because I knew that if I didn't restrain them they'd go for the jugular and everything would be lost. It is great to have lawyers who will fight if they need to but I find them all too ready to get sucked into the adversarial way of doing things even when this doesn't produce the results we want."*

> *"I will always brief our lawyers carefully about the negotiation process and what is important to our company. I find that without careful guidance they easily get bogged down on trivia and fine detail that is irrelevant to the deal. They are too hooked on process and the "can't do" aspects rather than being creative and showing me how I can get what I want."*

> *"I don't think lawyers are very good negotiators. They are very influenced by the relationship they have with the other side and their fear of being sued. This means they are either too conservative or too 'gung ho' and none of it is motivated by a desire to help me to do the best deal possible for my Board."*

> *"Our lawyer is a really good negotiator in the strategic sense. I don't always agree with what he does but I can see that he commands the respect of the other lawyers and when they see he really is determined to win a particular point they will let him have it. He also takes responsibility when things start to fall apart even if it is in some part of the transaction that doesn't concern us much but is important for other parties. Even in a deal outside his direct expertise, I would choose him for his negotiating style and his ability to get the other lawyers working as a team."*

"It really annoys me how conservative lawyers are in 'protecting their arse' - I think it's time they realised that they would be much more valuable if their bums were on the line as much as mine. They seem to jump at shadows and want to withdraw from the deal the minute they feel at risk. I want them to understand what it feels like to carry and manage the level of risk that I do but I haven't managed to get them to that point yet."

"Lawyers have this really annoying habit of choosing form over substance. When the deal was finally negotiated and we had a firm agreement the lawyers who had done the negotiation brought in others from their firms to help them with the complex drafting. It was a nightmare. Suddenly this really creative, life-saving deal we were all really delighted with began to fall apart in front of our eyes."

"The lawyers fought over everything - the grammar, whose document was the most concise, who could be the cleverest at imagining a completely deal-busting occurrence which the agreement had not taken account of. I liked it better in the old days when we just negotiated things ourselves and we signed up to one sheet of paper. I can't help but think the lawyers take pleasure in making negotiations and their documentation as complex and full of minutiae as possible"

4. What are the elements of an effective negotiation?

The parties were asked to talk about how they saw negotiation and what they saw the elements of it to be. There was strong agreement that effective negotiation involved:

- being clear about when you could walk away;
- getting better than your bottom line and more;
- getting a deal that you can sell to your Board of Directors and which will encourage them to accept your judgement in the future;
- being able to do business with the negotiating parties again;
- being able to work together to devise a creative solution;
- being able to walk away if necessary without destroying the relationship;
- building on past deals and experiences; and
- protecting the bottom line.

5. What are the characteristics of how lawyers negotiate?

The group was then questioned about the negotiating role which lawyers played in negotiating the agreement. After some discussion it was agreed that the lawyers demonstrated a range of characteristics which the group preferred to express as strengths and weaknesses.

5.1 Strengths

- good existing relationships between the lawyers allowed them to keep talking even at times when the deal seemed hopeless;
- lawyers brought skills beyond technical legal skills which enabled them to see the project as a whole and to devise ways of managing it;
- lawyers had respect for each other which made them prepared to work as a team despite the very diverse interests they represented; and
- lawyers recognised that their clients' interests were that a deal should be done and this prompted them to work together very creatively to devise a most unusual but very workable agreement.

5.2 Weaknesses

- the need to protect themselves from negligence actions was a very dominant factor in the lawyers' behaviour - the clients, who themselves were risking millions of dollars whether the deal happened or not, were critical of this behaviour. They thought it was a bit precious and wanted to see the lawyers acknowledge and take a share of the risk in some form or other;
- lawyers seemed to have a professional model of the adversarial system which emerged regularly under stress - this led to unnecessary posturing and conflict until the reality testing of their clients interests forced them to back down;
- existing relationships between the lawyers sometimes gave the appearance of a "boys club" which excluded non-lawyers and at times made them feel as if that relationship was more important than the lawyer/client relationship. The clients who were themselves experienced corporate lawyers found this particularly tedious; and
- under pressure, lawyers tended to focus on the micro, the fine detail of the transaction and to lose focus on the big picture - the good outcome for the client. Often it took client intervention to bring them back on track.

Focus Group 4 - Year 11 Legal Studies Students

1. Background

The group comprised twenty-five Year 11 Legal Studies students who had agreed to participate in a focus group to help the writer to obtain information for a study of 'Negotiating With Lawyers'. In preliminary discussions the writer was told that they were coming to the end of the first year of a two-year program of Legal Studies. During that time they had visited many legal institutions and had attended six different courts to observe lawyers at work. Strangely, none had a parent or close relative who was a lawyer and, despite close study, they all expressed a lack of experience about what lawyers really do.

This group had the least experience of lawyers of any of the focus group and the process they followed (which was directed by the students) reflects this. It flowed quite differently from most other focus group.

There was some introductory discussion of the role which lawyers play in society and the ways in which they can and do add value. The students all saw lawyers as an immensely powerful group who had education and knowledge far superior to the rest of the community. This was of some concern to them as they reported being very disturbed at how powerless they observed litigants to be, particularly in the criminal jurisdictions. They saw that lawyers had a tremendous social responsibility to help people and they were troubled that not all lawyers chose to exercise this power wisely or consistently and that there did not seem to be any social measure or accountability for how lawyers were using their privileged position.

2. What are the elements of an effective negotiation?

After this discussion, the group was asked to turn their attention to the subject of negotiation and to tell what they thought were the elements of a simple definition. The group agreed quickly that negotiation was something that we all did all the time. They had quite a strong debate about what it was and was not and after a lot of deliberation they agreed that, whilst difficult to define in absolute terms, it contained five main elements:

- resolving problems;
- compromising;

- bargaining with another party;
- trying to get your way; and
- ensuring that you are taken care of

and involved a process with at least four characteristics namely:

- two or more people are involved;
- the people have different perspectives or views;
- convincing/influencing how others see things is important; and
- bargaining is involved.

3. What is the goal of negotiation?

Some time was spent reviewing what the goal of negotiation is. The group again reached agreement easily and found six elements which may form part of the negotiation goal namely:

- to reach agreement;
- to resolve conflict;
- to ensure that each party is better off than if there were no negotiation;
- to ensure that each party is happy and can deal with the other party again; and
- each to get what they want through the use of good communication to be efficient - the process saves time/money.

4. What are the characteristics of how lawyers negotiate?

After this discussion, the question was posed to the group of what were their experiences about how lawyers negotiate and the skills that they bring to the process.

This question caused them the greatest difficulty because they felt that they had not observed enough of lawyers in negotiation for them to know the answer. What they were particularly keen to talk about was what affected the quality and success of a negotiation. In particular they felt that any scrutiny of how lawyers negotiate should take account of the two matters that had the most significant effects namely:

- how they communicate - the language and the behaviour experienced; and

- the form of negotiation chosen - the reasonableness and the realistic expectations.

On further questioning they agreed that what they were really saying was that both the process selected and the manner in which it was conducted, with particular reference to communication, were the things that would influence the outcome the most.

5. What are the main elements of lawyers' work?

As a result of this discussion, the students wanted to have a discussion about what they thought was lawyers' work as a way of putting the topic of negotiation in some kind of context.

There was a very broad discussion of this and finally they reached agreement to the following list of lawyers work:

- to represent clients;
- to conduct legal research;
- to achieve the best for the client;
- to advise clients about the law; and
- to help seek justice and to seek to discharge this role throughout society.

6. Is negotiation part of lawyers' work?

When this list was completed, it was pointed out to the group that they had not included negotiation within the list. It was explained that the writer did not wish to influence the outcome of the discussion but wanted to explore whether they saw negotiation as playing a role in achieving the best for the client especially as, at the beginning of the session, they had all agreed that negotiation was something that we all do all the time. Some time was then spent investigating the range of tasks which were involved in obtaining the best for the client. There was a very robust discussion and analysis of what occurred when lawyers conducted their work.

As result of this, the group agreed that when the role was scrutinised closely, negotiation turned out to be an integral part of what lawyers do and that in fact they negotiate constantly with:

- juries;

- other lawyers:
    - solicitors; and
    - barristers;
- their clients;
- the judge;
- other institutions e.g. Department of Community Services; and
- police

and that without thinking about it they had observed a lot of this negotiation in action.

The group then wanted to discuss how lawyers are seen as part of their role in the community. They had strong feelings about the responsibilities of lawyers and concerns about how those responsibilities were exercised.

In their view, the perception of the community is that lawyers are seen as:

- highly trained;
- on a higher level than the rest of the community; and
- knowing a lot that society does not and as a result they have:
    - power;
    - value;
    - power in society; and
    - membership of an exclusive club.

The group saw that the result of these perceptions is that people who are not part of the exclusive club may feel like outsiders who are not made to feel welcome in the 'system'. For the poorest people, without resources and good education, this translated as worsening their disadvantaged state.

They felt that one of the reasons for community dislike or suspicion of lawyers was that they did not share their skills with others and acted in a patronising and overpowering way. They perceived a general unwillingness of the profession to be accountable for the power they had and how they chose to use it.

They were particularly concerned that, during their professional training and throughout their professional life, lawyers' skills were as well developed as possible so that there could be confidence about that in the community.

They felt that they were not sure whether negotiation skills were something innate or something in which people could be trained. On balance, they agreed that formal negotiation skills training was probably important to bridge the gap between skills levels. This should include communication training and an understanding of how others see and experience things.

In drawing the comments and conclusions together, the group was asked to flesh out the comments they had already made by turning their attention to the characteristics of the way lawyers negotiate.

7. What are the characteristics of the way lawyers negotiate?

There was considerable discussion which generated the following responses:

> *"Lawyers are very powerful and how they treat people is important. They know a lot and this puts distance between them and ordinary people. I can see that negotiation is a part of how lawyers relate to people all the time. That means that how lawyers go about getting what their clients want (that is how I see negotiation) is probably the most important thing they do as well as knowing what the laws are."*

> *"I do think lawyers have this power thing. They are really nice to you, showing you round the courts and that kind of thing but there is still something very intimidating about them. I've never been in trouble or anything like that but if I was I think I would be a bit nervous about dealing with lawyers after the way I have seen them speak to people in court. I know they have to make people feel a bit scared, but sometimes this can have the opposite effect. I think it's possible that you could be completely innocent but, because of nerves and being afraid, say things that you didn't mean or express them in a way that makes things look bad for you."*

> *"I haven't seen a lot of lawyers doing negotiation but when I come to think of it, a lot of what they were doing in court was negotiating with the magistrate or the lawyer on the other side or with witnesses they wanted to bring around to their way of seeing things. I agree with the power thing. It does seem like a bit of a closed shop or a club to me. The lawyers and the magistrates all seem to know each other and they have a sort of language of their own. You feel a bit excluded from things and sometimes you wonder if they are speaking in a kind of secret language."*

> *"I'm not sure if lawyers really understand how ordinary people experience things. The kinds of questions they ask and the language they use doesn't always seem to be good for communication. They seem to want to get their point across but they don't always seem to be very good at listening to what is being said."*

"All people are different and it seems to me that your personality is going to have a big influence on how you negotiate. I can see that the adversarial system does seem to make lawyers aggressive and they seem to like scoring points against each other. I know I haven't seen a lot of lawyers and I haven't met many in their offices doing business, but sometimes it looks like they would rather fight than agree whether that seems the best thing for their client or not. I saw one case where the lawyer was very rude to the magistrate quite a few times. This didn't seem to me a very good way to negotiate with the Magistrate to let the client out on bail especially as the crime was quite a violent assault."

"I think how lawyers negotiate with their clients is very important. It is all part of proper communication. If I am paying all that money for professional advice, I want to be confident that the lawyer really understands my point of view. I don't want him to try to talk me out of doing something, say some business deal, just because from a strictly legal point of view it is a bit hard. I would also like to be reassured that my lawyer had good training not just in technical things but in what it takes to communicate well and to negotiate. Now I've thought about it I realise that is important training for all lawyers."

In summary, they agreed that they possibly had not had enough experiences to speak about how lawyers as a group negotiate, but they were anxious that matters be recorded, namely:-

- lawyers need to be aware of how important communication is. It is easy to forget that most ordinary people want to feel listened to and to be able to understand easily what is being said to them. Lawyers need to think carefully about this especially about the language they choose; and
- lawyers are powerful and it gives them an obligation not to misuse it. Power can be good or bad depending on how you use it. People need to reach agreement in negotiation because it is the right thing for them not because they feel afraid of the power of the lawyer.

Focus Group 5 - Law Firm Staff: Secretaries and Other Support Staff

1. Background

This group consisted of eleven senior secretarial and support staff from a medium sized CBD law firm. These staff had been participating in a climate survey of the firm looking at staff satisfaction levels. After undertaking the climate survey, which the writer had been retained to do on behalf of the firm, the staff were asked if they would be willing to participate in a focus group for this research project. Eleven of the fifteen staff agreed to attend the following lunchtime for a meeting.

The Word Processing Supervisor agreed to act as moderator. As it turned out the writer was more intrusive in this group than had been intended since the members were not very experienced in business meetings and, especially at first, they were very shy. The writer needed to intervene to give them encouragement to contribute although extreme care was taken not to intrude on content.

The initial question and discussion was over confidentiality. The group made it plain that they were only participating on the basis that they would not be identified to their firm and indeed at all and that the writer would record and use their comments in a way that ensured they could never be identified.

In order to begin with something that would not be controversial, ideas were first sought about what was a good outcome to a negotiation. After some discussion, the group agreed an appropriate summary was:

- people feel well treated when it is over;
- one person does not overpower/feel overpowered by the other;
- there is clear understanding about the things that have been agreed ;
- people do what they say they will do;
- the people negotiating achieve a result they can live with; and
- things like emotion don't get things off track.

2. Is negotiation part of lawyers' work?

The group was then encouraged to discuss whether negotiation was part of lawyers' work. They were not very interested to pursue this as they expressed surprise that

anyone could consider that negotiation was not a major part of **everyone's** life - personal and professional. They thought it was a given that negotiation was an important part of what lawyers do.

3. What are the characteristics of how lawyers negotiate?

Discussion then moved to what are the characteristics of how lawyers negotiate. At this stage, discussion became very animated. The group agreed that they were often not involved in the negotiations which the lawyers had with their clients. Many of these occurred on the telephone or in meetings when the support staff were absent.

The group felt the most useful contribution they could make was to provide input about the circumstances in which they had experience of lawyers in negotiation, namely, when lawyers were negotiating with them.

The discussion that followed became very lively and at times quite heated.

> *"It's really not true to talk about lawyers in the negotiating role because if we're honest, lawyers only negotiate with you when there is no other option. They'd much rather **tell** us what to do or better still send us a memo to avoid any contact altogether."*
>
> *"The lawyers really don't care what we think or what we want. We are there to come running when they snap their fingers and they really prefer situations where things are not negotiable."*
>
> *"The way they talk gives you the cue about how they see us. The call us 'non-professional' staff. How good do you think it is for our working relationship? But it is clear to us if you are not a lawyer you are not as good as they are. It's really just another excuse for a men's club."*
>
> *"The way they deal with each other doesn't seem to create very good relationships either. They often gossip to us about each other and say things which really seem quite indiscreet, but they never seem to deal with these things with each other."*
>
> *"They are really very argumentative and they like to 'nit-pick'. They tend to like to challenge you about everything like it is a bit of a game."*
>
> *"They never really let us forget it is their firm and we work for them. Whatever they say about us being a team, that is really what HR wants them to do. They really want to be in charge and they are never willing to admit a mistake."*
>
> *"I have worked in several other law firms and although the personalities are different, basically lawyers seem to behave the same wherever they are. The*

most disappointing part is that they don't really see negotiation and communication as vital tools for everyday life."

"A couple of the partners have some quite big bad debts. We know about it because they told us there will be a bit of a freeze on our wage increases because cash flow is a bit tight. But they won't deal with the real problem. They just hate having to talk to clients about money. They're happy to write letters and deal with clients remotely. That is the kind of communication they prefer. They'd do anything rather than ring up and negotiate with a client over a bill."

"I feel some of the comments being made are a bit hostile - they don't really tell the whole story. I see the lawyers here achieve some very good results for their clients. They are dedicated to their work and they are as hard on each other as they are on us. It's just hard to work with them and be treated as if we aren't there half the time. They just don't have a clue how to deal with us."

Other members of the group added further anecdotes which built upon the characteristics discussed above.

In drawing the session to a close the group was asked to agree on a list of characteristics of lawyers' negotiating behaviour. The provided the following list which noted that lawyers:

- like to be in charge - given the chance they would rather 'direct' than negotiate;
- often behave as if their skills are superior to those of others they work with;
- are not good team players - they often have difficulty with working relationships; and
- have poor communication skills when dealing with staff day to day.

Focus Group 6 - Managers:
4-10 Partner Law Firms

1. Background

By this stage in the focus group process the writer had become very experienced in running the groups and was confident that the process was well refined and the questions were now clarified. The topic of the main elements of lawyers' work was taking too much time and was not producing valuable or novel material. The most valuable data were coming from the questions about whether negotiation was part of lawyers' work and what are the characteristics of lawyers in negotiation. Accordingly these experiences were applied to tighten focus group processes and spend the main part of focus group sessions considering the qualitative data.

The members of this focus group consisted of eight law firm managers who meet regularly to share information about practice management. They are drawn from practices which have between four and ten partners. Following a meeting of this group at which the writer made a formal presentation, the managers agreed to remain to participate in this focus group.

In discussion it emerged that this group had all been employed in management positions in general commercial business before they accepted positions as law firm managers. Six of the eight managers had experience in more than one law firm. All managers had more than three years experience in the law firm environment.

2. Is negotiation part of lawyers' work?

There was a short discussion about whether negotiation is part of lawyers' work. The group thought it was self-evident and did not wish to discuss it further.

3. What are the characteristics of how lawyers negotiate?

In discussing their experience of lawyers in negotiation the group members made the following points:

> *"Lawyers are terrible communicators. They like to talk but not to listen so they never check that they have made their expectations clear. You might think something is settled but it's not. You can't re-open things but they can impose new requirements whenever they like."*

"Lawyers constantly change the goal posts. They seem to have a very short-term focus and attention span where management is concerned so you never really know what is going to happen."

"They like to tell me what to do rather than to negotiate with me about what is the best way to do things. I find it very frustrating because I am far more experienced in management than they are and I always have to clean up their messes"

"They are really sure that being a lawyer sets them apart from the rest of us. Their language makes this very plain. They tend to call me and my staff 'non-professional staff' which is a bit of a joke really - I have better tertiary qualifications than most of them! The lawyers club is very much alive and well and it is very excluding. It means they don't get the best out of us because they don't negotiate with us as equals."

"Lawyers hate the hard negotiations - for example the negotiation with the employed solicitors who are not pulling their weight. They tend to leave that to me to handle though they feel free to criticise the results or to overrule me if they think I have been too harsh. I find I get very mixed signals from them."

"Our negotiations are affected by the fact that they don't seem to think it is important to work on our relationship. They can be very dismissive of me even in front of my staff and I find this makes me apprehensive when I am dealing with them. Often we need to negotiate together, for example with the landlord over the move we are planning. Because our relationship is defective we don't have the level of trust that would help us to negotiate as a good team. I had the landlord really screwed down on price but at our last meeting the Managing Partner was not across the detail properly so he gave away things I had already negotiated. He took over the negotiation instead of letting me handle it. Not only did we lose benefits but the Agent now thinks he can sideline me and get a better deal for his client."

"The other thing I notice constantly is that they keep getting bogged down in the detail that really doesn't matter very much. Here we are negotiating with our IT consultants about the new software platform we are going to adopt and how we will manage the staged installation. Suddenly the IT sub-contractor gets completely sidetracked about what font is going to be the standard font for word processing. It was so irrelevant and so trivial the IT people really couldn't believe it and I feel they lost a lot of respect for us over it."

"When I conduct client reviews I notice the same comments appearing there from clients who say the lawyers get too concerned about dotting every 'i' and crossing every 't' to the point where documents are ridiculously long and complicated - far beyond the value of the job to the client."

"We have quite a number of employed solicitors and I need to spend quite a bit of my time trying to identify problems that are occurring between the lawyers and negotiating their resolution. This is very difficult because while lawyers seem very happy to fight in court and to argue with lawyers in other firms, they

seem to hate dealing with internal conflicts. So they never deal with things between themselves and I have to step in constantly to set up communications to fix things. Otherwise they just pretend there is no problem when they are in public and in private they gossip and complain about each other in quite a destructive way."

"I agree entirely. They are tremendous avoiders. Considering that part of their job is helping people resolve their conflicts, they are terrible at it themselves. Last year we had three staff who we wanted to sack because they had been behaving inappropriately. They had been coming to the office at weekends and using it as a social club and even bringing their friends here. The partners were very annoyed and asked me to commence the termination process. I gave them the required warnings and was getting close to termination when the whole process went off the rails. The two partners in their area had conducted the six monthly evaluations and had given them glowing reports. When I challenged them they said that they hadn't really felt comfortable dealing with the disciplinary matters themselves and didn't want the staff to feel they were being spied on. They felt it was my job to do the disciplining. But they had completely undermined my role in the process by creating such positive reviews. It was a nightmare and they refused to back down and admit that they had committed an error of judgement. They just refused to discuss it or to negotiate with me about what they would do in the future. They just refused to deal with it. I was astounded."

"I had a similar experience over my own job. On my appointment it was agreed that my job would be reviewed at the end of the first six months and my salary re-negotiated based on my performance. When the time came, I was amazed to discover that the partners did not want to negotiate this and found every excuse not to deal with me. I had to get very serious about looking for other jobs, I felt so insecure. I think finally they realised that I was looking around and they came to negotiate with me very unwillingly. The first thing they said was they resented my 'blackmailing' behaviour and wished I had come to them with my concerns. I was amazed. It was so different from the company I was at previously. In that business, negotiation was a way of life and by developing good working relationships I was able to achieve very good deals for myself, for my staff and for the business."

