

THE 'NEW' LIMITATIONS OF FISHER AND URY'S MODEL OF INTEREST-BASED NEGOTIATION: NOT NECESSARILY THE ETHICAL ALTERNATIVE

BOBETTE WOLSKI*

I INTRODUCTION

[A] negotiator who can easily claim a large share of a small pie may wind up with more to eat than one who helps bake a much bigger pie but ends up with only a sliver. A skilful negotiator moves nimbly between imaginative strategies to enlarge the pie and conservative strategies to secure an ample slice no matter what size the final pie turns out to be.¹

Interest-based negotiation was popularised by Fisher and Ury in a text² which has been described as 'path-breaking'.³ It quickly became the focal-point in mediation training courses. In an article published in 1994, shortly after I completed five mediation training courses sponsored by a number of organisations, I identified some of the limitations of Fisher and Ury's model of interest-based negotiation in mediation.⁴ My concern then was that novice and overly optimistic mediators, trained in interest-based negotiation and little else, expected all mediations to end with integrative solutions that left the parties fully and equally satisfied without the need for compromise. Mediation training did not prepare practitioners to manage the distributive phase of negotiation. In the years since that article was published, our unqualified acceptance of Fisher and Ury's model of interest-based negotiation has continued unabated despite the fact that its shortcomings have been well documented.⁵ While we now ac-

□ Associate Professor of Law, Faculty of Law, Bond University.

¹ Robert H Mnookin, Scott R Peppet and Andrew S Tulumello, *Beyond Winning – Negotiating to Create Value in Deals and Disputes* (Belknap Press of Harvard University Press, 2000) 9.

² Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* (Business Books Limit, 2nd ed, 1991). The first edition was published in 1981.

³ Robert F Cochran, 'Legal Ethics and Collaborative Practice Ethics' (2009) 38 *Hofstra Law Review* 537, 544.

⁴ Bobette Wolski, 'The Role and Limitations of Fisher and Ury's Model of Interest-based Negotiation in Mediation' (1994) 5 *Australian Dispute Resolution Journal* 210.

⁵ James J White, 'Essay Review: The Pros and Cons of "Getting to Yes"' (1984)

knowledge the diversity that exists in mediation practice, mediators (and mediation training courses) are still heavily biased towards interest-based negotiation. Collaborative Law or Collaborative Practice (hereafter CL) is explicitly based on interest-based negotiation. Recently, as we have turned our minds to the ethical dimensions of these forms of practice, a new interest-based bias has emerged. Practice guidelines issued by lawyers' professional associations urge their members to facilitate and/or to adopt interest-based negotiation when carrying out their roles as mediators and legal representatives respectively. But they do not stop there - some of these guidelines go so far as to suggest that advocacy skills – deemed to be adversarial in nature - are misplaced in mediation and CL. It has now been suggested that legal representatives should be required to use interest-based negotiation by their professional codes of conduct.

These latest developments are disturbing because they are premised on a number of false assumptions. It is assumed: that there is a clear dichotomy between interest-based negotiation and positional negotiation; that it is always possible and desirable to use interest-based negotiation; and that interest-based negotiation is more ethical than positional negotiation. These assumptions are challenged in this article. The bias toward interest-based negotiation is also troubling because if code drafters acted on the latest proposals, they would reduce the capacity now afforded to legal representatives to exercise discretion in moving back and forth between positional and interest-based strategies. The article does not explore the considerable number of practical obstacles which might preclude the application, interpretation, monitoring and enforcement of such 'non-adversarial' codes of behaviour in private dispute resolution processes, although such obstacles surely exist.

The article is in six parts. In part II, I provide an overview of positional and interest-based negotiation. Part III explores the interest-based process bias that exists in mediation and CL. It also examines existing practice guidelines and a number of proposals for new codes of conduct for lawyers which favour

34 *Journal of Legal Education* 115; Gerald B Wetlaufer, 'The Limits of Integrative Bargaining' (1996-1997) 85 *Georgetown Law Journal* 369; Ross Buckley, 'Adversarial Bargaining: The Neglected Aspect of Negotiation' (2001) 75 *Australian Law Journal* 181, 183-4; Jeffrey M Senger, 'Tales of the Bazaar: Interest-Based Negotiation Across Cultures' (2002) 18 *Negotiation Journal* 233, 248; Robert J Condlin, 'Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along' (2007-2008) 9 *Cardozo Journal of Conflict Resolution* 1, 73; Mark Dickinson, 'An Evaluation of Non-Adversarial Models of Negotiation' (2009) 20 *Australasian Dispute Resolution Journal* 212, 215-7.

interest-based negotiation over positional negotiation. The limitations of interest-based negotiation are explored in part IV. In parts V and VI, I discuss the implications of these limitations from a number of perspectives. I focus on the position of legal representatives in part V. I suggest that they should proceed cautiously when they use interest-based strategies. I urge them to embrace advocacy (and the law, when appropriate) in the hope of debunking the assumption that advocacy (and the law) is incompatible with mediation and CL. I conclude the article in part VI with a plea to code drafters to continue to allow legal representatives the freedom to move between interest-based and positional strategies as they see fit, rather than to make assumptions about what is and what is not, the ethically fitting course to be followed.

The arguments advanced in this article also apply to the conduct of legal representatives in unassisted negotiation but for the sake of brevity, I restrict the discussion to mediation and CL.

II OVERVIEW OF POSITIONAL AND INTEREST-BASED NEGOTIATION

According to the relevant literature, parties in negotiation typically adopt one of two major approaches,⁶ positional (or distributive) negotiation or interest-based (or integrative) negotiation.⁷ In positional negotiation, each party begins by advocating a single specific solution (or position) to the problem. In order to maximise their respective gain, each party will usually adopt an extreme position and conceal information as to the level or point at which they are prepared to settle.⁸ An agreement can only be reached by the parties successively

⁶ An approach to negotiation, sometimes referred to as a negotiation strategy, must be distinguished from a negotiation style and a negotiation tactic. An approach refers to the method or process by which a person negotiates, while style refers to his or her general overall interpersonal behaviour. A tactic is a specific move or intervention made to achieve a particular result in a negotiation. Generally, see Nadja Alexander and Jill Howieson, *Negotiation: Strategy, Style, Skills* (LexisNexis Butterworths, 2nd ed, 2010) 10-11.

⁷ Negotiation theorists generally identify two approaches to negotiation, namely principled or interest-based vs. positional (Fisher and Ury, above n 2, 11); integrative vs. distributive (Howard Raiffa, *The Art and Science of Negotiation* (Belknap Press of Harvard University Press, 1982) 33); cooperative vs. competitive (Dean G Pruitt, *Negotiation Behavior* (Academic Press, 1981) 15); and problem-solving vs. adversarial (Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1983-1984) 31 *University of California Los Angeles Law Review* 754, 756-8).

⁸ Roy J Lewicki, Bruce Barry and David M Saunders, *Negotiation* (McGraw-Hill, 6th ed, 2010) 49-50.

conceding to new positions. Proponents of interest-based negotiation argue that in the process of maintaining and then giving up on a series of positions, the parties may overlook the reasons why they originally adopted the position (that is, to satisfy their needs or interests). As a result, the agreement reached may not be reflective of the interests of either party.⁹

In interest-based negotiation, attention is given to the needs or interests of the parties, the reasons why they have adopted a particular position rather than to the position itself.¹⁰ The rationale for focusing on interests is that for every interest there may exist several possible solutions that could satisfy it. It may be possible to find a solution which meets the interests of all parties.¹¹ In the sense that interest-based negotiation seeks to broaden the range of acceptable solutions, it is said to expand the pie to be divided between the parties (for this reason, it is often referred to as value creating rather than value claiming negotiation).

Interest-based negotiation was popularized by Fisher and Ury in their book *Getting to Yes: Negotiating Agreement Without Giving In* ('*Getting to Yes*').¹² Their model of interest-based negotiation relies upon the following four principles:¹³

1. 'Separate the people from the problem':¹⁴ disentangle the people problems from the substantive problems and work on each separately.
2. 'Focus on interests, not positions':¹⁵ identify and make explicit the needs or interests that the people want satisfied from the negotiation.¹⁶
3. Generate a variety of options for mutual gain: before deciding upon a specific solution, invent a variety of alternatives 'that advance shared interests and creatively reconcile differing interests'.¹⁷
4. 'Insist that the result be based on some objective standard':¹⁸ where interests conflict, make a decision based on 'some fair standard independent of

⁹ Fisher and Ury, above n 2, 5.

