University of Strathclyde

How Lawyers Negotiate – Perceptions of Effectiveness in Legal Negotiations

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By

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Declaration

‘This thesis is the result of the author’s original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.’

Signed: Date:

Abstract

This thesis presents the results from a study that qualitatively assessed how practicing lawyers perceive effectiveness in legal negotiations.

The results from this study suggest that practicing lawyers primarily perceive effectiveness in legal negotiations subjectively rather than based on objective criteria, and that their subjective perception of client satisfaction is the most important factor in their determination of overall effectiveness.

Both the reputations of practicing lawyers, as well as the relationships between the parties involved in legal negotiations including the relationship between the lawyers themselves, were identified as being particularly important to practicing lawyers in relation to how and what they perceive as being effective. The effect of these factors appear to be related directly to the size and structure of the legal market with the findings suggesting that smaller legal markets populated by specialist repeat player lawyers such as is found in Scotland may act to heighten the influence of both reputations and relationships.

This study also suggests that lawyers differentiate between the tone of negotiation behaviour and the content of the behaviour and that this distinction is important to their perception of effectiveness. The lawyers involved predominantly perceived themselves to have a negotiation behavioural style characterised as 'reasonable' and more 'cooperative' in nature than 'competitive', with the analysis suggesting the nature of their style is likely to be in the nature of a 'reasonable/compromiser' with little evidence found of any true interest based value creating types of behaviour being dominant.

Finally, although the motivations in relation to legal negotiations held by practicing lawyers in the study appear to be linked to perceptions of effectiveness, no evidence was found that suggests specific motivations are linked to any particular negotiation style.

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PART ONE - INTRODUCTION

Chapter 1 – How do lawyers negotiate?

1.1 Lawyers negotiate

The connection between lawyers and negotiation seems to be obvious. Lawyers spend much of their time negotiating and arguably it is the activity that most accurately defines what they do.

'Lawyers constantly negotiate. They negotiate on the telephone, in person, through the mail, and through fax and e-mail transmissions. They even negotiate when they do not realize they are negotiating. Lawyers negotiate with their own partners, associates, legal assistants, and secretaries; they negotiate with prospective clients and with current clients. Attorneys then negotiate on behalf of clients with outside parties as they try to resolve conflicts or structure business arrangements of various kinds[1]'.

Lande goes as far as to provide a fairly comprehensive list of situations where lawyers commonly negotiate. These include: *'negotiation about whether lawyers will represent the clients including negotiation of fee arrangements…. Sometimes (they) negotiate about the adjustment of the lawyers' bills… lawyers negotiate with a wide range of service providers such as process servers, investigators, court reporters, technical experts, tax and other financial professionals, and dispute resolution professionals such as mediators and arbitrators about the nature, scope, cost, and timing of their services…. in litigation, lawyers commonly negotiate with each other for acceptance of service of process, extension of filing deadlines, scheduling of depositions, resolution of discovery disputes, and numerous other procedural matters…. in negotiating transactions, lawyers negotiate over the*

[1] Craver C. B., (2003) 'The Negotiation Process', *27 American Journal of Trial Advocacy*, 271 at p271

exchange of information as well as the logistics of the negotiation and implementation of the transaction'.[2]

However, perhaps Nelken's view expressed more succinctly is arguably more helpful when she concluded simply that *'Negotiation is at the heart of what lawyers do'*[3].

It therefore appears to be well established that negotiation is considered to be a crucial function that lawyers perform when they practice. It is perhaps therefore not surprising that considerable time, effort and thought has been expended in an attempt to formulate an appropriate framework or model that is capable of accurately analysing and describing the negotiation process and indeed what constitutes 'effectiveness'[4] in the context of legal negotiations. As will be seen in the next two chapters of this thesis, the study of negotiation has generated a great deal of literature and research over the last four decades, both in the broader negotiation context and also specifically within a legal context. However, it is arguably still not clear if this has yet produced an understanding that accurately describes what might be considered to be effective legal negotiation behaviour, and perhaps arguably more fundamentally, even what the legal profession means by 'effectiveness' in this context in the first place.

This research study therefore proceeds on the basis that negotiation is an integral part of the function of the legal profession and that there is therefore value in understanding how the process is ultimately conducted effectively. The broad aim of this research study is therefore to increase understanding of the concept of effectiveness in legal negotiation.

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[2] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p122 & p123

[3] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p17

[4] The term 'effective' and effectiveness in general is central to this thesis and will be explored in much more detail later.

The term 'legal negotiation' could have a number of meanings depending on the context it is used. It could refer to the legal rules that govern a particular negotiation process, it could mean the legality or otherwise of a particular negotiation as determined by the criminal law or civil law, it could mean negotiation over the creation or amendment of new legal statutes. However, for the purpose of this thesis, 'legal negotiation' will refer to negotiation conduct used by a member of the legal profession when acting on behalf of a client. Such an approach is supported by Korobkin when he defines 'legal negotiation' as any negotiation '*in which the participation of lawyers is ubiquitous*'[5]. Where the term 'legal negotiator' appears within this thesis, it is used to describe someone who participates in a 'legal negotiation' in his or her capacity as a lawyer. Having defined the term 'legal negotiation' as it is used in this thesis, the term 'lawyer' also requires some further explanation. It is used in this thesis to identify any individual who is licenced to practice law within the legal jurisdiction in which they practice. This avoids the use of often jurisdictional specific terms such as 'solicitor' or 'attorney', as well as the need to differentiate between different types of lawyers with a given jurisdiction where there is a split profession such as is found with the UK jurisdictions. It is perhaps worth highlighting at this stage that all the lawyers that took part in this research study were 'solicitors' rather than 'advocates' or 'solicitor-advocates'.

1.2 'All models are wrong, but some are useful'[6]

Chapter 2 of this research study explores the evolution of the central analysis of negotiation, an evolution that has relied substantially on the development of a framework built around the interlinked duality of two distinct types of behaviours generally associated with what is broadly characterised as cooperative types of

[5] Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323 at p1337

[6] Box, G. E. P., & Draper, N. R., (1987) 'Empirical Model-Building and Response Surfaces', Wiley Series in Probability and Statistics at p. 424

behaviour and those associated with what is characterised as broadly competitive types of behaviour.

Cooperative negotiators are described variously as value creators, interest-based bargainers, win-win variable sum negotiators, and problem-solvers that seek integrative outcomes and are associated with principled and ethical behaviour.

Competitive negotiators are described variously as value claimers, positional bargainers, win-lose fixed sum negotiators who seek (or obtain) distributive outcome and are associated with adversarial techniques and behaviour.

Table 1 shows some of the behaviours and motivations that are associated with the two distinct types of behaviours portrayed in the conventional analysis of the negotiation process.

Table 1. Behaviours associated with Cooperative Problem-Solving and Competitive Adversarial negotiators[7].

Cooperative Problem-Solving	Competitive Adversarial
Move Psychologically Toward Opponent	Move Psychologically Against Opponent
Try to Maximize Joint Returns	Try to Maximize Own Returns
Strive for Reasonable Results	Strive for Extreme Results
Courteous and Sincere	Adversarial and Disingenuous
Begin with Realistic Opening Positions	Begin with Unrealistic Opening Positions
Rely on Objective Standards	Focus on Positions Rather than Neutral Standards
Rarely Resort to Threats	Frequently Resort to Threats
Maximize Information Disclosure	Minimize Information Disclosure
Open and Trusting	Closed and Untrusting
Work to Satisfy Underlying Opponent Interests	Work to Satisfy Underlying Interests of Own Side
Willing to Make Unilateral Concessions	Work to Induce Opponent to Make Unilateral Concessions
Try to Reason with Opponents	Try to Manipulate Opponents

Much of the literature that has developed over the past four decades is arguably dominated by a tradition that considers more cooperative types of negotiation behaviours to be more effective and indeed superior to behaviours associated with a more competitive and adversarial type of behaviour.

It has long been argued in best selling books that have made their academic authors negotiation superstars[8], supported by evidence from highly influential research

[7] Reproduced in its entirety from: Craver, C. B., (2011) "The impact of Negotiator Styles on Bargaining Interactions', 35. *American Journal of Trial Advocacy* 1 at p2

[8] In particular: Fisher, R. & Ury, W., (1981) 'Getting to yes : negotiating agreement without giving in'. England: Penguin Books.

studies[9], that negotiators are more often effective when using approaches characterised as broadly cooperative than when using approaches characterised as being more competitive in nature.

Although there has indeed always been those authors who have advocated the value of a more competitive approach to negotiation behaviour, the last decade or so has arguably seen these authors begin to reclaim some of the ground lost to the 'cooperative supremacists'[10] by advancing their arguments for recognition of the significance that the role that competitive types of behaviour play in the context of an effective approach to negotiation.

Chapter 3 carries forward the general negotiation literature review in Chapter 2 by focusing on how the negotiation literature has developed specifically in the field of legal negotiation. Crucially, it considers in detail some of the highly influential empirical evidence that is regularly cited in support of the argument for the promotion and adoption of fundamentally cooperatively based negotiation behaviour within the legal profession, evidence which is the subject of on-going debate and reinterpretation.

At the very heart of the empirical legal negotiation literature is the highly influential research study that considered the nature of effective legal negotiation carried out by Professor Gerald Williams and later updated by Professor Andrea Schneider[11]. Both of these studies essentially purported to find empirical support for the

[9] See in particular: Williams, G. R., (1983) 'Legal Negotiation and Settlement' St. Paul, MN: Thomson West; Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143

[10] A phrase adapted from one used by: Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323 at p1337 & p1338

[11] Williams, G. R., (1983) 'Legal Negotiation and Settlement' St. Paul, MN: Thomson West; Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 – both studies are discussed at length later.

conclusion that the use of cooperative types of negotiation behaviour is most likely to be effective in any given legal negotiation situation[12].

A key part of the debate into legal negotiation behaviour is now concentrated on these findings and involves a focus on the reinterpretation of the nature of the behaviour of those effective legal negotiators who were originally characterised in the research studies as engaging in cooperative type of behaviour. It is increasingly now being argued that many of these individuals are thought to have actually been engaging in a type of behaviour involving some of the characteristics of both cooperative and competitive types of behaviour.

1.3 The development of a more accurate framework

Chapter 3 explores the support in the literature for a more refined approach to explaining legal negotiation behaviour which is arguably of key importance in the development of a more accurate framework which can be used to better understand legal negotiation and which potentially offers a framework that more closely relates to what is experienced by lawyers engaged in everyday legal practice.

Craver, one of the proponents of a hybrid type of approach to understanding negotiation, labels a type of effective legal negotiation behaviour as *competitive/problem-solving* akin to '*wolves in sheep skins'*[13], a type of behaviour he argues is supported by a reinterpretation of both the original Williams and the Schneider empirical studies. Essentially Craver, and indeed also Williams, now argue that many people who were characterised as cooperative in both studies were in fact indiscernibly working in pursuit of competitive type goals and should therefore be characterised as negotiators who use a cooperative problem-solving style[14] to

[12] Williams, G. R., (1983) *'*Legal Negotiation and Settlement' St. Paul, MN: Thomson West at p19 and p41.

[13] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337 at p 346

[14] Negotiating or bargaining '*style*' can usefully be defined as '*relatively stable, personality-driven clusters of behaviors and reactions that arise in negotiating encounters'* - Shell, G. R. (2001)

achieve underlying hidden competitive objectives[15]. Evidence from studies such as those carried out by authors such as Allred[16] and Genn[17], also discussed in Chapter 3, also lend some empirical support to the development of such a framework.

The development of a new more accurate framework should arguably work to address what Lande describes as the '*negotiation romanticism'*[18] he considers prevalent amongst some academics. This is where negotiation is characterised by a '*single dramatic settlement event'* that is the product of either an extended series of strategic offers and counter offers akin to a self-interested, win-lose, high stake poker game, or alternatively is from a systemic interest-based approach aimed at identifying solutions that maximise both sides gains and produce satisfaction for both parties[19]. Instead, Lande argues that lawyer engage most of the time in a process he labels '*Ordinary Legal Negotiation'* aligned with legal norms and distinct from both a competitive positional model or a cooperative interest based model[20].

1.4 The nature of the legal profession

In the context of the overall effectiveness of legal negotiators, it is of relevance to highlight that there is an argument that the fundamental nature and underlying

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'Bargaining styles and negotiation: The Thomas–Kilmann Conflict Mode Instrument in negotiation training'. *Negotiation Journal*, 17, 155–174 at p156

[15] See Allred, K.G. (2000). *Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value*. Negotiation Journal, Vol 16, Issue 4 at p394-396.

[16] Allred, K.G. (2000) 'Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value'. *Negotiation Journal*, Vol 16, Issue 4, 387-397

[17] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press.

[18] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p113

[19] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p113

[20] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p118

structure of the legal profession itself may actually be operating to make lawyers negotiate in a way that many commentators considered to be ineffective.

Professor Robert H. Mnookin[21] of Harvard Law School tells a story where he describes the modern law school as a place where students spend three years of their life in an environment where the left hand side of their brain is encouraged to slowly circle round the right hand side of their brain and then to eventually eat it[22]. He is alluding to his feeling that the modern law school acts to nurture and promote the highly adversarial behaviour associated with lawyers across many legal jurisdictions around the world and arguably achieved at the expense of more creative value creating behaviour[23].

The existence of an adversarial and highly competitive approach to practising law appears to have continued despite the predominance of a negotiation academic literature tradition that broadly considers this type of behaviour to be less effective than a more cooperative problem solving approach.

Although it might be expected that such a body of literature would have impacted the behaviour of practising lawyers directly, there is at least some evidence to suggest that the nature of the legal profession does not appear to have become significantly more cooperative in nature as might have been expected if it mirrored the developing literature. Indeed, one study suggests that the degree of the

[21] Samuel Williston Professor of Law at Harvard Law School, the Chair of the Executive Committee, Program on Negotiation at Harvard Law School, and the Director of the Harvard Negotiation Research Project.

[22] It has often been suggested that the right side of the brain is more creative than the left side. See: Bruner, J., (1979) 'On Knowing: Essays For The Left Hand', (Second Edition) Belknap Press of Harvard University Press.

[23] The author heard Professor Mnookin say this in a speech he gave at a Mediation Pedagogy Conference, held at Harvard Law School between May 15 & 16, 2009 (attended by the writer). He went on to say that the challenge the legal profession now faces is trying to encourage lawyers to 're-grow' the creative right hand side of their brain to encourage creative problems solving collaborative negotiation behaviour.

competitive and adversarial behaviour used by lawyers in the US has become more extreme in nature rather than less so over a twenty-five year period [24].

There are perhaps many reasons for the suggested continued prevalence of competitive and adversarial negotiation behaviour amongst many lawyers; countless fictional characters portrayed across many forms of media reinforce the orthodoxy of the competitive adversarial behaviour, described by Riskin as '*the lawyer's standard philosophical map'*[25]. From Rumpole of the Bailey[26], to Perry Mason[27], from Kavanagh QC[28] to LA Law[29], from Judge John Deed[30] to Ally McBeal[31], not to mention best selling authors such as John Grisham[32]. The stereotypical confrontational, argumentative and adversarial lawyer is very much still part of the Anglo-American cultural landscape.