"And it is not just the partners who are like this. The employed solicitors all exhibit the same tendencies. Even the ones who have suffered with partners who won't deal directly with them tend to be reluctant to negotiate with me. I have the responsibility of meeting with them each month to review their figures and to deal with business issues. On many occasions they treat me as some kind of lesser being and they never hesitate to go to a partner if they think I am being unfair. Even when they know the partnership has given the responsibility to me they treat me with a bit of distain and refuse to deal with me respectfully as someone who is a professional with a lot of experience."

Other members of the group added further anecdotes which built upon the characteristics discussed above. In completing the session the group agreed on a list of characteristics of lawyers' negotiating behaviour, noting that lawyers:

- have poor communication skills - they would rather talk than listen;
- have a habit of changing the goal posts - they like to be able to re-open negotiations when it suits them;
- like to be in charge and they pass up the chance to negotiate when it would be useful;
- are elitist in their behaviour and they behave as if being a lawyer sets them apart from others;
- don't recognise the importance of building good relationships;
- get bogged down in the detail and don't pay enough attention to the big picture; and
- embrace conflict in their work but avoid it in their own working relationships. The problem with this is they leave important problems unresolved.

Focus Group 7 - Suppliers of Services to Law Firms (No. 1): Consultants in Training and Human Resources

1. Background

This was the first of two focus groups held with providers of services to law firms. The seven members of this group were part of a larger group attending a session on Managing People as part of a general seminar for the legal profession. They agreed to meet after the session to participate in a focus group. It was explained to them that the purpose of the focus group was to enable the collection of some qualitative data about their perceptions of lawyers in negotiation.

2. What are the main elements of lawyers' work?

After some discussion between group members it was agreed that the main elements of lawyers' work are:

- ensuring transactions are properly and legally recorded;
- helping people to protect their legal rights and to negotiate their way out of legal problems; and
- provide advice about the law and its consequences.

3. Is negotiation part of lawyers' work?

It was noted that, unlike all the other focus groups to date, negotiation appeared on this list and the group was asked what they thought about the importance of negotiation in lawyers' work. They appeared very surprised at the question and agreed quickly that negotiation was an underlying part of everything that lawyers do. The group had no interest in discussing this further and wanted to move on with the discussion of how lawyers negotiate.

4. What are the characteristics of how lawyers negotiate?

Members of this group appeared to know each other quite well and they immediately began a rather social discussion about their experiences of working in law firms including gossip about current happenings in law firms. The writer, reluctant to intervene, allowed the discussion continue for some time before asking the group to turn its attention to their particular experiences of lawyers in negotiation.

A very lively discussion followed. It appeared that five of the group members had been employed in law firms at some stage of their careers in either a training or a human resources role. This brought another dimension to the discussion, since they were able to speak about their experiences both as employees and as external service providers.

> *"I was the HR Manager of a medium sized law firm - their first, and I came with great expectations. I had been in manufacturing before that and I was very excited to be working with a professional firm. We had this terrific planning meeting in the mountains and we developed a firm mission and vision and a list of firm values. We came home from that on a real high. Over the next few months I was devastated to see the partners behave as if that meeting had never happened.... It pretty soon became clear to me that for all the talk, people were completely unimportant in the money making machine. Provided you recorded your time, did your bills and didn't p...s off clients, you could do what ever you wanted. That continues to be my experience with the law firms I consult to. For all the effort that goes into recruitment programs to attract clever people and keep them in the firm, they couldn't really care less about their staff. In terms of negotiation, this means they don't. I mean that they either tell their people what to do - so it's not negotiable - or they ignore them."*

> *"Negotiation is what humans do as part of getting along with each other. We share ideas and perceptions as part of working out solutions that are satisfying. Lawyers would much rather do their legal work and avoid human interaction which does not involve debating technical issues."*

> *"I often find that I turn up to deliver a program to lawyers and they are very annoyed or unco-operative. Then I discover that they have not chosen the program because they see value in it. They have been* ***told*** *to come by their work group leader or some other partner. Instead of having someone sit down with them each year to negotiate with them what their plans would be for their personal and professional development in the coming year, they are either told what the firm expects them to do or else left completely to their own devices. The only time they are ever challenged is about the cost of the course - not its value - and even then it's a* ***challenge*** *not a negotiation."*

> *"Part of what I do involves helping law firms and other professional firms undertake staff satisfaction surveys. The usual practice in business is that a staff satisfaction survey is used as part of the HR management plan. The results should be useful to assist staff retention and to allow difficulties to be identified and resolved early. It is a tool for negotiation and relationship building.... I work for a number of businesses where this is very successful but most often with lawyers it is not used like that at all. They seize on the positive comments and accept them unquestioningly. Then their either ignore or get very defensive about problem areas. It is so hard to get them to accept the data and learn from it. Often they have made a great fuss of telling everyone what a useful exercise it is going to be and then they drop it like a hot potato the minute there is some critical comment.*

The Managing Partner will be tearing his hair out because he has really been convinced of the value but his partners will refuse to accept it and use it as a tool for negotiation and relationship building. The result is cynicism from staff and confirmation of their suspicions that the partners don't want to deal with them directly - they just want to give them the 'mushroom' treatment."

"I see lawyers interacting with their staff and their clients all the time and I must say I think they are terrible negotiators. I am sure when they are in court and all dressed up and following pretty strict rules they do OK but in ordinary interaction they are terrible. They use jargon and behave quite dismissively of people and their ideas. They are used to being in charge and being agreed with. They don't want to negotiate - they want to be right!"

"I've had several jobs as an employee of a law firm and I had to leave and set up my own business in order to have some kind of proper relationship with them where they would listen to me and accept my advice. I think lawyers negotiate really well with each other. They deal with facts and documents and the law and it is technical and clear cut. But when they have negotiate on human issues, they will avoid it if they possibly can. On any matter like unfair dismissal, pay rises, staff relationships for example, hell can freeze over before you can get to the table. There are lots of occasions where I know things could be resolved if only the lawyers would sit down and talk about it with their people or with each other... It does seem strange to me that they so regularly pass up the chance to resolve things by negotiation when it would be so simple."

"Lawyers aren't good communicators. I have been working with the HR Manager in one law firm to develop a program on managing client complaints. I was astonished to hear her say that the most serious problem they have is that when lawyers get a complaint they often deal with it by not replying. They have one partner who had a complaint result in disciplinary proceedings because first he didn't respond to all the client's requests for an explanation (made over many months) and lots of letters and then he didn't respond when the Legal Services Commissioner contacted him either. Finally he had to go and face the music but by then any chance of resolving things amicably was long gone.... And I think to myself perhaps these really intelligent, well educated people won't communicate and negotiate even when it is obviously sensible and useful because they like being in charge - in control - and they hate having to explain themselves. They think that amounts to giving up their status and authority!"

"And they ***are*** *really intelligent people - law students these days are the cream of the HSC students. Yet they can't (or won't) think through the logic of the fact that they will probably always do better if they sit down and talk things through and build a good working relationship than if they keep people at a distance and refuse to talk about problems. You would think that their brainpower would show them the logic of that - but they don't think ahead in that way. They seem to think they can send the problem away by ignoring it today and there will be no consequences in the future."*

"In all this discussion I do think we need to be fair. I agree that lawyers are hopeless at communication in the way we mean it but we should acknowledge that they do have good technical skills. It is a very competitive industry and they have to work hard to make it. I think they probably negotiate pretty well with one another. You know there are rules and language and procedures and everything and that works well. I am sure they find negotiating with one another OK - it is just that they haven't a clue how to negotiate with other people - including clients - and they don't really enjoy the interaction or find it valuable."

Other members of the group added further anecdotes which confirmed the characteristics discussed above. In drawing the information from the session together, the group agreed upon a list of characteristics of lawyers negotiating behaviour in which they noted that lawyers:

- do not place great value on building good working relationships - they often talk about its importance but they don't do it;
- are poor communicators in general. They deal well when negotiating with each other on technical issues where they share a common technical language and there are clear rules and processes that govern what happens;
- often choose not to negotiate in circumstances where it would get them a much better result;
- like to be in charge - their ability to control things is important to them. This can lead to situations where they **tell** people what will happen rather than engaging them in the process of negotiating what will happen; and
- use technical language that can make it difficult to negotiate with them.

Focus Group 8 - Suppliers of Services to Lawyers (No. 2): IT Suppliers (Debrief of a Tender Process)

1. Background

This focus group comprised suppliers of information technology (IT) services to law firms. They were delivering a trade show accompanying a series of management seminars for law firms. Six of the suppliers agreed to meet after the seminar to participate in a focus group.

It was explained to them that the purpose of the focus group was to enable the collection of some qualitative data about their perceptions of lawyers in negotiation.

2. What are the main elements of lawyers' work?

After some discussion they produced their own list of lawyers' work as follows:

- solving the legal problems of their clients;
- advising clients about their rights;
- helping clients navigate transactions with legal implications; and
- preparing documents to record transactions.

3. Is negotiation part of lawyers' work?

It was noted that negotiation did not appear on this list and the group was asked what they thought about the role of negotiation in lawyers' work. There was considerable discussion about this. It was agreed that it was a proper assumption to make that negotiation is an activity that runs through all the work that lawyers do.

> *"It would be very difficult to contemplate any of the day to day activities that lawyers undertake without recognising that negotiation activities are to be found throughout."*

> *"Of course negotiation is part of lawyers' work. Whether they do it well or not is another matter!"*

> *"Solving problems and advising clients includes a lot of negotiation. Negotiation is an underlying feature of all lawyers' activities."*

The group then began to discuss their own experiences of dealing with lawyers. Each member of the group had a sales responsibility within their business. Most were responsible for the legal market only but one had responsibility for some educational sales as well. All had experience with other market segments which provided them with comparable experiences in the sales environment.

4. What are the characteristics of how lawyers negotiate?

After some further discussion their attention was turned to questions of the characteristics of lawyers in negotiation. The discussion produced a range of observations.

> *"My job is to sell systems to law firms and, to tell you the truth, they are the most difficult of all the groups I have worked with. I don't think you could describe what happens as negotiation. I think a really noticeable characteristic of lawyers is that they don't negotiate until they are really pushed. They realise you are very keen to get their business and they play a game - they reel you in. They tell you a whole lot of things are not negotiable and they really try to screw you. They are not really interested in the value proposition - they just want to win."*

> *"In the kind of negotiations we do, lawyers have all the power. There are lots of suppliers and they play one off against the other sometimes using very questionable tactics."*

> *"These days lawyers are much more aware of what they want in their systems and often have professional advice in calling for tenders. Despite this they always seem to behave as if I am just trying to rip them off. I feel that really gets in the way of the negotiation. They keep going back to the documentation and pounce on things they think prove I am trying to put one over them. Usually it is just they don't understand the technical language or there a genuine misunderstanding. The thing that always surprises me is that they can feel the need to be so aggressive about the process. It doesn't matter whether it is a big point or a small one - they just seem to feel the need to do it. They put the squeeze on about everything - I feel really beaten to a pulp by the time the negotiation is over."*

> *"They seem to me to behave quite inconsistently. I read the Law Society Journal and I read the brochures in the waiting rooms of my customers. The message seems to be that value is more important than price and that relationships with clients are what matters most. But with us it is quite different; money is more important than anything and the fiercest fight is always about cost. This doesn't surprise me any longer but I do see it as very short sighted. It often ends up with lawyers being unwilling to commit to a system that will meet their needs according to their specifications. They really don't think things through."*

"I have some clients where the relationship really works well but overall I get the message that the lawyers I work with don't place any value on having a good working relationship with me. I mean, I'll kill myself for my clients - I'm in business for the long term and I invest a lot in making relationships work. But lawyers have this power thing and behave as if they are a bit above that or that we are a bit beneath them. I have no trouble with getting along with the IT Managers or the General Managers - but the lawyers are another matter. I see the lawyers treating their own people the way they treat me so I know I am not imaging it."

"I have trouble with lawyers who keep wanting to reopen the negotiation after the deal is done. The contract is signed and I am bound by it but these guys often try to reopen things. I don't know whether it is a game and they are just trying it on or just an accident that I seem to experience it so often. It is not common to other customers of mine. I don't know whether they do it when negotiating for their clients but they do seem to do it in their own negotiations."

"I think lawyers have two sets of rules when they are negotiating - one for us and one for them. We have to respond to their invitation to tender, on time, with all the detail, with all i's dotted and t's crossed. Time is everything. But once the tender is in, time means nothing. Lawyers seem to take an unusually long time to make up their minds. I think this really creates difficulties in the relationship."

"I don't like the assumptions that lawyers make when they are negotiating with me. They assume that I am out to make a killing and that I am really going to rip them off. This seems to lead to very aggressive behaviour which I actually find quite offensive. They can be quite bullying I find. It takes a lot of experience not to be intimidated by the way they talk. They will impose all sorts of conditions and requirements on you - just when you think you have met their terms they want another piece of information. I'm in this business for the long term. I want good relationships with my customers. I want them to come back to me for their next upgrade and I want to use their site to make other sales. They don't see any of that. They don't think about business deals in that way. And any concession I give them they seem to see as evidence that I have lots more left in the kitty to bargain with. It's really a very naive approach to business and not very constructive."

Other members of the group added further anecdotes which built upon the characteristics discussed above. Finally they agreed on a list of characteristics of lawyers negotiating behaviour noting that lawyers:

- value power and control - they only negotiate when they are pushed. Negotiation is rarely their first choice;
- are short term thinkers in negotiation - they don't pay enough attention to future needs;

- don't behave as if they value good working relationships - there is a difference between what they say and how they behave in this regard;
- tend to be argumentative and aggressive in the negotiation process even over apparently small details; and
- don't behave consistently. They seem to have one set of rules for when they negotiate with other lawyers and one set of rules for when they are negotiating with their suppliers.

Focus Group 9 - Service Managers:
20+ Partner Law Firm

1. Background

The participants in this group were the managers of all the key service areas in a medium sized law firm with offices in several States of Australia. Their roles covered human resources (HR), marketing, information technology (IT), information management (IM) and finance. All of these managers were based in Sydney and their roles required some kind of interaction with other States. They all reported to a Sydney board of partners and, at times, to a local Managing Partner in other States.

The managers had been attending the firm's strategic planning retreat and agreed to stay on at the end of the retreat to participate in a focus group. It was explained that the purpose of the focus group was to enable the collection of some qualitative data about their perceptions of lawyers in negotiation.

The group was most uncommunicative. This was surprising since the writer knew them quite well and had been working with them for two days. They were asked if they would like to defer the meeting and after some conversation it appeared that their real concern was confidentiality and whether it was proposed to report back to the partners on the outcome of the meeting. Some time was spent reassuring them of the confidentiality of the session and confirming that none of the subsequent reporting would enable them to be identified.

2. What are the main elements of lawyers' work?

After some discussion the group agreed that the main elements of lawyers' work are:

- handling all kinds of matters for clients that have legal consequences;
- documenting formal agreements so that they are legally binding;
- advising people about their legal rights and remedies; and
- working in a team with other business advisers to ensure that clients get practical, sensible advice that takes into account all their requirements.

3. Is negotiation part of lawyers' work?

It was pointed out to the group that they had not included negotiation in their description of lawyers' work and they were asked what their views were about the role of negotiation. There was immediate agreement that negotiation was a task interwoven through all the elements they had listed and was clearly part of what lawyers do.

4. What are the characteristics of how lawyers negotiate?

The group was then asked to share what they considered to be the characteristics of how lawyers negotiate.

> *"We can only really talk about how lawyers negotiate with us and the people we interact with daily. We can't really talk about how lawyers negotiate with other lawyers and with clients because, for the most part, we don't see that."*

There was some discussion of this and it was pointed out that the purpose of the research was to obtain qualitative data about how lawyers negotiate in all the areas of their business life and so the experiences of the managers were most relevant.

> *"I suppose the first thing that is really noticeable, coming from a non-law firm background, is the way lawyers treat and speak to people who are not lawyers. The 'them' and 'us' is very noticeable and my colleagues in other law firms say that this is a common thing for them also. They call us 'support staff' or 'administrative staff' and they call the lawyers 'professional staff'. Considering that I have an Honours Commerce Degree and a Masters of Finance I find that a bit offensive. I suppose this sounds a bit far removed from how lawyers negotiate but this elitism colours every interaction they have with us. We are treated as being not as good or valuable as lawyers and they talk about us being a cost centre rather than as productive staff. This sets the scene for any negotiations they have with us and it is very difficult to overcome."*

> *"I hate putting people in pigeonholes but lawyers really do have a 'lawyers' way' of doing things that can be very difficult for non-lawyers to deal with. They are a bit like a secret society and until you get a chance to learn some of the rules they operate by, you are at a real disadvantage."*

> *"I think lawyers are very argumentative. When you are negotiating with them they pick up on trivial details and argue about them in a way I find quite surprising. Whatever I take up to a partners' meeting, however much research I have done, I know I will be cross examined within an inch of my life. It has nothing to do with the content or its significance to the firm. It can happen with something small, really trivial, as readily as with something of great importance to the firm. They just like a good scrap and they like to question everything, whether it is useful or not. Sometimes I come home after a partners' meeting and I feel bruised and exhausted but they come out smiling and invigorated - they have had a great skirmish."*

"I have learned that lawyers don't really like to negotiate. They don't like personal interaction very much - they would much rather be working on documents and details. So I have learned to do the research and present it to them with several options. They always go for the cheapest option so provided I can make sure that what I want to do can be made to seem the most cost effective way of doing things, I manage to get my projects approved. But it's disappointing really because if I could only focus their minds on being constructive I think we could work as a team and maybe get far better results. Because I am always having to manage the downside of their behaviour I never really feel that I can add the value to their business that I know I am capable of."

"There are two things to pay attention to when you want to negotiate with a lawyer. First they will never come to the table as their first choice. Their preference is to avoid things altogether or, if pushed, to play hardball. So getting them to the table is really hard. Second - when you do get them to the table - they will need to feel in control. They have this superior/power thing. You need to let them think that they have won - that it was all their idea. And whenever you report the outcome of that negotiation, you always give the lawyer the credit for all the good ideas. Never negotiate with a lawyer if you want recognition. You'll be squashed!"

"Part of what we have been doing the last two days is to develop a strategy for managing our people more effectively. We've decided to develop a communication plan for the whole firm. As part of it we are going to push the training programs for communication skills and building better client relationships that we developed this year. But the irony is that I can't get any of the partners to attend the training. They rate quite badly on the client surveys we have done on communication skills and relationship skills but I can't persuade them to take the program. They have gone away all fired up about making their lawyers do the courses but what kind of message is it to the lawyers if the partners won't lead from the front. This is the negotiation problem - so much is not negotiable."

"I can see why managers in law firms tend to have such a short life span. We get overridden and worn out because they always know best and won't listen to us and when we try to negotiate changes in ***their*** *behaviour so the business will benefit - like collecting their debts or dealing with clients' complaints - they give us the big freeze and won't discuss it."*

"It is really very frustrating. I'm used to corporate life where senior managers have a lot of authority and autonomy. Here we have a lot of responsibility but not the authority or autonomy to get on with it. The partners do not treat us a peers who are as well qualified as they are professionally and I think this has a really negative impact on our relationships and our ability to negotiate with them."

"I find it very hard to get their attention. They are really short-term thinkers. I can't get them to look into the distance and see what is coming and prepare for it. So I can jump up and down and say that our debtors have blown out to 150

days and they will look at me blankly or be too busy to see me. Apart from the Managing Partner, no-one at a Partners' Meeting will agree to do anything different. But the minute the cash crisis is here because they wouldn't fix the debtors, they will jump on me from a great height because I let it happen. This short-term thinking seems to colour all their negotiations. It was the same when we changed out IT platform. It was a huge decision with important consequences for the firm long-term. I know it was a lot of money but their first thought was - what can we get away with spending? Rather than 'what is the proper level of investment to make now that will give us better productivity through the next business cycle'. As it was, they were so penny pinching that we had two major technology glitches and nearly lost a most important client so they have had to spend a deal more money anyway. But the timing meant that we couldn't plan effectively and we couldn't negotiate such effective terms with our suppliers - we stretched our relationship with them too, past the stage where they were willing to help us out."

"Don't be misled into thinking that this is just about our relationship with them. They don't have good relationships with each other either. They gossip and bitch about one another but they rarely deal with problems directly or talk things through. They are just not people who put any effort into good relationships - not with each other, not with their lawyers and not with their managers."

"I'm sorry if this is sounding like a big whinge session but I think what we all feel is that if we had proper business relationships with the partners we could help them have a more effective and profitable business. We almost feel that we are more ambitious for them than they are for themselves because they don't want to communicate with us and they don't want to build real partnerships with us."

Other members of the group added further anecdotes which confirmed and expanded on the characteristics discussed above. In drawing the information from the session together, the group agreed on a list of characteristics of lawyers negotiation behaviour, noting that lawyers:

- are short-term thinkers. They don't negotiate agreements which take account of long-term considerations;
- like to be in control. They don't chose negotiation as their first option to deal with business situations and they are reluctant to make agreements where they feel they have given up control;
- use the 'them' and 'us' approach to overpower fellow negotiators who are not lawyers;
- don't behave as if they value good working relationships and they don't demonstrate a willingness to develop and encourage them; and
- are poor communicators and not willing to:

- listen to how others experience the communication process with them; and
- engage in learning processes so that they can improve their communication skills.

Focus Group 10 - Partners:
Medium-Sized Accounting Practice

1. Background

This focus group comprised seven of the eleven partners of a medium-sized accounting firm who agreed to participate in a focus group following the completion of their annual strategic planning meeting. A key element of the planning meeting was a review of negotiations taking place with a ten partner law firm to develop a close business relationship with the ultimate aim of a merger when legislation permits.

It was explained that the purpose of the focus group was to enable the collection of some qualitative data about their perceptions of lawyers in negotiation.

2. What are the main elements of lawyers' work?

The group was asked to identify what they considered to be the main elements of lawyers' work. They quickly pointed out that they were sure there was some definition proscribed by statute or by professional regulation and failed to see the value of discussing this. The writer thought it wisest to abandon the attempt to obtain a definition from them.

3. Is negotiation part of lawyers' work?

Rather than push further discussion, the group was asked if, whether formally acknowledged or not, they considered negotiation to be part of lawyers' work. It was quickly agreed that negotiation is an important responsibility lawyers have both for and with their clients.