¹⁰ Ibid 11.

¹¹ Ibid 43.

¹² Ibid.

¹³ Wolski, above n 4, 211.

¹⁴ Fisher and Ury, above n 2, 11.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid 12.

¹⁸ Ibid 11.

the naked will of either side'.¹⁹

According to Fisher and Ury, the desired outcome of interest-based negotiation is a 'wise agreement',²⁰ defined by them as 'one which meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account'²¹ and which is reached through a process that does not adversely affect the parties' relationship.²²

Theoretically at least, interest-based negotiation seems to be a perfect match with mediation. The connection between the concept of interest-based negotiation and mediation is explored in the next part of the article.

III THE BIAS TOWARDS INTEREST-BASED NEGOTIATION

A. Mediation

One of the most widely used early definitions of mediation is that furnished by Folberg and Taylor who describe the process as one '[b]y which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs'.²³ This definition, which emphasises several of the stages of Fisher and Ury's model, is still in use. For example, the National Alternative Dispute Resolution Advisory Council (hereafter NADRAC) defines 'mediation' as a process 'in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement'.²⁴ The similarities between Fisher and Ury's model of interest-based negotiation and the mediation process are apparent at first glance. The overall objective of each is an agreement that satisfies the needs or interests of the parties. In order to arrive there, the interests of the parties (not their positions) are identified, and options and alternatives

¹⁹ Ibid 12.

²⁰ Ibid 4.

²¹ Ibid.

²² Ibid.

²³ Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Giving In* (Jossey-Bass, 1988) 7. For another well known definition, see Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 3rd ed, 2003) 76.

²⁴ National Alternative Dispute Resolution Advisory Council (hereafter NADRAC), *Dispute Resolution Terms: The use of terms in (alternative) dispute resolution* (September 2003) 7 <<http://www.nadrac.gov.au>>.

that meet those interests are sought.

In fact, not all mediators favour interest-based negotiation all the time. Mediation is an extremely diverse process.²⁵ In order to make sense of this diversity and to resolve some persistent definitional problems,²⁶ a number of different styles or models of mediation have been identified over time. For instance, Boulle identifies four paradigm models – the settlement, facilitative, therapeutic and evaluative models.²⁷ They differ from each other in the way they describe the purpose of mediation, the values to which priority is given, and the role, functions and interventions of the mediator.²⁸ Facilitative mediation follows most closely the principles espoused by Fisher and Ury. The objective of facilitative mediation is ‘[t]o avoid positions and negotiate in terms of parties’ personal and commercial needs and interests instead of legal rights and duties’.²⁹ In contrast, mediators in the settlement model of mediation tend to favour positional negotiation. Their interventions are aimed at moving the parties from fixed positions to a point of compromise using incremental bargaining.³⁰

In reality, most mediators probably mix their approaches. Boulle’s view is that these models are not distinct alternatives to one another.³¹ They may operate in tandem. For example, a mediator might commence in the facilitative mode, but later move into the settlement or evaluative modes.³² Alternatively, they may operate simultaneously. For example, a mediator might use techniques associ-

²⁵ Jacqueline M Nolan-Haley, ‘Lawyers, Clients, and Mediation’ (1997-1998) 73 *Notre Dame Law Review* 1369, 1379; Robert P Burns, ‘Some Ethical Issues Surrounding Mediation’ (2001-2002) 70 *Fordham Law Review* 691, 701.

²⁶ Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 3rd ed, 2011) 43.

²⁷ *Ibid* 43-7. Boulle’s framework is one of a number of categorisations available. Also see Leonard L Riskin, ‘Decisionmaking in Mediation: The New Old Grid and the New New Grid System’ (2003-2004) 79 *Notre Dame Law Review* 1, 3. For a discussion of the pragmatic, transformative and narrative models of mediation see Michal Alberstein, ‘Forms of Mediation and Law: Cultures of Dispute Resolution’ (2006-2007) 22 *Ohio State Journal on Dispute Resolution* 321, 325-31.

²⁸ Omer Shapira, ‘Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics’ (2008) 8 *Pepperdine Dispute Resolution Law Journal* 243, 244.

²⁹ Boulle, above n 26, 44. Also see Burns, above n 25, 692-3.

³⁰ Boulle, above n 26, 44.

³¹ *Ibid* 43.

³² *Ibid*.

ated with two, three or four models in a single mediation.³³ Nonetheless, much of the literature, discussion and training in mediation gravitates towards the facilitative or interest-based model, so much so that it is sometimes referred to as the 'standard' or 'classical' model.³⁴ Most mediators are trained in some variant of Fisher and Ury's model.³⁵ It is 'the style most frequently acknowledged publically by mediators'.³⁶

The terminology of interest-based negotiation has even found its way into some mediator standards. For example, the Queensland Law Society's Standards of Conduct for Solicitor Mediators state that one of the functions of mediators is to 'promote interest-based bargaining among the parties where possible'.³⁷

In the early 1990s, a new dispute resolution process known as Collaborative Law (or CL) emerged.³⁸ According to some authors, the development of CL

³³ Also see Riskin, above n 27, 17-8; and Jeffrey W Stempel, 'The Inevitability of the Eclectic: Liberating ADR from Ideology' [2000] *Journal of Dispute Resolution* 247, 248 who argues that effective mediators adopt a mixed approach. The *Australian National Mediator Standards* acknowledge that mediators may use a 'blended process' model: see Australian National Mediator Standards, Practice Standards (for Mediators Operating Under the National Mediator Accreditation System) (September 2007) <<http://www.nadrac.gov.au>>.

³⁴ Boule, above n 26, 43. Also see Rachael Field, 'Rethinking Mediation Ethics: A Contextual Method to Support Party Self-determination' (2011) 22 *Australasian Dispute Resolution Journal* 8, 8 (who claims that facilitative mediation is the 'dominant model of mediation practised in Australia') and Moore, above n 23, 77 (who asserts that mediators have a procedural bias towards interest-based negotiation). There is an explicit preference for an interest-based approach in certain types of disputes eg in family law matters: John Lande and Gregg Herman, 'Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases' (2004) 42 *Family Court Review* 280, 282.

³⁵ James K L Lawrence, 'Mediation Advocacy: Partnering with the Mediator' (1999-2000) 15 *Ohio State Journal on Dispute Resolution* 425, 427; Barbara Wilson, 'Mediator Ethics: What Does the ADR Literature Say?' (28 March 2010), Paper available at <<http://ssrn.com/abstract=1574438>>.

³⁶ Samuel J Imperati, 'Mediator Practice Models: the Intersection of Ethics and Stylistic Practices in Mediation' (1997) 33 *Willamette Law Review* 703, 711.

³⁷ Queensland Law Society, *Standards of Conduct for Solicitor Mediators* (at 23 September 1998) clause 2.1.5.

³⁸ Collaborative Law was the brain-child of Stuart Webb, a Minnesota family law practitioner, who in 1990 began experimenting with other trusted lawyers to settle family law matters through collaboration: Stu Webb, 'Collaborative Law: A Practitioner's Perspective on its History and Current Practice' (2008) 21 *Journal of the American Academy of Matrimonial Lawyers* 155, 163.

was a direct response to the adversarial culture of legal negotiation.³⁹ It is premised on an interest-based approach to negotiation.⁴⁰ It is explored next.

B. Collaborative Law

Collaborative Law (CL) is a structured negotiation process conducted via a series of four-way meetings between the parties and their respective lawyers. The participants usually agree, by way of practice protocols, to participate in the process in good faith and in a cooperative non-adversarial manner using interest-based negotiation.⁴¹ They also agree to make full and honest disclosure of all relevant information⁴² (although it is noteworthy that there are different views as to what is relevant for the purpose of information exchange under CL agreements).⁴³ Most importantly, the parties agree that if negotiations reach an impasse, the process is terminated and their lawyers are disqualified from continuing to act in the matter. In this event, the clients must engage new lawyers (and other associated professionals)⁴⁴ if they wish to commence legal proceedings. The disqualification provision is considered the sine qua non of the CL process and ‘the real force’ behind it.⁴⁵ According to proponents of CL, it creates a powerful incentive for all concerned to try to reach agreement

³⁹ Julie Macfarlane, ‘Experience of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project’ [2004] *Journal of Dispute Resolution* 179, 216.