There has also been some evidence presented that, in the US at least, lawyers may commonly have pre-existing personality traits that predispose them to competitive behaviour such as leadership, an increased need for attention, diminished interest in the emotional interests and needs of others, and a lower tolerance for assuming

[24] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p147 to 148

[25] Riskin, L. L., (2002) 'The Contemplative Lawyer: On the Potential Contributions of Mindfulness Mediation to Law Students, Lawyers, and their Clients', 7 *Harvard Negotiation Law Rev*. 1, 16 at p14

[26] Rumpole of the Bailey is a British television series created and written by the British writer and barrister John Mortimer about an aging London barrister who defends any and all clients. Original run was from December 1975 to December 1992.

[27] Perry Mason is an American legal drama produced by Paisano Productions that ran from September 1957 to May 1966 on CBS in the US.

[28] Kavanagh QC is a British television series made by Carlton Television for ITV between 1995 and 2001 featuring James Kavanagh QC who comes from a working-class upbringing in England.

[29] L.A. Law is an American television legal drama series that ran for eight seasons on NBC from September 15, 1986 to May 19, 1994.

[30] Judge John Deed is a British legal drama television series produced by the BBC that ran from January 2001 to January 2007.

[31] Ally McBeal is an American legal comedy-drama television series, originally aired on Fox from September 8, 1997 to May 20, 2002.

[32] John Ray Grisham, born in 1955 is an American lawyer and author, best known for his popular legal thrillers who has sold over 250 million books worldwide.

subservient roles[33]. In addition, it has been speculated that the nature of the legal teaching methods used in many law schools foster an adversarial approach to life. Dr Andrew Benjamin, a leading researcher on lawyer and law student distress at the University of Washington, argues that '*the adversarial nature of legal education and the legal system encourages the development of a world view that fosters suspiciousness, hostility, and aggression*'.[34]

It may also be relevant that both the UK and US legal systems are underpinned by a fundamentally adversarial court system (as opposed to the more inquisitorial systems found in some continental jurisdictions) that perhaps makes a change of behaviour amongst lawyers practising in adversarial based jurisdictions especially difficult.

However, it is also possible that a reason competitively orientated types of legal negotiation behaviour still persists is perhaps simply because such behaviours are at least in part considered to be 'effective', or at least a constituent part of what is perhaps considered to be effective.

One explanation for this may therefore be that the legal negotiation literature has fundamentally misunderstood what the constituent elements of 'effective' negotiation are for most lawyers. It may also suggest that the literature has failed to understand what is actually happening in legal negotiations and that it is inadequate and overly simplistic to attempt to frame negotiation behaviour broadly in terms of cooperative and competitive types of behaviour, supporting a conclusion that something more complex may be taking place.

[33] Daicoff, S., (1997) 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attribute Bearing on Professionalism', 46 *American University Law Review* 1337 at p1426

[34] Benjamin, A., 'The Role of Law School in Producing Psychological Distress Revisited', Undated, available at: http://archive.law.fsu.edu/academic_programs/humanizing_lawschool/images/benjamin.pdf (last visited 26.5.2015)

Indeed, it has been argued that *'we still have little strong empirical evidence (or systematic methods for assessing our own utilities) that our simple, elegant, and founding theories work. It is unclear that we even have a good empirical picture of what negotiators actually do outside of laboratory settings in a wide variety of real-world settings'.*[35]

1.5 Outlining the research problem

Arguably the words of Menkel-Meadow go to the very heart of the research problem that is explored in this research study. At the very centre of the problem she identifies is the crucial on-going difficulty of how to define what is actually understood by the concept of 'effectiveness' in the context of legal negotiation.

Various authors have struggled to produce universally agreed criteria for effectiveness in the context of legal negotiations. Early in the development of legal negotiation research Rackham and Carlisle acknowledged this difficulty in their empirical study of negotiation behaviour, eventually deciding to pre-assign three criteria, namely perception of both sides, track record over time, and low rates of agreement implementation failure[36]. These criteria encompassed the notion that effectiveness might include a combination of a subjective perception by both parties as well as more objective criteria based around a demonstrated ability to reach concluded agreements, with an assessment of the quality of these agreements that the authors equate to their ability to be implemented.

Menkel-Meadows [37] proposed a more elaborate list of evaluation criteria to measure effectiveness based primarily on a utilitarian rationalisation of negotiation that incorporated a mixture of objectives measures of both parties short and long-

[35] Menkel-Meadow, C., (2009) 'Chronicling the Complexification of Negotiation Theory and Practice', Negotiation Journal October 25(4)at p423

[36] Rackham, N., & Carlisle, J., (1978), 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Iss: 6 at p6

[37] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754

term 'real' needs, goals and objectives, as well as assessing whether desirable relationships have been promoted. The criteria proposed encompass the notion of efficiency of outcome based on an assessment of whether any more effective solutions existed that increased the value of the outcome to one party without reducing the value to the other[38]. Her criteria also include concepts of efficiency of transaction cost, ease of implementation of the agreement, the needs of the client to engage in a particular type of process and finally an assessment based around concepts of fairness and morality[39].

More recently Allred rated effectiveness more broadly in terms of the perception of the negotiators ability to claim value, create value, and to maintain relationships relative to predetermined measures of 'best practice' and 'strategic practice' developed by the author from the literature[40]. The three best practice measures were derived either from earlier work considered by the study or constructed rationally by the authors. They involved working to develop your BATNA, the use of predetermined persuasive arguments, assessment of whether the negotiators own needs and wants had been met. The best strategic practices were derived from research that indicated making extreme opening offers and avoiding compromises, as well as using power and authority could be effective in claiming value[41].

Craver appears to define effectiveness in the context of legal negotiation simply in terms of overall efficiency of the process and thus the ability to '*achieve more*

[38] Based on a notion of the Pareto-Efficient Frontier. See: Raiffa, H. (1982). 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University at p190

[39] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p760 & p761

[40] Allred, K.G. (2000) 'Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value'. *Negotiation Journal*, Vol 16, Issue 4, 387-397 at p389

[41] Allred, K.G. (2000) 'Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value'. *Negotiation Journal*, Vol 16, Issue 4, 387-397 at p390

efficient agreements that would maximize the joint returns for both parties'[42]. In contrast, rather than looking at efficiency Macfarlane in her study on Collaborative Family Law ultimately looked at what she considered to be the 'quality' of the negotiated outcomes achieved, considering criteria that included the reduction of expense and speed of results, the responsibility for role modelling (in respect of the children involved), and personal growth of the individuals involved[43]. It is perhaps also worth highlighting work by Davies on *legal reputation markets*[44] has proposed a highly innovative if arguably somewhat overly complex system that essentially links effectiveness directly to the optimising of cooperative behaviour achieved through reputational markets that reward good behaviour and punish defections using a mix of derivative contracts and rating house clearing houses[45].

Another approach that is worthy of mention is found in a body of literature that has emerged from within the UK over the last 20 years that has sought to assess the quality of the overall performance of lawyers measured against predetermined criteria[46]. Although this literature is clearly of relevance when assessing the overall quality of the service that lawyers provide and in the development of assessment criteria for peer review[47], this literature does not relate specifically to negotiation outcomes and behaviour nor does it shed light on the factors that lawyers

[42] Craver C. B., (2003) 'The Negotiation Process', *27 American Journal of Trial Advocacy*. 271 at p272

[43] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015).

[44] Davies, J. (2011) 'Formalizing legal reputation markets'. *Harvard Negotiation Law Review* 16(1): 367–382

[45] Davies, J., (2011) 'Formalizing legal reputation markets'. *Harvard Negotiation Law Review* 16(1): 367–382 at p 382

[46] See: Moorhead, R., Sherr, A., Webley, L., Rogers, S., Sherr, L., Paterson, A., & Domberger, S., (2001) 'Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot'. Norwich, England: Stationery Office;

[47] See: Sherr, A., & Paterson, A., (2007) 'Professional Competence Peer Review and Quality Assurance in England and Wales and in Scotland', 45 Alta. L. Rev. 151 – 168; Sherr, A., Moorhead, R., & Paterson, A., (1994) 'Lawyers, The Quality Agenda: Assessing and Developing Competence in Legal Aid', London: Her Majesty's Stationery Office.

themselves deem to be relevant in the assessment of effectiveness specifically in the context of legal negotiation.

What therefore is clear from the literature is that defining effectiveness in the specific context of negotiation is not straightforward and is something that researchers have wrestled with over the years. Given that no consistent definition has been used across the most influential studies that have dominated the negotiation literature or indeed that there is very little accepted characterisation of what lawyers actually mean themselves by effectiveness in the context of negotiation, and that this concept has actually been central to empirical studies that have shaped the literature, it is argued that it is a valuable research objective to explore this area further. Indeed, despite its central role in much of the legal negotiation research there appears to have been remarkably little research devoted to understanding what lawyers actually understand themselves by the concept of effectiveness, in terms both of outcomes as well as behaviours.

Inextricably linked to a consideration of effectiveness in the context of behaviours used in legal negotiations is arguably the concept of negotiation 'style'. Negotiation style is generally regarded as an overall characterisation of an approach to negotiation helpfully described by Shell as a '*relatively stable, personality-driven clusters of behaviors and reactions that arise in negotiating encounters*[48]*.* In addition, given the argument that the interpretation of the results from significant empirical studies[49] failed to identify that some of the effective negotiators categorised as cooperative were in fact motivated by competitive objectives but used cooperative appearing behaviour to attain their goals, an understanding the underlying motivations of legal negotiators is another area of focus that may help to

[48] Shell, G. R. (2001) 'Bargaining styles and negotiation: The Thomas–Kilmann Conflict Mode Instrument in negotiation training'. *Negotiation Journal*, 17, 155–174 at p156

[49] In particular: Williams, G. R., (1983) 'Legal Negotiation and Settlement' St. Paul, MN: Thomson West; Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143

inform the development of a more accurate interpretation and understanding of what may really be happening at the heart of the legal negotiation process.

It is therefore clear that developing an understanding of how lawyers themselves perceive negotiation effectiveness, something that has been acknowledged within the literature as being an important area of future research[50], will help in the continued development of our understand of the nature of what constitutes effective legal negotiation behaviour, an understanding that to date has been highly influenced by existing studies based on an assessment of effectiveness of lawyers by the lawyers they negotiate against without first having an understanding of what the lawyers doing the assessment in these studies first understood by the concept of effectiveness. One of the aims of developing such an understanding would be to develop teaching programmes within the profession that would lead to more effective and efficient negotiation behaviour and ultimately to better served clients.

1.6 Refining the research objectives and developing specific research questions

In order to address the identified research problems outlined above, it is necessary to outline the research objectives and develop a number of specific research questions.

The overall objective of this research study is to provide additional insight into the nature and characterisation of what amounts to effective legal negotiation behaviour. This is to be achieved by, firstly, seeking to develop a deeper understanding of what individual lawyers understand by the concept of effectiveness in a legal negotiation context, and then relating this to perceptions of negotiation effectiveness and negotiation behavioural style as well as the underlying motivations present in legal negotiations. This insight will then be tested

[50] See Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310 at p279 Note 24

against the developing negotiation behaviour literature and in particular the hybrid behavioural model proposed by Craver discussed above[51].

The first research question therefore has the aim of adding to our understanding of what lawyers mean when they describe negotiation behaviour as being *effective*. The question will seek to explore how lawyers characterise what they mean by 'effectiveness' in relation to legal negotiation. This will assist in the broader development of a legal negotiation framework by identifying common elements of understanding and areas of agreement or indeed divergence in relation to the concept of effectiveness as understood by practising lawyers.

> Research Question 1 - *How do lawyers characterise what they understand by 'effectiveness' in the context of a legal negotiation?*

The second research question seeks to provide additional insight into the concept of effectiveness by exploring how individual lawyers perceive both their own effectiveness as negotiators as well how they characterise their overall negotiation behavioural style.

> Research Question 2 – *How do lawyers perceive their own effectiveness as negotiators and characterise their personal negotiation behavioural style?*

The third research question is concerned with identifying the underlying *motivations*[52] of lawyers when they negotiate and whether these might be related to perceived effectiveness or to a particular negotiation behaviour style. This should provide a deeper understanding and insight into the range of underlying drivers of previously observed or reported behaviour described in the literature.

[51] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337

[52] The selection of this parameters was influenced by the significant study carried out by Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) p17 to p27

Research Question 3 - *What are the underlying motivations of lawyers when they are engaged in legal negotiation and are they related to perceptions of effectiveness or to a particular negotiation behavioural style?*

1.7 Selecting an approach

The broader purpose of this research study is to add to the general understanding of the legal negotiation process and more specifically to what constitutes effective negotiation behaviour in negotiations that take place between lawyers.

One of the key challenges of understanding legal negotiation behaviour has been the difficulty in designing empirical legal negotiation research studies that observe live legal negotiations, primarily because of the requirement to protect client confidentiality and the often highly commercial or personal nature of the subject matter that is at the heart of many legal negotiations. The available literature confirms that there are very few studies involving practising lawyers and even fewer that actually evaluate real legal negotiations. There is no doubt that research in the field of mediation has provided some input into this area of study[53], although it is still not entirely clear how truly applicable this type of research is to non-mediated legal negotiations. To date, therefore, much of the research into legal negotiation has relied on either simulated negotiations[54] or perceptions of behaviour and outcomes that have involved asking one lawyer to assess their perception of the behaviour of another. Whereas this undoubtedly provides some valuable insight

[53] For an example of relevant mediation research in the Scottish jurisdiction see: Agapiou, A., and Clark, B., (2011) 'Scottish construction lawyers and mediation: an investigation into attitudes and experiences', *International Journal of Law in the Built Environment,* Vol. 3, No. 2; 159-181; Agapiou, A., and Clark, B., (2012) 'An empirical analysis of Scottish Construction Lawyers' interaction with mediation: a qualitative approach', *Civil Justice Quarterly*, 31(4), 494-513 and Agapiou, A., and Clark, B., (2013) 'A follow-up empirical analysis of Scottish construction clients interaction with mediation', (2013) *Civil Justice Quarterly,* 32 *(3). pp.* 349-368. The latter study cites evidence at p360 that suggests there may be '*an adversarial climate within the construction legal profession*' within the Scottish jurisdiction.

[54] See: Wilkenfeld, J., (2004) 'Reflections on Simulation and Experimentation in the Study of Negotiation', *International Negotiation* 9: 429–199

into what is taking place during the legal negotiation process, it clearly has some limitations that have been identified earlier in this thesis.

Against that background and operating within the restrictions posed by the professional obligations of the legal profession, the purpose of this study is to provide a new source of empirical evidence that aims to offer some additional insight into the overall nature and characterisation of what might be considered effective legal negotiation. In order to achieve this and to address the specific research questions the research study is arranged as follows:

Chapter 2 firstly outlines the broader negotiation literature with Chapter 3 focusing in on the legal negotiation literature and identifying the main themes that have informed the research problem and development of the three research questions.

Chapter 4 then outlines in detail the reasons for selecting the chosen methodology and outlines how the research was planned and implemented. This research methodology is primarily qualitative, utilising data gathered through the use of semi-structured interviews and uses a sample group of single practice area lawyers drawn from a cross-section of pre-selected practice areas based in large law firms all based within Dundee, Edinburgh and Glasgow in Scotland. It has a quantitative dimension through the use of the Thomas Kilmann Conflict Mode Instrument (TKI)[55] survey negotiation style questionnaire used to provide more insight into the primary interview data.