4. What are the characteristics of how lawyers negotiate?

When asked this question, the group was at first very reluctant to make any general statement. This presented quite a challenge. The writer was very interested to tap into the perceptions of this group since it was known that they all had many interactions with lawyers over a long period of time and must have had many experiences of lawyers in negotiation.

However the writer also needed to be mindful of the need to let the group contribute as it wished and to avoid influencing their responses. In the circumstances it was thought appropriate to reframe the question. Accordingly the group was asked '*Is there a pattern of behaviour you have observed when lawyers negotiate or is it your experience that there do not seem to be regularly recurring, common characteristics?*' This produced quite an active discussion about what happens when accountants and lawyers negotiate. There was some repetition of the usual lawyer jokes and some talk about old rivalries. The writer decided that the discussion should be allowed to run on freely. The writer was anxious not to direct or influence the answers and to conceal the surprise felt at the fact that, unlike all the other focus group to date where members had actual experience of lawyers negotiation, this group did not immediately move into anecdotes about patterns of behaviour.

After quite some time the view was formed that the focus group probably needed to be brought to a close. Beginning to thank the group for their time, the writer said that it was intended to record that this group was of the view that the characteristics of lawyers in negotiation could not be readily identified as a recurring pattern of behaviour.

For whatever reason, the Managing Partner then began a quite serious discussion of a tender the firm had just lost for the audit of a group of private hospitals. The tender had been run by the Chairman of the hospital group (who was at the time a partner in a large law firm) together with the in-house lawyer for the group.

The loss of the tender had been very troubling for the accountants as they felt they had demonstrated considerable expertise in nursing home audits and compliance issues. In discussing the questions asked by the lawyers at the tender presentation, the Managing Partner reflected his obvious frustration with the process. The writer remained silent being unsure where this was going and not wanting to do anything to interfere with the group dynamics. Then the Managing Partner said:

> *"If we are really honest, there are things that happen when we deal with lawyers that we need to think about and be prepared for. We hadn't prepared properly for that interview and we should have known what they were going to do.... And in the same way there are things happening in the negotiations with [the law firm] that we have not thought about properly and will get us right off the track if we are not careful."*

There was some discussion about setting up a strategy meeting to review how the merger negotiations were proceeding. Again the writer thought it was probably time to intervene and bring the group to a close. On doing this, surprisingly, the Managing

Partner indicated that in fact the question had triggered some useful thinking for them and had caused them to take some action about their current negotiations that they had been neglecting.

> *"So lets revisit the question - it seems that if we look at recent history we do seem to be saying that there are things that lawyers can be counted on to do in negotiations - things we see all the time. So lets deal with this question of Rosemary's now...."*
>
> *"Well I think the first thing we see, and we are seeing it in the way our negotiations are stalled now, is that lawyers tend to have a culture that is very excluding. They have been negotiating with us as if the merger is giving up the crown jewels and you can be sure when we are merged they will want everything to be their way. I think all the different qualifications and services our business provides make us very diverse and very accommodating whereas the lawyers seem to value and preserve some kind of model of the exclusive gentleman's club - their stand on women partners is a good example."*
>
> *"I have felt for some time that the lawyers aren't really entering into the spirit of the negotiation at all. It has been something I have seen a lot. They come to the table with some kind of 'take it or leave it' proposition and they are not really interested in sitting down to negotiate in the way I understand it."*
>
> *"I felt the same way in the joint marketing plans we are developing at the moment. They want access to our clients and I think they are impressed by the amount of repeat and continuing business we get but they just want us to hand the clients over. They don't want to earn the business by spending time building trust and a good relationship with the clients. At the same time they seem quite reluctant to give us access to their clients so we can do this kind of relationship building. They seem almost mistrustful that our talk about building relationships is a front for stealing their clients."*
>
> *"I think they are very territorial. It's like they have to p...s in every corner of the room and take charge before they can sit down to talk."*
>
> *"I'm always surprised at how naive they are as business people. They really don't think strategically at all. They care more about where the full stops are and whether the grammar is right than about what the client really wants and what the deal is about."*

At this stage the discussions again turned to the merger negotiations and strategy and it seemed likely that all the useful discussion this group was likely to provide had been extracted.

As a concluding step, the group was asked if they could summarise their discussions and agree on what they would put forward as a list of characteristics of lawyers'

negotiating behaviour. They agreed and provided the following list, noting that lawyers:

- often come to the negotiating table to present a 'take it or leave it' proposition rather than actually being willing to negotiate;
- have a culture of clubbishness which can set up barriers to the negotiation process;
- focus on the technical process and have a poor understanding of what business people want to achieve;
- like to be in charge and don't see everyone at the negotiating table as equals; and
- do not see the need to work at developing effective business relationships.

Focus Group 11 - Undergraduate Law Students

1. Background

This group of nine law students was a self selecting group from a class of final year undergraduate law students. The writer explained the focus group process to the class as a whole and asked for volunteers who had some experience of lawyers in negotiation. The group all had experiences as employees of law firms. All the group members had worked in a law firm for at least six months and five had experience in more than one law firm. All of the group had other employment experiences as well which ranged from hotel staff jobs to employment in consulting and accounting firms. The meeting took place over a lunchtime during a three day intensive training course.

2. What are the main elements of lawyers' work?

After some discussion, the group produced their own list of lawyers' work as follows:

- drafting documents and agreements which are intended to be legally binding;
- managing the carriage of transactions with legal outcomes;
- providing advice about the law and its application;
- representing clients in court; and
- providing or helping to secure pro-bono services to ensure that access to legal representative is a right everyone can enjoy.

3. Is negotiation part of lawyers' work?

It was noted that negotiation did not appear on this list and the Group was asked what they thought about the role of negotiation in lawyers' work. They agreed that negotiation was part of providing advice, managing transactions and representing clients where the lawyer might conduct the negotiation directly or act as a partisan, supporting the client in the negotiation process. This description was unsurprising given that the course they were attending included this language as part of its description of negotiation.

4. What are the characteristics of how lawyers negotiate?

The group was then asked if they would discuss their experiences of lawyers in negotiation and what, if any, characteristics they had observed.

There was some discussion between the group members about their introduction to lawyers and law firms and the fact that their university experiences really gave no indication about what law firm life would be like.

It seemed from their conversations with each other that their encounters with lawyers had been in three different circumstances:

- during the recruitment process for paralegal work and summer clerkships;
- as law firm employees interacting with other lawyers; and
- as law firm employees observing or participating in interactions with clients.

This was put to the group and they agreed.

> *"The progression was very interesting really. I had pretty good results and so lots of firms wanted to interview me. There were lunches and cocktail parties and cruises and really it was more like a seduction than a negotiation with me. I found the choice really difficult to make. I didn't know anything about the firms or what it would be like to work for them so in the end I chose the firm where I had a few friends who seemed quite happy."*

> *"Yeah - I had a pretty similar experience. I've got a distinction average and quite a few firms wanted me. But they didn't really sit down and negotiate with me. I kind of expected more talking with partners and maybe senior associates. I expected them to want to know more about me. I certainly wanted to know if I would fit in and be able to do the kinds of things that interested me. I felt that I had a lot of power in that negotiation but it was pretty unreal. Here we are up on Level 60 something with magic views and a waiter to ask what kind of coffee I wanted!"*

There was a range of other experiences along these lines that the group shared. Common themes seemed to be that the students had experienced a poor introduction to what life in various firms would be like and the students really thought that what they had experienced should not be regarded as examples of negotiations at all. The group was then encouraged to share experiences of negotiation once they had agreed to join law firms.

"The firm was very different once I was on board. I certainly didn't have the power anymore - and it was interesting that not much was negotiable once I was there. I was assigned to a group that was doing a really big piece of litigation and basically I was stuck in a windowless room four days a week doing discovery. Not my idea of why I joined a law firm! I think they just expected me to be grateful and do as I was told. Suddenly I didn't have any of the power and they certainly didn't want to negotiate with me. The partner in charge of our work group wasn't interested and was very dismissive. Finally I went to the HR Manager who was a bit annoyed - I think the case was a big earner for the firm and they were short of bodies to do the sh...t work . In the end he realised I was going to leave and he moved me to an area where I could get some more interesting work. But the relationship was wrecked - I could see they thought I was a trouble maker and I had to move on. I still feel a bit cheated - I think they changed the rules once they thought they had me in their power. I have a number of friends who have had very similar experiences with the firms they have joined. I don't think it was just me."

"I think what really hit me was how non-negotiable everything was once I joined the firm. With all the hoo-haa to get me to join I suppose I expected to feel I was still important after I was there. I was lucky I got to work on some very important matters even though I was just picking up after the partner but it was really interesting work. So, although I really liked the work, I was a bit put off by all the politics and the power plays. Perhaps all business is like that and I was just naive but I suppose I expected them to sit down and talk to us about what they wanted from us and give us the chance to negotiate about what we'd do. From what I noticed, this was a fairly general experience. The only time they'd really negotiate was when you got so fed up you told them you had an offer from another firm. Then suddenly it was - 'Why didn't you come to us sooner - can't we persuade you to stay with us?' or 'I'm very disappointed that you didn't feel you could talk to me about your concerns' - and this from a partner who would never give me the time of day!"

"I noticed the same thing happening to the senior admins [administrative staff]. There was quite a high turnover in our section. One partner used to come in really late then suddenly at four or five o'clock he'd be pressing them to stay back and work late. The firm didn't pay overtime unless it was charged against a matter so these girls never got it. They tried hard to negotiate a resolution but they didn't get a hearing. In the end they just left. I think in the end though there were changes made because the turnover was so much higher in that group than in other parts of the firm and the agency expenses were correspondingly high to find replacements. But it is the power thing - that's how I see it. There is a kind of culture that says 'We're in charge - take it or leave it' and it really seems illogical to me and a bit of a waste of the talent and the loyalty they could have."

"The worst thing for me was getting the budget and suddenly discovering I was not meeting budget - it was such a shock. I thought I'd be consulted about it. I thought they'd discuss their expectations with me. I felt terribly stressed. It was quite different from what I'd been led to believe would happen. After the induction process which was really terrific I was passed over to a department

where the partners were so busy they really didn't have time for me. I used to hang about trying to get work but I didn't know anything and anytime I did some research or drafted anything it seemed to go into some black hole and I never heard back. Then suddenly one morning I was at the department meeting and the partner running the meeting hauled me up the front and asked me to explain why I was behind budget. He was awful. Even though a number of the lawyers got the same treatment, it was out of the blue. I felt we should have sat down and discussed it - not been humiliated in public."

"The interaction with clients was quite interesting to watch. I sat in on quite a few strategy sessions with clients. In the two cases that made the most impression on me the clients had been with the firm a long time. In the first case, the client, a reseller of high tech equipment, was having serious problems with a major supplier. A government contract was at stake so things were pretty serious. At the first strategy meeting I attended the partner came on really heavy about the need to stamp out this kind of bad behaviour from the supplier and really pushed the litigation process. I thought the client was really concerned - not with the financial aspects but at the prospect of scaring off the government if they got wind of the supply problems. I thought there were some very serious messages coming from the client that were just not being listened to. I went to the next two meeting where there was discussion about choosing barristers and getting some expert evidence and reviewing draft affidavits. I thought the client was getting more and more nervous but the partner kept up the pressure to strike the supplier with some pretty serious stuff. The next thing I knew, the client rang to say he'd had a negotiation with the supplier and things were resolved. The partner was furious - fired off quite a cranky letter to the client with a hefty bill. I was really surprised. It didn't seem to me like a very sensible way to treat such an important client relationship.

The other case was reasonably similar and again I got the feeling the partner thought the client was weak and gutless not to fight and was just not listening to the client's concerns about business vulnerability.

.....I think part of it is the power and control issues but also, now I have left and I'm working in a consulting firm, I can look at it a bit more objectively. I think the lawyers get so hooked up in the challenge and interest of the legal work they forget about the clients and what they want and they get quite cranky when the clients deny them the chance to pursue an interesting case."

There were numbers of other examples the students discussed along the same lines revealing concerns about relationships between lawyers and clients. The students also spent some time talking about relationships between the lawyers inside the firm.

"I was surprised to find partnerships so political and bitchy. Perhaps it was just a feature of the two large firms I worked in - maybe smaller firms don't behave like this. But I did find it surprising. They didn't have very healthy working relationships with each other and they would say some pretty amazing thing to the staff which seemed very indiscreet when they were talking about their fellow partners."

"I've been to all the training on marketing and practice development and I think it's pretty hard for someone at my stage to play much of a role in it. But I can see the value of building up business relationships... And it doesn't make a lot of sense to me to get all of us young lawyers trained in relationship building and then to see that the partners aren't sponsors to the training and don't provide us with examples of it. I find the messages in all of this a bit confusing."

After some more discussion along these lines the group was asked if they would spend time developing a list of the characteristics they would identify as a fair representation of lawyers in negotiation. They prepared the list, identifying that lawyers:

- have a tendency to give instructions rather than to negotiate;
- do not turn to negotiation as their first choice in dealing with people and situations over which they have control;
- do not invest the same energy in relationship building that they do in pursuing legal solutions; and
- enjoy argument and dispute and bring elements of this into their business relationships.

Focus Group 12 - Senior Management Teams: NSW State Government Department

1. Background

One member of this senior management team was a student at a negotiation training program delivered by the writer. He shared some anecdotes in one of the breaks and was then asked if he would approach some of his fellow management team to participate in a focus group with the writer. Four members from Central Office plus two regional managers agreed to participate and the meeting was held soon after. It was explained to the focus group that the purpose of the group was to collect some qualitative data about lawyers in negotiation.

2. What are the main elements of lawyers' work?

The group members noted that they were all career public servants and had no experience of working with lawyers in general business situations that did not involve the work of the Department. They provided a list of their understanding of the main elements of lawyers' work as follows:

- providing advice about the law;
- reviewing and drafting documentation;
- facilitating the resolution of disputes;
- providing policy advice on legal issues; and
- facilitating legal review and reform in line with government action and community interests.

3. Is negotiation part of lawyers' work?

The group was asked if they considered that negotiation was part of lawyers' work and they were very clear that they saw negotiation as being an integral part of the day-to-day work of a lawyer.

4. What are the characteristics of how lawyers negotiate?

The group explained that their experiences with lawyers had been with the various in-house lawyers appointed by the Department and with the CSO (Crown Solicitor's

Office) of the New South Wales Attorney General's Department. The internal legal team had experienced many personnel changes over the past ten years.

> *"I think the first thing to say is that lawyers are very dedicated to getting what they see is a good result for their clients. I know they are a group everyone loves to hate but from my experience they really are committed to doing the best for you."*
>
> *"It is right to acknowledge that because they often come in for a bucketing when the Minister or the DG (Director General) is thwarted in some pet project because the lawyers have pointed out that our legislation says they can't do it."*
>
> *"So they are a dedicated bunch but the thing is they have this unfortunate focus at times on the negative. They are very clear about what we are not allowed to do. They do their research very thoroughly and they know the legislation back to front. But they are not good a coming into the team and being creative about how we* ***can*** *do something. They do behave a bit as if they are the guardians of truth and justice and they have to stay very alert to keep us on the straight and narrow."*
>
> *"We've been lucky with this last lot of lawyers. There are a couple there who have really got around the Department and got a clear idea of what is going on here. I can go to one of them direct these days and usually find they are pretty helpful. But actually I don't see them as very good negotiators. They'd rather write an advice or a letter than sit down and talk. They do business in quite a formal way and this doesn't make them very approachable in a sort of low key group-think kind of way. In fact they have made a complaint to my immediate report that too many of us are simply dropping in to talk to them about problems. They want a more formal process adopted where we have to instruct them in a formal written way. I think this is an example of how the lawyers would always prefer to interpose a piece of paper between you and them."*
>
> *"I have been working with them to develop their part of a corporate plan and I do find the way they think can be very frustrating. They are very clear about what they don't want to do and what they won't accept. They are not very good at talking about what they* ***do*** *want. The document has been through so many rewrites I am getting annoyed - and they don't just want to change the substance - anytime I let them get their hands on it they have changed all the language and the grammar. They do get a bit hooked up in the trivia."*
>
> *"They should get credit for working to create better relationships across the Department. Most of the other lawyers we've had coming through here were rather stand offish. We'd have to go to them and we'd have to make formal approaches. These guys do seem to have taken the trouble to develop relationships across the whole Department. They have been to the Regional Offices and even developed some guidelines about how to use Legal. I think it is a great change from how most lawyers seem to be. I can't imagine turning up at the Crown (Crown Solicitor's Office) without an appointment and without*

having submitted a four page letter of instructions to them - I'd be told where to go pretty smart."

"The Crown are more like the traditional lawyers I am used to. I'd take them to a negotiation with another Department if I thought I was going to get railroaded and I needed a cool brain and someone who wouldn't be bullied. Or if I was under big pressure to do something and I needed time to think I could always rely on someone from the Crown to hold things up for three or four weeks over some trivial regulation."

"Our people don't do this but I have found that lawyers use really formal language and can sometimes behave as if they think they are a bit intellectually superior. It can be to our advantage when we need to be really tough in a negotiation but when we need co-operation and to work together co-operatively it can be a bit of an impediment."

The group members all contributed anecdotes which expanded the point already made. The group was then asked if they would reflect on these discussions and develop a list of characteristics they would identify as a fair representation of lawyers in negotiation. In doing so they asked that the writer take particular note of the fact that they were talking about their experiences over the years and that several of the comments they were making were about their experience generally and not their experience with their current legal team. They agreed on the following list which recorded that lawyers:

- are dedicated to getting good results for their clients - this is the intention that motivates them in negotiation and all their other activities;
- have a tendency to focus on the negative - to identify what you can't do rather than to look at creative ways of making things possible;
- can become overly concerned with and distracted by the fine detail and not pay enough attention to the big picture;
- often prefer to deal with issues in formal ways such as correspondence rather than sitting down and talking things through or negotiating;
- use formal language and jargon which can operate to keep negotiating parties at a distance from each other;
- often present in a negotiation with non-lawyers as intellectually arrogant; and
- favour a formality of approach which can impede the development of good working relationships.

Focus Group 13 - Statutory Authority: Business Unit Managers

1. Background

Whilst conducting a training program on business planning the writer met a number of staff from this Authority. At the end of the training program the business unit managers were asked if they would participate in a focus group meeting the next time they met. Five of the managers agreed and formed this focus group. Two of the group had experience as practising lawyers although they had left practice a number of years ago to undertake roles in management.

It was explained that the purpose of the focus group was to obtain qualitative data about the characteristics of lawyers in negotiation. These managers were part of an authority with a large in-house legal team which also contained a floating population of secondees from major law firms.

2. What are the main elements of lawyers' work?

There was very little discussion of this. The group quickly decided that an adequate list was:

- providing advice about the law and its application;
- documenting and conducting legal transactions;
- providing advice on the effective resolution of disputes including undertaking the conduct of litigation;
- 'signing off' on a range of business activities and processes with legal implications; and
- advising their CEO and the Board on governance issues such as compliance.

3. Is negotiation part of lawyers' work?

It was noted that negotiation did not appear on the list and the group was asked whether they considered negotiation to be part of lawyers' work. There was some discussion of this and the group was careful to point out that their lawyers played no real role in commercial negotiations. All major deals were negotiated by business unit managers according to the level of their delegated authority and then signed off by the lawyers.

They agreed, however, that a lot of the work the lawyers undertook involved negotiation in a more general sense. They did not see negotiation as a stand-alone element of lawyers' activities but they saw it as an activity that ran through most of the items on their list.

4. What are the characteristics of how lawyers negotiate?

"We have a rather unusual business structure here. There is a small group of lawyers presently in Central Office and at any one time there are usually some quite big litigation teams. But mostly they are allocated to and live with the Business Units. This means that we all have the opportunity to decide how we are going to use the lawyers in our particular Units. Strangely enough, most of us have the same approach to the role we give our lawyer and I think it comes from our assessment from what lawyers do best.... Most of us don't involve the lawyers in the deals we are doing until quite late in the piece. We have quite a lot of standard form documentation that they have drafted for us with the instructions on how it is to be used."

"Most of us have found that lawyers are great deal breakers unless you keep them on a tight leash. If you let them get a look in early on they can kill the deal stone dead and you can never resurrect it. They have minds made for detail and they hate agreements in principle. They want to document everything in the finest detail so that nothing can go wrong."

"And there is a time for that but you have to get the relationship going first. Companies that deal with us want us to keep coming back. For a lot of them it is a bit of a coup to deal with us. It builds the strength of their business. Along the way this often leads to a business opportunity for us both."

"So it is no good going in there with two hundred pages of conditions that are so punitive they'd go broke trying to meet them. There has to be some good faith and some give and take. They can't afford to let us be disappointed. And they need to know we will be fair to them and reward them for really looking after us."

"The lawyers think we take big risks and they are very critical of us for not bringing them in earlier, but they are really the last people you want at the negotiation table. It's a pity they don't listen to us when they raise this issue with us - if they would be a bit more respectful of our business nous and experience we could probably be more of a team."

"I've had a lot of experience as a practising lawyer and I must say that I find it strange that some young kid with a year's experience can give me a lecture about our exposure to risk. Perhaps I have changed now I'm not practising - I'm sure I was never quite so arrogant."

"Actually I think the negotiations our lawyers need to manage most effectively are their negotiations with ***us****. They really don't handle them very well at all.*

They force us to give formal, written requests for advice, they aren't very accessible on the phone and they don't have a lot of respect for the kind of deadlines we are under. And if we just walk into their office to get a bit of off-the-cuff advice or talk something through they look as if we've just asked them to conspire with us in some kind of price fixing agreement."

"They do need to be a bit more approachable and less rigid about things. It's like they don't really want to have a working relationship with us like equals - they get very miffed if we don't respect their advice and don't act on it but they don't respect the kind of business risks we need to take and the pressure on us to build market share and emerge from our old protected environment into a very competitive business."

"It is their job to give us advice about risk but it really annoys me when they call in the Head of Legal to give some extra clout if they feel we are ignoring their advice."

"That has happened a few time and it was such overkill. It would have been better to sit down and talk about it like colleagues rather than feel I was going to be hauled before the Board at any minute and asked to explain."