⁴⁰ Jim Hilbert, ‘Collaborative Lawyering: A Process for Interest-based Negotiation’ (2009-2010) 38 *Hofstra Law Review* 1083, 1087-6.

⁴¹ For a general discussion about the practices and protocols of CL, see Gary L Voegelé, Linda K Wray and Ronald D Ousky, ‘Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes’ (2006-2007) 33 *William Mitchell Law Review* 971, 984; William H Schwab, ‘Collaborative Lawyering: A Closer Look at an Emerging Practice’ (2003-2004) 4 *Pepperdine Dispute Resolution Law Journal* 351, 358; Pauline H Tesler, ‘Collaborative Family Law’ (2003-2004) 4 *Pepperdine Dispute Resolution Law Journal* 317, 328.

⁴² Sandra S Beckwith and Sherri G Slovin, ‘The Collaborative Lawyer as Advocate: A Response’ (2002-2003) 18 *Ohio State Journal on Dispute Resolution* 497, 499-500. Also see Christopher M Fairman, ‘A Proposed Model Rule for Collaborative Law’ (2005-2006) 21 *Ohio State Journal on Dispute Resolution* 73, 79; James K L Lawrence, ‘Collaborative Lawyering: A New Development in Conflict Resolution’ (2001-2002) 17 *Ohio State Journal on Dispute Resolution* 431, 436.

⁴³ Macfarlane, above n 39, 193.

⁴⁴ The parties also agree to use joint experts. Absent agreement, those experts are disqualified from further involvement in the event that the matter proceeds to litigation: Schwab, above n 41, 360; Tesler, above n 41, 320.

⁴⁵ Beckwith and Slovin, above n 42, 503.

without litigation.⁴⁶

Currently there are no specific provisions for CL contained in lawyers' professional conduct rules although some guidelines have emerged. These are discussed in the next section.

C. Current Practice Guidelines For Legal Representatives

Law societies and bar associations in Australia have not yet promulgated additional or supplementary rules to govern their members' conduct when they are acting as legal representatives in mediation and CL. In the absence of specific standards of conduct, lawyers who represent parties in these processes are governed only by the general rules of professional conduct promulgated by the professional associations to which they belong,⁴⁷ together with other components of the 'law of lawyering'.⁴⁸ Some accommodations for these processes have been made in the professional conduct rules in Australia.⁴⁹ The Barristers' Rules define 'court' to include 'arbitrations and mediations', while the ASCR use the phrase 'an arbitration or mediation or any other form of dispute resolution'.⁵⁰ The implications of these definitions have not yet been fully explored. It is clear however that lawyers are not currently required to use interest-based negotiation either by the law of lawyering or any rule of custom. Nor is there any prohibition on lawyers acting competitively rather than cooperatively.

Some non-binding 'guidelines' for legal representatives (and parties) in me-

⁴⁶ Schwab, above n 41, 358; Webb, above n 38, 168.

⁴⁷ In most jurisdictions in Australia, relevant professional bodies have adopted (or are in the process of adopting) the new National Conduct Rules recently approved by the Law Council of Australia and the Australian Bar Association as a result of the National Legal Profession Reform Project. See Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) (hereafter the ASCR) and Australian Bar Association, *Barristers' Conduct Rules* (approved 1 February 2010) (updated 8 October 2010) (hereafter the Barristers' Rules).

⁴⁸ The expression 'the law of lawyering' refers to the body of law which regulates the behaviour of members of the legal profession. It consists of relevant portions of the law of contract, torts, equity, adjectival law, general legislation, legislation governing the practice of the law and the rules of professional conduct promulgated by the regulatory bodies to which lawyers belong. Generally, see Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007) 3.

⁴⁹ See, for instance, ASCR r 7.2 by virtue of which solicitors owe clients a duty to advise on reasonably available alternatives to 'fully contested adjudication'.

⁵⁰ See glossary of terms, ASCR and definitions section, Barristers' Rules.

diation and in CL have emerged.⁵¹ For example, the Law Council of Australia (hereafter LCA) published *Guidelines for Lawyers in Mediation* in March 2007 and the Law Society of New South Wales published its *Professional Standards for Legal Representatives in a Mediation* in January 2008.⁵² The concept of interest-based negotiation also permeates these documents. For example, clause 5(c) of the LCA guidelines (dealing with preparation for mediation) urges practitioners to assist clients to ‘identify positions and interests and the best ways to achieve outcomes’, and suggests that they approach mediation ‘as a problem-solving exercise’.⁵³ The Law Society of New South Wales uses a variant of the Folberg and Taylor definition in its mediation package⁵⁴ and urges solicitors involved in mediation to ‘participate in a non-adversarial manner’.⁵⁵

The LCA has also published ‘Practice Guidelines’ for CL.⁵⁶ The Guidelines, which define the Collaborative Process in terms reflective of the Folberg and Taylor mediation definition, state that a collaborative practitioner will conduct the process in a manner which is procedurally fair and supportive of interest-based negotiation.⁵⁷ The Guidelines also provide that: ‘[t]he collaborative process supports interest based negotiation. Competitive negotiation strategies and tactics are antithetical to the collaborative process’.⁵⁸

Although there is no bright line distinction, guidelines are not the same as rules or codes of conduct. Guidelines are usually considered to be non-binding in nature. They ‘do not impose any additional obligations on legal representatives; nor do they derogate from the usual obligations imposed on them’.⁵⁹

⁵¹ Also see the LCA *Guidelines for Parties in Mediations* (August 2011) which favours the interest-based approach in its description of the mediation process (clause 1) and in the advice given for preparation for mediation (clause 8).

⁵² The Law Society of New South Wales first promulgated its *Professional Standards for Legal Representatives in a Mediation* in 1993.

⁵³ LCA, *Guidelines for Lawyers in Mediation* (March 2007), clause 6.

⁵⁴ See, eg, Revised Guidelines for Solicitors who act as Mediators (1993), Guideline 2 contained in the Law Society of New South Wales Mediation and Evaluation Information Kit, 2006.

⁵⁵ *Professional Standards for Legal Representatives in a Mediation* (January 2008) clause 2.3.

⁵⁶ LCA, *Australian Collaborative Practice Guidelines for Lawyers*. Also see International Academy of Collaborative Professionals (IACP), *Ethical Standards for Collaborative Practitioners*.

⁵⁷ LCA, *Australian Collaborative Practice Guidelines for Lawyers*, clauses 1 and 42.

⁵⁸ LCA, *Australian Collaborative Practice Guidelines for Lawyers*, clause 3.

⁵⁹ Introduction Note, LCA, *Guidelines for Lawyers in Mediation* (at March 2007).

They are more in the nature of aspirational statements than prescribed directives about appropriate conduct (I say that there is no bright line because most model rules contain some statements which are aspirational in nature). Non-binding guidelines and standards are not without influence on legal practitioners. These statements may guide practitioners in selecting 'best practices' in conditions of uncertainty. They may also be taken into account by disciplinary bodies charged with assessing complaints about unprofessional conduct.⁶⁰ The guidelines for CL might have more influence than mediation guidelines as they are reinforced by the practice protocols mentioned earlier.⁶¹ Additionally, collaborative lawyers signal their intention to collaborate by becoming members of CL practice groups. It is membership of this group which makes it easier to find 'trustworthy' and likeminded colleagues.⁶² On the flip side, collaborative practitioners face expulsion from the group if they do not observe the established guidelines.

D. Recommendations For New Codes Of Conduct For Legal Representatives

Some commentators are calling for more than behavioural guidelines and aspirational statements. A number of influential authors maintain that the legal profession's general rules of conduct were fashioned with adversarial litigation in mind⁶³ and that they are inappropriate for, and incompatible with, mediation - a process which, claim the critics, is premised on problem-solving negotiation.⁶⁴ Some of these authors have argued for the development of new 'non-ad-

⁶⁰ Boule, above n 26, 466-9.

⁶¹ CL is no longer practised according to a unified contractual model. For a discussion about the original and most common structure for CL, see Scott R Peppet, 'The Ethics of Collaborative Law' (2008) *Journal of Dispute Resolution* 131, 136, 155. One contractual variation has given rise to the practice of Cooperative Law: Peppet at 135-6, which is also based on interest-based negotiation.