The research methodology is both inductive and deductive in its approach to analysing the interview data. It is inductive insofar as it relates to the formulating frameworks and providing insight and deeper understanding, and deductive insofar as it relates to the use of existing frameworks to organise the research data and to the testing of existing theories and frameworks.

[55] Kilmann, R. H., & Thomas, K. W., (1977), 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument,' *Educational and Psychological Measurement*, 37, 309-325

Chapter 5 presents the interview data gathered in the context of the first research questions, looking at perceptions of the concept of effectiveness in legal negotiations.

Chapter 6 presents the data in the context of the second research question and focuses on perceptions of effectiveness and negotiation behavioural style.

Chapter 7 considers the data in relation to motivations in legal negotiations and any connection there may be with perceived effectiveness and behavioural style.

Chapter 8 draws together the themes and insights from the research and discusses them in the context of the relevant literature. Chapter 9 then presents the conclusions of this thesis.

PART TWO – LITERATURE REVIEW

Chapter 2 – The birth of a dichotomy

2.1 Defining Negotiation

Negotiation happens all around us, almost all of the time. Most of us negotiate in one form or another from the time we get up in the morning until the time we go to sleep at night. Some of us even negotiate in our sleep.

We negotiate over many different things in a broad variety of settings and contexts. Howard Raiffa, who has been described as 'the father of negotiation analysis'[56], portrays the breadth of negotiable disputes as '*between husband and wife, between siblings, between friends, between individual and firm, between developer and environmentalist, between regions within a nation, between a region or city or state and the nation – and perhaps in the far future (who knows) between planet and planet*.'[57]

But what is 'negotiation', what does it involve and how can it be defined?

Some authors have described negotiation as a complex, emotional decision making process which involves numerous elements such as interest, opinions, legitimacy, alternatives, commitment, compromises, communication and relationships[58].

Others have described negotiation as a highly complex human activity that involves a dynamic interpersonal process[59], which is one of the fundamental methods of

[56] Sebenius, J. K., (2009) 'Negotiation Analysis: From games to Inferences to Decisions to Deals'. *Negotiation Journal* Volume 25, Issue 4 at p450

[57] Raiffa, H. (1982). 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University at p7

[58] Moffitt, M., & Bordone, R., (eds) (2005) 'The Handbook of Dispute Resolution', San Francisco: Jossey-Bass

'*social decision-making, a crucial element in commerce, diplomacy, law and everyday international (and other) life*'[60].

Lax and Sebenius outline four key elements to negotiation: interdependence, some perceived conflict, opportunistic interaction and the possibility of agreement[61]. They argue that negotiation is a way of life for managers, and it has been proposed by others that negotiation is an essential management skill[62] and a fundamental legal skill[63]. Lax and Sebenius discuss the distinction made by some authors between the terms 'bargaining' and 'negotiating', and conclude that there is no advantage in distinguishing between the terms, using them interchangeably[64]. They offer some further insight into the nature of negotiation by considering the question '*what are we actually trying to do by negotiating?*' They answer by arguing that '*your negotiation objective should be to create value and claim value for the long term by crafting and implementing a deal that is satisfactory to both (or all) parties*'[65].

One of most widely read definitions of negotiation can arguably be found in Fisher and Ury's best selling book 'Getting to Yes', where they describe it as a back and

[59] Lewicki, R. J., Saunders, D. M., & Minton, J. W., (1997). Essentials of Negotiation. Chicago: Irwin at p3

[60] Zartman, I. W., Jensen, L., Pruitt, D. & Young, P. (1996). 'Negotiation as a Search for Justice'. *International Negotiations: A Journal of Theory and Practice* 1(1) at p79

[61] Lax, D. A., & Sebenius, J. K., (1986) 'The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain'. New York: Free Press p6 to p11

[62] Bazerman, M. H., & Neale, M. A., (1992) 'Negotiating rationally'. New York: Free Press.

[63] Williams, G. R., (1983) 'Legal Negotiation and Settlement' St. Paul, MN: Thomson West; Schneider, at p1

[64] Lax, D.A. and Sebenius, J.K., (1986) 'The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain'. New York: Free Press at p6. I will take their lead and propose to use both terms interchangeably throughout this study.

[65] Lax, D. A. & Sebenius, J. K., (2006) '3D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals', Harvard Business School Press, Boston, MA at p16

forth communication designed to reach an agreement when a party and the other side have some interests that are shared and others that are opposed[66].

Clearly there are a variety of definitions of negotiation found in the literature that, with varying degrees of success, attempt both to recognise its key features and at the same time acknowledge the complexities of the process. For the purpose of this Thesis it is proposed to use the admirably simple and yet effective working definition of negotiation that captures its essence found in Leigh Thompson's well-regarded[67] book 'The Mind and Heart of the Negotiator'. She writes:

'*Negotiation is an interpersonal decision-making process necessary whenever we cannot achieve our objectives single-handedly*'[68].

2.2 The development of a theoretical framework – different approaches

The study of negotiation takes place across a wide range of academic disciplines including, law, economics, political science, psychology, communication, anthropology, and organisational behaviour[69].

In order to make sense of the study of negotiation, it is firstly perhaps helpful to divide the subject into broad approaches[70].

[66] Fisher, R. & Ury, W., (1981) 'Getting to yes : negotiating agreement without giving in'. England: Penguin Books p17

[67] 'Well-regarded' is a phrased used by Professor Andrea Schneider to describe Thompson's book (Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13 at p21)

[68] Thompson L., (2015) 'The mind and the heart of the negotiator'. Prentice Hall, Upper Saddle River, New Jersey, Sixth Edition at p2

[69] See: De Dreu C. K. W., & Carnevale P. J., (2005) 'Disparate methods and common findings in the study of negotiation'. *International Negotiation* 10:193–203

[70] Pruitt, D. G. & Carnevale, P. J. (1993) 'Negotiation in social conflict'. Buckingham: Open University Press.

The first approach can be described as a prescriptive approach exemplified by the development of 'interest based' negotiation at the Program on Negotiation (PON)[71], which underpins much of the more widely read work to come out of that programme[72]. Another example of a prescriptive approach is found in the research carried out by Alder and Silverstein into problems created by power differentials in negotiation, which goes on to propose potential strategies for dealing with power imbalances[73]. Prescriptive studies and works largely offer practical guidelines to help the practitioner negotiate more effectively[74].

A second approach found in the literature has developed from an academic tradition known broadly as 'negotiation analysis' which focuses on mathematical models of rational behaviour that have predominantly been developed by decision analysts and game theorists[75]. Although this approach has been useful for understanding scenarios such as repeat negotiations in highly structured settings such as the design of auction and bidding mechanisms and has also uncovered competitive dynamics within negotiation and has contributed to the analysis of fairness principles[76], its dependence on the existence of fully rational players (which

[71] The Program on Negotiation (PON) is a university consortium dedicated to developing the theory and practice of negotiation and dispute resolution. Founded in 1983 as a special research project at Harvard Law School, PON includes faculty, students, and staff from Harvard University, Massachusetts Institute of Technology and Tufts University.

[72] For example: Fisher, R. & Ury, W., (1981) 'Getting to Yes: Negotiating agreement without giving in', England: Penguin Books; Ury, W. (1991) 'Getting past No: Negotiating with difficult people', New York, Bantam Books; Stone, D., Paton, B. and Heen, S., (1999) 'Difficult conversations: How to discuss what matters most', New York: Penguin

[73] Adler, R. S., & Silverstein, E. M., (2000) 'When David meets Goliath: dealing with power differentials in negotiations.' *Harvard Negotiation Law Review*, 5: 1-112

[74] For example see: Lewicki, R. J., Saunders, D. M., & Minton, J. W., (1997) 'Essentials of Negotiation'. Chicago: Irwin; Raiffa, H., (1982) 'The art and science of negotiation'. Cambridge, Mass.: Belknap Press of Harvard University Press; Thompson L., (2015) 'The mind and the heart of the negotiator'. Prentice Hall, Upper Saddle River, New Jersey, Sixth Edition

[75] For example see: Luce, R. D. & Raiffa, H. (1957) 'Games and Decisions: Introduction and Critical Survey'. New York: Wiley, Paperback reprint, New York; Dover; Raiffa, H., (1982). 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University

[76] Sebenius, J. K., (2009) 'Negotiation Analysis: From games to Inferences to Decisions to Deals'. *Negotiation Journal* Volume 25, Issue 4 at p453

a body of evidence appears to suggest do not often exist[77]) means it is difficult to translate into real life negotiation settings.

The third approach is focused on a behavioural study of negotiation, which considers the effect of environmental factors on negotiator behaviour and on negotiation outcomes. This approach considers issues such as the relationships between the context (individual/social) and the negotiation process and the related outcomes, communication between the parties, interpretations and misunderstandings, personal predispositions, and the relationships between the process and personalities involved. Research in the behavioural methodology has been conducted both through the study of role-play exercises as well as in real life settings[78].

With some notable exceptions[79], the predominance of available literature on negotiation falls into either the prescriptive category or the behavioural category with many of works using behavioural studies to inform prescriptive advice.

2.3 The birth of a dichotomy

Although some earlier studies had considered various aspects of negotiation and negotiation behaviour[80] and had made the distinction between the 'efficiency' aspect of negotiation, which was behaviour that sought to explore 'mutually profitable adjustment', and the 'distributional' zero-sum aspect which sought to divide value[81], arguably the most influential early behavioural studies in the field of

[77] See: Tsay, T.J. & Bazerman, M. H., (2009) 'A decision making perspective to negotiation: A review of the past and a look to the future'. *Negotiation Journal* 25(4): 465-478

[78], Pruitt, D. G. & Carnevale, P. J., (1993) 'Negotiation in social conflict', Buckingham: Open University Press at Note 8

[79] Howard Raffia is arguably the most notable of the negotiation scholars to have emerged from the mathematical decision science tradition. See: Raiffa, H., (1982) 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University

[80] For example: Siegel, S., & Fouraker, L., (1960) 'Bargaining and Group Decision Making', New York: McGraw-Hill

[81] Schelling, T. C., (1956) 'An Essay on Bargaining', 46 *American Economic Review* 281 at p281

negotiation was produced by Walton and McKersie in 1965[82]. They first used the terms *integrative* and *distributive* bargaining to describe the negotiation process, which they explored in the context of US labour management negotiations[83]. In doing so they established one of the most enduring terminologies and frameworks used for thinking about negotiation.

Walton and McKersie described a 'Behavioural Theory' of negotiation and argued that the negotiation process is essentially made up of four parallel sub processes that encompass nearly all the behaviours observed in negotiations.[84] The authors describe how each of these processes work, as well how they interact with the other three concurrent processes they describe. The four processes described are Distributive Bargaining, Integrative Bargaining, Attitudinal Structuring and Intraorganizational Bargaining.

The two lesser processes are 'Attitudinal Structuring' and 'Intraorganizational Bargaining'. 'Attitudinal Structuring[85]' is the sub process that defines the quality and type of relationship between labour and management. This 'shaping inter-group differences' works to shape and influence the relationship between the parties and directs attitudes such as friendliness and hostility, trust, respect, fear and the motivational orientation of competitiveness and cooperativeness[86].

'Intraorganisational Bargaining' takes place largely away from the bargaining table and refers to the internal negotiations that occur within the respective

[82] Walton, R. E., & McKersie, R. B., (1965) 'A behavioural theory of labor relations'. New York: McGraw-Hill

[83] This work itself was built on a concept had been pioneered by Mary Parker Follett, a business consultant in the early 1900s who developed an integrative bargaining model for her business clients. See: Graham, P., (ed) (2003) 'Mary Parker Follett - prophet of management: a celebration of writings from the 1920s', District of Columbia: Beard Books at p67 & 68

[84] Walton, R. E., & McKersie, R. B., (1965) 'A behavioural theory of labor relations'. New York: McGraw-Hill at p15

[85] Walton, R. E., & McKersie, R. B. (1965) 'A behavioural theory of labor relations'. New York: McGraw-Hill at p4-5.

[86] Walton, R. E., & McKersie, R. B. (1965) 'A behavioural theory of labor relations'. New York: McGraw-Hill at p4-5.

organisations. This is primarily the activity that is designed to achieve consensus between and within the negotiating team and those on behalf of whom they are negotiating[87].

The two dominant processes they describe (the key enduring legacy of their work) are Distributive and Integrative Bargaining[88]. These are independent decision processes which are opposite in character and which require contrasting and often conflicting behaviours.

Distributive Bargaining is characterised by the presumption that what one party gains, the other party loses and is therefore fundamentally competitive. Distributive behaviour includes making strong assertions, giving selective responses, using the other side's statements tactically, and limited disclosure of feelings and interests[89].

Integrative Bargaining is characterised by the presumption that if both negotiators are open with each other and work together, they will be able to find a solution that will reconcile their respective interests. Integrative behaviour includes exchange of information, exploring interests, brainstorming, active listening, paraphrasing and disclosure of feelings and underlying interests[90].

The distributive/integrative dichotomy pioneered by Walton & McKersie led to a number of descriptive studies, many of which prescribed various strategic approaches designed to generate both distributive and integrative behaviour and/or outcomes. Many of these studies also sought to develop the dichotomy offered by Walton & McKersie and produced new terminologies which include:

[87] Walton, R. E., & McKersie, R. B., (1965) 'A behavioural theory of labor relations'. New York: McGraw-Hill at p5

[88] For a good description of both integrative and distributive bargaining see: Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323

[89] Walton, R.E., Cutcher-Gershenfeld, J.E., & McKersie, R. B., (1994) 'Strategic Negotiations: A Theory of Change in Labor-Management Relations'. Boston: Harvard Business School Press at p44 - 45

[90] Walton, R.E., Cutcher-Gershenfeld, J.E., & McKersie, R. B., (1994) 'Strategic Negotiations: A Theory of Change in Labor-Management Relations'. Boston: Harvard Business School Press p45

claiming value and creating value[91], positional bargaining and interest based bargaining[92], contending (competing) and cooperating[93], bargaining and problem solving[94], and win-lose and win-win negotiations[95]. Many of these works tended to promote the general view that taking a more integrative approach to negotiation results in broadly better outcomes. Although the behavioural framework described by Walton & McKersie has been developed, modified and adapted over the last fifty years, it is a testament to its significance that it is still clearly highly relevant to the analysis of negotiation behaviour today.

2.4 The emergence of interest-based negotiation

Fisher and Ury's highly influential work first published in 1981[96] drew on a number of disciplines[97] and sought to develop the evolving framework by arguing that there was a third approach to negotiation. Hard (distributive), soft (integrative) and what they labelled 'principled' negotiation. 'Principled' negotiation was arguably very close to the concept of integrative negotiation, proposing that if parties were open and honest and disclosed their underlying interests and then sought to meet the other parties' interests then optimum negotiation outcomes would follow.

However, although highly influential, Fisher & Ury's 'principled' negotiation and indeed the 'integrative and distributive' dichotomy on which it was based have

[91] Lax, D.A. and Sebenius, J.K., (1986) 'The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain'. New York: Free Press

[92] Fisher, R. & Ury, W., (1981) 'Getting to yes : negotiating agreement without giving in', England: Penguin Books

[93] Pruitt, D. G., (1981) 'Negotiation Behaviour', New York: Academic Press.