"But they really do come into their own when we've got a big fight on our hands - one that we have to win in a pretty public way, to show the market we mean business. They really put up a terrific fight."

"We have had some pretty good wins and some where I was positively sh...ng myself that we would be done like a dinner but we put up such a good show that the other side folded."

"But I do criticise them for getting a bit too attached to the excitement of the fight. A couple of times I found them really pushing me to fight and getting things really wound up for a battle but then, as the moment of truth got a bit nearer, they went to water and suddenly started to push settlement negotiations. I think litigation is not something to engage in lightly. Unless we need to give a big signal to the market or take a very public stand about some major issue, if something can be settled it should be - early and efficiently. I'm not convinced the lawyers see that their role is to negotiate a satisfactory resolution of these claims. I think a lot of them like to fight first and then come to settlement options if the fight doesn't go as planned."

"But I do think the good thing about our legal team is that they have a good reputation with the legal profession. They get taken seriously. I think they get co-operation from other lawyers and the big firms respect them. That works well for us - we do get benefit from it."

Business structure and their imminent restructuring was a big issue for this group and the discussion became focussed on this. It was clear the group had concluded its discussion of the issues relevant to negotiation.

The group was asked if they would conclude the session by drawing their agreed list of the characteristics of lawyers in negotiation. They did so as follows, noting that lawyers:

- have a tendency to be 'deal breakers' in a negotiation because of their focus on fine detail and 'cover every contingency' documentation;
- fail to recognise the role of good business relationships in negotiation;
- require more respect for their judgement and advice than they are prepared to give other professionals;
- have a formal approach which can prevent early discussion and resolution of issues;
- can sometimes find the prospect of litigation more technically challenging and interesting that the early resolution of claims which is more likely to meet the business interests; and
- value respect and credibility in lawyer to lawyer negotiations and clients benefit from this.

Focus Group 14 - Medium-Sized Law Firm: Debrief With Small Business Client

1. Background

This focus group followed a debriefing session held by a medium-sized law firm with one of its clients. The session provided a post-mortem of a legal transaction which involved:

- restructuring a medium sized family business;
- introducing external capital and shareholders; and
- raising capital for an international business.

Four law firms were involved at various stages throughout the transaction. The focus group comprised four of the original family members, two of the new shareholders, the CEO, two partners and two associates from the law firm acting for the business.

2. What are the elements of an effective negotiation?

The members of this group had some very specific objectives of their own and the writer had to be very careful to respect this. The clients were driving the meeting and they were not interested in creating their definition of lawyers' work. Instead they wanted to review the negotiation process and to identify what they saw as the elements of an effective negotiation.

After some discussion, the four family members and the two new shareholders agreed that the elements of an effective negotiation were:

- the parties achieve the essential elements of their original plan;
- no-one is surprised or disappointed by the end result;
- there is nothing left on the table at the end of the negotiation;
- the deal is likely to be completed - no one backs away or breaks the agreement; and
- the parties can work together again - probably they will do better and more effectively next time because the relationship has been established.

The post mortem process had produced some action plans for the lawyers of elements of the transaction which still needed attention. The parties were keen to continue this discussion for a while and so it was allowed continue naturally.

3. Is negotiation part of lawyers' work?

After some time the writer was able to pose this question. There was very little discussion. All parties agreed immediately that, formally or informally, negotiation is part of the work that lawyers do.

4. What are the characteristics of how lawyers negotiate?

It was then possible to engage the parties in a discussion of lawyers in negotiation.

> *"I have used this law firm since we first put our toe in the overseas pond and they are now really in tune with our business and what we want to achieve."*

> *"... will forgive me for saying this but is has been a hard slog - at first they really just wanted to be lawyers. They would give us a lecture about our business risks and about how we couldn't do business on trust but they were not seeing the bigger picture of the whole business and where we were going... It has been hard work but we have got them there now. We stuck with them because we felt that they were experienced in helping growing businesses and they knew their way around the law and the procedures. It was hard going though - give them the slightest opportunity and they get all finicky about fine detail and get lost in trivia."*

> *"But the most difficult part for us was the other three law firms that were involved. We weren't privy to a lot of what went on between them but those parts we were involved in were difficult for us. They do talk a lot of jargon and it is hard to keep up at times!"*

> *"Yes and it's strange because although they carry on in a way that excludes us outsiders, who are not lawyers, they don't communicate well and they don't listen! We would go to a meeting and think we had an agreement but when we saw the documents, we would wonder what was going on."*

> *"It was really a very simple deal we were engaged in. We had plenty of security; we had good business experience and it was a good deal for the financiers. So it was surprising to see the squabbling the lawyers did over really trivial things."*

> *"They seemed to like to flex their muscles. It was quite surprising to see the posturing (turning to the lawyers) .... I think you guys must enjoy it the way you*

keep doing it - I don't think you realise what it looks like to those of us looking on."

"We go into a deal like this very carefully. We know the business well and we have analysed the risks thoroughly; but the lawyers take quite a different view of the risks - they want us to have an agreement that covers every petty risk they can think of. It's not a very helpful approach really - not very business like."

"At one stage these guys [gesturing to the lawyers present] were so frustrated with the other lawyers they suggested that we deal directly with the two executives from our potential new shareholding companies. Their lawyers were just making things so complicated. We did have a few meetings and that I think their lawyers got the message and the general negotiations resumed."

"I've been through a number of deals like this - several of them before I came back to rejoin the family business and I can't say this transaction was any better or worse. I think what we experienced was a fair representation of how lawyers negotiate."

"You invited us here to review the transaction we've all been in and we don't want you to feel beaten up because, as we said at the beginning, you are our lawyers of choice. But as a group, as I think about it, it is clear top me that there are a number of characteristics lawyers have and they don't all work well for us. So it's a good opportunity to see how we can all work better as a team!"

The discussion continued for some time and some personal agreements were made between the parties. In the end, the clients agreed on a list of characteristics they thought summed up how lawyers negotiate, noting that lawyers:

- have high quality technical skills and in negotiation they place the greatest value on these;
- have difficulty distinguishing between trivia and deal-breakers and so they tend to take positions on everything;
- tend to get very lost in the technical detail and forget or fail to recognise what we are trying to get out of the deal - they seem to forget whose negotiation it is and what we want to get out of it. So they have a tendency to take over and decide what is important and what is not from a technical point of view;
- have poor communication skills. They are formal and inflexible in their communication style and they love jargon; and
- they are attached to the adversarial system. Even when there is nothing to fight about they seem to enjoy a good scrap. It doesn't seem to affect their relationship with each other but it is very frustrating for clients.

Focus Group 15 - Corporate Client: Claims Managers, Insurance Company

1. Background

This focus group comprised eight claims managers drawn from States and Territories all around Australia who were employees of one particular insurance company. Few had tertiary qualifications, although one had graduated with legal qualifications but had never practised. As a group they considered themselves to be very experienced negotiators and their jobs required them to negotiate the management and settlement of insurance claims on a daily basis. They all had day-to-day working relationships with lawyers whose firms had been appointed as panel firms to the insurance company following a tender.

2. What are the main elements of lawyers' work?

It was explained to them that the purpose of the focus group was to enable the collection of some qualitative data about their perceptions of lawyers in negotiation. It was explained that there were several questions the writer wanted them to consider during the session and these would be introduced at appropriate times during the discussion. The group was asked to share what they considered lawyers' work to be. After some discussion they produced a list as follows:

- representing the concerns and wishes of their client in the legal process;
- identifying the business interest of the clients and ensuring these are applied to the management and settlement of litigation;
- keeping the client up to date with progress in matters and maintaining good reporting processes;
- giving the client timely advice about matters of liability and quantum so that effective business decisions can be taken; and
- making a commitment to the early resolution of claims.

3. Is negotiation part of lawyers' work?

It was noted that negotiation did not appear on their list of lawyers' work and they were asked if they thought that negotiation was part of lawyers' work.

The claims managers made it clear that they considered negotiation to be an integral part of what lawyers were required to undertake for their clients. They then began high-spirited and at times angry debate about the characteristics of the way lawyers negotiate and the results of this which they experienced.

> *"Of course negotiation is what lawyers are there to do, but they need to remember that it is our process and not theirs."*
>
> *"Lawyers have a way of taking charge and making decisions for you that really aren't their decisions to make."*
>
> *"I think negotiation is what lawyers should do, but I don't think it is what they* ***do*** *very often. Because of my experiences with lawyers and how they negotiate there are many circumstances in which I would never involve them. Of course I will use them when there is legal work to be done, but there are many situations early in the case when I would rather make the decisions myself about what we are going to do and bear the risk than to allow the lawyers to negotiate with the other side at that stage."*
>
> *"Lawyers have a very narrow view of what negotiation is. Negotiation is something they should be doing with me and other claims managers all the time. They should be seeking to persuade us to their point of view and to get us on side so that we move forward as a team, not as two people playing a game with each other about which is the more powerful."*
>
> *"Lawyers don't really want to negotiate, they want to run cases. If they really wanted to negotiate they would be committed to the early resolution of claims and the statistics would really show that. Instead they like to wind you up about the case and the law to keep the matter going and then just before hearing they go to water because they aren't up to speed and they get pushy with you about a settlement."*
>
> *"There are many opportunities when lawyers could and should negotiate effectively for and with us but instead they like to use their power to overpower you. They like to make us squirm, and when we have to go to a negotiation with them, they can spend as much time during the negotiation exercising their power over us if they can in trying to resolve matters with the other side."*
>
> *"I agree that lawyers are very hung up with power and control and this comes through in the way they pass up the opportunity to deal with us as equals. They will often use a technicality to confuse you and I often come away from dealing with them feeling patronised. They talk about things in a way they think you will find difficult to understand. I think it is their job to explain things to me as if I am an intelligent adult who simply does not have legal training, rather than as an idiot who has to be treated like a child."*
>
> *"I think communication is probably the most important part of any negotiation and this is the area where lawyers are most defective. They are masters at*

holding things back, even where it would be really useful to share information. Lawyers have taught me never to reveal anything. I hold back everything."

"Lawyers have a relationship with each other which is like a club. Anyone who is not in the club is automatically excluded. I think they negotiate well with each other because they see each other as equals who are worthy of the effort required to negotiate."

"I have seen some lawyers who are very good negotiators and they have taught me some important lessons. For example when the client is emotional or feels very strongly about things it is better to exclude the client from the negotiation. We can manage negotiations much better if clients are excluded in these circumstances."

"If negotiation is such a great tool, why don't more lawyers use it!"

4. What are the characteristics of how lawyers negotiate?

Other members of the Group added further anecdotes which built upon the characteristics discussed above. In the end the group agreed on a list of characteristics of lawyers' negotiating behaviour which they chose to describe as follows:

- lawyers have difficulty developing good working relationships with clients. The ability to work well together in a team is a really important part of the negotiation process;
- power and control are important to lawyers in negotiation;
- the kind of language that lawyers use make it difficult to negotiate with them. Lawyers often pass up the opportunity to use negotiation when it would be useful, for example, to change how clients see things; to persuade clients of a particular course of action;
- lawyers engage in 'clubbish' behaviour with other lawyers which can be experienced as excluding and inhibiting the development of a good working relationship with us; and
- lawyers are not really committed to the early resolution of claims through negotiation or other processes such as mediation. Despite what they say in their tender documents, they would really rather fight and win than settle.

As the session drew to a close participants noted that, as a result of this business strategy, there were continuing pressures on them to deliver cost effective, early resolution of claims. If lawyers were to play a useful part in this, effective negotiation skills would be vital in delivering the most valuable legal advice. In their view, as

negotiation became increasingly important it would seem sensible for law schools to offer courses in the training of negotiation and alternative dispute resolution so that all lawyers could have a chance to upgrade their skills.

Focus Group 16 - Law Firm Marketing Managers

1. Background

This group of seven was part of a large group of law firm marketing managers who had invited the writer to a preliminary planning session for a proposed national conference. They were all employed in a marketing role in law firms in roles such as Marketing Manager, Director of Marketing, Marketing Coordinator and Business Development Manager.

It was explained that the writer was collecting qualitative data on the characteristics of lawyers in negotiation and they were asked if they would be prepared to work with the writer in a focus group. The group met informally some months later.

2. What are the main elements of lawyers' work?

Surprisingly the group was not at all interested in discussing this topic and questioned the writer about its relevance. It was explained that the open-ended question was asked because the writer did not want to influence their answers. It was apparent that if the attention of this group were to be kept, the writer needed to abandon this question and move on.

3. Is negotiation part of lawyers' work?

It was explained that the writer was interested to see if they thought negotiation was part of lawyers' work. After some discussion the group agreed that, while they might well have omitted negotiation on a formal list of what lawyers do, it clearly formed part of everyday business life and was obviously part of what lawyers needed to do.

At this stage the writer became concerned that the group members were regretting their agreement to participate in the group session and accordingly some discussion of extraneous matters was allowed. They are a group which does not meet formally very often and they seemed to want to 'catch up'. It was thought best to wait patiently until their attention could be brought back to the main process.

4. What are the characteristics of how lawyers negotiate?

Some time later it was possible to bring the discussion back to lawyers in negotiation. The group was asked about the circumstances in which they observed lawyers in negotiation and after some discussion it appeared that they had various experiences which included:

- negotiating with lawyers as their employer;
- negotiating with the partners the marketing plan for the firm and the associated budget and other resources;
- negotiating with lawyers their commitments to undertake various marketing activities; and
- attending client debriefing sessions with the lawyers to review major tenders and projects.

Members of this group thought they were very experienced in observing lawyers in negotiation. They were asked to talk about their experiences.

> *"I must say it's been a big eye-opener for me coming to work for lawyers. I've worked in a number of marketing roles and I've worked for a big accounting firm but I think lawyers have been the biggest challenge .... lawyers are really terrible negotiators you know..."*
>
> *"My first negotiation with lawyers was quite extraordinary. We were doing a big tender - it was worth between three quarters and a million dollars based on our past relationship with them. I needed to get a couple of partners to turn their attention to fee structures. The brief was very clear that the client was looking for tenderers to be offering some innovative fee structures and also to share some of the business risks with them in our fees.*
>
> *We had done most of the work for this client until a few years ago when a new head of the corporate team and some major cost cutting sent the work to tender and a panel was appointed. At that time we were the highest tenderer on price and we lost quite a lot of business. This tender was intended to rationalise the panel and would be a great chance to build our fees back up. But I couldn't get the partners to give me any time. I did everything I could but they just wouldn't turn up at any of the tender meetings. One partner was on sabbatical and at home and I even offered to go to his house but he wouldn't even return my messages.*
>
> *I was so disappointed. The tender was weak. I knew it and the client knew it. We missed out on the panel though we did keep some of the one-off project work but nowhere near what we could have done. In the debrief I did with the client and our Managing Partner they said how disappointed they were that the firm didn't respond to such a clear direction on fees.*

At our internal debrief I thought the partners were very arrogant. They didn't want to talk about the fees issue. I felt the Managing Partner thought it was my fault - I didn't try hard enough. I thought about resigning, I was so upset but I hadn't been there long and I thought it would look bad on my CV - like I wasn't a stayer."

"You'll find that all of us here have had similar experiences. I think that part of the problem is that lawyers are really personally offended at being asked to tender and they hate having their fees challenged. They really don't understand the massive changes that have been going on in their clients' businesses - and they think if they just ignore it and refuse to deal with it and negotiate, it will just go away.

They all talk about relationships but they don't really pay attention to their clients. There is an arrogance about them. They do think they are better than everyone else."

"I'm surprised by how much most of them hate marketing. It's so hard to get them to do it. They'd much rather go into their offices and shut the door and work. Marketing is really just a big negotiation about relationships. They don't get it but that's what it is."

"No - I think they ***do*** *get it. It's because it's about relationships that they hate it. They don't want that kind of relationship - the relationship that is based on even ground. They want to be respected. They want to be the one who gives the OK before the client can breathe. They want to be in charge. That's what they mean by relationship and anything else really threatens them."*

"... and they certainly don't want a relationship with us. The last big tender I worked on we worked nearly seventy-two hours straight. We had round the clock WP operators and it was touch and go whether we'd make it on time. The deadline was a Tuesday morning and we worked all over the weekend. The Client Relationship Partner was away with his family down at Bowral and I had his mobile phone number but the phone was off for two days so that didn't help. I was really pi..ed off. When we won the tender the lawyers all behaved as if they had been heroes. There was a lot of congratulating going on but my office was pretty empty."

"I think part of the problem is that they don't see us as professionals. We are the people who organise the functions and do brochures but it's not a professional - we're like the caterers. That's why they don't actually have a relationship with us in which negotiation figures very much at all. We're not important enough to negotiate with. We're here to be told or to be ignored - nothing much in between!"

"If we're going to be fair we should acknowledge that lawyers do a very good job at the things they're supposed to be doing - being lawyers. They have terrific technical skills - they are very focussed. All the things clients retain them to do. It's just that anything that requires a bit of the human touch they are hopeless at."

'Lawyers do have very dysfunctional relationships. Not just in negotiation but in everything. Our printers and our external marketing consultants, our web designers - they all hate the meetings they have with us if the partners are there. They get treated very badly by the lawyers who seem to enjoy being very difficult and stirring things up."

"... and they are so finicky about the tiniest, most irrelevant things. They'll be more concerned about the size of the logo and its position on the page than they will be about the strength of the marketing message. I can talk till I'm blue in the face about what our brand should be and no-one will listen. But if I get the apostrophe wrong - watch out! They are really fine detail people - not interested in the big picture. If they were, they would be able to see and understand all the changes around them and engage in them sensibly."

"... and they do think they are the elite group. If they don't like something I do they'll never just pick up the phone or drop in to see me about it. Their first reaction is a memo - and they can be terribly rude - I think that avoiding personal contact seems to give them the right to behave however they like. And if I go to see one of them about a particularly rude memo they are always really amazed that I could be offended. I think it's genuine you know. They just don't seem to seek or need the same level of personal interaction that the rest of us do. That's probably why we're in marketing and they are in law!"

"It is a very political environment too. I've never really seen so much political backbiting and infighting as I have in law firms. I think we've all found that haven't we? - and it's something we all remark about when we have our meetings.

They have real difficulty dealing with things directly and I think that is where the gossiping and backstabbing comes from."

"I think my biggest problem is that they never say what is right with something - they just pick up the defects. If you ask a lawyer what they think of something, what they hear you ask is "what's wrong with it" and that is the question they answer.

Funnily enough I think this is another face of what comes up in client surveys all the time. Clients say lawyers are always telling them what the problems with their transactions are. They don't grasp the business idea and find creative ways to make things happen - not without a lot of pushing and shoving from the client."

"Yes - I see that in the client surveys and the debriefs. "Can't do" people - that's the expression clients use and the lawyers do seem a bit pleased when they discover the flaw that is the deal-breaker."

The group continued to expand on the points made above for some time and contributed a range of anecdotes which emphasised these points.

The group members were asked if they would reflect on these discussions and develop a list of the characteristics they would identify as those of lawyers in negotiation. In doing so, the group asked the writer to note their views that lawyers' behaviour when negotiating did not seem to them to be very different from their behaviour at other times. So the characteristics they were identifying were those which could be observed throughout lawyers' activities, not just in negotiation.

The group developed the following list, noting that lawyers:

- are often surprisingly reluctant to negotiate and to engage in the interaction it requires - often they will choose to ignore a situation or to use devices such as memos to have influence without interaction;
- focus on detail and technical accuracy meaning that they can often miss the big picture;
- often behave as if finding a problem or defect is more important than finding a solution;
- enjoy a culture of argumentative, politically charged behaviour which does not encourage healthy, open relationships; and
- have an elitist view of the world and this affects negotiation, communication and their dealings with non-lawyers including staff and clients.

Focus Group 17 - Corporate Client: Senior Executive Team, Manufacturing Industry

1. Background

This focus group followed a two day training program conducted for a major manufacturing business. Eleven of the nineteen senior managers undertaking the course agreed to remain after the training session to participate in the focus group. All of these executives had significant responsibility for negotiating a range of agreements, both internal and external. It was explained to them that the purpose of the focus group was to enable the collection of some qualitative data about their perceptions of lawyers in negotiation.

2. What are the main elements of lawyers' work?

The writer began by asking this question. After some discussion the group agreed on the following list of lawyers' work:

- advising clients on the law and its application;
- representing clients in court and in a range of business and personal transactions; and
- contributing to and supporting business ethics and morality within a legal framework.

3. Is negotiation part of lawyers' work?

It was noted that negotiation did not appear on this list and the group was asked what they thought about the role of negotiation in lawyers' work. There was very little discussion of this as the group quickly agreed that it would not be possible for lawyers to undertake the roles identified above without the need for negotiation. It was an element which ran through all the roles in the same fashion as interacting with clients and writing letters.

4. What are the characteristics of how lawyers negotiate?

The group was then asked to share what they considered to be the characteristics of how lawyers negotiate.

"I think it's interesting that, as a large manufacturing business which trades worldwide, we have really resisted having a big team of lawyers here. We have one corporate lawyer and he is pretty good to deal with - he knows our business well but, by and large, we try to keep out of the hands of lawyers. I have worked in a number of places and done lots of deals and I can tell you the deals work best when you can keep them out of the hands of the lawyers."

"I agree - lawyers really are 'can't do' people - they focus on small problems and fine details. Sometimes it seems like they are single mindedly out to wreck the deal."

"I don't mean to sound unfair, but I think they kind of enjoy it. You can practically see them smiling to themselves when they find the one thing that makes the deal not doable. I often think that if they gave the same attention to finding a clever way to make the deal happen, we would all be amazed at the result."

"Our lawyer here is pretty good - it took a while to train him but now I find that he tries hard to be accessible and he does seem to get the commercial drive we have for doing a deal. But if I can get away without consulting him, I will. People in this industry know each other well and we have a high level of trust. Unless something doesn't seem quite right or we are doing a very unusual deal, I reckon we're better off to leave the lawyers out of the negotiation."

"I think lawyers get really hooked up on making sure the deal is 100% no risk. But risk is just a part of business life. I'm happy for some lawyer to confirm my judgement about what the risks are but then it's my decision. Of course I'm not going to take the risk of doing something illegal - that will come back to bite me and the company - but there are lots of other risks I will take because of my experience and judgement about the people I'm dealing with."