⁶² Schwab, above n 41, 362.

⁶³ Robert C Bordone, 'Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes' (2005-2006) 21 *Ohio State Journal on Dispute Resolution* 1, 3; Carrie Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibility' (1997) 38 *South Texas Law Review* 407, 410; Kimberlee K Kovach, 'Good Faith in Mediation - Requested, Recommended, or Required? A New Ethic' (1997) 38 *South Texas Law Review* 575, 619.

⁶⁴ Carrie Menkel-Meadow, 'Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve' (2004) 57 *Current Legal Problems* 84, 106; Christopher M Fairman, 'Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads' (2002-2003) 18 *Ohio State Journal on Dispute Resolution* 505, 528; Kimberlee K Kovach, 'Lawyer Ethics Must Keep Pace with

versarial ethics standards' for lawyers who represent clients in mediation and other 'non adversarial' contexts.⁶⁵ These authors have called for the introduction of rules requiring higher standards of disclosure, good faith participation, fair dealing, cooperation and interest-based negotiation. A few authors have also called for the promulgation of new rules of conduct for CL.⁶⁶ One of the most controversial issues arising from this debate is the question of whether or not the collaborative lawyer is still an advocate for his or her client.⁶⁷ This issue is discussed again later in the article.

In this article, my concern is with the proposals for interest-based negotiation although this concept has implications with respect to other negotiation behaviours - such as disclosure of information (or the lack of it), and general requirements to cooperate. My concern is that we tend to ignore the limitations of interest-based negotiation. As I discuss in the next part, interest-based negotiation is not possible or desirable in all circumstances and it does not provide a template for ethical behaviour in negotiation.

IV THE LIMITATIONS OF FISHER AND URY'S MODEL OF INTEREST-BASED NEGOTIATION

A. When Interest-based Negotiation is Not Possible or Desirable

Fisher and Ury's model of interest-based negotiation relies upon the assump-

Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards' (2002-2003) 39 *Idaho Law Review* 399, 413-4.

⁶⁵ Fairman, above n 64, 528; Kovach, above n 64, 413-4; Jacqueline M Nolan-Haley, 'Introduction: Lawyers' Ethics in ADR' (2000-2001) 28 *Fordham Urban Law Journal* 891, 893-894; Menkel-Meadow, above n 63, 453-4; Walter W Steele Jr, 'Deceptive Negotiating and High-Toned Morality' (1986) 39 *Vanderbilt Law Review* 1387, 1403.

⁶⁶ See, eg, Fairman, above n 64, 508. Other authors take a different view: see, eg, Beckwith and Slovin, above n 42, 497, 502; John Lande, 'Principles for Policymaking About Collaborative Law and Other ADR Processes' (2006-2007) 22 *Ohio State Journal on Dispute Resolution* 619, 678; Peppet, above n 61, 147; Cochran, above n 3, 547.

⁶⁷ Debate has also concerned the potential for conflict of interest, between a lawyer and his or her own client, which might arise because of the disqualification provision in the CL arrangement. For the time being at least, relevant professional bodies have decided that the obligations arising by virtue of the contractual arrangements underpinning CL, and the profession's rules of conduct, are not inconsistent: see Peppet's discussion of relevant ethics committee rulings in the USA: Peppet, above n 61, 142.

tion that behind opposed positions lie many more interests that are shared than divergent and that new integrative solutions may be found which advance shared interests and reconcile divergent interests.⁶⁸ The notion is that the pie can be expanded by inventing options – integrative solutions - which leave everyone satisfied, so that a win/lose or compromise scenario will be avoided. However, in real life the opportunities to create integrative solutions that meet the interests of all the parties might be limited. They are likely to be limited when negotiations involve one critical issue; when interests and/or values truly conflict; and where the parties disagree on objective criteria.⁶⁹

1 Single-issue Negotiations

Where there is one critical issue involved (for instance, the amount of compensation to be paid for injury to a person or damage to property or where each side claims exclusive possession of property),⁷⁰ negotiations are likely to be distributive. When compensation is the issue, one more dollar for the victim usually means one less dollar for the insurance company. Some authors claim that single-issue negotiations do not exist, except in theory. When the central issue is the amount of money to change hands (as compensation or for the purchase of a commodity), the timing and manner of payment are also negotiable issues. In addition, the parties usually have a mutual interest in the process or manner by which their substantive issue is resolved.⁷¹ But it is undoubtedly the case that the opportunities for integrative bargaining are fewer when there are fewer disputed issues on the negotiation table.⁷² This is particularly so in two-party 'one shot' bargaining situations where the parties will not deal with each other in the future and where the scope for widening the issues is extremely limited.

⁶⁸ Fisher and Ury, above n 2, 43 and 73-6.

⁶⁹ Wolski, above n 4, 214-7. Also see Wetlaufer who uses a number of fact scenarios to demonstrate that 'opportunities for integrative bargaining, especially meaningful opportunities for integrative bargaining (e.g., where the pie may be made to expand and to stay expanded), exist within a narrower range of circumstances than sometimes has been claimed': Wetlaufer, above n 5, 390.

⁷⁰ Wolski, above n 4, 215-6; Raiffa, above n 7, 13; Raymond A Whiting, 'The Single-Issue, Multiple-Issue Debate and the Effect of Issue Number on Mediated Outcomes' (1992) 10 *Mediation Quarterly* 57.

⁷¹ Ross P Buckley, 'The Applicability of Mediation Skills to the Creation of Contracts' (1992) 3 *Australian Dispute Resolution Journal* 227, 235. Generally see Whiting, above n 70.

⁷² Donald G Gifford, 'A Context-Based Theory of Strategy Selection in Legal Negotiation' (1985) 46 *Ohio State Law Journal* 40, 70.

2 *Conflicting Interests and/or Values*

The second situation occurs by virtue of the very nature of the interests and values of individuals. Negotiations will generally involve a mixture of common or shared interests, differing but not necessarily incompatible interests, and interests that conflict. It will not always be possible to fashion a solution that reconciles conflicting interests. When no such solution exists, the parties are likely to see the situation in terms of win/lose and engage in distributive negotiation. (This situation could also arise where the parties have compatible interests but insufficient resources to satisfy them and when parties in a multiple issue dispute negotiate on one issue at a time.)⁷³

It might also be the case that the values of the parties are actually opposed (as they are in the right to life versus right to abortion debate). Avruch draws our attention to the problems of values-based conflicts, where values cover a 'wide range of notions, including such ideas as ideology, beliefs, or worldview'.⁷⁴ Values are more deep-seated than interests. Values-based conflicts may resist the sort of rational, problem-solving negotiation practices represented by Fisher and Ury's model of interest-based negotiation (for their model assumes that the parties make rational choices). Parties may act in a non-rational way when values are at stake (in fact, in the real world, parties frequently do not make rational choices because of the effect of 'a range of fairly frequent and "standard" cognitive distortions').⁷⁵

3 *Conflicting Objective Criteria*

Fisher and Ury maintain that where interests conflict, the outcome should be decided by reference to objective standards.⁷⁶ However, this step in the process may be problematic in itself. The parties may have their own preferred standards of legitimacy, be it case precedent or expert opinion, in support of their respective cases.⁷⁷ They might disagree on which criteria are more legiti-

⁷³ Jeffrey Z Rubin and Bert R Brown, *The Social Psychology of Bargaining and Negotiation* (Academic Press, 1975) 146; Wolski, above n 4, 218.

⁷⁴ Kevin Avruch, 'Toward An Expanded "Canon" of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic' (2005-2006) 89 *Marquette Law Review* 567, 573-575.

⁷⁵ *Ibid* 569. As a result of these distortions 'information is very often partial or imperfect and hence, expectedly, decisions are far from optimally rational'. A common example of such a distortion with which most dispute resolution practitioners are familiar is 'reactive devaluation'.

⁷⁶ Fisher and Ury, above n 2, 85.

⁷⁷ Robert J Condlin, 'Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role' (1992) 51 *Maryland Law Review* 1, 33.

mate or persuasive. Alternatively, the parties may agree that the standard each has proposed is equally persuasive and legitimate but the application of those standards may produce different results. Another possibility is that there are no objective criteria by which to gauge likely outcomes.