[94] Hoppmann, P. T., (2000) 'Bargaining and Problem Solving: Two Perspectives on International Negotiation'. In Crocker, C. A., Hampson, F. O. and Aall, P. (Eds), *Turbulent Peace: The Challenges of Managing International Conflict.* Washington DC: USIP Press

[95] Thompson, L., (1991) 'Information exchange in negotiation'. *Journal of Experimental Psychology* 27, 161-179

[96] Fisher, R. & Ury, W., (1981) 'Getting to yes : negotiating agreement without giving in', England: Penguin Books

[97] Menkel-Meadow, C., (2006) 'Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections'. Negotiation Journal, Volume 22, Issue 4, 485–503 at p486

been criticised by various authors for not characterising accurately enough what actually happened in the real world of negotiation.

'Principled' negotiation was criticised for being based on unrealistic oversimplification[98], that it omitted to take into account the relevance of gender[99], culture[100] or of differing negotiation context[101].

However, White's main criticism of Fisher and Ury's work is that it focuses almost completely on the '*problem solving'* aspect of the negotiation process and almost completely ignores the distributive '*hard bargaining'* part[102]. He argues that nearly all negotiations must ultimately require value to be divided through a distributive process and that it is naive of the authors to advocate that it can be almost completely avoided through the use of 'i*ngenious'* problem solving negotiation techniques[103]. He also considers naive the authors reliance on '*objective criteria'* to avoid a power struggle and believes their treatment of '*dirty tricks'* to be '*distasteful'* and '*self-righteous'* since it does not deal in any way with the nuances of what may or may not constitute appropriate behaviour in a negotiation [104]. White considers the way the authors distinguish 'warning' and '*threats*' and the way they deal with deception to be *'facile'*[105].

[98] White, J., (1984) 'The pros and cons of "Getting to Yes."' *Journal of Legal Education* 34: 115–124 at p115

[99] Menkel-Meadow, C., (2000) 'Teaching about gender and negotiation: Sex, truths and videotape' *Negotiation Journal* 16(4): 357–377 at p360

[100] Avruch, K., (2000) 'Culture and negotiation pedagogy'. *Negotiation Journal* 16(4): 339–346 at pp399 & 340

[101] Menkel-Meadow, C., (2001) 'Negotiating with lawyers, men and things: The contextual approach still matters'. *Negotiation Journal* 17(3): 257–93 at p284

[102] White, J., (1984) 'The pros and cons of "Getting to Yes."' *Journal of Legal Education* 34: 115–124 at p116

[103] White, J., (1984) 'The pros and cons of "Getting to Yes."' *Journal of Legal Education* 34: 115–124 at p116

[104] White, J., (1984) 'The pros and cons of "Getting to Yes."' *Journal of Legal Education* 34: 115–124 at p117-118

[105] White, J., (1984) 'The pros and cons of "Getting to Yes."' *Journal of Legal Education* 34: 115–124 at p118

Condlin[106] is also critical of the way the authors deal with 'warnings' and 'threats' both in 'Getting to Yes'[107] and in William Ury's follow up book 'Getting Past No'[108], which builds on his earlier work and deals with the situation where a 'principled' negotiator meets a 'hard bargainer' (distributive negotiator). Condlin disputes that there is any significant difference between 'warning' and 'threatening' and indeed argues that they are the same thing[109] (a distinction that Ury relies on in his fifth strategy 'educate, don't escalate' in his strategies to deal with hard bargainers). He comes to the conclusion that Ury's approach amounts to advocating that if integrative bargaining doesn't work then one should resort to using competitive adversarial methods.

However, despite criticism, 'Getting to Yes' remains one of the most widely read and highly influential negotiation texts ever written[110], no doubt at least partly due to its ability to place negotiation theory in an everyday accessible context and to offer practical advice that has clearly resonated with its readers.

[106] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution* 231

[107] Fisher, R. & Ury, W., (1981) 'Getting to yes : negotiating agreement without giving in', England: Penguin Books at p143

[108] Ury, W., (1991) 'Getting past No: Negotiating with difficult people' New York, Bantam Books

[109] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution* 231 *at p261.* I have had difficulty with Ury's distinction for some time now when teaching students and have not been able to come up with a plausible explanation for this distinction.

[110] Randon House Publishers describe the book as '*over 2 million copies sold in over 20 different languages, Getting to Yes is the most successful book on negotiation on the market*' - See: http://www.randomhouse.com.au/books/roger-fisher/getting-to-yes-negotiating-an-agreement-without-giving-in-9781847940933.aspx#sthash.3F4kcrU7.dpuf last visited on 5.11.2015

2.5 A more structured rational approach

Around the same time as Fisher and Ury published 'Getting to Yes', Raiffa[111] took a different approach to thinking about negotiation and was one of the first authors to offer a comprehensive structured analysis of the process by looking how the series of choices made by one party affect the other negotiator and how they are affected by the structure and other variables that characterise any particular negotiation[112]. He developed his analysis by moving from two parties with one issue[113], to two parties with many issues[114] and finally to many parties with many issues[115]. Raiffa frames the contradiction inherent in simultaneous problem solving behaviour and competitive behaviour in terms of joint steps that can be taken to move towards the Pareto efficient frontier[116] and steps that can be taken to agree a particular point that serves ones party's particular interests[117]. His book seeks to blend decision science based mathematical analysis with practical negotiation advice[118].

As noted earlier in this chapter, although the type of approach taken by Raffia provided valuable insight into certain highly structured negotiation scenarios, its dependence on the existence of fully rational players and its limited contextual

[111] Raiffa, H., (1982) 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University

[112] Wheeler, M., (1984) 'The Theory and Practice of Negotiation' 34 *Journal of Legal Education* 327 at p327

[113] Raiffa, H., (1982) 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University, Part II from p35

[114] Raiffa, H., (1982) 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University Part III from p133

[115] Raiffa, H., (1982) 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University Part IV from p257

[116] Raiffa, H., (1982) 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University see p190

[117] Raiffa, H., (1982) 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University see p148

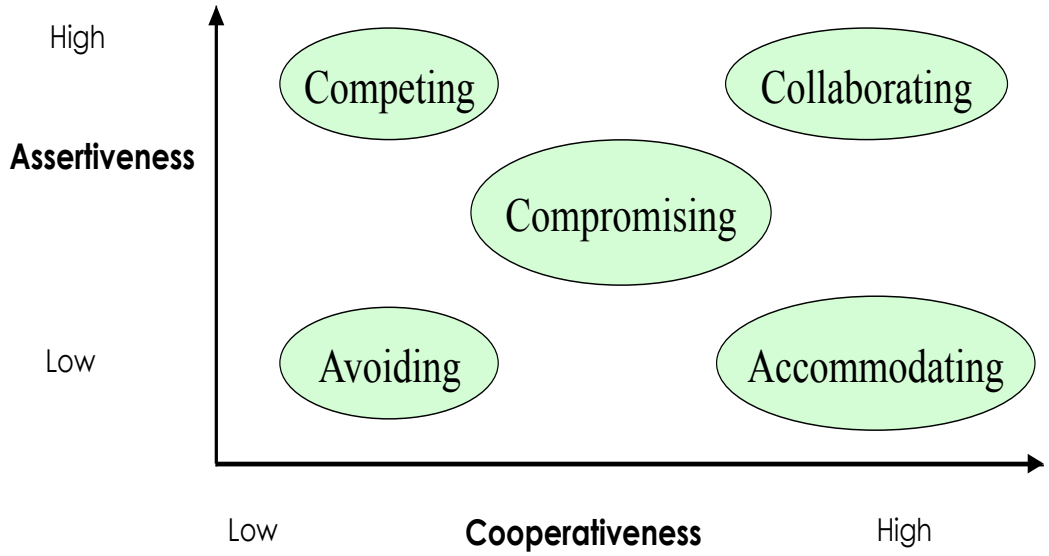
[118] Raiffa, H., (1982) 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University p9

applicability meant it often lacked common prescriptive capacity in real life negotiation settings[119].

2.6 The emerging field of conflict management

At this stage it is also worth considering the influential work that was carried out in the mid 1970's by Kenneth Thomas [120] in the emerging field of Conflict Management. He produced a broader framework that included five different conflict-handling modes, which he measured against the two axes of 'Assertiveness' and 'Cooperativeness', itself derived from the 'Dual Concern Model' developed by Blake and Mouton over a decade earlier built around the bargainers' concern for either 'self' or for the concern of the 'other'[121].

Figure 1 – Outline of the five Thomas Conflict Handling Modes



[119] See: Tsay, T.J. & Bazerman, M. H., (2009) 'A decision making perspective to negotiation: A review of the past and a look to the future'. *Negotiation Journal* 25(4): 465-478 at p 468

[120] Thomas, K., (1976) 'Conflict and Conflict Management'. In Dunnette M. D., (Ed) *Handbook Of Industrial And Organizational Psychology.* Rand McNally College Pub. Co.

[121] Blake, R. R., & Mouton. J. S., (1964) 'The Managerial Grid', Houston: Gulf Publications

Thomas essentially described the five different modes of avoiding, accommodating, compromising, competing and collaborating that could be used in any given conflict situation, with each mode being expressed in terms of the mix of both their assertive and their cooperative behavioural content. This model arguably offered some insight into the link between the developing dichotomous negotiation framework and the various strategies that can be used in practice. Following the subsequent development of a relatively quick and easily administered psychological assessment designed to measure levels of assertiveness and cooperativeness known as the Thomas Kilmann Instrument (TKI)[122], the model has been used extensively in the teaching of negotiation over the last three decades[123] and is described in more detain later in this thesis.

2.7 The negotiators' dilemma

As the prevailing Walton & McKersie inspired negotiation framework continued to evolve, many researchers questioned those that sought to promote the clear-cut distinction between the two types of integrative/cooperative and distributive/competitive negotiation behaviour as distinct and indeed mutually exclusive processes, as well as the progressive blurring of the distinction between processes and outcomes. Instead, some authors argued that real world negotiations involve an interaction between both types of processes and behaviours, which inevitably overlap and indeed happen simultaneously, and which are distinct from (although associated with) outcomes.

Although Walton and McKersie had used the term "mixed" to describe a situation when the negotiating agenda has '*significant elements of conflict and considerable*

[122] Kilmann, R. H., & Thomas, K. W., (1977) 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument,' *Educational and Psychological Measurement*, 37, 309-325.

[123] See: Shell, G. R., (2001) 'Bargaining styles and negotiation: The Thomas–Kilmann Conflict Mode Instrument in negotiation training'. *Negotiation Journal*, 17, 155–174, and Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13 at p24

potential for integration'[124] and had explored some strategies that might be appropriate in such a situation, it was Lax and Sebenius[125] who are usually credited as the first to have provided a model based on their argument that all negotiations are inevitably an amalgamation of both approaches. In doing so they coined the phrase '*the negotiators' dilemma'* which recognised that tough distributive strategies often repress integrative value creation[126].

They argued that for best results, negotiators should first attempt to 'create value' through the use of cooperative interest-based behaviours and strategies. Once the amount of available value has been enlarged, negotiators should then try and claim as much of that value as possible using more distributive methods. Their approach can be characterised as first working together to bake as big a pie as possible and then competing with each other to divide the enlarged pie up between the parties, attempting to secure as big a slice as you can for yourself.

'*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 helped create it first'*[127].

The recognition of this 'dilemma' was arguably an important step in the development of a negotiation behavioural framework as it represents a move in some areas of the literature away from simply describing behavioural processes towards a focus on considering how different processes interact with each other.

[124] Walton, R. E., & McKersie, R. B., (1965) 'A behavioural theory of labor relations'. New York: McGraw-Hill at p161-162

[125] Lax, D. A. & Sebenius, J. K., (1986) 'The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain'. New York: Free Press

[126] Lax, D. A., & Sebenius, J. K., (1986) 'The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain'. New York: Free Press at p38 - 41

[127] Lax, D. A., & Sebenius, J. K., (1986) 'The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain'. New York: Free Press at p 33

Other authors sought to develop theoretical frameworks for managing the 'negotiators' dilemma' of mixed motives engendered by the two processes[128]. Allred presents an empirical based framework of prescriptive advice for how negotiators can manage the tension between competitive moves to claim value and cooperative moves to create value[129]. He draws a distinction between 'best practice' and 'strategic practice'. He describes 'best practice' as those behaviours that work well in one or more negotiation dimensions whilst don't diminish performance in other dimensions and can therefore be used all the time in every situation (by 'dimensions' Allred is referring to particular negotiation scenarios or situations). He uses listening as an example of 'best practice'. He describes 'strategic practices' as those behaviours that work well in certain dimensions but that tend to reduce performance in others. He uses the example of sharing information as a 'strategic practice' as it may lead to better outcomes in some circumstances but may be exploited in other leading to the classic negotiators' dilemma.[130]

Building on their 1996 paper[131] examining the tension between assertiveness and empathy in a way that helped explain how negotiators require to balance their natural impulses and skills in order to be able to deal with the negotiator's dilemma to both claim and create value[132], in their book '*Beyond Winning: Negotiating To*

[128] See: Rubin, J. Z., Pruitt, D. G. & Kim, S. H., (1994) 'Social conflict: Escalation, stalemate and settlement'. New York: McGraw-Hill; Mnookin, R. H., Peppet, S. R.,Tulumello, A. S., (2000) 'Beyond Winning: Negotiating To Create Value In Deals And Disputes'. By Cambridge, Ma: The Belknap Press of Harvard University.

[129] Allred, K. G., (2000). Distinguishing *Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value.* Negotiation Journal, Volume 16, Issue 4 pp387-397

[130] Allred, K. G., (2000) 'Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value'. *Negotiation Journal*, Vol 16, Issue 4, 387-397 at page 388.

[131] Mnookin, R. H., Peppet, S. R.,Tulumello, A. S., (1996) 'The Tension Between Empathy and Assertiveness', 12 *Negotiation Journal* 217

[132] Mnookin, R. H., Peppet, S. R.,Tulumello, A. S., (1996) 'The Tension Between Empathy and Assertiveness', 12 *Negotiation Journal* 217 at p221-222

Create Value In Deals And Disputes'[133] the authors (who are arguably firmly from the tradition that believe negotiations should be treated as a joint problem solving opportunity that will lead to better results than by using hard bargaining techniques) seek to develop the framework by introducing an analysis of what they describe as the three tensions present in negotiations. The first is between the desire for joint gain (cooperating) and the desire for distributive gain (competing); the second is between empathy (exhibiting an understanding of the other person's point of view) and asserting your own views, interests, and concerns; and the third is the tension that exists between principal and agent[134]. The authors argue that these tensions cannot be removed but instead must be managed and they provide prescriptive advice designed to achieve this.

Nelson and Wheeler[135] conducted a study into how a mixed population of experienced negotiators perceived the strategic tension between creating and claiming value and the interpersonal tension between assertive and empathetic behaviour. The respondents had to rate their own strengths and weaknesses but were only given a limited number of points to allocate themselves across a number of predetermined skills. The study did reveal a perceived tension between empathy and assertiveness as the theorist predict. However, at the same time, respondents reported no such tension between creating and claiming value. Respondents who thought they were good at claiming value also reported that they were good at creating it[136]. The authors speculated why respondents might think they could be good at both. Their suggestions included that the respondents considered themselves to be skilled at each but in separate negotiation settings; that they

[133] Mnookin, R. H., Peppet, S. R.,Tulumello, A. S., (2000) 'Beyond Winning: Negotiating To Create Value In Deals And Disputes'. By Cambridge, Ma: The Belknap Press of Harvard University

[134] Mnookin, R. H., Peppet, S. R.,Tulumello, A. S., (2000) 'Beyond Winning: Negotiating To Create Value In Deals And Disputes'. By Cambridge, Ma: The Belknap Press of Harvard University at p9-10

[135] Nelson, D. & Wheeler, M., (2004) 'Rocks and Hard Places: Managing Two Tensions in Negotiation'. *Negotiation Journal*, Volume 20 Issue 1, 113 – 128

[136] Nelson, D. & Wheeler, M., (2004) 'Rocks and Hard Places: Managing Two Tensions in Negotiation'. *Negotiation Journal*, Volume 20 Issue 1, 113 – 128 at p115

considered that value maximisation (i.e. claiming value) could be achieved simply by value creation; and finally that confident people are generally positive about all their skills and perceive them all as being equally good.