"The worst nightmare for me is the big international deal where everyone has a big team of lawyers from all the large firms at the table with them. The lawyers just love to fight with each other. I think it is some tradition that goes with the secret society they belong to. They love to have a go at each other and to find fault with the documents the other side has produced - usually at a really critical time in the negotiation...."

"....and then they get us sidetracked into trivial issues that really don't affect the substance of the deal and everyone goes off really annoyed and frustrated."

"I have a lot of difficulty trying to make the lawyers understand what I am trying to do. We are in a very tough market at the moment. There is great price competition. I've got to meet and exceed pretty tough quotas and that means return business. I need strong relationships with the companies I supply to. My experience is that when we bring the lawyers into the negotiation they really don't know how to negotiate. They want to write long letters of advice that never get to the point and they don't want to put the time into getting to know the people we're dealing with. Yet the people make the deal. I've been saved quite a few times when the competition was really strong because my guy I supply

knows me and knows I would deliver on time and in good order and I wouldn't whinge or complain over any default notices for him."

"The worst experiences I've had with lawyers are when we should have been advised to negotiate early and our lawyer talked us out of it. The restructuring we've been through has caused a lot of problems with middle management. Our lawyer brought in lawyers from a big firm with a lot of industrial experience. They urged us to be tough and not give in to blackmail. These were guys I've know a long time. Middle aged and redundant is not easy to deal with and I wanted to sit down and talk. They deserved that. But my boss was talked out of it by arguments about not setting a bad precedent. Well we took the advice and suddenly it hit the press and there were lots of legal claims and after a lot of posturing and heavy talk, the lawyers told us to start talking settlement. Seems to me they got it arse about. We should have talked first and treated people properly."

"The company lawyer has done some very good things here - we really need to be fair to him. He has forced management to face up to some pretty dodgy practices that were starting to get us into trouble. The training and the internal auditing of some of our practices has been very worthwhile and it has kept us out of the hands of the ACCC at a time when some of our competitors have been caught out. I think that is what lawyers really are good at - rules and systems to make sure everything works smoothly and can withstand scrutiny. It's just that they are not business people - they wouldn't really know one end of a deal from another and the only thing they ever have to sell is time on the clock - and sh..t, do they know how to sell that!"

"If we are balanced about it, it's not all negative. When there is a big, serious fight, you want a blood and guts lawyer in there fighting for you. They've got the discipline and the nerve for a big fight and they enjoy it. It is bad news for us. So we should all stick to what we do best. I'll stay out of their courtroom and they can stay away from my negotiation table."

Other members of the group continued the same themes which build on the characteristics discussed above. As the session drew to a close the group agreed on a list of characteristics of lawyers' negotiating behaviour, noting that lawyers:

- are deal breakers not deal makers because they focus on small details and are not committed to finding constructive ways to get deals done;
- enjoy a good fight and this brings argumentative behaviour to the negotiation table that we could well do without - and often they would rather fight than start negotiating early;
- focus on the rules and not on the people so they miss the significance of developing good business relationships; and
- tend to confuse business advice with legal advice. They focus on no risk solutions rather than recognising that their role is to advise not to decide.

Focus Group 18 - Corporate Lawyers (No. 1)

1. Background

This group of seven was part of a larger group of corporate lawyers which attended a Corporate Lawyers Conference. The seven members of this group agreed to meet as a focus group at the end of the first day's proceedings. The lawyers all worked for Australian companies. Three had other lawyers working for them or on secondment from law firms and four had sole responsibility for the corporate legal role. All had worked for more than one company and had experience at salaried or equity partner level in private practice.

It was explained to the group that the writer was collecting qualitative data on the characteristics of lawyers in negotiation.

2. What are the main elements of lawyers' work?

After some discussion between group members is was agreed that the main elements of lawyers' work through the eyes of corporate lawyers are:

- identifying areas of legal risk and exposure;
- supporting clients in the timely and cost effective resolution of claims;
- providing advice about the law and its operation; and
- representing clients in court and tribunals.

3. Is negotiation part of lawyers' work?

It was noted that negotiation did not appear as a separate element and the group was asked if they considered negotiation to be part of lawyers' work. They agreed immediately that negotiation was an integral part of the daily activities undertaken by lawyers and, of course, undertaken by all of us continually in our business and personal lives.

4. What are the characteristics of how lawyers negotiate?

The group was asked to turn their attention to this question. This provoked a discussion about lawyers as a separate group and whether lawyers' behaviour could be seen as having special characteristics. The group finally agreed that there were some

distinguishing characteristics about lawyers' behaviour but they felt these characteristics were not peculiar to lawyers in negotiation but could be observed across the range of lawyers' activities.

> *"From my perspective the lawyers I deal with have two different kinds of negotiations - negotiations with other lawyers in private practice and negotiations with me and my senior managers and directors. I think these are conducted differently and the results are different. Lawyers in private practice deal pretty well with each other. I think their negotiations are reasonably effective. They see things the same way. They use the same language. In the commercial arena at least they mostly have respect for and confidence in each other. I think if you ask most lawyers (apart from the personality differences that everyone experiences and you probably can't exclude) they would say their negotiations are effective, efficient and have good outcomes.*
>
> *I don't think clients see it this way at all. I include myself as a client rather than a lawyer because after a few years in this job away from private practice, you have to change your way of thinking - a lot or else you won't make it."*
>
> *"I've been amazed at how differently I see lawyers in private practice now that I'm not one of them. I think they are all the things I used to resent being accused of and felt were unfair - 'i' dotting, 't' crossing technical thinkers who enjoy scoring points off each other and think it's clever to find fault and criticise the drafting skills of the other side.*
>
> *They don't listen, they give gratuitous advice about things they haven't been consulted about and they have no idea about where they add value and where they don't."*
>
> *"I think we need to be careful to be balanced about this because there is a lot of very good advice we depend on them for. We need to give the credit for the fact that they are a really dedicated bunch and they do go all out to be responsive and keep us happy."*
>
> *"I'm proud to be a lawyer and I think I'm a good one but my exposure to the Board and my need to support deals and make them happen has really changed how I think - and I do think that is the real problem with the private profession. They are not connected to the answer. They aren't affected by the outcome. They can be clinical and dispassionate - it doesn't matter as long as the advice is right in a legal sense."*
>
> *"And all these things are what we see when we are negotiating with them and what our managers say when they've been exposed to them."*
>
> *"I think our last tender was very instructive. They sent us all this stuff - brochures and capability documents and they talked about how they were dedicated to great working relationships with us. It looked wonderful. But then came time for the presentation and they spent the first twenty minutes talking about how wonderful they were and how they had a history practically going*

back to the First Fleet. The two Directors who were there with me were really turned off. It was such a sad signal about how they viewed relationship building - telling us about ***them*** *- not engaging us in a dialogue about how we wanted things to be. I do think the greatest problem we have in using the outside lawyer as effectively as we'd like is that our idea of a good working relationship and theirs are so different. We want to consult; to brainstorm; to throw ideas around and try to come up with something constructive. They want to research; to write a twenty page letter of advice and tell us what we can't do and send the bill and be paid whether or not it was useful to us."*

"I think we would like to do more negotiating with them along the lines of throwing ideas around, testing ideas, getting creative. I don't think they really like to negotiate much at all. If they can do things from their desks, negotiate by letter or fax or something then that is their preference."

"And I think our roles have forced us to be far more flexible than private commercial lawyers. We've had to learn to communicate in a whole range of ways. We walk on the shop floor. We fly all round the country to see our people face to face. We do flow charts; we set up spreadsheets. I think it has emphasised to me how limited are the communication skills of regular lawyers. They prefer the formal, written document over everything else. They are really very inflexible. And for all their marketing people and their training people trying to make them more client focussed, they just pretend a bit better - they haven't really changed."

"... and I suppose one of the most serious problems they have is they don't deal with relationship problems when they should. They just ignore them until maybe it's too late. We got a new CFO last year who got really stuck into the expenses. Thought our external legals were far too high. He was horrified about the one line bills we'd been getting - I wasn't because I knew that we were getting the value and I'd query them if I wasn't satisfied. But the CFO got a bit worked up and told [me] to set up a new reporting regime with particular details that could be fed straight into other activity codes across the company. I rang the partner in charge to tell him this was coming and he was very frosty and took it very personally. Then I sent him the pro-formas and asked for his input. Nothing - just a big silence. I think nearly two months passed and the CFO wouldn't let me sign off on any bills until this was fixed. So we weren't paying the bills. I finally got a very unpleasant call from some credit person - I was really annoyed. The partner had said nothing about the new format - just behaved as if nothing had happened. I finally had to call the Managing Partner to sort it out. I'm still annoyed and bewildered by what happened and our relationship will never be the same. I'll probably go on using them because they're the best in the field but if I have a choice I'll go somewhere else where the experience is better.'

"I've never had any experience like that but I do notice that there are times when we have a legal problem when I think we should go in and negotiate but our lawyers try to talk me out of it. I often get advised to 'tough it out' or 'call their bluff' or 'wait and let's see if they're really serious' - and when you're dealing with someone like a regulator who has the power to take a very big stick

to your business, then I'd rather sit down early and see if things can be resolved. I think there are lots of opportunities for early resolution of problems by negotiation or some kind of ADR process that the lawyers don't really take advantage of. They leave things far too late to start talking about settlement and resolution. Often by then there is no trust or the relationship has taken such a beating it is hard to get it back on track."

"I've found that since we moved from one law firm to a panel, things are very improved. I was opposed to the tender myself because I thought our firm looked after us well and it really is one of the best firms in the country, but the tender did make a big difference. I think they got a wake up call that we were in charge and that they needed to work at the relationship if they wanted our business.

The changes have made me realise that they really used to engage in some quite patronising behaviour and they really liked to behave as if they were in control. I remember one due diligence they did for us. It turned up some big compliance issues but it was still a good acquisition for us. We needed the market spread and they had a big piece of business we wanted. The partner in charge advised us in the strongest terms not to proceed. He even took it to the Acquisitions Committee of our Board. I think they were astonished. We pay him to tell us what the legal risks are, not to exercise commercial judgment. I was embarrassed for him. He just thought he could take charge. He didn't see where he fitted at all into the process."

"I think most of us would find it quite difficult to go back to private practice now because, to survive, we've had to learn to think and behave quite differently."

The group continued to reflect on these issues and to add anecdotes which further reflected the points made above. As the time for the session drew to a close, the group was asked if they would consolidate the information they had provided in this session by agreeing on a list of the elements of lawyers' negotiating behaviour. They did so, making it plain that these were characteristics of lawyers in private practice. Their list noted that lawyers:

- ability to communicate effectively is hampered by their preference for formal, written process and their inflexibility in responding to the different communication styles adopted by their clients;
- have limited skills in building effective, peer to peer working relationships with clients;
- are more likely to choose avoidance or confrontation than negotiation when seeking to clarify issues or resolve disputes; and
- take positions of power and control when dealing with clients rather than adopting collaborative behaviour.

Focus Group 19 - Corporate Lawyers (No. 2)

1. Background

This group of five corporate lawyers were part of a panel of seven corporate lawyers contributing to an industry conference. They were all the sole corporate counsel for their companies although three of the five each worked with a lawyer who was on secondment from a large law firm. In each case the corporate lawyer undertook only small amounts of legal work. The prime role was identifying the legal needs of the corporation, outsourcing the work appropriately and monitoring and managing the outsourced work. The lawyers agreed to meet the writer for lunch following their session.

It was explained that the purpose of the group was to collect some qualitative data about their perceptions of lawyers in negotiation - lawyers in this case being solicitors in private practice.

2. What are the main elements of lawyers' work?

The group was able to decide quickly that (in the commercial context, which they knew best) the main elements are:

- providing advice about the law and its operation;
- advising on legal risk and compliance;
- drawing and reviewing documentation of business transactions so as to ensure they are legally permissible and enforceable; and
- developing processes to minimise legal disputes and to ensure their early resolution.

3. Is negotiation part of lawyers' work?

It was noted that negotiation was not part of the list identified and the group was asked if they considered negotiation to be part of lawyers' work. They agree quickly that negotiation played an important role in all of the elements already identified although they did not see negotiation as a stand alone element.

4. What are the characteristics of how lawyers negotiate?

There was some discussion about whether there really can be said to be characteristics which are peculiar to lawyers or which can be identified as belonging to lawyers. The group resolved this in an interesting way. They chose another professional group - accountants - to see how they would answer the same question. They came up with a list quite quickly and they were quite surprised by this.

> *"I suppose what we don't want to do is to be drawn into a stereotyping process where we go along with all the things that people love to hate about lawyers."*
>
> *"No - we don't want to be put in the position of debunking the urban myth but I don't think it's any accident that there are distinguishing characteristics to be found in any group of people doing the same kind of professional work. I can see a lot of similar characteristics in medicos for instance."*
>
> *"...and if we are truthful, when we get together at conferences like these with other corporate lawyers, we do a lot of collective whingeing about the private profession."*
>
> *'That's quite true - now that I think of myself more as a business person than a lawyer I do notice that my thinking has changed. I do see things differently. One of the things that is particularly noticeable is how I feel about getting legal advice. We might have some very knotty problems and I will get one of our panel firms with special expertise to do me an advice. Now I think I am saying - 'Tell me what the law is and what my obligations are so that I can decide what course of action to recommend to the Board.' But the lawyer hears me say 'Tell me what to do' and gets really peeved when I don't take the advice. I realise now that I used to do the same kind of thing when I was in private practice. I didn't understand what the business concerns were and I didn't understand that just because a course of action presents a risk it doesn't mean it should be abandoned. I want the lawyers to tell me what the risks are, not decide whether I should take them or not. They are not in business with me - they [are] business advisers."*
>
> *"And I think out of that come issues to do with negotiation. Because I think I have the same sort of perspective on business advice. I have pretty good legal instincts and I have legal experience that is pretty broad. Let's say I know enough to know where the gaps are. So often what I really want is to sit down with one of our external lawyers - a real specialist in whatever field I need at that time - and just brainstorm. I want to throw ideas backwards and forwards. I want to check out ideas. I want to check out where I can go with an idea or a structure. I think this makes the lawyers terribly uncomfortable. Because they don't really want to participate in a strategic sense. They want to be asked a question and provide technical advice on that question. They want a particular process to be followed - to do it how they've always done it. And I want to participate, not just passively wait for the answer. I also want them to help me*

to be sure what the question is - I don't want to have to wait until the end to be sure that I've asked the right question..."

"Our company does a lot of project management work - in all sorts of fields. I think this has knocked a lot of the old lawyer-like behaviour out of me. I've learned the two rules of successful project management - clarify, clarify, clarify. Talk about the project and clarify what success looks like right at the beginning. Share ideas and concerns and perceptions so that no-one is surprised about anything. This is invaluable for me because I have to draw the project management agreement and they are quite complex. I can't just do what I am told, I have to get involved in the project design questions and ask a lot of stupid questions so that I get the spirit of the agreement right.

The second rule is build the team. I see how our guys work. They get the relationships right from the very beginning. Who will do what; how they'll cope with problems; how they will deal with disagreements.

When I was in private practice, I didn't understand either of these things. I didn't understand that communication was talking about things and sharing ideas. I certainly didn't understand that good working relationships meant that I needed to be part of the team not the adviser to the team. I see it very differently now and I probably could never go back to private practice.'

'I had a lot of trouble when I first came to.... Company because they'd never had an in-house lawyer before and there was a lot of mistrust. In the early days I was excluded from a lot of the business decisions right up until the stage when they had to be documented. Then I'd be brought in at the last minute to document a deal I knew nothing about. I found this very frustrating because I felt I'd do a much better job if I was involved from the first. I talked to the CEO about it. He was very frank about their thinking. All their experiences with external lawyers had been that the longer you could keep things out of the hands of lawyers the less chance the lawyers would have to undo the deal.

I realised then that my challenge was to build some relationships of trust with the managers here so that they would actually ask for my advice early in the piece ... I think I have made a lot of progress... but I made a big mistake quite recently. I was going overseas and I didn't have time to deal with quite a routine deal that was going through. I was really stretched. I asked a partner from our external firm to sit in on the strategy meeting. He was a relatively junior partner but it was his field and I didn't expect any trouble... Suddenly when I'm away, all the urgent, angry faxes come for me. Apparently the guy had been so difficult and so negative at the strategy meeting he really brought the whole thing unstuck.

So I rang him up and asked what the hell he was doing - he said he thought I'd asked him to go to the meeting to take responsibility for identifying what legal problems might be encountered during the deal. He felt he had to point out some problems so that they would think he was making a contribution. It took me right back to my days in practice. A client would bring in an agreement to be reviewed. I'd scrutinise it carefully and feel a bit relieved when I could find

some technical problem that would show I was up to speed and reward him for being sensible enough to call me in. I always felt that if I just said 'fine, no problem with that' they wouldn't feel they were getting their money's worth."

"Well we do have a reputation for being 'can't do' people. It is a very common phrase people use about lawyers. I'm not sure that I ever operated like that but I do see it quite often among our panel firms. And the young secondee I've got at present, she does tend to do it. I can see with her it's lack of experience. She can't tell what's a big problem and what's inconsequential so she worries about them all. I couldn't let her go to a meeting of division heads on her own."

"You're right - it's a judgment thing I think. I don't think it is just being inexperienced because lots of lawyers do it. Just because they are very experienced lawyers doesn't mean they have business judgement. They see a range of problems and they don't know which ones matter and which ones don't so they make a fuss about them all."

The group continued to contribute anecdotes which built on the points already covered. The group was asked to bring the sessions to a close by drawing together the comments they had made. They were asked to create a list of characteristics they would identify as being those of lawyers in negotiation. They completed the following list:

Lawyers tend to adopt a unilateral style of dealing with clients which means that:

- they don't build the kind of team relationship that commercial clients find most useful;
- they don't develop a good commercial understanding of what problems are serious and require serious attention and what problems are trivial - accordingly they run the risk of being viewed by clients as being 'can't do' people; and
- they neglect opportunities to communicate and to negotiate which would clarify expectations and encourage creative problem solving with clients rather than for clients.

Focus Group 20 - Corporate Executives: Treasury Group, Financial Services Group Of Companies

1. Background

This group of eleven was part of a group of forty corporate executives who had been undertaking a negotiation training program as part of their Corporate Planning Conference. None had legal qualifications. Eleven of the forty agreed to meet before the start of the evening session to participate in a focus group with the writer. It was explained that the goal was to obtain some qualitative data about lawyers in negotiation.

2. What are the main elements of lawyers' work?

The group quickly agreed that the main elements of lawyers' work are:

- giving legal advice to clients;
- preparing legal documents;
- acting for clients in transactions which involve legal rights or consequences; and
- representing clients in legal proceedings.

3. Is negotiation part of lawyers' work?

It was noted that negotiation did not appear on the list and the group members were asked if they considered negotiation to be part of lawyers' work. They agreed quickly that they saw negotiating as part of the activities listed above but they did not see it as a principal activity of lawyers. It was simply something that was required as part of undertaking the activities listed above.

4. What are the characteristics of how lawyers negotiate?

The group was then asked if they would turn their attention to their experiences of the characteristics of lawyers in negotiation. The group shared with the writer a little of the structure of the business operation. Group members came from the treasury group of the institution and included the four senior business unit leaders and some of their most senior staff.

They explained that they had varying degrees of interaction with members of their internal legal services group (which they estimated to contain about fifteen to twenty lawyers) and with the legal representatives of some of the clients of the institution.

> *"We had a corporate restructure about four or five years ago and since then we've had a much improved relationship with Legal Services and we seem to have recruited more lawyers with financial services backgrounds who are a bit more experienced."*
>
> *"One of the biggest problems for us is that we don't really want to bring the lawyers in on the early stages of the deal. They are always trying to get in on things early and we don't do it because they are not useful at that stage. They really get in the way. Later on when the deal is being documented they get very annoyed that we have involved them so late and it takes a bit of managing."*
>
> *"It's because they really have no commercial sense that we don't do it. We work on very big deals. Sometimes it's taken three years to get the deal together. We probably had to tender and we've certainly put a lot of effort into the relationship with the customer. We've thought of everything we can do to make the deal better. We've used international contacts, we've introduced customers to each other. We've done all sorts of things. We've taken them to the football. We've entertained them pretty lavishly and we've really got to know them. The strike rate is quite low. Maybe one or two out of five. It's a big investment but you have to be willing to do it to be sure the good deals come to you.*
>
> *Now if we got the lawyers involved in the early stages they would really cruel the deal. I know because I see what happens. They start talking about all the problems they see, the exposure to risk, the legal problems. They get so bogged down on all the intricacies of the deal they lose sight of the main chance. Anyone who is going to get scared off, gets scared off then and we look really bad to the customer - we look like the ones who killed it."*
>
> *"The lawyers do fancy themselves as negotiators. That's why they get so cranky about being excluded. And of course they're hopeless at it. They don't know one end of a business deal from the other and if you're not careful they start doing lawyer speak to the customer and sounding so patronising and up themselves that the relationship is bu....ed. I've learned the hard way about this. We're the relationship people. We know how to do it and we do it well. We're the ones to nurse things along and through that go/no-go stage. Then, when it's a goer, that's when we need the lawyers."*
>
> *"...and they can be very useful when the time comes to document things. They can really force you to think through the implications of what is being agreed to and they are quite useful at understanding the kind of legal entities you need to use and the sort of things you need to do to protect the intellectual property that is created."*
>
> *"So lawyers do have their place but it's not at the negotiating table. They aren't commercial people. They don't know what's a significant issue that will kill a*

deal and something that doesn't matter at all. They dig their toes in and they fight over the most trivial details if you let them... And of course not everything is worth fighting over."

"And they do forget it's not their deal - they do try to take over. You couldn't really say they are team spirited. I get the feeling they think we are a bunch of sub-intelligent cowboys who run terrible business risks and only stay out of gaol because some lawyer on a white horse rides up and rescues us."