When there is one critical issue involved, when interests and/or values conflict and where objective criteria are uncertain or absent, the parties are likely to adopt a positional or distributive approach to negotiation.⁷⁸ But even in the best of circumstances, there is a limit to the integrative potential of most situations.⁷⁹ When the pie has been expanded as far as it will go, it must be cut – at this stage, the parties are likely to engage in distributive negotiation.

4 The Mixed Nature of Negotiations

It is said that '[p]urely integrative or purely distributive negotiation situations are rare'⁸⁰ and that 'even within the range of circumstances in which there are significant opportunities for integrative bargaining, the bargainer must almost always engage in distributive bargaining as well'.⁸¹ Put another way, most negotiations involve a mix of approaches. Fisher and Ury's model of interest-based negotiation assumes a dichotomy which does not exist. It was noted above that cooperative tactics (for example, being open, sharing information and not misleading about minimum requirements) are thought appropriate to interest-based negotiation while more competitive tactics (making high opening offers and small and slow concessions, and concealing information) are generally associated with positional negotiation.⁸² But this categorisation is an oversimplification – negotiators may simultaneously (or sequentially) employ both cooperative and competitive tactics.⁸³ '[F]ew negotiations occur where a wise negotiator would not employ at least some of each set of behav-

⁷⁸ Fisher recognises that some situations are not amenable to interest-based negotiation. He concedes that positional bargaining might be the best way to proceed where the negotiation concerns a single issue (such as the price to be paid for a commodity), where it takes place among strangers, where the transaction costs of exploring each party's interests are high and where each side is protected by competitive opportunities: Roger Fisher, 'Negotiating Power' (1983) 27 *American Behavioral Scientist* 123, 149.

⁷⁹ Pruitt, above n 7, 139.

⁸⁰ Lewicki, Barry and Saunders, above n 8, 103; Raymond A Friedman and Debra L Shapiro, 'Deception and Mutual Gains Bargaining: Are They Mutually Exclusive?' (1995) 11 *Negotiation Journal* 243, 244, 247.

⁸¹ Wetlaufer, above n 5, 390.

⁸² *Ibid* 371.

⁸³ Gifford, above n 72, 57.

iors. Indeed, one of the more interesting challenges faced by negotiators is how to balance both of these elements.⁸⁴

In selecting an overall approach and in making decisions about ‘hundreds of individual tactical maneuvers and moves that make up a single negotiation’⁸⁵ negotiators must manage a constant tension between cooperative and competitive moves. Condlin confirms that an effective negotiator uses both types of strategy, noting that:

Successful bargainers are those who blend cooperative and competitive choices into a unified approach so that they are able to share private information without making themselves disproportionately vulnerable, test differing legal views without weakening their support for nonrelated issues, and invent and make multiple proposals for settlement without committing themselves to the worst of the possibilities. They cooperate with an eye toward protecting their competitive positions and compete so as not to preclude the development of mutual trust and bipartisan effort, even though competitive strategies make cooperation more difficult and cooperative moves make parties disproportionately vulnerable to competitive responses.⁸⁶

Negotiators may be wise to err on the side of interest-based negotiation. It is widely acknowledged that ‘an examination of interests and options will often result in an improved outcome for both parties’.⁸⁷ Interest-based negotiation offers, in most types of negotiation, major potential improvements in outcomes over purely positional negotiation.⁸⁸ But negotiators ought not to neglect the inevitable distributive aspects of negotiation or the tension that exists between the two approaches. It is difficult to conceive of many situations where such tension does not exist. One might expect that CL would be free of this tension

⁸⁴ Friedman and Shapiro, above n 80, 247. On the tensions which exist in negotiation, see Charles B Craver, ‘Negotiation Ethics for Real World Interactions’ (2010) 25 *Ohio State Journal on Dispute Resolution* 299, 305; Alex J Hurder, ‘The Lawyer’s Dilemma: To Be or Not To Be a Problem-Solving Negotiator’ (2007-2008) 14 *Clinical Law Review* 253, 291; Jonathan M Hyman, ‘Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?’ (1986-1987) 34 *University of California Los Angeles Law Review* 863, 889-93; Jeffrey Z Rubin, ‘Negotiation’ (1983) 27 *American Behavioral Scientist* 135, 136-7.

⁸⁵ Condlin, above n 77, 11.

⁸⁶ *Ibid.*

⁸⁷ Buckley, above n 5, 183.

⁸⁸ *Ibid.*

for a number of reasons. First, most of the cases that are selected for CL are multiple issue family disputes where the parties are in a continuing relationship. Second, the parties and their lawyers have agreed to abide by practice protocols which require them to use interest-based negotiation. Third, the disqualification provision might act as an incentive to 'do the right thing'. It is noteworthy then that tensions continue to exist in CL between the use of interest-based and positional negotiation (and between other aspects of negotiation such as cooperation and competition, and disclosure and non-disclosure). The CL arrangement does not eliminate positional or distributive negotiation (even the founder of CL concedes that distributive negotiations occur at the four way meetings),⁸⁹ nor does it eliminate adversarial behaviour. Hoffman notes that:

[i]n the paradigmatic CL negotiation, the parties and attorneys negotiate in four-way meetings, in a nonadversarial manner. In some CL cases, however, despite the parties' and counsel's best intentions, the negotiations can become so protracted, positional, and adversarial that they are virtually indistinguishable from ordinary negotiation in a high-conflict case.⁹⁰

5 Other Instances in Which Interest-based Negotiation is Not Possible or Desirable

For the most part, Fisher and Ury assume that parties are willing and able to negotiate. They may not be. A few years after *Getting to Yes* was published, William Ury (with others) published *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*.⁹¹ The text dealt with the topic of dispute systems design, the process of designing a system of procedures for handling a series of disputes.⁹² The main themes of the text, as relevant to this article, are the following:

1. Dispute resolution processes can be categorised according to whether they are primarily interests, rights or power-based in approach.⁹³ It was conceded that processes are not, or rarely, pure in their approach.

⁸⁹ Webb, above n 38, 162.

⁹⁰ David A Hoffman, 'Exploring the Boundaries and Terrain of ADR Practice: Mediation, Arbitration, and Collaborative Law' (2007-2008) 14 *Dispute Resolution Magazine* 4, 5.

⁹¹ William L Ury, Jeanne M Brett and Stephen B Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Program on Negotiation at Harvard Law School, 1993).

⁹² *Ibid* 21.

⁹³ *Ibid* 4-8.

2. Despite the potential benefits of interest-based procedures, rights and power-based procedures are both necessary and desirable components of a dispute resolution system.⁹⁴
3. The most efficient and satisfactory way in which to deal with disputes is through the design of an interests-oriented system, that is, one which encourages the resolution of disputes through interest-based processes such as mediation but which also provides low-cost rights and power-based procedures as backups.

Ury and his associates allowed that parties might be unwilling or unable to use interest-based procedures such as negotiation or mediation because: the interests and/or values of the parties are so opposed that agreement is not possible; the parties hold divergent perceptions of who is right; or the parties have divergent perceptions of who is more powerful. They conceded that resort to a rights-based procedures (such as arbitration) might be necessary in the first two instances to clarify the rights boundaries within which a negotiated resolution can be sought; and that resort to a low-cost power procedure (such as a threat) might be necessary to bring a recalcitrant party to the negotiating table.⁹⁵

Ury also conceded that there are some cases, such as those concerning a significant question of public policy, where use of interest-based procedures is not *desirable*. He reasoned that in these cases, a public articulation of values through a rights-based procedure such as litigation, is more desirable from a societal perspective.⁹⁶

B. Interest-based Negotiation - Not the More Ethical Alternative

There are two additional overlapping assumptions or misconceptions about interest-based negotiation that often appear in the literature. First, it is wrongly assumed that interest-based negotiation is synonymous with ethical negotiation (and that positional negotiation is unethical). Second, it is wrongly assumed that interest-based negotiation requires complete candour.

A recent example of the over-claiming done for interest-based negotiation appears in a popular negotiation text.⁹⁷ Alexander and Howieson note that positional negotiation has a 'controversial reputation'.⁹⁸ It is often associated with

⁹⁴ Ibid 16-17.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Alexander and Howieson, above n 6, 20.