Nelson and Wheeler acknowledged the methodological limitations of their survey, which they reported to include the subjective nature of self assessment, the difficulty in measuring success in negotiation (how do negotiators know that they have added value), the difficulties that the interactive nature of negotiation causes to the accuracy of self assessment of effectiveness (your effectiveness is in part dependent on the skills of your negotiating partner)[137] and the possibility of a self selecting bias within the sample group[138].

Lax and Sebenius in their 2006 work[139] sought to develop what they call the traditional 'one dimensional' negotiation framework by arguing that there is a 2nd and 3rd dimension to negotiation which they call 'deal design' and 'set up' (the first dimension they label 'tactics'). This highly prescriptive work, which the authors describe as 'pathbreaking', is arguably simply a refocusing of the distributive/integrative framework to include the description of a strategic preparation stage (which they call 'deal design'), and 'set up' which they define as '*moves away from the table to set up the most promising situation once you are at the table*'[140]. It could be argued that their '3D' model is still very firmly anchored in the traditional framework of creating and claiming value, although it provides a helpful reformulation and bringing together of previously offered prescriptive advice alongside a more novel way of conceptualising the negotiation process.

[137] Nelson, D. & Wheeler, M., (2004) 'Rocks and Hard Places: Managing Two Tensions in Negotiation'. *Negotiation Journal*, Volume 20 Issue 1, 113 – 128 at p117

[138] Nelson, D. & Wheeler, M., (2004) 'Rocks and Hard Places: Managing Two Tensions in Negotiation'. *Negotiation Journal*, Volume 20 Issue 1, 113 – 128 at p118

[139] Lax, D. A. & Sebenius, J. K., (2006) '3D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals', Harvard Business School Press, Boston, MA.

[140] Lax, D. A. & Sebenius, J. K., (2006) '3D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals', Harvard Business School Press, Boston, MA at p12

From the dispute resolution perspective, a framework has been developed based on a model of 'Interests, Rights and Power' that perhaps also needs to be considered in the overall context of negotiation theory[141]. In this analysis the authors assert that disputants can chose one of the three approaches to negotiation, namely interests, rights and power. They associate a focus on interests as being the strategy that is most likely to lead to a value creating integrative solutions. A focus on rights (the application of some standard of fairness, contract or law) or a focus on power (a focus on coercion) is more likely to lead to a distributive outcome. The analysis describes how parties to a dispute cycle through interests, rights and power strategies and that 'reciprocity' is a phenomenon that can direct the negotiation towards one of the strategies but that negotiators can also deflect rights and power strategies and refocus on interests by using a number of prescriptive measures[142] (a further study concentrated on how the negative effects of reciprocal behaviour on negotiation can be managed[143]).

Although the 'Interests, Rights and Power' framework presents an informative way for considering behaviour within conflict negotiations and offers prescriptive advice about the strategic implications of this, it also does so within the conventional framework of integrative and distributive behaviour. Indeed the main advocates of the 'Interests, Rights and Power' approach base their prescriptive advice on the underlying assumption that integrative behaviours lead to more favourable outcomes.

2.8 Arguing for the primacy of distributive behaviour

It is important to note that although there has been a great deal of focus in the literature over the last thirty years on the effectiveness of what can broadly be

[141] Ury, W. L., Brett, J. M., and Goldberg, S. B., (1993) 'Getting Disputes Resolved', 2nd Ed. San Francisco: Jossey-Bass Publishers

[142] Lytle, A. L., Brett, J. M., Shapiro, D. L., (1999) 'The Strategic Use of Interests, Rights, and Power to Resolve Disputes', *Negotiation Journal* Jan; 15, 1 at p 49

[143] Brett, J. M., Shapiro, D. L., Lytle, A. L., (1998) 'Breaking the bonds of reciprocity in negotiations'. *Academy of Management Journal* 41, 4; 410-424

described as cooperative behaviour and the achieving of value creating outcomes, as well as authors that have focused on the tension and interaction between creating value and claiming value, there are also those who argue for the primacy of value claiming distributive behaviour within the negotiation process[144].

Authors such as Ringer[145] and Gifford[146] and more recently Condlin[147], Korobkin[148], Camp[149] and Dawson[150] are arguably all advocates of the effectiveness and importance of distributive value claiming behaviours used within the context of an overall negotiation framework.

Supporting this overall position, the effectiveness of various specific distributive behaviours and strategies[151] has also been the subject of a number of focused studies.

Anchoring in negotiation describes the disproportionate influence that the first number or position introduced into a negotiation has on the final outcome. In the classic study by Tversky and Kahneman[152], individuals were asked to estimate whether a number generated from the arbitrary spin of a "wheel of fortune" was

[144] Condlin R. J., (2008) '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', 9 *Cardozo Journal of Conflict Resolution*. 1

[145] Ringer, Robert J., (1978) 'Winning Through Intimidation'. London: Circus/Futura

[146] Gifford, D. Legal (1989) 'Negotiations: Theory and Application'. St. Paul, Minnesota: West Publishing Co.

[147] Condlin R. J., (2008) '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', 9 *Cardozo Journal of Conflict Resolution* 1; Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231.

[148] Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323

[149] Camp, J., (2002) 'Start with No: The Negotiating Tools That the Pros Don't Want You to Know'. Crown Publications

[150] Dawson, R., (2001) 'Secrets Of Power Negotiating'. Career Press 2nd Ed.

[151] Thompson L., (2015) 'The mind and the heart of the negotiator'. Prentice Hall, Upper Saddle River, New Jersey, Sixth Edition, see Chapter 3

[152] Tversky, A., & Kahneman, D., (1974) 'Judgement under uncertainty: Heuristics and Biases', 185 *Science* 1124-1131

higher or lower than the percentage of countries on the African continent in the United Nations and then to guess the correct percentage. Guesses were significantly lower if the "wheel of fortune" generated a low anchor number than if it provided a high anchor number. This provides supporting evidence that an arbitrarily selected anchor point can significantly influence a negotiator's value estimation because individuals tend to inadequately adjust away from the anchor point towards a more objective value.

Anchors have been shown to exert a significant effect on purchase price[153] and settlement price[154]. In their meta-analysis of the literature, Orr and Guthrie found that '*anchoring has a powerful impact on negotiation outcomes*'[155]. Research has also produced evidence that you can potentially reduce the effect of anchors through the use of de-biasing strategies[156].

The following quote from a pursuers' solicitor practising in Scotland, which describes the rationale behind the decision to sue for more than a particular Personal Injury claim is realistically worth, is an example of anchoring used in legal practice:

"...if you feel you have a very strong case and you're trying to worry the other side into making as good an offer as they can, it's not inconceivable that you might sue for £100,000 but actually think that you'd be lucky to get £10,000."[157]

It has also been shown that both anchors and 'reference points' jointly influenced counteroffers in a simulated price negotiation[158]. The role of 'reference points' in

[153] Bottom, W. P., & Paese, P. W., (1999) 'Judgment accuracy and the asymmetric cost of errors in distributive bargaining', *Group Decision & Negotiation* 8:349, 358-362

[154] Korobkin, R., & Guthrie, C., (1994) 'Opening offers and out-of-court settlement: A little moderation may not go a long way', 10 *Ohio State Journal on Dispute Resolution* 1

[155] Orr, D., & Guthrie, C., (2005) 'Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis', 21 *Ohio State Journal on Dispute Resolution* 597 at p598

[156] Lord, C. G., Lepper, M. R., & Preston, E., (1984) 'Considering the Opposite: A corrective strategy for social judgement', 47 *Journal of Personality & Social Psychology* 1231

[157] Coope, S., & Morris, S., (2002) 'Personal Injury Litigation Negotiation and Settlement' HMSO, Edinburgh at p40

negotiation is a concept closely related to anchoring. The distinction made is that where an anchor influences the counteroffers negotiators make, a reference point establishes how any offer made is initially perceived[159]. 'Reference points' are any focal prices, facts or information within the negotiation that define what the negotiator considers to be the status quo and from which losses or gains are measured[160]. They have been described as:

'The term "reference point" has been reserved for salient neutral points on evaluation scales[161]'

Some authors have argued that negotiators measure offers against multiple reference points[162] with a number of studies showing that initial offer and reserve price were found to jointly effect counteroffers[163]. Other authors argue that negotiators focus on a single prevailing reference point that dominates their decision-making[164]. In particular, there is evidence to suggest that when negotiators formulate a 'reserve point' (the point or price beyond which the negotiator would choose impasse over agreement and is generally formulated with reference to the

[158] Kristensen, H., & Garling, T., (1997) 'The Effects of Anchor Points and Reference Points on Negotiation Process and Outcome', *Organizational Behavior and Human Decision Processes* Vol. 71, No. 1, July, 85–94, at p93

[159] Kahneman, D., (1991) 'Reference points, anchors, norms, and mixed feelings', *Organizational Behavior and Human Decision Processes*, 51, 296–312 at p310

[160] Thompson L., (2005) 'The mind and the heart of the negotiator'. *Prentice Hall,* Upper Saddle River, New Jersey, Third Edition p162 and p333.

[161] Kahneman, D., (1991) 'Reference points, anchors, norms, and mixed feelings', *Organizational Behavior and Human Decision Processes,* 51, 296–312 at p310

[162] Neale, M. A., Huber, V. L., & Northcraft, G. B. (1987) 'The framing of negotiations: Contextual versus task frames', *Organizational Behavior and Human Decision Processes*, 39, 228–241 at p239

[163] Kristensen, H., & Garling, T., (1997) 'The Effects of Anchor Points and Reference Points on Negotiation Process and Outcome', *Organizational Behavior and Human Decision Processes* Vol. 71, No. 1, July, 85–94

[164] White, S. B., Valley, K. L., Bazerman, M. H., Neale, M. A., & Peck, S. R., (1994) 'Alternative models of price behavior in dyadic negotiations: Market prices, reservation prices, and negotiator aspirations', *Organizational Behavior and Human Decision Processes*, 57, 430–447 at p441

negotiators 'best alternative to a negotiated agreement', or BATNA[165]) prior to entering a negotiation, this reference point become the main determinant of the outcome[166]. A more recent study has found that if the negotiator concentrates on target price (optimistic best case scenario) rather than reserve price (lowest acceptable scenario) this leads to objectively better results[167].

In the study of concession behaviour, it has been shown that taking longer to make concessions lead to the concessions being valued more highly with the converse being true for quicker concessions[168]. 'Good' negotiators have been shown to have a tendency to start negotiations having formulated a projected pattern of concessions[169]. It has also been shown that negotiators who make smaller and fewer concessions are more effective at maximising their distributive outcomes compared to those who make more frequent and larger concessions[170].

An early paper by Schelling[171] considered the importance of bargaining power, threats and promises in the context of distributional bargaining. Subsequently, threats have been shown to be most effective at securing concessions when they are either made early and are implicit or when they are made late and are explicit[172].

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[165] Fisher, R. and Ury, W., (1981) 'Getting to Yes: negotiating agreement without giving in', England: Penguin Books; See also: Thompson L. (2005) 'The mind and the heart of the negotiator'. Prentice Hall, Upper Saddle River, New Jersey, Third Edition at p46

[166] White, S. B., Valley, K. L., Bazerman, M. H., Neale, M. A., & Peck, S. R., (1994) 'Alternative models of price behavior in dyadic negotiations: Market prices, reservation prices, and negotiator aspirations', *Organizational Behavior and Human Decision Processes*, 57, 430–447 at p441

[167] Galinsky, A. D., Mussweiler, T., & Medvec, V. H., (2002) 'Disconnecting outcomes and evaluations: The role of negotiator focus'. *Journal of Personality and Social Psychology*, 83, 1131–1140

[168] Kwon, S. & Weingart, L., (2004) 'Unilateral concessions from the other party: concession behavior, attributions, and negotiation judgements'. *Journal of Applied Psychology*, 89(2):263-278

[169] Craver, C. B., (2001) 'Effective legal negotiation and settlement', Fourth Edition, Lexis at p 150 where he cites: Freud, J., 'Smart Negotiating', Simon & Schuster, 1992 at p130 - 141

[170] Yukle, G. A., (1974) 'Effects of the opponent's initial offer, concession magnitude and concession frequency on bargaining behaviour', *Journal of Personality and Social Psychology*, 30(3), at p334

[171] Schelling, T. C., (1956) 'An Essay on Bargaining', 46 *American Economic Review* 281

[172] Sinaceur, M., & Neale, M., (2005) 'Not all threats are created equal: how implicitness and timing affect the effectiveness of threats in negotiations'. *Group Decision and Negotiation*, 14:63-85

Although much of what has been written about ethics in negotiation falls outside the scope of this Thesis, it is relevant to note that some important studies in the field of negotiation have either explicitly or implicitly characterised competitive/adversarial behaviour as being unethical in nature[173]. It is therefore also perhaps relevant in this context to note that some authors argue that lying may give the negotiator a distributive advantage in certain circumstances. Wetlaufer writes:

'*The most important is that we cannot say as a general matter that honesty is the best policy for individual negotiators to pursue if by "best" we mean most effective or most profitable. In those bargaining situations which are at least in part distributive, a category which includes virtually all negotiations, lying is a coherent and often effective strategy*[174]*'*.

Wetlaufer[175] also considered whether the opportunities for integrative negotiation are as widespread as is often claimed and whether it is in the financial self-interests of a party to use open and honest integrative strategies in negotiation. He reaches three conclusions:

1. Opportunities for integrative negotiation are not nearly as widespread as are often cited,

2. The financial argument for integrative behaviour is not anything like as robust as is sometimes claimed,

[173] See in particular: Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West; Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143. Both these studies are considered in some detail later.

[174] Wetlaufer, G. B., (1990) 'The Ethics of Lying in Negotiations', 75 *Iowa Law Review* 1219 at page 1230

[175] Wetlaufer, G. B., (1996) 'The Limits of Integrative Bargaining', 85 *Georgetown Law Journal* 369-394

3. Accordingly, there must therefore be other arguments other than financial self-interest that justify the use of integrative behaviour[176].

Korobkin is amongst those who argue that the predominant framework is now too focused on the overly enthusiastic emphasis on integrative outcomes and to the denigration of the distributive process[177]. The author believes that the value of integrative bargaining in negotiation in general, but especially in the context of legal negotiation, has been oversold[178] and describes the 'missionary zeal' with which many are dedicated to the notion of 'integrative bargaining supremacy'. He argues that most legal settlement negotiations are held in the nearly perfect bilateral monopolistic conditions that are associated with large distributive potential and, especially were such legal settlements are between strangers, they have limited integrative potential[179]. He seeks to make the point that although the potential benefits of integrative bargaining are real and often substantial, the value of distributive behaviour is often overlooked and undervalued[180].