"I think we are getting the best quality legal work out of our people that we've ever had and I think it has been good for our team. We should acknowledge that - but the continuing pressure to add them to our customer teams right up front is a bit tiresome. Head of Legal has made an approach to the Board a few times to lobby about this and the pressure is still on. I've said that when the lawyers agree to do the relationship management training with our people and the communication skills and business negotiation courses then perhaps we can look at restructuring our teams a little differently. I know I'm safe because although they do send the young lawyers on these courses, the senior lawyers won't come. I think they think that it's beneath them or that they are so senior they don't need them. Whatever it is, they value legal skills above everything else and I truly believe they think that if you are a lawyer you are better than everyone else!"

The group shared a number of other anecdotes which built on the points already made. To close the session the group was asked if they would agree on a summary of the characteristics of lawyers in negotiation. They did so as follows, noting that lawyers:

- are poor negotiators in a business sense because they:
  - will fight about trivial matters at the risk of jeopardising the deal;
  - are poor communicators. Their use of legal jargon and their superior attitude impede negotiation with business people;
  - would rather lose a business relationship than lose an argument;
- lack the commercial experience to see the big picture in any deal - their focus is on the detail and the documentation;
- fail to distinguish between evaluating risk and taking risk and only feel comfortable in zero risk situations. They don't understand what drives our risk appetite;
- are poor team players when working with non-lawyers because:
  - they don't respect the experience and talents of others;
  - they have a need to take charge.

In providing this list the group made it plain that these characteristics were ones they observed across the whole range of lawyers' behaviour, not just negotiation. They did

not see that there were special characteristics that could be attributed to negotiation as distinct from the other activities undertaken by lawyers.

Focus Group 21 - Real Estate Agent: Western Suburbs Sydney

1. Background

This real estate agency is a member of a national affiliation. Its branches include a number in Sydney's Western suburbs. The agency from which this focus group was drawn came to be the most successful in its catchment area. The writer approached the agency to participate in a focus group because it was a significant source of new business for a number of law firms in the Western suburbs. It was felt staff and principals were likely to have considerable expertise in interacting with lawyers. Setting up the group process proved very difficult. Not surprisingly, the principals and staff saw no benefit to them from the project and were not interested in the topic. It took some persistence but finally the writer was able to offer to deliver a regular monthly training session for the firm, without charge, on a topic which was of great interest to them. In return the firm agreed to devote one of its weekly staff sandwich lunches to a focus group for those willing to attend. Two principals and four sales staff attended the session. There was considerable concern about law firm relationships and confidentiality. It was explained that this issue had arisen in every focus group already undertaken and the writer reaffirmed her commitment that participants in the focus groups would not be identifiable in the thesis material.

It was explained to the group that the purpose was to obtain some qualitative data about the characteristics of lawyers in negotiation.

2. What are the main elements of lawyers' work?

The group was asked to share their views and they devised the following list:

- giving legal advice;
- helping people to protect their legal rights;
- negotiating terms and conditions of deals and agreements and recording these in documents; and
- handling litigation for clients.

3. Is negotiation part of lawyers' work?

It was noted that they had included negotiation in lawyers' work and they explained that they thought it was probably the dominant activity in which they interacted with lawyers. They further explained that their experience with lawyers is primarily limited to conveyancing transactions but they felt it was safe to assume that the same level of negotiation would be required in the other work lawyers do.

4. What are the characteristics of how lawyers negotiate?

The discussion of lawyers' work flowed neatly into this question.

> *"Well we have quite an assortment of law firms in our area and overall we all get on very well. Business is good here - properties are moving quickly where the price is sensible. The lawyers make it their business to get on well with us and at least those with strong conveyancing practices do."*
>
> *"I think if they had their preference, they wouldn't be having much to do with us, but it's business - they need us so they put some effort into getting along with us."*
>
> *"Yes, I've worked in this business a long time - I've seen lots of ups and downs. I think our two professions have had to learn how to get along together although we're not natural partners. I think we tend to get drawn into a profession that we're suited for - that makes the best use of our skills and talents."*
>
> *"That's right - we're in the people business, we're good at persuading people to buy something. Of course the people are attached to a property deal but it's really the people and how we deal with them that's our skill... There's an intimacy about our relationship that's important. We're always available - never off duty. We spend a lot of time with them. We listen and watch and do everything to make them feel they're in good hands."*
>
> *"And despite the jokes about Estate Agents, integrity is important. We want the deal to stick. We don't want the purchaser to cool of in the cooling period. We want the vendors to buy their next place from us and we want the purchaser to come back to us when it's time to sell. Relationships and reputation - that's how we build our business - these are the most important things we bring to the table in all our negotiations."*
>
> *"And for all their efforts of building good relationships with us, lawyers aren't in the relationship business. Intimacy horrifies them - I think they would rather put their fingers down their throats than have the kind of relationships with their clients that we do."*
>
> *"...and you can see that throughout all the relationships they have with their clients - they aren't very accessible however much they say they are. They think being accessible means their switch is manned ten hours a day or their girl is always available to take a message."*

"You could ask any of our vendors or purchasers. They all tell you that the paralegals and the conveyancing clerks are very accessible. Great to deal with - good rapport. But getting to the lawyer takes a lot of effort. They surround themselves with all these other people so that they can have as little as possible to do with clients. Their approach is really the reverse of ours. We deal primarily with the people - we'd probably do as well whatever the deal was. But lawyers deal primarily with the transaction. That's what gets their interest and their attention - not the people."

"...and when lawyers are negotiating, or doing anything else for that matter, I think this is what is most apparent. Things have to be done a certain way - there is a process for everything and they are sticklers for detail."

"The greatest problem for us is that, if we'd let them, they'd all be deal killers. They love finding a problem. They do seem to feel they've achieved some kind of real success if they discover a fatal flaw in the deal. They see any level of risk as unacceptable - they are utterly hooked on a no risk situation and they think their clients should be too. It takes a lot of energy to keep them on track and not let them give in to this instinct. We have to keep reminding them that the clients want the deal - that their job is to find a way to solve problems not to get caught up in them."

"We make it plain to the lawyers when they are wining and dining us. If they want business from us they have to be 'can do' people. I don't mean bending the rules - it's not in anyone's interests to do that - I mean not letting something trivial ruin a deal. They have to have a sense of perspective and remember they are there acting on behalf of the client. They need to be making the process painless and simple for the client - not blocking the transaction with some legal mumbo jumbo that no-one understands and isn't important anyway."

"They really do find it difficult to put themselves in anyone else's shoes. They are quite arrogant about wanting things done their way and by their rules. If we didn't make a big fuss about it they'd still be keeping us waiting for our commission a month after settlement."

"And this arrogance does get in the way of good communication. For example, they think once there has been an exchange that their relationship with us is really finishing. We don't have a big interest in the sale anymore except to get paid. Often we are still a primary point of contact for the client because we are so accessible. They have our mobile numbers and they know we work all hours. So the lawyers will get together and negotiate things between that suit them and they will often forget that we need to be kept in the loop. It isn't a good idea to surprise us so we look foolish and we don't have the chance to input stuff."

"I'm sure that the lawyers can get equally frustrated by our behaviour because we see things so differently from them. I do think we should be clear that in fact our relationships do work quite well. And that's because regardless of our differences, we have all put some effort into getting along together."

"And around here the conveyancing companies do pose a bit of a threat so I think the lawyers are putting a bit more effort into it as well. They do talk big - you know the stuff about licenced conveyancers not being able to give legal advice and cutting corners and only doing the easy ones but really, most of this Mum and Dad conveyancing work is very easy. After all, they trust it to their clerks and paralegals - they really handle very little of it themselves. So they realise that they need to get along with us if they are going to stop the work going to the licenced conveyancers."

"It's funny really, the arrogance and the manner - as if what we do is a bit grubby and the part they play is the challenging part that takes brains. You only have to look at the fees to see what the punters think. We've been able to retain commission levels that have held up pretty well. That's no accident. We sell ourselves well and if there is no sale there's no commission. So we work hard and we share the risks with the vendor. Around here that means a lot to people.

The lawyers haven't been able to do it. They don't have the relationship with their clients. They don't sell the value of their work. They don't have the relationship with each other either - they are silly enough to think that undercutting each other is a clever way to get business. So they cut their fees to the bone and all they've done is set a new low benchmark that will be very difficult ever to push up again. So who's cleverer? You tell me!"

"If we're talking negotiation - and I suppose it's broader than that because the behaviour is the same across the board as far as I can see - then the real features that you see in lawyers are the relationship things. They talk about the importance of relationship but they don't do it. Even the best of them have this slightly superior attitude about them. They think twice before coming here - and they still expect their clients to go to them. They'd much rather write a letter or send a fax than pick up the phone and they write in such formal, obscure ways half the time their clients don't know what it means."

"We can have a beer with them or play golf and get on really well. They can be as pleasant and friendly as the next person but the next day or the next week in business they will be the same nit picking, [de]structive people they've always been. It still surprises me that they'd never just drop in. It would have to be on their marketing schedule before they'd think to do it."

By this stage the time allotted had expired and the group was asked if they would conclude by agreeing on a summary of characteristics of lawyers in negotiation. They did so as follows, noting that lawyers:

- have difficulties developing the most effective business relationships because they:
  - are more interested in the job than in the people; and
  - have a sense of superiority that creates a distance between them and those with whom they are dealing;

- often fail to communicate effectively with non-lawyers because they have a communication style which favours formal, written, one-way communication;
- use legalese and do not always recognise how clients would like the communication to be;
- feel they have done their job well when they find errors and flaws however trivial. This can be more important than finding a way to complete a deal that a client is keen to do; and
- are totally motivated by a desire to do the best they can for the client in the transaction. Whether or not they understand what is important to the client, this is their motivation.

Focus Group 22 - Managing Partners: Medium-Sized Law Firms

1. Background

This group comprised seven Managing Partners of medium-sized law firms who meet regularly to review key practice indicators and share ideas about law firm management.

They agreed to participate in a focus group after the writer addressed one of their meetings.

Initially there was great reluctance as they were concerned that their comments might be used as more ammunition to 'beat up' on the legal profession. It was not just a confidentiality issue for the group - they were concerned to have reassurance that the outcome would be constructive.

Some time was spent reviewing research goals with the group and finally they agreed that obtaining some qualitative information about the characteristics of lawyers in negotiation would be useful. They asked the writer to share the results of her research with them once the thesis was completed. This was agreed to with the proviso that the focus group summaries would remain confidential in order to respect the undertakings made to all the other focus group members.

2. What are the main elements of lawyers' work?

The group questioned the value of spending group time on discussing this issue. Given that all those present were lawyers, they felt the answer was self-evident and asked the purpose of the question.

3. Is negotiation part of lawyers' work?

It was explained that the writer had an interest in determining whether negotiation is seen as part of lawyers' work. There was some discussion of this and it was agreed that while negotiation does not come within the statutory definition of lawyers' work, that is, work that must be undertaken by a properly qualified lawyer, it is an important tool that lawyers use constantly to serve client needs.

4. What are the characteristics of how lawyers negotiate?

The group members were asked to consider this and the response was immediate.

"I think we could say without fear of argument that lawyers are probably the most difficult group in the world to negotiate with. They do like a good scrap and in the absence of something to fight about they can be counted on to dredge something up from somewhere."

"Managing Partner is a difficult role you know. It's old hat now to say that managing lawyers is like herding cats but it is true. We're all arrogant and independent and we hate being told what to do - we're [that is, this group of Managing Partners] probably not so bad as a group. The management role has forced us to modify our behaviour a bit."

"... and we have the worst job because our role requires us to negotiate with lawyers all the time - mostly we're trying to get them to change or at least to stop fighting against the change going on all around them."

"We are also the ones who have the responsibility for the client satisfaction reviews so we learn a lot about our clients' experience of their interaction with lawyers - and we have the responsibility for trying to resuscitate the relationship when things go off the rails."

"Having this role has given me the chance to stand back a bit and watch the interaction and - because there's a lot riding on the negotiations I have with my partners - I've had to learn how to deal with them more effectively as individuals and as a group."

"My Marketing Manager is always telling me that the real problem with lawyers is that they are not relationship people. What they really like is to go into their offices and shut the door and do their work and have someone else have the relationship with the client.

I have to say that I think she's right. We had a couple of claims this year and we stepped up our lawyers' risk management training program. LawCover showed us some statistics about the causes of claims and I was surprised to see that poor communication stands out as the single most significant cause of claims - and this has been so for a very long time. It's depressing really because after participating in our client feedback sessions I think it's probably an underestimate."

"The thing I find hardest to deal with is lawyers' capacity to squabble - I won't say fight because I don't think that's what it is - but whenever I see a group of lawyers together I know that sooner or later they are going to end up squabbling.... I went to a Divisional meeting this week and one of the younger lawyers was giving a paper on something or other and she hadn't got more that five paragraphs into it when the arguments began. I don't know anything about the area of practice but as an observer it looked like they were doing it as a kind of Pavlovian reflex.

After all it's what we're paid to do a lot of the time - our clients want our reassurance that things are OK; that documents are watertight; that agreements will stick. We are paid to poke and prod and argue about all the detail because when we sign off on something then the client can have peace of mind... or someone to sue!"

" I don't know if it's born or made in us but there is that argumentative streak. A number of our clients in their feedback sessions have talked about big negotiations where the lawyers were arguing point after point with each other the whole time. What the clients were saying was that it wasn't just the major problem areas that the lawyers were having a go at... they were squabbling about everything and since the lawyers didn't always know what was a deal breaker and what wasn't then the arguments were quite often over really trivial issues. The clients saw that as a big weakness and they said it meant they thought hard about including lawyers in their business negotiations because lawyers tended to argue rather than to negotiate. They also said that the fault finding and focus on the negatives also meant that they saw lawyers as people who got in the way of doing a deal."

"... and it is not restricted to partners. It's not just some condition that you acquire on admission to partnership. I see it in our junior lawyers too - once they start to get responsibility for matters themselves, then this kind of pedantic, argumentative behaviour starts to come out."

"I know I was a bit opposed to this session today because I didn't want to be seen as sponsoring more lawyer bashing but there are things that we do need to focus our minds on here. Because I think what is coming through from what we are all saying is that a real block to the growth of our commercial practices is the fact that our lawyers engage in behaviour, or sometimes fail to engage is behaviour, that influences the extent of the role that clients are prepared to give us.

And there is no evidence I can see to persuade me that lawyers are open to accepting this or, even if they will accept it, that they are open to change."

"That's right. Even when we are clear from a strategic point of view what clients want from our lawyers, our lawyers are absolutely unwilling to change. So I think there are some terribly serious issues for us here - not just as competitors with each other but jointly as a group with the responsibility for growing our practices.

It is very clear to me, listening to all the comments today, that there are some behaviours lawyers engage in that are preventing us from being able to sell ourselves as the kind of commercial advisers we want to be.

We keep complaining and feeling frustrated that our clients won't involve us early enough in transactions or that they don't let us get involved as thoroughly as we'd like. We keep saying that we have to upgrade our marketing so that we can persuade our clients to value us more and use us differently. And we keep

saying this in the face of very consistent feedback from our clients that we do things that they don't value."

"So a really serious challenge for us and I guess for all the profession is to accept that, if we want our clients to use us differently and value us more, then ***we*** *have to change* ***our*** *behaviour or at least persuade the lawyers in our firm to behave differently."*

"But that is a really big ask - at our recent retreat the Practice Director and I presented the results of our client surveys which we undertook with all our clients who give us more than $50,000 a year in fees. These are the clients we want to grow and where we see we can expand our specialty areas like tax and intellectual property.

The results were very clear. We haven't been good at building relationships across and up and down these companies and we haven't convinced them that we have strategic, as opposed to technical, value to offer. They are critical of how we manage our relationships with them, how we fail to develop a proper understanding of their business drivers and how we value and charge for the services we provide.

We put a proposition to the partners that we had to show our clients we were listening and prepared to change. Our proposal was to do three things. We wanted to develop a training course for all our lawyers, including partners, in advanced communication skills which we planned to develop in conjunction with our Plain English program. We wanted to give all our senior associates and partners some advanced business planning training as a way of giving them a better understanding of the way our clients undertake their planning processes.

We thought it would be a great way to show our clients that we'd been listening to their feedback. We really thought we were on to something.

But we were absolutely howled down by the partners. They were so critical of what we'd put up - tore the proposal to pieces. I was astonished because I'd been to see each of them individually and I thought I had their support - but once they got together in a group that old argumentative spirit emerged and I was left licking my wounds.

So - I agree with you all - we know what we need to do but I've run out of energy to keep going.'

There was considerable further discussion in the group about the issue of changing the behaviour of their partners and lawyers. Many more anecdotes were shared about the problems encountered which supported the points made above.

As the time allocated for the session ran out, the group members were asked if they would draw the session to a close by summarising what they saw as the characteristics of lawyers in negotiation. They agreed but pointed out that the characteristics they had

been discussing were not restricted to lawyers in negotiation but could be observed throughout lawyers' behaviour.

They produced the following list which noted that lawyers:

- are poor negotiators because they often mistake being argumentative for negotiation;
- often fail to listen to and understand the things that clients want and value in an effective working relationship;
- dislike change and put a lot of energy into avoiding it;
- don't understand the strategic issues facing their clients' businesses and they are easily distracted from what their clients are trying to achieve by unimportant operational issues; and
- are not committed to and do not see the value of developing non-technical skills. They see technical excellence as being the most important skill despite considerable client feedback to the contrary.

Focus Group 23 - Corporate Lawyers (No. 3)

1. Background

This group of nine corporate lawyers were members of a large legal team for a major Australian corporation. The whole legal team had assembled for their annual retreat, which the writer facilitated. The focus group members were senior team leaders who arrived a day before the retreat to conduct their own team leaders' meeting. They agreed to spend some time at the end of their session to participate in a focus group.

They expressed considerable concerns about confidentiality as their corporation did not welcome external scrutiny of its day-to-day business process. The legal team was very reluctant to draw attention to itself. It was explained that this was a concern shared by all the focus groups and that the writer was happy to give an undertaking about confidentiality.

2. What are the main elements of lawyers' work?

The group agreed that the main elements are:

- advising clients on the law and its application;
- managing legal transactions including drafting, reviewing and negotiating;
- building a relationship of trust and respect with clients;
- handling disputes and managing litigation; and
- getting the result the client wants legally and effectively.

3. Is negotiation part of lawyers' work?

It was noted with interest that this group was one of the few to include negotiation in its list of the main elements of lawyers' work. Whilst all groups, on questioning, accepted that negotiation was clearly part of what lawyers do, few groups included it in their formal list.

It was also interesting that this was the only group whose list had such a strong focus on the client by including relationship building as part of legal work. Most groups focussed on the technical activities lawyers perform that are distinctive to them. The group was asked if there was a particular reason why they had included relationship

building. They reported that in the last two years their corporate measurement program recast the performance measurement process. This included introducing 360 degree feedback to measure, amongst other things, the satisfaction levels of their internal clients. It appeared that this had led to a refinement of their KPIs (Key Performance Indicators) to include measures of effective working relationships including team working, communication and accessibility. Apart from the award of performance bonuses, maintaining satisfactory results against KPIs for the legal team is now a pre-requisite for the work remaining in-house. Failure to perform means that the work will be outsourced as it was in the past.

Whilst the lawyers in the focus group were only nine of a much larger legal team, they were the most senior group and all but one felt that the linking of the evaluation process to client satisfaction levels had changed their perception of doing well for the client from one concerned with technical results to one which paid attention to the clients' view of success.

4. What are the characteristics of how lawyers negotiate?

The group was then asked to share their views of the characteristics of lawyers in negotiation. They felt that as a result of the 360 degree feedback they had some very relevant information about client perceptions of this.

> *"It has been rather a painful process having to deal with the internal customer satisfaction reviews. It wasn't just we lawyers who had this experience, it was throughout the business. So transport, finance and purchasing had to go through it too since they also have internal customers. But it was very threatening to our people - probably not for us at the most senior level because we were consulted very thoroughly and we had the chance to influence how the process was adapted - but it was still quite tough."*
>
> *"Perhaps it would be useful to explain what happened.....*
>
> *Our main internal customer centres were asked what were the factors they identified as being the most important in the delivery of legal services to them. The HR Department collated all the responses and came up with a list of seven factors. The clients were then asked to rank us on each of these factors out of 10 and to provide feedback for areas of improvement for any scores less than 7.5.*
>
> *The rating looked like this:*[397]

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397 The writer was not permitted to photocopy the document produced but was permitted to make handwritten notes which are reproduced here.

•	*understanding our clients' business*	*8.5*
•	*technical know how*	*9*
•	*accessibility*	*7*
•	*team working*	*5*
•	*effective communication*	*4.5*
•	*commerciality of approach*	*3*
•	*commitment to effective business outcomes*	*4*

This was not really what we had expected at all and we took it pretty hard. I think at that stage we all felt like walking out and going back to private practice. We see ourselves as a dedicated hard working team. We really go out of our way to service client needs. We work long hours and we are available via mobile at all hours. We know that our clients think we are better value than private law firms because that was why the legal team was increased substantially and the role of our external lawyers really cut back.

But HR gave us good support and persuaded us to sit down and go through the comments about areas for improvement. There was a clear pattern in the feedback - it was really about the working relationship and the business approach. In terms of the characteristics you're talking about in your research, they valued our legal expertise and our special knowledge of the business but it was ***how*** *we dealt with them that gave them the most concern.*

So it was really the relationship which was the issue. They wanted us to be part of the team. They wanted us to use language they could understand and work with them in their environment. They didn't like the way they had to make appointments to see us and provide us with written instructions.

What we saw as taking time to get a proper brief, they saw as distancing ourselves and being controlling.

What we saw as thorough, carefully crafted responses that covered every issue they saw as pedantic, obscure and detached from the reality of the business issue.

Our thorough and painstaking review of their draft documents was seen as pedantic and fault finding - more interested in finding fault than doing business."

"It was difficult not to feel really defensive and quite offended. Quite a lot of it sounded like us once again being the group that everyone loves to hate and tell jokes about. It was a difficult time."

".... and actually I think the turning point for us was having some of the business centre managers at our retreat last year. We had the idea that one way to deal with the feedback was not to get stuck on the criticisms but to go back to the seven factors themselves. So we asked the managers to come to the retreat with some case studies that we could really get our teeth into and learn from."

"Four of us did some preliminary work with them - we wanted some success stories so we could show the group examples of things going well along with things that didn't. So we agreed on five or six case studies that had a balance."