⁹⁸ Ibid.

dirty tricks and aggressive behaviour. They refer to Condlin's work⁹⁹ and note that he has challenged 'the demonisation and exclusion of positional bargaining in favour of the interest-based approach'.¹⁰⁰ Alexander and Howieson continue:

We agree that it is unrealistic and unfair to limit positional bargaining and bargainers to such a negative caricature. At the same time, it would be naïve to suggest that exaggerations, bluffs and deceit do not occur in (positional) negotiation. Caught unprepared, inexperienced negotiators may quickly find themselves on the losing side of a win-lose game.¹⁰¹

While the authors are willing to concede that not all positional negotiators exaggerate, bluff and engage in deceit, they make no allowance for the possibility that interest-based negotiators might do so, that is, that they might exaggerate, bluff and be deceitful. As discussed below, interest-based negotiation is not premised on honesty and candour.

Ethics and interest-based negotiation are separate issues (although it is not uncommon for proponents of interest-based negotiation to equate the two).¹⁰² Positional or distributive negotiation is not unethical per se, anymore than interest-based negotiation is inherently ethical in its approach.¹⁰³ Unfortunately, the 'principles' enumerated by Fisher and Ury give the impression that they are more honest and ethical than traditional negotiations (especially with the label 'principled' being used to describe the approach).¹⁰⁴ Friedman and Shapiro claim that, as a result, ethics and interest-based negotiation (or Mutual Gains Bargaining or MGB) become conflated.¹⁰⁵ But as Friedman and Shapiro point out:

MGB suggests that negotiators explain to their opponent what their *interests* are, so that the opponent can propose actions that

⁹⁹ See, eg, Robert J Condlin, "Every Day and in Every Way We Are All Becoming *Meta and Meta*" or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory) (2007-2008) 23 *Ohio State Journal on Dispute Resolution* 231.

¹⁰⁰ Alexander and Howieson, above n 6, 20.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Robert B McKay, 'Ethical Considerations in Alternative Dispute Resolution' (1990) 45 *Arbitration Journal* 15, 19.

¹⁰⁴ Friedman and Shapiro, above n 80, 246.

¹⁰⁵ Ibid 247.

meet one's real needs at least cost. It does not, however, say anything about revealing one's alternatives to a negotiated agreement, what one's true reservation price is, or how much money is in the bargaining budget – all of which influence what final *position* will be acceptable.¹⁰⁶

In other words, interest-based negotiation (or MGB) and deception are not mutually exclusive, as some proponents of interest-based negotiation claim.¹⁰⁷

MGB says only that you should not deceive the other party about your core, underlying interests. And – this is worth emphasizing – the reason for this prescription is not that being honest about interests is inherently ethical. Rather, it is that being honest about one's interests can help you get more.¹⁰⁸

Wetlaufer takes the same view as Friedman and Shapiro stating that the argument for openness and truth-telling in interest-based negotiation is not an argument for openness and truth-telling with respect to everything, but instead is 'limited to information useful in identifying and exploiting opportunities for integrative bargaining'.¹⁰⁹ Even in interest-based negotiation, negotiators may hide their true level of dependency (for example, by asserting that they have other offers), fail to disclose their bottom line and exaggerate the value of their options in the event of no agreement.¹¹⁰ Some academics who favour interest-based negotiation over positional negotiation concede the validity of these arguments. For example, Menkel-Meadow concedes that 'completely open, information sharing, trusting, and joint-solution seeking behaviour' will not be appropriate or fair in all settings.¹¹¹ And Peppet states that '[c]ollaboration does not mean revealing all of one's information, preferences, interests, and litigation strategies'.¹¹² Hurder claims that the problem-solving approach does

¹⁰⁶ Ibid 246.

¹⁰⁷ Ibid 244.

¹⁰⁸ Ibid 246.

¹⁰⁹ Wetlaufer, above n 5, 390-1.

¹¹⁰ Friedman and Shapiro, above n 80, 245.

¹¹¹ Carrie Menkel-Meadow, 'Introduction: What's Fair in Negotiations? What is Ethics in Negotiation?' in Carrie Menkel-Meadow and Michael Wheeler (eds), *What's Fair: Ethics for Negotiators* (Jossey-Bass, 2004) xxx (she does not indicate the circumstances in which it would not be appropriate).

¹¹² Scott Peppet, 'Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism' (2004-2005) 90 *Iowa Law Review* 475, 535.

not require total disclosure of a party's secrets and confidences,¹¹³ but it does require that the parties take the risk of exposing themselves to some degree.¹¹⁴ Even in interest-based negotiation, honesty and full candour is not the norm.

We cannot make judgments about the nature of our negotiation counterpart (and about how much information to reveal, how cooperative to be and so on) on the basis of whether or not he or she uses the language of positions and interests. An interest-based negotiator is not necessarily any more honest, open and trustworthy than a positional one.

In the remaining parts of this article, I make some suggestions about how to accommodate the limitations of Fisher and Ury's model of interest-based negotiation into practice.

V WHERE TO FROM HERE?

A. Implications of the 'Old' Limitations

Interest-based negotiation is not a comprehensive approach. When I wrote about the limitations of this approach in 1994, I was coming from the perspective of mediators and I urged that they:

- Not throw in the towel prematurely. They need to understand that integrative solutions are not always possible and that parties will have to be assisted to make trade-offs, concessions and even compromises if an agreement is to be reached.
- Become proficient in the use of interventions designed to get parties over the last gap.¹¹⁵
- Get comfortable with the fact that one party will often compromise more than the other.

I now add the following two points, neither of which is 'new', for mediators

¹¹³ Hurder, above n 84, 295. Also see Buckley who asserts that the interest-based negotiator is not open about everything: Buckley, above n 5, 188; and Rodney Harris, 'Contrasting "Principled Negotiation" with the Adversarial Model' (1990) 20 *Victoria University of Wellington Law Review* 91, 93-94 who agrees that the emphasis is on revealing interests, rather than on facts such as how much one can afford to pay.

¹¹⁴ Hurder, above n 84, 276.

¹¹⁵ For a range of strategies to cross the last gap, see John Wade, 'The Last Gap in Negotiations: Why is it Important? How can it be Crossed?' (1995) 6 *Australian Dispute Resolution Journal* 93.

and for legal representatives:

- Screen cases for their suitability for mediation and CL.
- Understand that participants in all negotiations, whether assisted or not, whether structured or not, are constantly pulled between the extremes of cooperation as against competition; honesty and openness as against misrepresentation and non-disclosure; and short-term gains as opposed to long-term gains.¹¹⁶

The following new learning points can also be derived from the limitations of Fisher and Ury's model. They are particularly relevant to legal representatives.

B. Implications of the 'New' Limitations

1 Take a 'Cautiously Cooperative' Approach

We should not labour under the false assumption that interest-based negotiators tell the whole truth and nothing but – nor should they. We should not expect a legal representative – even an interest-based one – to reveal all of his or her client's secrets (or to counsel the client to do so). As a more realistic alternative (although still inclined towards interest-based negotiation), Robinson proposes that practitioners take a 'cautiously cooperative approach to mediation'¹¹⁷ to deal with the tension between integrative and distributive negotiation.¹¹⁸ He urges negotiators to 'be cautious and circumspect, revealing as little and defending as much as possible until the other's intentions are known'.¹¹⁹ Buckley also advocates such an approach. He notes that the well prepared interest-based negotiator, having worked out in their preparation 'what information they can disclose without prejudice to their position if the matter does not settle', will 'only disclose further information if the other party is displaying good faith and likewise being disclosive'.¹²⁰ The position is the same in CL although some protection might be offered to collaborative practitioners because of their need to be, and to remain, a member of the CL organisational unit.

¹¹⁶ These are the three dimensions of tension identified by Rubin, above n 84, 136-7. There may well be other dimensions.

¹¹⁷ Peter Robinson, 'Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy' (1998) 50 *Baylor Law Review* 963.

¹¹⁸ *Ibid* 963.

¹¹⁹ Condlin, above n 77, 9.

¹²⁰ Buckley, above n 5, 188.