What is evident from a consideration of the negotiation literature is that a divergence has developed between those authors that consider cooperative based integrative types of behavioural processes to be the dominant and indeed the most important element of effective negotiation behaviour, and those authors that feel competitive based distributive process are the central and are therefore are the most important feature of effective negotiation behaviour.

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[176] Wetlaufer, G., (1996) 'The Limits of Integrative Bargaining', 85 *Georgetown Law Journal* 369- 394 at p272

[177] Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323.

See also; Condlin R. J., (2008) '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', 9 *Cardozo Journal of Conflict Resolution*. 1

[178] Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323 p1324

[179] Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323 p1337 & p1338

[180] Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323 at p1323

2.9 Moving away from the conventional framework

Although there has been an evolution and refinement of negotiation theory over the last 30 years through the study of a broader range of negotiation variables, contexts, process steps and behaviours, there are also those who argue that the current framework has not evolved sufficiently to deal with the complexities of the modern world.

Some authors have sought to apply the concept of 'critical moments' and 'transformations' developed in the dispute resolution and mediation literature more directly to the field of negotiation[181]. This approach sees transformation as the eventual objective of conflict management in the same way as the distributive or integrative results define negotiation outcomes[182].

Critical moments in negotiation have been defined as fundamental, possibly irrevocable, process shifts that radically alter the meaning of events[183]. They are associated with events or moments that occur within a negotiation that potentially give rise to transformations. Wheeler considers openings in a negotiation to hold potential as critical moments:

'Openings are opportunities. They are critical moments in which mood is set, issues are framed, and relationships established. If these moments are recognized and lived emotionally, not just deliberately, they can be openings to new understandings and possibilities.'[184]

[181] See: Menkel-Meadow, C., (2004) 'Critical Moments in Negotiation: Implications for Research, Pedagogy, and Practice' *Negotiation Journal* Apr 20, 2; 341-347

[182] Vayrynen, R., (Ed) (1991) 'To settle or to transform? Perspectives on the resolution of national and international conflicts. New directions in conflict theory: Conflict resolution and conflict transformation'. London: Sage

[183] Leary, K., (2004) 'Critical moments in Negotiation', *Negotiation Journal*, 20 (2): 143-145 at p 144 where she cites: Wheeler, M. and Morris, G., (2001) 'A note on critical moments in negotiation'. *Harvard Business School Note*, no. 9-902-163.

[184] Wheeler, M., (2004) 'Anxious Moments: Openings in Negotiation'. *Negotiation Journal*, 20: 153–169 at p167

Putman[185] distinguishes transformative behaviour from integrative bargaining in that the former relies on the acquisition of new understanding about the dispute, interdependence of the parties and the circumstances that they face, leading to a fundamental shift in their comprehension of the conflict. Integrative behaviour, she argues, focuses on depersonalising disputes and describing differences in ways acceptable to both parties and seeking to discover commonalities within the existing frame. Transformative behaviour reorganises rather than seeking to completely reconstitutes the constituent elements of the dispute[186], it '*moves the conflict to a different dimension of discussion rather than focusing on interests and needs*'[187].

Putman argues that the opportunity for critical moments and transformations to happen in negotiation stem from the five levels of abstraction described in the dispute resolution literature namely: specific to general, concrete to abstract, part to whole, individual to system and literal to symbolic, which all have in common that they represent moments that conflicts can be transformed by allowing movement of the discussion to a different level[188]. Putman goes on to identify three internal conditions that promote transformation: developing a stance of curiosity, connecting with the other party and building recognition and trust[189], as well as the external conditions of differentiation and a balance of conflict complexity[190].

[185] Putnam, L. L., (2004) 'Transformations and critical moments in negotiation'. *Negotiation Journal* 20, 2; 275-295

[186] Putnam, L. L., (2004) 'Transformations and critical moments in negotiation'. *Negotiation Journal* 20, 2; 275-295 at p290

[187] Putnam, L. L., (2004) 'Transformations and critical moments in negotiation'. *Negotiation Journal* 20, 2; 275-295 at p291

[188] Putnam, L. L., (2004) 'Transformations and critical moments in negotiation'. *Negotiation Journal* 20, 2; 275-295 at p283

[189] Putnam, L. L., (2004) 'Transformations and critical moments in negotiation'. *Negotiation Journal* 20, 2; 275-295 at p284

[190] Putnam, L. L., (2004) 'Transformations and critical moments in negotiation'. *Negotiation Journal* 20, 2; 275-295 at p289

Putman concludes that transformation can be characterised as a type of re-evaluation, and that shifts in levels of abstraction can be characterised as a type of re-framing that fosters new comprehensions favourable to changing the essence of the conflict[191]. It should, however, be noted that the author describes the transformative approach as only one type of approach to negotiation and argues that it is not appropriate for all types of negotiation but that it does provide an alternative to the conventional model[192].

Druckman has been pivotal in developing understanding of an arguably related concept known as 'turning points' in negotiation. He defines these as *'events or activities that change the direction of negotiation, usually moving from impasse to progress'*[193]. His research has shown that turning points occur following a crisis that endangers the continuance of the negotiations and consist of '*clear, self-evident departures from earlier events or patterns during the negotiation process, sometimes appearing rather suddenly, other times more gradually'*[194]. These turning points can result form a re-framing of the issues that alter the way parties understand their differences leading them potentially to search for integrative solutions. However, it is also pointed out that turning points can result in the break down of the negotiation[195].

[191] Putnam, L. L., (2004) 'Transformations and critical moments in negotiation'. *Negotiation Journal* 20, 2; 275-295 at p291

[192] Putnam, L. L., (2004) 'Transformations and critical moments in negotiation'. *Negotiation Journal* 20, 2; 275-295 at p293

[193] Druckman, D. & Olekalns, M., (2011) 'Turning Points in Negotiation', *Negotiation and Conflict Management Research*, 4: 1–7 at p1

[194] Druckman, D. & Olekalns, M., (2011) 'Turning Points in Negotiation', *Negotiation and Conflict Management Research*, 4: 1–7 at p1 citing the following earlier studies: Druckman, D. (1986) 'Stages, turning points, and crises: Negotiating military base rights, Spain and the United States'. *Journal of Conflict Resolution*, 30, 327–360; Druckman, D. (2001) 'Turning points in international negotiation: A comparative analysis', *Journal of Conflict Resolution*, 45, 519–544; Druckman, D. (2004), 'Departures in negotiation: Extensions and new directions', *Negotiation Journal* 20, 185–204; Olekalns, M., & Weingart, L. R., (2008), 'Emergent negotiations: Stability and shifts in negotiation dynamics', *Negotiation and Conflict Management Research*, 1, 135–160.

[195] Druckman, D. & Olekalns, M., (2011) 'Turning Points in Negotiation', *Negotiation and Conflict Management Research*, 4: 1–7 at p1

Some other authors have argued that our current approach to understanding negotiation, and indeed teaching negotiation, is too simplistic[196]. It has been argued that an approach based on the development of rational, egocentric strategies built around the core challenge of how to essentially create and claim value and how we think of the 'process' of negotiation is limiting and constrains development of new knowledge[197].

Fox highlights three recent areas of study that he argues have challenged our assumption about the negotiation process. These areas are globalisation, international conflict and crisis and hostage negotiation. He introduces a concept of a 'post-modern' approach to understanding negotiation, which he defines as 'an orientation toward scholarship that reflects an emergent and dynamic sense of knowledge and how we make, or "co-create," meaning'[198]. By this Fox appears to mean that researchers should be focusing on the social world in which negotiators operate as well as the 'social space' between negotiators where he argues new meaning is made[199].

Other areas of the literature have considered a processual approach to the analysis of negotiation that focuses on identifying stages and phases that negotiators move through from the beginning to the end of a negotiation. This is in contrast to a behavioural analysis considered within the current study that focuses on the use of strategies and a characterisation of behavioural approaches used throughout the negotiation by individual negotiators[200]. Processual analysis is clearly of importance

[196] Putnam, L. L., (1994) 'Challenging the Assumptions of Traditional Approaches to Negotiation', 10 *Negotiation Journal* 337

[197] Fox, K. H., (2009) 'Negotiation as a Post-Modem Process', 31 *Hamline Journal of Public Law & Policy* 367

[198] Fox, K. H., (2009) 'Negotiation as a Post-Modem Process', 31 *Hamline Journal of Public Law & Policy* 367 at p379

[199] Fox, K. H., (2009) 'Negotiation as a Post-Modem Process', 31 *Hamline Journal of Public Law & Policy* 367 at p382

[200] See: Gulliver, P.H., (1979) 'Disputes and Negotiations: A cross cultural perspective', Academic Press; and De Girolamo, D., (2013) 'The Negotiation Process: Exploring Negotiator Moves Through a Processual Framework' 28(2) O*hio State Journal on Dispute Resolution* 353.

in the development of an understanding of the negotiation process and there is an identifiable need to bringing these two areas of negotiation theory and analysis together in future studies in an attempt to determine whether different negotiation behavioural approaches are associated with any of the different phases of negotiation identified and described within the processual literature.

2.10 From framework to context

When considering the development of negotiation theory over the proceeding twenty years, Menkel-Meadows wrote in her 2001 paper:

'*If we have learned anything in the last twenty years, it is that negotiations are conducted in contexts, with different subject matters, parties, bargaining endowments, relationships, goals, purposes, and histories.*'[201]

She goes on to write:

'*if context is not all, it is at least extremely important in conceptualizing what we do and why we do what we do in negotiation.*'[202]

In his review of the 263 articles published between 1996 and 2005 with the word 'negotiate' in the title, Agndal categorised negotiation research into a number of contexts: medium of negotiation, negotiation setting, time, negotiation issue(s), cultural context, the parties, organisational variables, individual variables, variables relating to the relationship, the negotiation process, steps in the process, preparations, information sharing and communication, making offers, tactics, negotiation behaviours, negotiation outcomes, definitions of outcomes[203].

[201] Menkel-Meadow, C., (2001) 'Negotiating with lawyers, men and things: The contextual approach still matters'. *Negotiation Journal* 17(3): 257–93 at p258

[202] Menkel-Meadow, C., (2001) 'Negotiating with lawyers, men and things: The contextual approach still matters'. *Negotiation Journal* 17(3): 257–93 at p159

[203] Agndal, H., (2007) 'Current trends in business negotiation research: An overview of articles published 1996-2005', SSE/EFI Working Paper Series in Business Administration, No 2007:003 February available at: http://swoba.hhs.se/hastba/papers/hastba2007_003.pdf (last visited 26.5.2015)

Menkel-Meadow herself had initially provided twelve contextual factors (subject matter, content of the issue, relationship of the parties, what's at stake, power, visibility of negotiation, accountability, voluntariness, personal characteristics of the negotiator, negotiating medium, routines of the negotiation and alternatives to negotiation) which she argued would impact both on the negotiators' initial process orientation and then the strategies that they would employ to achieve their outcome goals[204]. She suggested later the further factors of: number of parties, culture, history, timing or outcome sought and referred to additional factors such as mood or emotional state, the influence of regular or legal endowments, cognitive or psychological biases, third party intervention, and organisational setup suggested by other authors[205].

Menkel-Meadows goes on to argue that it is virtually impossible to study these contextual variables in isolation and suggests it is therefore valid to '*examine a few particular negotiation contexts more deeply to assist us in the development of more nuanced and accurate pictures of negotiation in particular settings.*'[206]

According to this analysis, the consideration of how lawyers' negotiation could validly be viewed simply as a bundle of contextual negotiation factors present within the particular practical context found within the legal profession. There are those, however, that might argue that negotiation within the legal profession is more than simple context, and that it amounts to what is actually a distinct legal bargaining theory.

[204] Menkel-Meadow, C., (1983) 'Legal negotiation: A study of strategies in search of a theory'. *American Bar Foundation Research Journal:* 905-937

[205] Menkel-Meadow, C., (2001) 'Negotiating with lawyers, men and things: The contextual approach still matters'. *Negotiation Journal* 17(3): 257–93 at p260

[206] Menkel-Meadow, C., (2001) 'Negotiating with lawyers, men and things: The contextual approach still matters'. *Negotiation Journal* 17(3): 257–93 at p260

Chapter 3 - Towards a theory of legal negotiation

3.1 'Negotiation is at the heart of what lawyers do'[207]

In 1982 Lowenthal argued that it was important for society that legal scholars study negotiation so rules can be developed to regulate the conduct of negotiators[208]. It can also be argued that it is important for society that lawyers negotiate effectively (although there are clearly problems in defining what is meant by 'effective', something that the researchers in this area have wrestled with and is central to this thesis study). In order to achieve these goals it is necessary to understand more about how the legal profession actually negotiates.

Although a significant proportion of the development of the overall theory of negotiation discussed in Chapter 2 has taken place within the broader legal negotiation context, it is important to focus more specifically on 'legal negotiation', defined in Chapter 1 as a negotiation '*in which the participation of lawyers is ubiquitous*'[209].

This then leads to the central question implicit in the theme of this chapter: Is there a distinct legal negotiation theory and framework developed from its own body of literature and research?

In the period between 1994 and 2004 one study found there were 211 articles identified with the word 'negotiation' in the title in a Lexis/Nexis search of law reviews and legal journals. In the ten years before 1994 the same study found only 70 articles were identified[210]. This would suggest that the amount of legal literature

[207] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p17

[208] Lowenthal, G. T., (1982) 'General Theory Of Negotiation Process, Strategy, and Behaviour', 31 *University of Kansas Law Review* 69 at p71 &p72

[209] Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323 at p1337

[210] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p.152

involving some aspect of negotiation has increased significantly over the period of the study. A Hine-on-line search of law journals conducted for the purpose of the current study identified 233 articles with the word 'negotiation' in the title in the ten years between 1994 and 2003, and in the ten years before 1994, 146 articles were identified. In the 10 years between 2004 and 2013 a total of 312 were identified[211]. This lends some support Hollander-Blumoff findings that there has been a significant increase in the number of negotiation article in the legal literature over the last 30 years and that the increase is continuing.

Menkel-Meadow, having in an earlier work described negotiation as a study of '*strategies in search of a theory*'[212], has more recently argued that '*scholars and practitioners who write about negotiation theory and practice are usually situated in some negotiation environment (even if only in a university disciplinary department) that sets a context, or setting, for theory development, research priorities, or practice problems*.' She concludes '*As we take learning in the field seriously, we are beginning to be more sophisticated about how different conditions, structures and contexts have shaped our initial theories and how our theories and our strategies must be context-dependent*.'[213]

From the distinct legal negotiation theory perspective, Menkel-Meadow's view supports an argument that there is perhaps no distinct theory of legal negotiation but rather that legal negotiation should be understood as a distinct negotiation context that has given rise to a specific body of literature[214].

Although this chapter essentially considers how the negotiation behavioural literature has developed specifically in the context of legal negotiation, an

[211] Search carried out on the 20th March 2015

[212] Menkel-Meadow, C., (1983) 'Legal negotiation: A study of strategies in search of a theory'. *American Bar Foundation Research Journal:* 905-937 at p.910

[213] Menkel-Meadow, C., (2001) 'Negotiating with lawyers, men and things: The contextual approach still matters'. *Negotiation Journal* 17(3): 257–93 at p258

[214] Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323 at p1337

underlying theme of this chapter will also be whether there is a distinct theory of legal negotiation.