"Then we workshopped them using the business centre managers as group leaders and we came up with some really useful, constructive ways to help us all work together."

"Of course there's still a long way to go and there are some criticisms that we will keep getting because some of the managers just don't have a proper grasp of the seriousness of the legal risks they are taking - and we have a really important obligation to the corporation to be alert to legal risk and not sign off on transactions where the corporation is exposed."

"So to some extent we will still be seen as 'nay-sayers'. We have to do it. Compliance is a really serious issue these days and if we let them, some of these guys would still be doing deals with secret commissions and dodgy pricing policies. We have to protect them from themselves in an environment that is way tough."

"So that's where we are up to. I'm not sure if that was what you wanted but perhaps the internal feedback will provide the characteristics you were after.... as you know one of the sessions tomorrow will be to review the KPIs which are now operating and to look at the improvements to our ratings in the feedback which has just been collected. It looks as if communication and accessibility are rating significantly better and we have been successful in some of the team building initiatives."

The group had to leave at this stage and reaffirmed their concerns about confidentiality. In the end this was satisfied by the execution of a simple confidentiality agreement.

Focus Group 24 - Postgraduate Negotiation Students: Non-Lawyers (No. 3)

1. Background

This group of eleven was the last of the focus groups held with students of negotiation who were at the end of their negotiation training. They were a mix of graduate certificate and masters students from a number of faculties and tertiary institutions. They were not lawyers and they had not undertaken formal negotiation training previously. (The full class had contained seven lawyers and fourteen non-lawyers and the lawyers did not participate in the focus group).

All the focus group participants were mature age students in full or part-time employment. The meeting began with a general discussion of negotiation and their negotiation experiences. As a group they were all of the view that they were quite experienced negotiators in the sense that they saw negotiation as something required in their daily business and personal lives.

There was some discussion of the course they had just completed and it was explained that the purpose of the focus group was to enable the writer to obtain some qualitative data about their perception of lawyers in negotiation.

2. What are the main elements of lawyers' work?

The group was asked to consider what they would identify as the main elements of lawyers' work. After some discussion, they agreed on the following list:

- building and maintaining legal expertise;
- understanding and satisfying clients' legal needs and interests;
- building relationships of mutual respect; and
- communicating effectively.

3. Is negotiation part of lawyers' work?

It was noted that negotiation did not appear in the list and the group was asked what they thought about the role of negotiation in lawyers' work.

> *"If I recall correctly, the first book in the bibliography you gave us - 'Getting to Yes'-*

points out that negotiation is something that we all do all the time. It is just part of everyday life so of course it's part of what lawyers do. But I don't see it as a separate role - not like preparing a will or a contract. It is a kind of a thread that runs through everything."

In commenting on this, the group was happy to agree that negotiation is part of lawyers' daily activity and accordingly it was important for lawyers to be skilled negotiators.

4. What are the characteristics of how lawyers negotiate?

The group was then asked to consider what characteristics lawyers bring to the negotiation process.

"I haven't been involved in a lot of legal matters in my life but I have always felt that lawyers as a group are the role models for the positional bargainer type - I see them as people who have no concern about the interests of the parties, just their legal rights.

I've been working with lawyers in this negotiation training just finished and every negotiation role play I've done has been with a lawyer, funnily enough. All the people on my table in 'Pepulator'[398] were lawyers. So I've had quite a concentrated exposure these last 3 days. I'm now even more of the view that they are positional bargainers. Even after the session we had on moving from positions to interests it was fascinating to have the experience of some really entrenched positional bargaining."

"I think it was the 'Pareto Optimal'[399] work that I found the most interesting. We had quite a number of opportunities to practise and the case studies had been designed to give good possibilities - but I could see the lawyers struggling with the idea of being creative.

My family has a property development business south of Sydney and over the years we've had to do some very creative deals particularly with farmers so that we could really make it worthwhile for them to sell while protecting our cash flow when it is at its most vulnerable.

We've done some deals I'm really proud of - really shared the financial gains - and every time, it was one of us who came up with the creative solution. It was never the lawyers. We've used one firm for a long time and we are quite happy with their expertise but they just want to do the deal as quickly as possible and move on. And the lawyers on the other side, whoever they are, seem to be the

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398 The Pepulator Pricing Exercise, developed by the Harvard Negotiation Project, is a negotiation game used as a teaching tool in the negotiation program.

399 The Pareto Optimal. developed by the Italian mathematician Pareto, is an analytical method of identifying a zone of opportunity which exists in a negotiation, once the basic needs of the parties have been met, to enhance the deal through the use of creative options.

same. I'd say this is quite a feature of lawyers - not just in negotiation but in running transactions. They just want to focus on being as efficient as possible."

"Well I do think lawyers come in for a lot of bagging and I think we shouldn't just get on the band wagon of doing it. I'm not really an expert - I haven't had a lot to do with lawyers but the things I have done I've felt the lawyers treated me well.

When my mother died, her things were in a terrible mess. She'd left a lot of things in my father's name - didn't change them when he died and it caused a lot of problems. The lawyer I had couldn't have been more helpful. He was always available and very patient with me when I didn't understand things. I think that generally the profession is really dedicated to getting the best results for their clients.

Our local church has been in some hot water with the council over some work we did on the community hall without the proper planning permission. One of our congregation owns a law firm and he did all the negotiation with the council for us at no charge and he got an excellent result for us. It took up a lot of his time and he got no commercial benefit."

"Of course it's important to be fair and of course the legal profession must have lots of good lawyers in it just like in any profession. But if we are going to focus on ***characteristics*** *then I do think there are positive and negative ones which distinguish lawyers.*

I work in a large accounting practice and I have a lot of interaction with lawyers. I'm often in circumstances where we are engaged in some kind of negotiation. And I do agree that it is concern to get the best for their clients that drives them - not self interest as the critics enjoy suggesting. I think that's common throughout the professions. I think we are all very focussed on getting the best for our clients.

But I do think one problem lawyers have is that often they won't negotiate when they should. I do think it is part of being positional bargainers. They give their clients some advice about what to do and they won't budge from it. I often see this in business deals that break down and end up in litigation. Time and time again the lawyers refuse to talk. They issue proceedings; they make threats; they talk up the case; and then a few days before the hearing they are madly sending us faxes asking us to do all kinds of calculations because suddenly they realise that the other side has not caved in and if the case goes on their clients might lose.

So then they sit down and it's all a...e about. The client's annoyed, the parties' relationship is often ruined by now and there is serious time pressure that does not lead to wise decisions."

"Yes, I'd have to agree with you. I do a lot of arbitration work in the building industry and I'm constantly amazed at the matters that come before me where clearly the parties should have been talking about resolving things from day one.

But the lawyers haven't been encouraging it. In fact, despite all the talk about ADR and how it provides great opportunity for the creative resolution of disputes, I don't think lawyers ***want*** *to resolve claims early. They seem to me to be the ones most suspicious of ADR.*

I think that's why there have been opportunities for many non-lawyers to break into the mediation field."

"Well I work in a state government department and I have had quite a lot of interaction with lawyers over the years - and I agree we need to be balanced. I mean if I'm in really, really serious trouble then the lawyers are probably amongst the first people I'd turn to. And when I've made some awful stuff-ups the lawyers have been terrific - they've always managed to find some obscure regulation to explain why the due date wasn't the due date. So yes - I agree about the dedication to doing the best for the client - that's true.

But the flip side is that they are the chosen ones who get to choose what is the best for the client, at least that's how they see it. So they'll do everything in their power to do what ***they*** *think is best for you. And they'll do all that without asking you what is best for you or what a good outcome is. They certainly don't practise active listening in a way that makes me feel I've been listened to and then when I am critical of the result they get cranky and don't return telephone calls."*

"I think we do all agree about the dedication - I've certainly had experience with that but I think it's how they do things that is the problem. I think there is a lawyer's way of doing things and when they are negotiating together it's quite an excluding experience. They talk their own language and they do give off an air of superiority as if us lesser beings should not speak until we're spoken to and might just as well wait outside.

I think they communicate very differently from the rest of us and that means, for the most part, when they are communicating with non-lawyers the communication is not very effective."

"What strikes me as most serious - and I think I've been watching it over the past few days - is that even with the lawyers we've had here (who clearly are interested in growing their skills as we are) there is a really serious resistence to change. They really haven't liked the idea of doing things differently. It seems really difficult for them to give up old patterns. You said on the first day that a lot of this material is quite counter-cultural for us, well I think that is particularly so for lawyers."

At this stage the group added more anecdotes which built on the points already made. The group members were asked if the session could be brought to a close by developing a list of the characteristics of lawyers in negotiation from their point of view.

They developed the list as follows, noting that they saw that lawyers:

- are committed to getting the best outcome for their clients - this is what drives them;
- focus on positions rather than interests - they are positional bargainers;
- focus on efficiency of transactions and do not readily take account of Pareto possibilities;
- tend to share a style of communication which is:
    - inflexible;
    - not influenced by client preferences; and
    - excluding to non-lawyers - this can suggest that lawyers feel superior to non-lawyers;
- dislike and resist change even when it is clear that clients would welcome it and benefit from it; and
- are not committed to the early resolution of claims and can avoid the opportunity to negotiate when it would be useful.

APPENDIX 2. Core Subjects offered by all Australian Law Schools as at 31 May 1999

UNIVERSITY	CORE SUBJECTS
Australian National University - Canberra	**Compulsory Subjects:** Administrative Law; Australian Public Law; Commonwealth Constitutional Law; Contracts; Criminal Law and Procedure; Equity and Trusts; Foundations of Australian Law; International Law; Lawyers, Justice and Ethics; Legal Theory; Property; Torts.
Bond University	**Core Subjects:** Communication Skills; Information Technology; Cultural and Ethical Values; Management. **Compulsory Subjects:** Australian Legal System; Legal Reasoning; The Law of Civil Remedies (Torts and Contracts A); Principles of Tortuous Liability (Torts and Contracts B); Principles of Contractual Liability (Torts and Contracts C); The Law of Obligations (Torts and Contracts D); Criminal Law & Procedure A; Criminal Law & Procedure B; Constitutional Law; Property Law; Land Law; Equity; Personal Property Transactions; Business Associations; Corporations Law; Administrative Law; Evidence; Civil Procedure; Legal Skills; Advanced Legal Skills.
Deakin University	**Compulsory Subjects:** Administrative Law; Business Organisations; Civil Procedure and Alternative Dispute Resolution; Commercial Law; Competition Law and Policy; Contract; Criminal Law; Criminal Procedure; Equity and Trusts; Evidence; Federal Constitutional Law; International Commercial Law; Jurisprudence; Land Law; Legal Practice and Ethics; Misleading Conduct and Economic Torts; Property; Public Law and Civil Rights; Restitution; Taxation and Torts.

UNIVERSITY	CORE SUBJECTS
Flinders University of South Australia	**Compulsory Subjects:** Legal Method (Legal Research); Principles of Tort Law; Public Law and Regulation; Principles of Criminal Law and Procedure; Contract; Lawyering: Procedures and Ethics; Contract; Criminal Law; Property Law Concepts; Issues in Criminal Law; Advanced Contract (Oral Advocacy); Constitutional Law; History and Philosophy of Law; Issues in Tort; Administrative Law (Interviewing); Criminal Practice; Real Property Law; Corporate Law (Drafting); Resolving Civil Disputes (Negotiation); Trusts and Assignments; Property Practice; Evidence; Family Practice; Advocacy; Succession and Estates Practice; Legal Practice and Management; Commercial and Corporate Practice; Legal skills and Ethics.
Griffith University	**Core Subjects:** Law and Legal Obligations; Constitutional and Administrative Law; Associations and Trusts; Property Law; Torts; Revenue Law; Advanced Civil Obligations; Litigation; Criminal Law and Procedures; Jurisprudential Theories and the Environment **OR** Australian and Asian Jurisprudence; Issues in Legal Practice.
James Cook University of North QLD	**Core Subjects:** Criminal Procedure and Sentencing; Principles of Criminal Law; Legal Studies; Legal Research and Analysis; Law of Contract; Torts A - Specific Torts; Torts B - Negligence Torts; Land Law; Constitutional Law; Principles of Equity; Law of Trusts; Company and Partnership Law; Commercial Law I; Commercial Law II; Evidence and Administrative Law.
La Trobe University	**Core Subjects:** Corporations Law; Criminal Law; Criminal Procedure and Evidence; Legal Practice and Conduct; Legal Skills in Context; Property Law; Law of Torts; Administrative Law; Civil Procedure;

UNIVERSITY	CORE SUBJECTS
	Constitutionalism; Constitutional Law; Common Law; Court & Remedies; Introduction to Legal Reasoning; Law of Contracts; Law, Economics and Society; Law of Equity and Trusts; Legal Practice and Conduct; Legal Practice and Conduct - B.
Macquarie University	**Core Subjects:** Jurisprudence; Torts/Legal History; Contracts; Constitution Law and/or Public Law; Property in Law & Equity; Business Organisations; Remedies; Criminal Law & Procedure; Litigation and Legal Ethics.
Monash University	**Core Subjects:** Legal Process; Contract; Torts; Criminal Law; Constitutional Law; Property and Administration.
Murdoch University	**Core Subjects:** Research and Writing; Australian Legal System; Criminal Law and Procedure; Torts; Australian Administrative Law; Constitutional Law; Contract, Evidence; Property; Civil Procedures; Equity and Trusts; Business Associations Law; Legal Practice and Transactions.
Northern Territory University	**Core Subjects:** Legal Process, Contracts; Criminal Law & Procedure; Legal Research & Writing; Constitution and Administration Law; Constitution Law 2; Equity; Torts; Administration Law 2; Trusts; Property Law; Administration Law B; Associations; Property Law; Corporations Law; Civil Procedure and Evidence.
Queensland University of Technology	**Core Subjects:** Criminal Law A; Criminal Law B; Contract A; Contract B; Introduction to Law; Legal Research and Writing; Torts A; Torts B; Constitutional Law A; Constitutional Law B; Equity; Trusts; Land Law A; Land Law B; Preparation for Advocacy; Moots A; Moots B; Jurisprudence; Corporations and Associations A; Corporations and Associations B; Administrative Law A;

UNIVERSITY	CORE SUBJECTS
	Administrative Law B; Consumer Transactions.
Southern Cross University	**Compulsory Subjects:** Legal Research & Writing; Legal Process; Constitutional Law; Administrative Law; Torts; Contracts; Criminal Law & Procedure; Family Law & Society; Evidence and Civil Procedure; Equity; Property Law; Philosophy of Law; Environmental Law; Company Law.
University of Adelaide	**Core Subjects:** Legal Skills Contract; Criminal Law; Law of Torts; Constitutional Law; Property; Legal Skills 2; Administrative Law; Equity; Corporate Law; Legal Research; Legal Skills 3; Civil and Criminal Procedure Evidence; Legal Ethics.
University of Canberra	**Core Subjects:** Advanced Research and Writing; Constitutional Law; Criminal Law; Equity; Evidence; Law 1: Introduction to Law; Law 2: Contracts; Law 3: Business Transaction; Law 4: Corporations; Law 5: Taxation; Law 6: Administrative Law; Law of Obligations; Lawyers and Professional Responsibility; Legal Theory; Litigation and Dispute Processing; Property Law; Public Companies.
University of Melbourne	**Compulsory Subjects:** Torts & the Process of Law; History and Philosophy of Law; Contracts; Constitutional & Administrative Law; Criminal Law & Procedure; Property; Equity and Trusts.
University of Newcastle	**Core Subjects:** Legal System and Method; Criminal Law and Procedure; Torts; Contracts.
University of New England	**Compulsory/Core Subjects:** Introduction to Legal Systems & Methods; Constitutional Law; Administrative Law; Torts I & II; Criminal Law & Procedure; Formation of Contract; Enforcement of Contact; Civil Procedure & Evidence; Equity & Trusts; Moot Court; Property Law I & II; Succession; Corporation Law; Legal Research Project.

UNIVERSITY	CORE SUBJECTS
University of New South Wales	**Core Subjects:** Legal System - Torts; Contracts; Public Law; Criminal Law; Administrative Law; Law, Lawyers and Society; Legal Research and Writing; Advanced Legal Research; Litigation; Property and Equity; Federal Constitutional Law; Business Associations 1; Law and Social Theory **OR** Theory and Research Component.
University of Notre Dame Australia	**Core Subjects:** Theology; Philosophy; Ethics; Communications (Law). **Compulsory Subjects:** Criminal Law; Contemporary Legal Issues; Legal Process; Legal History; Principal of Contract; Principals of Torts; Property Law; Principals of Equity & Trusts; Legal Ethics; Constitutional Law; Administrative Law; The Law of Evidence; Moot Court; Corporation and Partnership; Legal Problem Solving; Legal Philosophy; Remedies; Civil Procedure; Commercial Practice; International Comparative Law; Alternative Dispute Resolution.
University of Queensland	**Core Subjects:** Criminal Law A & B; Contracts A & B; Introduction to Law; Legal Research & Writing; Torts A & B; Constitutional Law A & B; Equity; Trusts; Land Law A & B; Preparation for Advocacy; Moots A & B; Jurisprudence; Corporations & Associations A & B; Administrative Law A & B; Jurisprudence A; Consumer Transactions; Evidence; Ethics and Professional Conduct; Civil Litigation.
University of Sydney	**Core Subjects:** Law, Lawyers and Justice in Australian Society; Legal Institutions; Contracts; Criminal Law; Federal Constitutional Law; Torts; Administrative Law; Corporate Law; Equity; International Law; Litigation; Real Property.
University of Tasmania	**Core Subjects:** Contract; Torts; Criminal Law; Principles of Public Law; Property Law; Law of Groups; Equity and Trusts; Litigation.

UNIVERSITY	CORE SUBJECTS
University of Technology, Sydney	**Core Subjects:** Legal Process and History; Legal Research; Law of Contract; Criminal Law; Law of Tort; Federal Constitutional Law; Real Property; Personal Property; Corporate Law; Administrative Law; Equity and Trusts; Practice and Procedure; Law of Evidence and Remedies.
University of Western Australia	**Core Subjects:** The Legal Process; Property; Administrative Law; Evidence; Trusts; Corporations Law; Commercial Practice; Conveyancing and Drafting; Contract; Equity; Criminal Law; Torts; Constitutional Law and Procedure.
University of Western Sydney, Macarthur	**Core Subjects:** Introduction to Law; The Legal Context; Contracts; Torts; Criminal Law; Constitutional Law; Administrative Law; Equity & Trusts; Commercial Law; Family Law; Law of Associations; Property Law; Remedies; Dispute Resolution; Evidence; Revenue Law.
University of Western Sydney, Nepean	**Core Subjects:** Criminal Law; Administrative Law; Commercial Law; Constitutional Law; Corporations Law; Equity; Equitable & General Remedies; Law of Contract; Legal Method & Research (Orientation week plus 2 hours a week for the full year); Litigation; Professional Conduct & Legal Ethics; Property Law; Revenue Law; Torts Law; Trusts; Partnerships & Non Profit Associations Law; Law Foundation Subject (2 hours a week for the full year).
University of Wollongong	**Core Subjects:** Law in Society; Legal Research and Writing; Communication Skills; Law of Contracts; Perspectives in Law; Criminal Law and the Process of Justice; Litigation Practice; Law of Property A; Law of Property B; Drafting and Conveyancing Practice; Advocacy and Negotiation; Law of Torts; Public Law A; Public Law B; The Legal Profession and Australian Society; Remedies and Procedure;

UNIVERSITY	CORE SUBJECTS
	Evidence; Law of Business Organisations; Computer Skills; Legal Theory; Legal Research Project.

APPENDIX 3. Availability of Negotiation Training in Australian Law Schools as at 31 May 1999

UNIVERSITY	NO. OF LAW STUDENTS 1999	NEGOTIATION/ COMMUNICATION OFFERED AS ELECTIVE
Australian National University - Canberra	1,400	Dispute Resolution
Bond University	403 - Undergraduate 65 - Postgraduate	Communication is compulsory subject for Undergraduates. Offer a range of dispute resolution subjects.
Deakin University	1,238 - Postgraduate & Undergraduate	Mediation Programme is offered.
Flinders University of South Australia	194	Dispute Resolution. Compulsory - Resolving Civil Disputes (Negotiation)
Griffith University	734	Negotiation Nothing specific for Communication.
James Cook University of North QLD	550	No
La Trobe University	Approximately 450	Yes
Macquarie University	1,500 - Undergraduate 50 - Postgraduate	No Negotiation or Communication
Monash University	663	Alternative Dispute Resolution offered.
Murdoch University	Approximately 600	Alternative Dispute Resolution and Dispute Resolution offered.
Northern Territory University	421	Negotiation, Mediation

UNIVERSITY	NO. OF LAW STUDENTS 1999	NEGOTIATION/ COMMUNICATION OFFERED AS ELECTIVE
Queensland University of Technology	1,965 842 - Double Degrees which include Law.	No
Southern Cross University	120 100- Double Degrees which include Law.	Mediation units are offered including Dispute Resolution; Practice & Procedure; Legal Interviewing; Negotiation and Advocacy.
University of Adelaide	920	No
University of Canberra	184	Litigation and Dispute Processing, half of which is mediation. General Communications offered eg. Oral Communication etc.
University of Melbourne	1,782 - Undergraduate 801 - Postgraduate	Dispute Resolution & Legal Ethics offered (includes Civil Procedure & Professional Conduct) as elective but required for admission in Victoria.
University of Newcastle	328	Generally covered in various subjects but not specifically offered.
University of New England	1,409	Not this year. Will offer Advocacy in year 2000.
University of New South Wales	1,500	Dispute Resolution
University of Notre Dame Australia	200	Communication is compulsory. Alternative Dispute Resolution is offered.