2 Embrace Advocacy

Some authors argue that advocacy has no place in either mediation or CL.¹²¹ For example, Menkel-Meadow and Schuwerk both assert that the 'ethic of zeal' associated with adversarial advocacy is incompatible with mediation, and in particular, that 'excessive adversarial zeal can undermine the goals of mediation'.¹²² Bowie thought that mediation might, by its nature, require non-adversarial behavior.¹²³ Drawing upon the New South Wales Law Society's *Professional Standards for Legal Representatives in a Mediation*, Parker and Evans assert that it is the duty of the lawyer '[t]o participate in a non-adversarial manner'.¹²⁴ These assertions raise a host of related questions such as:

- Is there a place for excessive adversarial zeal in mediation or in CL?
- Is advocacy (even zealous advocacy) incompatible with mediation and CL?
- Is all advocacy adversarial in nature?
- Must the parties and their lawyers behave in a non-adversarial manner in mediation and CL?

Most authors agree that excessive adversarial zeal is out of place, in any dispute resolution context including litigation.¹²⁵ There is no place for 'table-pounding, endless discovery or boisterous behaviour'¹²⁶ or 'for a win-at-all costs mentality, and out-and-out dishonesty'.¹²⁷

¹²¹ See, eg, Mark C Rutherford, 'Lawyers and Divorce Mediation' (1986) *Mediation Quarterly* 17, 27. In relation to CL, see Joshua Isaacs, 'A New Way to Avoid the Courtroom: The Ethical Implications Surrounding Collaborative Law' (2004-2005) 18 *Georgetown Journal of Legal Ethics* 833, 841; Lawrence, above n 42, 438-9.

¹²² Menkel-Meadow, above n 63, 427; Robert P Schuwerk, 'Reflections on Ethics and Mediation' (1997) 38 *South Texas Law Review* 757, 765.

¹²³ James M Bowie, 'Ethical Issues in Construction Mediation: Are There Any Rules' (2004) 24 *Construction Law* 33, 34.

¹²⁴ Parker and Evans, above n 48, 135. The standard to which they refer is not drafted in the language of a rule: see the Law Society of New South Wales, *Professional Standards for Legal Representatives in a Mediation* (at 1 January 2008) clause 2.3.

¹²⁵ Lawrence Fox, 'Mediation Values and Lawyer Ethics: For the Ethical Lawyer the Latter Trumps the Former' in Phyllis Bernard and Bryant Garth (eds), *Dispute Resolution Ethics: A Comprehensive Guide* (American Bar Association Section of Dispute Resolution, 2002) 39, 41; Geoffrey C Hazard Jr, 'Lawyer for the Situation' (2004-2005) 39 *Valparaiso University Law Review* 377, 379. Generally see Fred C Zacharias, 'Five Lessons For Practicing Law In The Interests of Justice' (2002) 70 *Fordham Law Review* 1939.

¹²⁶ Fox, above n 125, 41.

¹²⁷ Beckwith and Slovin, above n 42, 498.

But there are authors who see a place for zealous advocacy in mediation and in CL and who recognise that one's commitment to her or his client is not diminished in either process.¹²⁸ For example, Bordone opines:¹²⁹

Whether a lawyer is representing a client in mediation, arbitration, litigation, or negotiation, a goal of zealous advocacy in the interest of the client is laudable. We need not back away from this in any re-design of ethics rules for negotiators. The problem is not zealous advocacy, but rather what zealous advocacy might mean in the context of each individual dispute resolution process. In litigation, zealous advocacy means winning an argument by persuading a third person (a jury or judge) that your version of events or your understanding of the law is true or correct. On the other hand, in negotiation, zealous advocacy entails identifying the underlying interests of the client and then employing one's skills of listening, creativity, and joint problem-solving to best meet those interests and attain a satisfying and efficient outcome.¹³⁰

Advocacy (and with it, zealous client representation) are indispensable in mediation and CL.¹³¹ Much depends on how one defines terms such as 'zeal' and 'advocacy'. I agree with Bernstein that zeal should not be equated with zealotry.¹³² Bernstein suggests that 'zeal' has two elements, a 'commitment to

¹²⁸ See, eg, Fox, above n 125, 39-41 (who argues that zealous advocacy and mediation are compatible concepts and that lawyers' duties are to their clients not the mediation process) and Beckwith and Slovin, above n 42, 502 (who argue that '[t]he collaborative lawyer is, in every sense, an advocate').

¹²⁹ Bordone, above n 63, 11. Abramson asserts that '[i]nstead of advocating as a zealous adversary, you should advocate as a zealous problem-solver': Harold I Abramson, *Mediation Representation: Advocating in a Problem-Solving Process* (National Institute for Trial Advocacy, 2004) 2, 22.

¹³⁰ Bordone, above n 63, 23. Also see Jean R Sternlight, 'Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting' (1998-1999) 14 *Ohio State Journal on Dispute Resolution* 269, 291-2.

¹³¹ See, eg, John W Cooley, *Mediation Advocacy* (National Institute for Trial Advocacy, 2nd ed, 2002) 127; Abramson, above n 129, 7. Also see John H Phillips, 'Practical Advocacy: Advocacy in Mediation' (1994) 68 *Australian Law Journal* 384. In relation to CL, see Beckwith and Slovin, above n 42, 502

¹³² Anita Bernstein, 'The Zeal Shortage' (2005-2006) 34 *Hofstra Law Review* 1165, 1175, 1178. She also argues that it is an error to equate zeal with agency, in the sense of lawyers being prepared to do the client's bidding: 1177.

one side (rather than to a neutral search for truth)' and passion.¹³³ With respect to the first element of zeal, she argues that all conscientious lawyers, even in transactional work, anticipate the possibility that harmony will turn sour and practise with a 'potential adversary in mind'.¹³⁴ This approach does not preclude 'treating this adversary with kindness or even deference, if such treatment would serve the needs of one's client'.¹³⁵ Partisan commitment might even lead a lawyer to recommend settlement to a client.¹³⁶ Bernstein argues that the second element of zeal - passion - requires effectiveness, creativity, attention to detail, 'enthusiasm, energy, and benevolent effort'.¹³⁷ I prefer to define advocacy very broadly as 'the art of persuasion'.¹³⁸ In CL, an advocate's task is to persuade the other party and his or her lawyer. In mediation, the advocate's task is to persuade the other party¹³⁹ and more controversially, the mediator. In this respect, I think the drafters of the LCA Guidelines for Lawyers in Mediations had the wrong idea about advocacy. Clause 6.2 of the guidelines state:

The skills required for a successful mediation are different to those desirable in advocacy. It is not the other lawyer or mediator that needs to be convinced; it is the client on the other side of the table. A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result.

Clause 6.2 still speaks of advocacy – that is, persuasion. Advocacy should not be confused with aggression.

More recently, Julie Macfarlane expressed similar views on this topic and in the process, coined some new phrases, those of 'conflict resolution advocacy' and 'client resolution advocacy' (terms which are wide enough to embrace both mediation and CL). She opines:

¹³³ Ibid 1171.

¹³⁴ Ibid.

¹³⁵ Ibid 1172.

¹³⁶ Ibid.

¹³⁷ Ibid 1174.

¹³⁸ George Hampel, Introduction to Max G Perry, *Hampel on Advocacy: A Practical Guide* (Leo Cussen Institute, 1996). For similar definitions, see David Napley, *The Technique of Persuasion* (Sweet and Maxwell, 4th ed, 1991) 1; Timothy Pinos, 'Advocacy Training: Building The Model - A Theoretical Foundation' (1983) 1 *Journal of Professional Legal Education* 18; Sternlight, above n 130, 291-2.

¹³⁹ Lawrence, above n 35, 426-7.

There is no lessening of the lawyer's responsibility to achieve the best possible outcome for his client in client resolution advocacy. In fact, advocacy as conflict resolution places the constructive and creative promotion of partisan outcomes at the center of the advocate's role and sees this goal as entirely compatible with working with the other side. In fact, this goal can *only* be achieved by working with the other side. ... There is no contradiction between a commitment to explore every possibility of facilitating an agreement with the other side and a strong primary loyalty to one's own client. ... [T]he goal of the conflict resolution advocate is to persuade the other side to settle – on her client's best possible terms.¹⁴⁰

Not all advocacy is adversarial - if by that term we mean that representatives act like combatants. Bordone speaks of advocates engaging in joint problem-solving, while Macfarlane speaks of the advocate working with the other side. An advocate will consider solutions that accommodate the interests of other parties as well as those of their client, and help clients to see that solutions, not judgments, may be in their best interests.¹⁴¹

Finally, must the parties and their lawyers behave in a non-adversarial manner in mediation and CL? The answer to this question is 'no'. Mediation need not be non-adversarial to retain its character as mediation.¹⁴² The same is true of CL. A client may approach mediation or CL as a contest, determined to advance his or her legal position, rather than to secure an agreement which satisfies everyone's interests. This fact does not mean that the dispute is inappropriate for mediation or CL and it does not make these processes ineffective. In order for the parties to reach an agreement, a proposal need only address the other side's interests sufficiently well to move toward agreement.¹⁴³ It may still be to everyone's advantage to avoid legal costs and the trauma associated with a court case.