Menkel-Meadows proposes a constructive model for negotiation in a legal context that develops a problem-solving framework at the expense of the adversarial model and is essentially polarised in its approach. She correlates a negotiator's orientation (problems-solving or adversarial) directly to the results achieved through an '*orientation ➔ mind-set ➔ behaviour ➔ results' relationship'* [215] and she contends that the main criterion for evaluating a negotiation model is the quality of the solution produced[216]. The author produces a list of eight criteria that she uses to measure quality, all of which appear to have a distinctly collaborative predisposition, and seven of which she describes as having a 'utilitarian' justification[217].

On that basis it is perhaps not surprising that, after she has arguably in effect pre-assigned negative attributes to adversarial behaviour, she argues that an adversarial orientation leads to poorer quality outcomes than the quality of problem-solving outcomes[218]. She does acknowledge that '*Empirical studies of the effectiveness of cooperative versus competitive behaviors, however, are more complex and as yet inconclusive, both in legal negotiation and in more general negotiations studied by*

[215] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p760

[216] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p760

[217] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p760 - 761

[218] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p794

social psychologists'[219] and acknowledges a number of the limits of a problem-solving model of negotiation[220]

She concludes: '*By viewing legal negotiation as an opportunity to solve both the individual needs and problems of their clients, and the broader social needs and problems of the legal system, negotiators have an opportunity to transform an intimidating, mystifying process into one which will better serve the needs of those who require it. Whether or not this will work, we don't yet know. But what can we lose by trying?'*[221].

3.2 A communitarian approach to legal negotiation

Menkel-Meadow's approach is at the heart of what is known as a communitarian approach to legal negotiation. Condlin described the communitarian approach to negotiation as:

'A communitarian approach to bargaining is characterized principally by a commitment to resolving disputes from the perspective of what is good for the social group, on the basis of consensus norms, rather than from the perspective of what is good for the individual bargainer, on the basis of rights claims[222]*'.*

Menkel-Meadow argues that the most important properties of communitarian bargaining are '*the focus on joint or mutual, rather than individual gain'*[223].

[219] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p827

[220] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p829-839

[221] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p842

[222] Condlin R. J., (2008) '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', 9 *Cardozo Journal of Conflict Resolution*. 1 at note 3 on p2.

[223] Menkel-Meadow, C., (2006) 'Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections'. *Negotiation Journal,* Volume 22, Issue 4, 485–503 at p491

The communitarian approach evolved within specific areas of the legal profession into a movement call 'Collaborative Lawyering' which is understood to have originated in 1988 by a family lawyer called Stuart Webb who practiced in Minneapolis and who developed a legal negotiation model called 'Collaborative Family Law'[224].

Collaborative Lawyering requires the lawyers involved on both (or all) sides of a dispute to enter into a contractual agreement whereby they commit to withdrawing from acting for their respective clients should they fail to reach agreement and need to proceed to litigation. It also incorporates a strong commitment by all those involved (lawyers and clients) to full disclosure, cooperation and the pursuit of a consensual outcome[225]. Schwab describes the central tenants of collaborative lawyering as:

- *A commitment to good faith negotiations focused on settlement, without court intervention or even the threats of litigation in which the parties assume the highest fiduciary duties to one another;*
- *Full, honest and open disclosure of all potentially relevant information whether the other side requests it or not, and,*
- *If either party decides to litigate, both lawyers are automatically terminated from the case requiring the parties to seek new litigation counsel*[226].

Condlin[227] strongly challenges the evidence on which communitarian bargaining theory is based suggesting that it is biased, based on idealised scenarios and does

[224] See: Schwab, W. H., (2004) 'Collaborative Lawyering: A closer look at an emerging practice'. 4 *Pepperdine Dispute Resolution Law Journal*, 351

[225] See: Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015)

[226] Schwab, W. H., (2004) 'Collaborative Lawyering: A closer look at an emerging practice'. 4 *Pepperdine Dispute Resolution Law Journal*, 351, at p358

[227] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231

not reflect what happens in practice. He also argues that the communitarian movement has only been successful in advancing its argument against adversarial behaviour by using effectively highly adversarial practices to win the argument[228]. He concludes that the existing prevalent communitarian theory of bargaining is not a complete theory and does not represent what we know happens in practice and he advocates that a new hybrid theory is required[229].

Although collaborative lawyering has been criticised, it is arguable that the development and successful introduction of 'Collaborative Family Law' across a number of jurisdictions represents one of the most innovative and radical changes to practical legal negotiation to have taken place in the last fifty years. It is an approach that clearly has its strong supporters both within sections of the legal profession and the clients they serve.

3.3 Arguing for a specific legal negotiation framework

Some authors have sought to analyse legal negotiation from the perspective of a specific legal negotiation framework. Gifford[230] argues that models that represent the negotiation process and client counselling functions as separate fail to take account the reality of how much they are interdependent. He therefore proposed an integrated framework recognising both the cyclical nature of the counselling function and negotiation process, and the relationship between the two that he described as being symbiotic[231]. This integrated framework essentially attempts to deal with the various agency problems encountered in the lawyer-client

[228] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231at p298

[229] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231at p299

[230] Gifford, D. G., (1987) 'Synthesis Of Legal Counseling And Negotiation Models: Preserving Client-Centered Advocacy In The Negotiation Context'. *UCLA Law Review*, 34: 811-862

[231] Gifford, D. G., (1987) 'Synthesis Of Legal Counseling And Negotiation Models: Preserving Client-Centered Advocacy In The Negotiation Context'. *UCLA Law Review*, 34: 811-862at p829

relationship by offering prescriptive advice to the lawyer to deal with the issues that arise. Druckman[232] also considers the agency issue through his bi-directional model of bargaining that recognises the position of the lawyer between the client and the other negotiating party. However, both approaches offered by Gifford and Druckman still appear to have their foundation in the more conventional framework of integrative and distributive negotiation.

Gilson and Mnookin consider the fact that litigation is carried out by agents to be the legal systems central institutional characteristic, which they argue must be incorporated into any meaningful litigation settlement model[233]. Rather than increase tension and escalate conflict between the parties, the authors offer a conceptual foundation based on the idea that legal representatives can promote client cooperation in circumstances where they could not do so on their own[234].

In the context of agent client relationships, it is relevant to mention a section of the literature on professionalism which takes a social constructivist view of lawyers as agents and provides the basis for an analysis of the relationship between client and lawyer specifically relating to the concept of managing client expectations[235], something that considered in later in Chapter 8 of this thesis.

Kritzer, after analysing data collected from interviewing a random selection of litigation lawyers from five federal judicial districts in the US, outlines three broad patterns of negotiation: 'maximal-result, concessions-orientated' (MRCO), 'appropriate-result, consensus-oriented' (ARCO), and 'pro forma' negotiation[236].

[232] Druckman, D., (1977) 'Boundary Role Conflict: Negotiation as Dual Responsiveness', 21 *Journal of Conflict Resolution*, 639

[233] Gilson, R. J., & Mnookin R. H., (1995) 'Disputing through agents: Cooperation and conflict between lawyers in litigation'. *Columbia Law Review* 94(2): 509–566 at p510

[234] Gilson, R. J., & Mnookin, R. H., (1995) 'Disputing through agents: Cooperation and conflict between lawyers in litigation'. *Columbia Law Review* 94(2): 509–566 at p 512

[235] Nelson, R. L., Trubek, D.M., & Solomon, R.L., (1992) 'Lawyers' ideals and lawyers' practices', Cornell University Press

[236] Kritzer, H. M., (1991) 'Let's Make A Deal: Understanding the Negotiation Process in Ordinary Litigation', Madison: University of Wisconsin Press at p118-127

MRCO is characterised as a positional competitive type of behaviour designed to extricate the greatest concessions from your opponent[237]. ARCO negotiation is characterised as being similar to problem-solving negotiation encompassing an appraisal of the facts to decide the appropriate result with reference to the relevant legal norms[238]. Kritzer's study indicated that between 52% and 69% of cases could be characterised as using an ARCO approach, and between 13% and 32% could be characterised as using a MRCO approach[239]. However, Lande argues that ARCO negotiation should not be characterised as a true problem-solving type of negotiation behaviour because it does not seek to uncover underlying interests but rather attempts to anticipate the likely court outcome with reference to legal norms[240]. He states that:

'Although lawyers using an ARCO approach try to be cooperative, that does not necessarily involve an explicit and systematic analysis of parties' interests and options, the hallmarks of true interest-based negotiation'[241].

He goes on to argue that if ARCO behaviour is used in a substantial amount of real-life negotiations between lawyers, it should be described more accurately as 'ordinary legal negotiation' (OLN). He characterises this type of behaviour as being '*distinct from both power-oriented positional and interest-oriented negotiation models'* due to its '*primary orientation to legal norms*'[242].

[237] Kritzer, H. M., (1991) 'Let's Make A Deal: Understanding the Negotiation Process in Ordinary Litigation', Madison: University of Wisconsin Press at p118-119

[238] Kritzer, H. M., (1991) 'Let's Make A Deal: Understanding the Negotiation Process in Ordinary Litigation', Madison: University of Wisconsin Press at p120

[239] Kritzer, H. M., (1991) 'Let's Make A Deal: Understanding the Negotiation Process in Ordinary Litigation', Madison: University of Wisconsin Press at p122. The study did not report on the 'pro forma' results.

[240] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p116

[241] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 p117

[242] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 p118

Korobkin argues that his 'Positive Theory of Legal Negotiation' moves past the two conventional dichotomies of Competitive/Cooperative styles, and of Distributive/Integrative negotiation approaches[243]. He considers that the latter dichotomy is more useful because it describes 'goals' rather than simply 'behaviour' described by the former. However, Korobkin is critical of the distinction between integrative and distributive bargaining because he considers that both approaches 'create value' since both parties in both types of outcomes are better off than they would be had no agreement been reached. He goes on to say that even if it can be argued that integrative outcomes are more 'efficient', very often they are simply the product of two simultaneous 'distributive' trades. Finally, he argues that in any event, the scope for true integrative outcomes in legal negotiations is limited because the focus is often well defined and primarily involves money.

Korobkin argues that his new 'zone definition/surplus allocation' dichotomy produces a well-defined theoretical structure that can be used to evaluate and understanding the legal negotiation landscape by providing an understanding of the two key strategic negotiation imperatives[244]. The first of these he describes as the attempt to define the 'bargaining zone', the gap between the parties' reserve points ('zone definition'). The second strategic imperative is to agree a single 'deal point' within the bargaining zone ('surplus allocation'). Although this 'new' dichotomy appears to be a restatement of a well understood purely distributive strategic imperative, Korobkin argues that it fits within and adds to the existing two conventional dichotomies and that, although it is not a new way to negotiate, he argues it is a new way to think about negotiating[245].

[243] Korobkin, R., (2000) 'A Positive Theory of Legal Negotiation'. *Georgetown Law Journal,* 88: 1789-1831

[244] Korobkin, R., (2000) 'A Positive Theory of Legal Negotiation'. *Georgetown Law Journal,* 88: 1789-1831 at p1791

[245] Korobkin, R., (2000) 'A Positive Theory of Legal Negotiation'. *Georgetown Law Journal,* 88: 1789-1831 at p1792

Other authors have sought to develop very targeted negotiation frameworks and models that are applicable only to very specific legal contexts[246]. Other disciplines, particularly the social sciences[247] and psychology, have also been influential in the way we think about legal negotiation[248].

Condlin, in a more recent paper[249], sees the evolution of modern legal negotiation theory (which he labels in all its forms as 'New Legal Bargaining Theory' – NLBT) away from conventional models of adversarial legal dispute bargaining, now seen as unfit for purpose, as having resulted in the devaluing and indeed the extensive denigration of traditional legal argument on the merits of a particular case. He argues that this appears to stem from the move to focus negotiation towards areas of potential agreement and avoid conflict rather than to argue, debate and persuade in an intelligent, open-minded, respectful and fair manner[250]. Condlin maintains that the process of argument should be '*a learning experience, expanding perspectives, provoking insights and generating ideas for dissolving differences*[251]'.

In making his argument Condlin produces his own categorisation of NLBT as he interprets it. He labels six subsets of NLBT which are summarised below[252]:

[246] Golden, J., Moy, H. A., & Lyons, A., (2008) 'The Negotiation Counsel Model: An Empathetic Model for Settling Catastrophic Personal Injury Cases'. 13 *Harvard Negotiation Law Rev*. 211

[247] For example see: Johnston, J. S., (2006) 'The Return Of Bargain: An Economic Theory Of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses And Consumers'. 104 *Michigan Law Review* 857

[248] For example see: Johnston, J. S., (2006) 'The Return Of Bargain: An Economic Theory Of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses And Consumers'. 104 *Michigan Law Review* 857; and Cialdini, R. B., (1993) 'Influence: The Psychology of Persuasion', Collins; Revised Edition

[249] Condlin, R. J., (2012) 'Bargaining Without Law' 56 *New York Law School Law Review* 281

[250] Condlin, R. J. (2012) 'Bargaining Without Law' 56 *New York Law School Law Review* 281 at p290

[251] Condlin, R. J. (2012) 'Bargaining Without Law' 56 *New York Law School Law Review* 281 at p290-291

[252] Condlin, R. J. (2012) 'Bargaining Without Law' 56 *New York Law School Law Review* 281 at p291-293

1. *The Cordiality View* – focuses on being nice and friendly, disclose information voluntarily, and making reasonable demands. Relies on reciprocity norms to engender the same behaviour in the other party.

2. *The Problem Solving View* – approaches negotiation as a problem solving exercise and values group interests over self-interest and long-term goals over short-term satisfaction. Looks to brainstorming to create mutual gains for both parties.

3. *The Principled (or Soft Adversarial) View* – accepts much of the problem solving approach but also understands that value needs to be divided and offers ways of approaching this using non adversarial techniques.

4. *The Behavioural Economics View* – sees negotiation as a psychological process and sees the leveraging and exploiting of tactic heuristics and biases used unconsciously by opponents as the main focus of negotiation rather than the use of substantive argument.

5. *The Instant Messaging View* – eliminates face-to-face contact and reduces the negotiation process to a series of demands, offers and proposals without the opportunity to explain or defend positions taken.

6. *Residuary Views* – a mix of techniques described as '*parlor trick'* methods for settling disputes which Condlin argues have little in common with each other and are characterised as including '*fair division algorithms, parables, fables, folkloric rules of thumb, mood altering techniques, and the like*'[253].

Condlin argues that NLBT, in all it semblances, has at its core a shared understanding of legal dispute negotiation as '*principally a psychological and social phenomenon rather than a legal one*'[254]. Condlin argues that the central place for legal argument must be reincorporated into legal negotiation models with negotiation academics showing how legal claims can be successfully argued to a self-interested conclusion without generating prolonged hostility, provoking

[253] Condlin, R. J. (2012) 'Bargaining Without Law' 56 *New York Law School Law Review* 281 at p293
[254] Condlin, R. J. (2012) 'Bargaining Without Law' 56 *New York Law School Law Review* 281 at p294

retaliation and at the same time protecting relationships[255]. He argues that lawyers will continue to argue about the legal merits of the claims they are tasked to settle since they have no other choice. The challenge for legal negotiation scholars and researchers, as he sees it, is to incorporate this reality into new, more relevant, legal bargaining theories and frameworks[256].