UNIVERSITY	NO. OF LAW STUDENTS 1999	NEGOTIATION/ COMMUNICATION OFFERED AS ELECTIVE
University of Queensland	1,281	Professional Legal Skills is offered which generally covers communication, dispute resolution etc.
University of Sydney	1,400 - Undergraduate 730 - Postgraduate	U/G - Advocacy; Interviewing; Negotiation and (Alternative) Dispute Resolution. P/G - Dispute Resolution in Australia and Environmental Dispute Resolution
University of Technology, Sydney	1,000 - Undergraduate 400 - Postgraduate	Both are covered in the subject Legal Skills and Professional Awareness.
University of Tasmania	564	No
University of Western Australia	201	Negotiation/Mediation is offered as an elective subject.
University of Western Sydney, Macarthur	Approximately 270.	Dispute Resolution and Remedies are compulsory subjects.
University of Western Sydney, Nepean	Approximately 400.	Alternative Dispute/Mediation Law offered.
University of Wollongong	600	Negotiation - Compulsory

APPENDIX 4. Deborah Tannen - Case Study

For my book *Talking from 9 to 5*, I spent time in companies observing people, interviewing them, and having individuals tape record their conversations when I wasn't there. The companies with which I worked were all happy to proceed on the basis of our verbal agreement on certain ground rules: the individuals would control the taping, any identifying names would be changed, and I would show them what I wrote about conversations that had taken place in their company and change or take our anything they did not approve. In some cases I also signed a confidentiality agreement, promising not to reveal anything I learned about the company's business. In several other companies, however, the people with whom I came to a verbal agreement turned the matter over to attorneys to draw up a contract stating what we had agreed to. In no case where the matter was referred to attorneys were we able to come up with an agreement to work together.

Negotiations with one company stand out. They had approached me to help them figure out why women were not advancing to the highest levels of management. I explained that to answer this question I would need to examine closely what was really going on in day-to-day business and that I would like to use my findings in my book. After a number of informal meetings and negotiations, we agreed on the procedures and safeguards and expected to have a contract drawn and signed in a matter of weeks. But six months later, after thousands of dollars in legal fees and untold hours of everyone's time, the company's lawyers called the negotiations a bust, advising the company that the risk was too great.

Since the company had a lawyer representing them, I needed a lawyer to represent me. The points on which negotiations between the lawyers broke down were these: The company's lawyer was demanding approval and veto power over my entire book. I could not agree to that; it meant I might write a three hundred page book in which a half dozen examples came from this company and then have the company decide they didn't like one example and tell me I could not publish the book. My lawyer was demanding for me total rights to videotapes of conversations to use any way I wanted. The company could not agree to that; it meant I could put videotapes of the company's employees on national television, make them look bad, reveal company secrets, and open the company up to being sued by its employees. Yet the people I was working with at the company had no desire to pass judgment on any part of my book that did not involve them, and I had no intention of using the videotapes except for analysis. The lawyers apparently figured they ought to ask for everything and back off if they had to.

But this impasse came after a long string of such manoeuvres that had used up everyone's patience (as well as the time I had to conduct the research). Rather than focussing on what the company and I had agreed to do to help each other, the lawyers tried to foresee and forfend everything we could do to hurt each other. We thought we were working together toward a common goal; the lawyers were constructing a world in which we were enemies.

When these negotiations broke down, this company and I parted ways and I found other companies to work with. But often parties to legal disputes must continue to deal with each other. Even those who defend the adversary system, such as DePaul University law professor Stephan Landsman, acknowledge that in such situations, it might not be the best hope for resolving disputes. Requiring people to behave like enemies can stir up animosity that remains long after the case has been settled or tried and the lawyers have moved on to other cases.

Extract from Deborah Tannen's "The Argument Culture"
- changing the way we argue and debate, Virago Press, 1998

APPENDIX 5. Biographical Notes - Rosemary Howell

PROFILE – ROSEMARY J HOWELL

CONTACT DETAILS:

Strategic Action Pty Ltd
2, Crown Street
Woolloomooloo NSW 2011
Australia

Telephone: (+61 2) 9380 2500
Facsimile: (+61 2) 9368 0643
email: rosemary@strategicaction.com.au

QUALIFICATIONS:

- Bachelor of Laws (Melbourne University)
- Barrister and Solicitor, Supreme Court of Victoria
- Solicitor, Supreme Court of New South Wales
- Accredited Quality Auditor (IQA Program)
- Accredited Administrator, Myers Briggs Type Indicator, Australian Psychologists Press

EXPERIENCE & EMPLOYMENT HISTORY:

- **1970-1974**
  Experience as a practising lawyer, in fields including town planning, property, insolvency, company law and estate planning.

- **1975-1977**
  Worked with a small team to establish the Victorian Legal Practice Course at the Leo Cussen Institute.

  Responsible for designing and teaching one third of the course and for student counselling.

  Maintained a small private practice specialising in commercial work and estate planning.

- **1978-1980**

  Invited to establish the Continuing Legal Education program of the Law Institute of Victoria. Also became consultant to and later acted as Manager of the Management Advisory Service. This was the first service of its kind in the southern hemisphere, offering advice on every aspect of law office management. Services were also provided to large firms in other professional groups such as accountants.

  During this period the management team visited close to 2,000 professional service businesses in Australasia, including 34 in New Zealand.

- **1980-1983**

  Appointed Secretary-General of the Law Council of Australia, the National Council of lawyers, responsible for initiating and administering a wide range of projects affecting the 19,000 Australian Lawyers.

  Assisted the Auckland District Law Society to establish a Management Advisory Service in May 1981 while on brief secondment from the Law Council.

- **1983-1985**

  Joined Touche Ross Services to establish and direct Lawyers' Management Services, a specialist unit providing management advice to law firms throughout Australia.

  During this period general consulting work was also undertaken including management reviews for State and Federal Government Departments and for a range of other professional practices including architects, engineers and accountants.

- **1985 - Present**

  Established Rosemary Howell Business Services in April 1985 which became Strategic Action in January 1995.

  The business provides strategic planning and human resources consulting to professional service businesses in Australia, New Zealand, USA, UK and South Africa. Clients include State and Federal Government Departments, in-house legal departments, major corporate entities in the retail, insurance and financial

services industries and a large range of professional service businesses including architects, law firms, engineers and accountants.

SPECIALISED COMPETENCE:

- Business diagnostic (including finance, administration, people, systems, equipment)
- Design and implementation of new management structures
- Strategic planning and strategic coaching to business
- Mergers, acquisitions, inter and intra state arrangements
- Quality Management programs
- Curriculum design, in-house training
- Planning and conducting retreats
- Change management processes
- Negotiation and Conflict Resolution training
- Recruitment, evaluation and outplacement of specialist staff

FURTHER TRAINING

- Attended Harvard Summer School course on Negotiation, 1987
- Assisted Harvard Professor Roger Fisher in teaching Negotiation workshops in Melbourne in 1988 and Sydney in 1994
- Teaching Fellow, Harvard Negotiation Program, June 1991
- Attended Harvard Summer School courses on Advanced Negotiation, 1991 (General) and 1995 (Gender Issues)

MEMBERSHIPS & APPOINTMENTS:

- 1980 Member, Council of Legal Education Victoria
- 1980-81 Executive Member, Association of Conference Executives
- 1980-82 Foundation Executive Member, Law Practice Management Section, Law Council of Australia.
- 1980-83 Attorney-General's Committee on Legal Information Retrieval
  Managing Editor, Australian Law News
  Member, Computerised Legal Information Committee, Victoria Law Foundation
- 1981-83 Board Member, Faculty of Law, Monash University
- 1982-91 Board Member, Council of Adult Education, Victoria

- 1983 Chairman, Committee on Staff Conditions, Council of Adult Education
- 1986-87 Chairman, General Practice Section, Law Council of Australia
- 1992-96 Member Professional Development and Practice Management Committee, Law Society of New South Wales and of its Quality sub Committee
- 1993-96 Chairman, Marketing Committee, Law Society of New South Wales
- 1994-Present Course Co-ordinator – Negotiation, University of Technology Sydney
  (Part of the Undergraduate, Masters and Doctoral program offered by the UTS Law School)
- 1997-Present Adjunct Lecturer – Alternative Dispute Resolution, University of New South Wales
- 1997-Present Member, New South Wales Board of QL (formerly Quality in Law), Law Society of New South Wales
- 2002-Present Director, Board of Directors, QL Incorporated
- 2003-Present Member of Legal Services Commissioner's Special Task Force on Conflicts (NSW)

PUBLICATIONS

- "Cross Selling in Law Firms" - Journal of the Law Society of New South Wales (With Nancy Pedler)

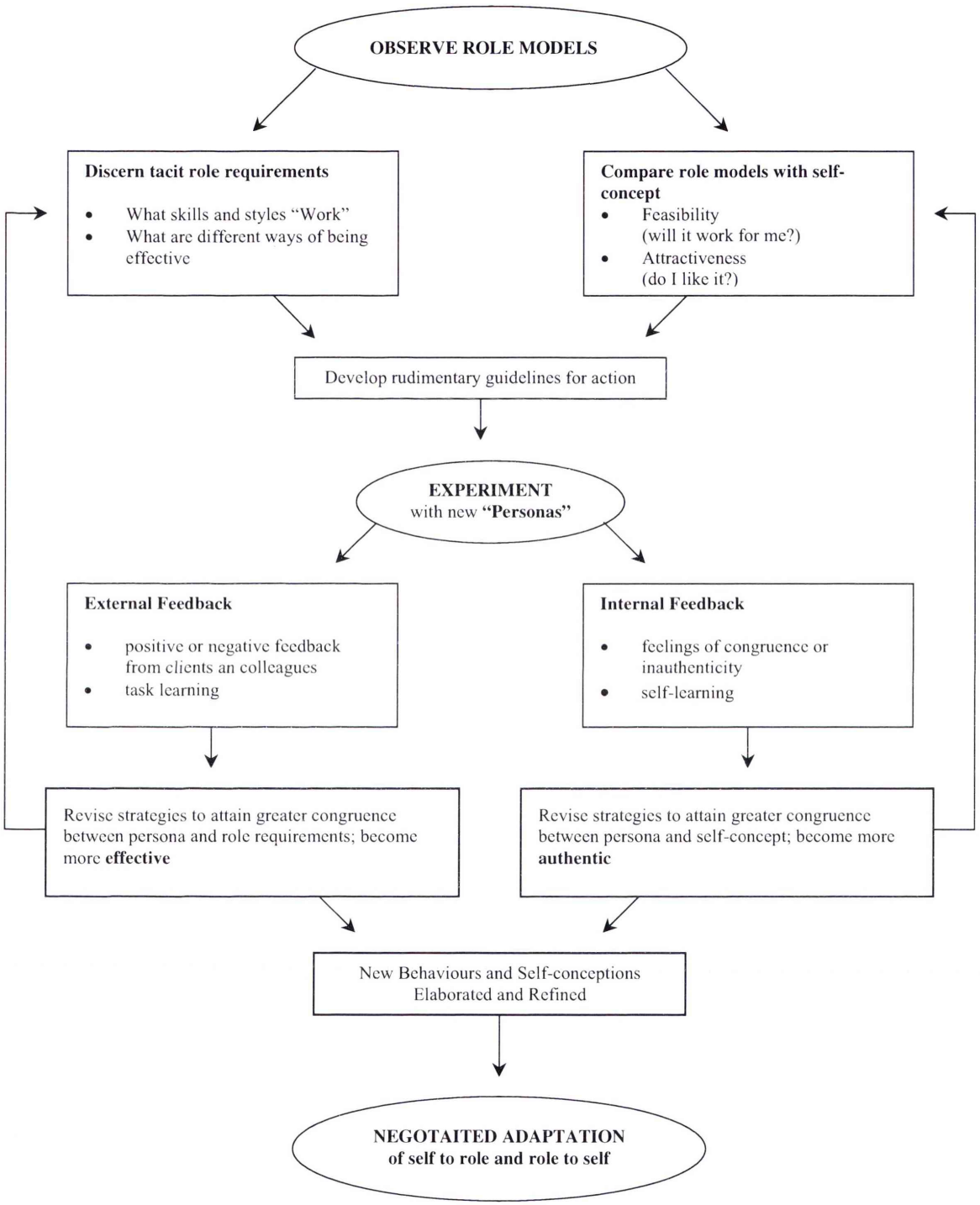
- "Working Smarter Not Harder: How to be Profitable in Tough Times" - Journal of the Law Society of New South Wales

- "Aspects of Administration: The Business Plan" - Corporate Management, Journal of the Institute of Corporate Managers, Secretaries and Administrators Ltd.

- "Quality Management for Legal Practice" - The Law Book Company Limited (Co-author)

- Law Practice Management Newsletter – Lexis Nexis Butterworths
  Monthly Contributor since June 2001

APPENDIX 6. How Professionals Learn



Extracted from Ibarra, H *Taking the Leap: How Professionals Advance*, Boston, Graduate School of Business Administration, Harvard University, 1998 – reproduced by permission of the author

APPENDIX 7. 1999 Study – Satisfaction With Lawyers: Summary of Findings & 2003 Study – Australian Insurance Lawyers: Precis of Findings
Julian Midwinter & Associates Pty Ltd

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STRATEGIC PRACTICE DEVELOPMENT

1999 INDUSTRY STUDY:

INSURERS' SATISFACTION WITH THEIR LAWYERS

SUMMARY OF FINDINGS

National attitudinal study

- Lines of business covered:
  - Workers' Compensation
  - Compulsory Third Party
  - Public Liability
  - Professional Indemnity
  - General Insurance
  - Property and Motor Vehicle Recovery
  - Other minor areas

Respondents

- 22 insurers
  - Multiple respondents within most insurers
  - Multiple lines of business
  - All states
- Personnel levels
  - General Manager 2%
  - Divisional/Line of Business Manager 21%
  - Claims Manager 76%
  - Corporate Counsel 1%

Overall satisfaction:

- Not satisfied at all 4%
- A little dissatisfied 9%
- Neither dissatisfied nor satisfied 9%
- Somewhat satisfied 38%
- Very satisfied 37%
- Exceptionally satisfied 3%

Very *high* satisfaction with:

- Panel size
- Panel firms' understanding of company and line of business
- Legal correctness of advice
- Instructing specific lawyer for specific file
- Education and training provided by lawyers
- Conformity of bills with administrative requirements

Moderate satisfaction with:

- Panel composition
- Treatment received as a client
- Response to concerns and priorities
- Being kept informed
- Style and frequency of reporting
- Consistently working in insurer's interests
- Use made of experts, including medicos
- Clarity of written information
- Effectiveness in negotiating settlements
- Performance at hearings
- Claims estimates

Ambivalence about:

- Law firms who work for multiple insurers
- Size of law firm - large or small
- Use made of barristers
- Post settlement file clear up

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Some concerns about:

- Disparity of capabilities between various panel firms
- Lawyer not providing feedback to insurers

Significant concerns about:

- "Feathering their own nests" at the expense of insurers
- Lawyers not seeking feedback about their performance

Least need to improve:

- Accessibility by telephone
- Medico legal knowledge
- Advice quality
- Valuing the relationship
- Turnaround on urgent matters
- Use of experts

Most need to improve:

- Pursuing early resolution
- Strategisation of cases
- Communication with claims officers
- Turnaround on initial advice
- Finalising files

Widely variable responses about

- Value for money
- Current fee structures
- Saving insurer's money
- Early resolution
- Negotiation skills
- Claims estimates

TENDERS & SELECTION PROCESSES

"Tenders and competitive bidding processes are useful in selecting lawyers and law firms"

▪ Strongly agree	17%
▪ Somewhat agree	17%
▪ Neither agree nor disagree	42%
▪ Somewhat disagree	20%
▪ Strongly disagree	4%

Quotable quotes

"Most tenders look the same"

"What they [law firms] promise in tenders and what you get are not the same"

"They [law firms] have to learn to take it seriously"

"Once the tender is over, it's just back to normal [for law firms]"

"They [law firms] seem to think that winning the tender means they can relax"

So:

- ❒ One-third think tenders are useful
- ❒ Two-thirds don't have an opinion or don't think they're useful
- ❒ But insurers' have overwhelming intentions to continue to use tenders

What's changed since competitive tenders ?

- ❒ Telephone accessibility
- ❒ Reporting improved
- ❒ Better communication
- ❒ Overall performance improvement
- ❒ Better value added services - *for some insurers*

What's hasn't changed at all or hasn't changed much since competitive tenders ?

- ❒ Value added services - for some insurers
- ❒ Prices
- ❒ "Dead wood" on panel
- ❒ Treatment as clients

Tenders and selection processes

- ❒ Clear intentions to continue to use tenders
- ❒ Next panel review due

▪ Within 6 months	28%
▪ In 7 to 12 months	32%
▪ During 2000	34%
▪ During 2001	4%
▪ Never	2%

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Current fee arrangements

- Time/hourly fees 48%
- Blended time rates 20%
- Event costs 36%
- Fixed costs 32%
- Scale fees 8%
- No win/no fee 4%

* Total exceeds 100% - many respondents used two fee arrangements

Expected future fee arrangements

- Time/hourly fees 48%
- Blended time rates 20%
- Event costs 36%
- Fixed costs 32%
- Scale fees 4%
- No win/no fee 12%

* Total exceeds 100% - many respondents intended to use two or more fee arrangements

Contact Julian Midwinter & Associates for:

❒ **Full details on this study**

❒ **Recommendations:**

- Alternate fee structures
- Better approaches to tendering to achieve agreed outcomes
- Better techniques to assess and manage legal providers work quality
- Draw on lessons available from overseas experience
- Briefings and workshops on these issues for your firm
- Advice and support service

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STRATEGIC
PRACTICE
DEVELOPMENT

2003 STUDY
AUSTRALIAN INSURANCE LAWYERS:

THEIR PERFORMANCE FROM THEIR INSURER CLIENTS' VIEWPOINT

PRECIS OF FINDINGS

ABOUT LINES OF BUSINESS COVERED

Public liability
Professional indemnity
Industrial Special Risk
Compulsory Third Party
Workers Compensation
General insurance
Special risks and major property

ABOUT THE RESPONDENTS

- multiple respondents from most insurers
- multiple lines of business
- throughout the nation.

Personnel levels

Claims Manager	70%
Technical claims, service, recoveries	15%
Divisional/Line of Business Manager	10%
Corporate Counsel	5%

ABOUT PANELS

Panel size

1 – 4 firms	27%
5 – 8 firms	41%
More than 8 firms	32%

About use of non-panel firms

Two-thirds of insurers instruct non-panel firms, citing:

- conflicts of interest
- trialling new firms
- interstate matters
- old connections.

ABOUT SATISFACTION WITH LAWYERS

Overall satisfaction

Levels have improved since Julian Midwinter & Associates last study.

Somewhat satisfied	23%
Very satisfied	68%
Exceptionally satisfied	9%

"If they weren't very good, they wouldn't be on the panel."

Very high satisfaction

- being kept informed
- panel composition
- effectiveness in negotiating on behalf of insurers
- use of experts and investigators.

Moderate satisfaction

- current fee structures
- clarity and conciseness of advice and reports
- conformity with service standards
- value for money
- saving insurer money
- size of panel.

Ambivalence about

- panel firm reporting
- claims estimates
- early resolution skills.

Widely variable responses about

- understanding of insurance companies and the business environment of insurers.

Most need to improve

- file finalisation
- claims estimates
- use of barristers
- use of information technology
- pursuing early resolution
- case strategy.

Least need to improve

- valuing the relationship
- manner and approach to work
- turnaround on requests for urgent advice
- accessibility and responsiveness
- response to instructions
- speed and quality of initial advice.

Reasons insurers stopped using a law firm

80% of respondents stopped using lawyers or law firms for one or more of the following reasons, in rank order:

- poor service
- lack of expertise
- high prices
- insufficient volume of work.

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- lack of interest or enthusiasm
- conflict of interest
- improper behaviour, including back-door solicitation of work.

ABOUT TENDERS AND COMPETITIVE SELECTION

- two-thirds of insurers see these as useful in selecting lawyers and law firms
- one quarter believe these are not useful
- there is no evidence that tenders and competitions will diminish in prominence in the near future.

Positive changes since last tender

- better fee certainty, cost effectiveness and prices
- fewer law firms of better quality
- better mix of law firms and skills
- better service and responsiveness
- better use of information technology
- some improvement in results.

Disappointments since last tender

- little change, in some instances
- decline in service in line with decline in cost
- lawyers insufficiently aggressive on file finalisation.

About what's changed in the last year

- 53% of insurers say that lawyers have been more responsive
- just over half say that communication and reporting hasn't improved, but nearly half say things are better in this regard
- 38% note that they've received far more value added services, especially training
- a quarter believe they have received much better all round treatment as clients, another quarter say they've had somewhat better treatment, a further quarter report no change, and just on a quarter believe that their treatment as clients has declined
- half of insurers enjoyed some overall performance improvement from their panels, while none has seen substantial improvement
- disappointingly, 25% believe that overall performance has declined.

ABOUT PRICES AND FEES

- while one-third of respondents say prices have decreased, more than half say prices haven't fallen in the last year.

Current fee arrangements

Time/hourly fees	50%
Event costs	25%
Regulated fees (WC)	17%
Fixed fees	8%

Expected future fee arrangements

Time/hourly fees	44%
Event costs	26%
Regulated fees (WC)	13%
Blended rates	9%
Fixed fees	4%
Unsure	4%

Current hourly rates

Partner	Range	$200	to	$350
Senior Associate	Range	$165	to	$275
Other lawyers	Range	$130	to	$225
Articled clerk or paralegal	Range		up to	$120

Please note that responses were widely divergent and only two-thirds provided information on rates.

OTHER INSIGHTS AND COMMENTS

"Event costing is not the answer – hourly rates are not – the defence community must reward best and brightest and recognise outstanding outcomes."

"I expect service will decline in Workers Comp."

"My preference is to select people I know rather than tenders – firms I have developed a relationship with."

"We have a comfort zone with those we have."

"I don't think there are many [lawyers] bleeding the system."

"[Law firms] don't take being removed from a panel well – either because of volume of work or poor performance – they were quite unpleasant."

"We received 262 submissions, and every one had the requisite expertise."

ABOUT JULIAN MIDWINTER & ASSOCIATES

Research for this study was undertaken by consultants, Linda Julian and Kate Richardson.

Julian Midwinter & Associates counsels law firms of all sizes, styles, and locations to meet their diverse needs for strategic practice development.

For further information, a full briefing on the study, or a workshop on how to best respond to these findings, please contact Linda Julian or Kate Richardson on 02 9968 4168 or julianmidwinter@julianmidwinter.com.au.

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