¹⁴⁰ Julie Macfarlane, 'The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law' [2008] *Journal of Dispute Resolution* 61, 66 ('*Reshaping the Practice of Law*'). Also see Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008) 116.

¹⁴¹ Ted Schneyer, 'Some Sympathy for the Hired Gun' (1991) 41 *Journal of Legal Education* 11, 27; Lawrence, above n 35, 443.

¹⁴² Boule, above n 26, 70-1.

¹⁴³ Harold Abramson, 'Problem-Solving Advocacy in Mediation: A Model of Client Representation' (2005) 10 *Harvard Negotiation Law Review* 103, 118.

In her work on negotiation, Norton expresses the view that 'the basic character of the [negotiation] relationship is always in some respect adversarial'¹⁴⁴ although 'cooperative or problem-solving bargaining strategies and tactics are used'.¹⁴⁵ Indeed, she believes that '[a]n adversarial posture is necessary in bargaining to protect and advance the parties' interests, including their interests in ethical treatment'.¹⁴⁶ An adversarial posture 'facilitates the search for truthful information, helps guard against injurious disclosures, and helps prevent treatment that could prejudice a party's interests'.¹⁴⁷ But, lying and unfairness are 'not a necessary function of the adversarial posture'.¹⁴⁸ 'The posture requires partisanship, not its excesses'.¹⁴⁹

3 Argue the Law When Appropriate

I turn now to consider yet another false assumption about interest-based negotiation, one which may not be solely attributable to Fisher and Ury. I suspect that some proponents of interest-based negotiation think that negotiation should be about interests, not law. Condlin also finds that '[c]ommunitarians as a group have always been somewhat hostile – or at least indifferent – to the role of law in bargaining, turning to it only when all else fails'.¹⁵⁰ There is nothing wrong (or sordid) with arguing over legal rights in informal dispute settlement. As Condlin asserts, '[l]egal argument contributes to the legitimacy of bargained-for agreements by resolving the substantive conflicts at the base of disputes'.¹⁵¹ As he sees it, substantive competitiveness 'is indispensable to successful bargaining'.¹⁵² Substantive competitiveness includes, for example, making strong demands when warranted, refusing to change views without good reasons, and supporting positions with well-developed arguments – 'its goal is to have one's views about applicable law or practical concerns adopted by the parties as the basis for settlement, and thus, to produce the best outcome consistent with the strength of one's substantive claims'.¹⁵³

My final point is for code drafters, and I make it by way of conclusion.

¹⁴⁴ Eleanor Holmes Norton, 'Bargaining and the Ethic of Process' (1989) 64 *New York University Law Review* 493, 530.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.* 529.

¹⁴⁷ *Ibid.* 530.

¹⁴⁸ *Ibid.* 531.

¹⁴⁹ *Ibid.*

¹⁵⁰ Condlin, above n 99, 256.

¹⁵¹ Condlin, above n 5, 82.

¹⁵² Condlin, above n 77, 22.

¹⁵³ *Ibid.*

VI CONCLUSION: A PLEA TO RETAIN FLEXIBILITY IN CODES OF CONDUCT

Currently, legal representatives are not required by their professional codes of conduct, or other components of the law of lawyering, to adopt an interest-based approach to negotiation. They have the ability to decide for themselves, in consultation with their clients, whether and to what extent to use an interest-based approach to negotiation. That is as it should be. We need to call a halt to the unqualified acceptance of interest-based negotiation. Those commentators who call for use of interest-based negotiation ignore a great deal about the reality and theory of negotiation. As Condlin observed, the ‘ADR bargaining scholarship overdid things somewhat, rejecting all types of adversarial manoeuvring rather than just its mean-spirited and asocial forms’.¹⁵⁴ With this in mind, the LCA might reconsider clause 3 of the Australian Collaborative Practice Guidelines for Lawyers which currently states that ‘[c]ompetitive negotiation strategies and tactics are antithetical to the collaborative process’. As demonstrated in this article, we cannot be so clear cut in our categorisation of competitive and cooperative strategies.

Proponents for new rules should remember that lawyers are not required to be competitive or deceitful. Just as lawyers are not required by the law of lawyering to adopt non-adversarial behaviour, nor are they required to adopt an adversarial approach in negotiation. Cooperation is not prohibited by the rules. ‘[L]awyers are not ethically required to press for every advantage, take every permissible step, react to every point raised, or to otherwise play hardball’.¹⁵⁵ ‘Nothing in the rules imposes an obligation to act in a win-lose manner designed to deprive opposing parties of fair terms’.¹⁵⁶ The existing rules enable lawyers to cooperate, collaborate and use joint problem-solving methods, in the appropriate circumstances. This is perfectly consistent with the discharge of duties owed to a client for it will sometimes be in the best interests of the client for a lawyer to act cooperatively.

Ultimately, decision making in negotiation is contextual. Legal representatives in mediation will adjust their strategy to the actions of their counterpart and to those of the mediator. It is worth bearing in mind that mediators are allowed a great deal of flexibility to exercise individual discretion in mediation and that

¹⁵⁴ Condlin, above n 5, 88. Wetlaufer echoes this sentiment in noting that: ‘[i]t seems clear that there has been a certain amount of overclaiming that has been done in the name of integrative bargaining’: Wetlaufer, above n 5, 391.

¹⁵⁵ Voegelé, Wray and Ousky, above n 41, 1018.

¹⁵⁶ Craver, above n 84, 311.

seems set to continue into the foreseeable future.¹⁵⁷ Even in CL, practitioners need to exercise discretion about the hundreds of individual tactical moves that go in to make up a negotiation (for example, making decisions about whether to share information or conceal it, to describe wants accurately or inflate them, to make or reject offers and to make or reject concessions). Lawyers in all negotiation contexts will react to factors such as the level of conflict between the parties, the level of sophistication of their client and so on. Of course lawyers may be proactive. But if they decide to adopt an interest-based approach, they are wise to do so cautiously. The only way lawyers can have this ability – this flexibility, is through the application of broad general codes of conduct, such as those that are presently in place. They should not be told what approach to negotiation is appropriate at any given moment in time. They should be able to move between cooperative and competitive strategies, as required.

Some of our most influential commentators stress the importance of being able to use both approaches to negotiation. As Lewicki and his associates seek to impress upon us, skillful negotiators must 'be able to recognize situations that require more of one approach than the other'¹⁵⁸ and to be 'versatile in their comfort and use of both major strategic approaches'.¹⁵⁹ At the end of the day, '[t]here is no single "best", "preferred", or "right" way to negotiate; the choice of negotiation strategy requires adaption to the situation'.¹⁶⁰ If Lewicki and his associates are correct and '[n]egotiator perceptions of situations tend to be bi-ased toward seeing problems as more distributive/competitive than they really are',¹⁶¹ it is appropriate that we are encouraged to use interest-based negotiation. It is not appropriate that we (lawyers) are directed to use it through our professional codes of conduct.

¹⁵⁷ Julie MacFarlane, 'Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model' (2002) 40 *Osgoode Hall Law Journal* 49, 62, 65; Charles Pou Jr, "'Embracing Limbo": Thinking About Rethinking Dispute Resolution Ethics' (2003-2004) 108 *Pennsylvania State Law Review* 199; Field, above n 34, 10.

¹⁵⁸ Lewicki, Barry and Saunders, above n 8, 16.

¹⁵⁹ Ibid. Also see Macfarlane, *Reshaping the Practice of Law*, above n 140, 70; Mnookin, Peppet and Tulumello, above n 1, 9; Chris Guthrie, 'The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering' (2001) 6 *Harvard Negotiation Law Review* 145, 180-2.

¹⁶⁰ Lewicki, Barry and Saunders, above n 8, 16.

¹⁶¹ Ibid.