Condlin's recent work arguably represents a noteworthy departure in a section of the legal negotiation literature away from a focus on the refinement of the behavioural model that has essentially evolved from the early work by Walton & McKersie[257], towards a focus on legal norms and the primacy of legal debate within legal negotiations and the rules that govern how that debate process should be effectively conducted. Condlin's approach moves towards a view of legal negotiation as a process for determining which party has the stronger legal arguments, rather than a process that focus on bridging gaps between parties that fundamentally disagree.

3.4 Significant empirical legal negotiation research

Traditionally, according to Hollander-Blumoff, academic research emanating from law schools and legal academics has been based on a review of emerging case law, library materials, statutory codes, administrative regulations and articles written by other legal academics[258]. She considers that the product of this work more often than not takes the form of an analysis of the law that supports the author's theoretical vision of a legal issue to readers without the need for the collection of empirical data (Hollander-Blumoff labels these 'prototypical' law review articles)[259].

[255] Condlin, R. J. (2012) 'Bargaining Without Law' 56 *New York Law School Law Review* 281 at p282

[256] Condlin, R. J. (2012) 'Bargaining Without Law' 56 *New York Law School Law Review* 281 at p328

[257] Walton, R. E., & McKersie, R. B., (1965) 'A behavioural theory of labor relations'. New York: McGraw-Hill

[258] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p150

[259] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p150. The author defines in Note (1) empirical work as that involving a systematic collection and analysis of data using social science methodology.

Hollander-Blumoff goes on to describe the initial emergence of a small minority of legal articles publishing legal research that used empirical data generated from the social sciences, which is then incorporated into conventional legal literature to make it more persuasive[260]. This has led more recently to the increased collection and inclusion of primary data by the legal researchers themselves[261]. She argues that this predisposition towards normative theoretical analysis over empirical research leading to the minor role for the use of empirical studies in the legal literature represents a difficult challenge to those legal researchers who want to study negotiation[262].

Legal academics have argued that any meaningful consideration of legal negotiation has to be done in a defined context to be of benefit[263]. The focus of Neumann and Krieger's 2003 article on the importance of the development of valid empirical research in the field of law and its practice essentially makes the point that to be scientifically and empirically sound, legal research must be context specific otherwise it runs the risk of introducing too may unaccounted for variables and therefore being empirically meaningless[264].

Arguably one of the most interesting empirical studies conducted out in the field was undertaken by Neil Rackham and John Carlisle in the UK, published in 1978[265]. The study looked at the negotiating behaviour of various preselected effective

[260] As an example of this approach see: Birke, R., & Fox, C. R., (1999). 'Psychological principles in negotiating civil settlements.' *Harvard Negotiation Law Review* 4: 1-57

[261] Hollander-Blumoff, R. (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p.151

[262] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p.152

[263] Neumann, R., & Krieger, S., (2003) 'Empirical inquiry twenty-five years after the lawyering process.' *Clinical Law Review*, 10: 349-397

[264] Neumann, R., & Krieger, S., (2003) 'Empirical inquiry twenty-five years after the lawyering process.' *Clinical Law Review*, 10: 349-397 at p 374

[265] Rackham, N., & Carlisle, J., (1978) 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Issue 6: 6 – 11

negotiators. The authors reported difficulty in deciding how to define skilled negotiators but settled on three requirements:

1. *They should be rated as effective by both sides.*
2. *They should have a track record of significant success.*
3. *They should have a low incidence on implementation failures*[266].

They studied a total of 49 preselected skilled negotiators over 103 separate negotiating sessions and compared the results with a control group. When compared with the control group, expert negotiators were shown to ask twice as many questions [267] , spent twice as much time summarising to confirm understanding[268], talked more about how they felt[269], made half as many counter-proposals[270], used fewer arguments to support their own position[271] and made six times less 'irritating statements'[272]. Although the study did not involve lawyers (the subject group was predominantly Union Representatives, Managements Representatives and Contract Negotiators), it is important to consider it in the context of all commercial negotiations because it is one of only a very few studies that have involved the observation of live negotiations, something that is extremely difficult for researchers to do.

[266] Rackham, N., & Carlisle, J., (1978) 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Issue 6: 6 – 11 p6

[267] Rackham, N., & Carlisle, J., (1978) 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Issue 6: 6 – 11 p9

[268] Rackham, N., & Carlisle, J., (1978) 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Issue 6: 6 – 11 p9

[269] Rackham, N., & Carlisle, J., (1978) 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Issue 6: 6 – 11 p11

[270] Rackham, N., & Carlisle, J., (1978) 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Issue 6: 6 – 11 p7

[271] Rackham, N., & Carlisle, J., (1978) 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Issue 6: 6 – 11 p6

[272] Rackham, N., & Carlisle, J., (1978) 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Issue 6: 6 – 11 p7

Although there were earlier studies that specifically looked into various aspects of legal negotiation[273], is was arguably not until the work by Gerald Williams and his colleagues at Brigham Young University[274] in the 1970's and early 1980's that the social-scientific empirical research into negotiation by lawyers began. The Williams study has been authoritively described as the most frequently cited and well known empirical study into the negotiation behaviour of lawyers[275].

Williams' work centred on a study of practising lawyers carried out in 1976 in the Phoenix area of the USA. The underlying premise for Williams' work was that '*negotiation is the principal occupation of the lawyer*'[276] and we should therefore understand how they perform the task in order to develop ways of teaching them to do it more effectively. In support of his assertion that lawyers spend much of their time negotiating, Williams refers to data form the US Courts the US District Courts in 1980 which states that only 6.5% of cases files reached trial with the remained being terminated before trial which, he concludes, are in most cases resolved through a negotiated agreement[277]. Williams goes on to conclude that in most US jurisdictions, less than 10% of all cases are resolved through the trial process[278]. In a later work he indicates that in 2006 only 2% of all cases filed in the US District Courts reached trial[279]. This is broadly supported by the finding of research carried out in Scotland looking at settlement rates for Personal Injury

[273] For example: White, J. J., (1967) 'The lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation. 19 *Journal of Legal Education*, 337. See also: Eisenberg, M. A., (1976) 'Private ordering through negotiation: dispute-settlement and rulemaking'. 89 *Harvard Law Review* 637-681 where the author considers the way 'principles, rules and precedents' function in private negotiations in the context of both resolving current disputes and policy development to govern future behaviour (at p637).

[274] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West

[275]Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at pp148-149

[276] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p1

[277] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p1 Note 2

[278] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p1

[279] Williams, G. R. & Craver C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p1

claims raised both in the Court of Session and Sheriff courts[280]. The study found that in 2001 86% of sheriff court actions and 89% of Court of Session were resolved through extra-judicial settlement[281]. Two other Scottish paper quote a settlement rate of 'some 95%'[282] and 'over 90%'[283] without any indication of where the figures are derived from. A study of personal injury actions raised in England published in 1984 estimated out of court settlement rate to be over 99%[284].

However, it should be noted that a more recent study of US cases found no support for settlement rates above 90% and indeed found much lower settlement rates of around two thirds (going back over 30 years), depending on the definition of settlement used. They also found that settlement rates varied depending on the class of case and that there was no evidence that settlement rates were increasing over time[285]. However, even the lower levels of settlement found by Eisenberg and Lanvers would still support the argument that settlement negotiation is very important for civil dispute lawyers, even if it is arguably not to the degree assumed by Williams.

Williams acknowledged that negotiation settings varied considerably and offered a rough classification dividing legal negotiation settings into four classifications: *transactions, civil disputes, criminal disputes and labor/management negotiations* [286] . Having made the distinctions and acknowledged that each

[280] Coope, S., & Morris, S., (2002) 'Personal Injury Litigation Negotiation and Settlement' HMSO, Edinburgh

[281] Coope, S., & Morris, S., (2002) 'Personal Injury Litigation Negotiation and Settlement' HMSO, Edinburgh at p35

[282] Main, B. G. M., & Park, A. (2002) 'The impact of defendant offers into court on negotiation in the shadow of the law: experimental evidence', *International Review of Law and Economics.* 22, 2, p. 177-192

[283] Main, B. G. M., & Park, A., (2000) 'The British and American Rules: an experimental examination of pre-trial bargaining in the shadow of the law'*, Scottish Journal of Political Economy*. 47, 1, p. 37-60

[284] Harris, D. R., Maclean, M., Genn, H., Lloyd-Bostock, S., Fenn, P., Corfield, P., & Brittan, Y., (1984) 'Compensation and Support for Illness and Injury', Oxford: Clarendon Press, at Chapter 3.

[285] Eisenberg, T., Lanvers, C., (2009) 'What is the Settlement Rate and Why Should We Care?' *Journal of Empirical Legal Studies,* Volume 6, Issue 1, 111-146

[286] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p2

classification has unique characteristics that should be taken into account, Williams then specified that for the purpose of his study he would assume a civil legal dispute setting since he considered that the information and principles he describes could be applied equally well to all four classifications[287].

The key tool used in the William study was a postal survey sent to around two thousand lawyers practising in Denver and Phoenix in the US. This asked them to characterise the negotiation style of the lawyer on the other side of their most recent negotiation. This was followed up using a series of one-hour interviews with forty-five of the original respondents which were transcribed and analysed. A small number of attorneys were also asked to keep an audio diary of the steps taken during a three-month period leading up to the trial of one of their cases. Finally, fourteen attorneys agreed to take part in paired simulated negotiations that were all also videotaped.

The research questions that Williams sought to answer were as follows[288]:

- *What are the characteristics of effective legal negotiators?*
- *Are there identifiable patters to their negotiating behaviour?*
- *What strategies do lawyers most commonly use?*
- *What objectives do lawyers have in mind when they negotiate?*
- *What attitudes do they display?*
- *What combinations of traits are found in the most effective (and most ineffective) negotiators?*
- *What are their strong points, and what are their weak points?*

Williams indicated that the survey results were the most useful of the study[289]. He argued that the results provided evidence that lawyers largely used two styles of

[287] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p5. See: Hollander-Blumoff, R., (2010) 'Just Negotiation', 88 *Washington University Law Review*. 381 at p385 Note 9 where the author describes the differences between "dispute resolution" and "transactional negotiation".

[288] Williams, G. R. & Craver C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p13 & p14

negotiation, which he characterised as 'competitive' and 'cooperative'. His study provided evidence that the lawyers in his sample group perceived approximately two thirds of the lawyers on the other side of their negotiations to be 'cooperative' with one third 'competitive'. The study also found that although both styles could be effective, there were substantially more effective lawyers of the cooperative type than of the competitive type[290].

The methodology of the Williams study has been criticised by various authors. Menkel-Meadow criticises it for adopting a polarised approach to categorising individuals as either competitive or cooperative and failing to take into account either a mixed of styles or the presence of a continuum[291]. Gifford[292] criticises Williams for failing to adequately distinguishing the difference between negotiation strategies and the personal negotiation style of the individual and for using the same terms (cooperative and competitive) to describe both style and strategy. The author describes negotiation strategy as follows:

'*A strategy is the negotiator's planned and systematic attempt to move the negotiation process toward a resolution favorable to his client's interests. Negotiation strategy consists of the decisions made regarding the opening bid and the subsequent modifications of proposals*'[293].

Condlin criticises Williams for not validating with evidence from the study his assertion that stalemate happens more often when negotiators are not nice to each other and that such behaviour will result in reputational damage that will have an

[289] Williams, G. R., & Craver, C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p14

[290] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p41.

[291] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p759 at Note 10

[292] Gifford, D. G., (1985) 'A Context-Based Theory of Strategy Selection in Legal Negotiation', 46 *Ohio State Law Journal* 41

[293] Gifford, D. G., (1985) 'A Context-Based Theory of Strategy Selection in Legal Negotiation', 46 *Ohio State Law Journal* 41 at p47

effect on future settlement of disputes[294]. He criticises Williams for not offering the recipients of the survey a definition of effective bargaining or even a list of specific virtues they should have considered when making the assessment[295], a defect that he considers to be '*fatal*' since, he argues, you cannot know what the recipients believed they were being asked[296]. Condlin further criticises Williams for not making the distinction between stylistic or substantive behaviour when his respondents were asked to comment on their opponent's behaviour. This in effect distinguishes what they said from how they said it, which Condlin argues is of vital importance in understanding what behaviour is actually being exhibited by those being studied[297]. The final problem that Condlin identifies with the study is that he asks his respondents to both classify their negotiation partner's behaviour and then to rate it as effective or not. This combines the duty of collecting the data with the duty of evaluating it, which he argues inevitably leads to the perception that 'successful' negotiations were the result of cooperative behaviour[298].

Condlin's criticism relating to what the respondents had assumed by 'effective' was an elaboration of an earlier criticism of the study made by Wheeler who wrote *'These cross-tabulations between negotiation behavior and negotiation effectiveness are the most intriguing yet least conclusive aspects of Williams's*

[294] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p278 Note 194

[295] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p279

[296] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p280

[297] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p280 - 281

[298] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p281

research because they rest on a rather incomplete view of what constitutes effectiveness'[299].

In 1997 Heumann and Hyman published their empirical study of non-matrimonial civil litigation settlements methods in New Jersey[300]. Their research methodology consisted of a self-assessed survey sent to litigation lawyers and sitting judges, open-ended interviews with seventy-eight litigation lawyers and finally observations of seventy-one settlement conferences using either judges or other lawyers acting as settlement facilitators[301]. The survey suggested that litigators were unhappy with both the timing of settlements (79% dissatisfied) and the style of negotiation used achieve settlement. 71% of respondents reported that 'positional' negotiation was used during the whole or almost the whole process whilst around 15% of the respondents reported that problem-solving behaviour was used the whole or almost whole process. The authors argued that one of the most interesting aspect of their study was a finding that the majority of litigators felt they lacked control and wanted to use a problem-solving approach more often (61%)[302]. They provided their respondents with the following definitions of negotiation behaviour:

Positional – *'the negotiators stake out bargaining positions. Negotiation consists of one or more moves and counter moves in which the parties may grant concessions*

[299] Wheeler, M., (1984) 'The Theory and Practice of Negotiation' 34 *Journal of Legal Education* 327 at p332

[300] Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310

[301] Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310 at p259

[302] Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310at p255

to the other party, and seek agreement by the reciprocal exchange of positions until agreement is reached or the matter is resolved in some other way'[303].

Problem-solving – *'is characterized by the mutual discussion of the underlying needs and interests of each side. Agreement results not as much from an exchange of concessions as from new proposals that both parties think meet their needs. These proposals can involve the exchange of goods or services in addition to, or instead of money, or tailor the terms and conditions of monetary payments to the unique needs of the parties'*[304].

On the basis of their finding, the authors went on to consider why lawyers would use negotiation methods that the majority of them indicated that they would rather not use. The study concludes that the reason for this is most likely due to a mixture of the following factors: the litigators' force of habit[305], a limited vocabulary of negotiation and constraints on the time and expense necessary to change established practice[306].

Lande argues that, although the self-reported survey data from the Heumann and Hyman study provided evidence that lawyers negotiated settlements used some interest-based problem solving behaviour in up to 33% of the time, the evidence

[303] Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310 at p254

[304] Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310 at p255

[305] Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310 at p259

[306] Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310 at p284

from the interviews or observed settlement conferences conducted in the study suggested that such behaviour was used rarely[307].

In the context of the criticisms of the Williams study it is relevant to note that Heumann and Hyman's study was again centred on how negotiators value process rather than any objective assessment of what type of behaviour was actually more effective. However, the authors did acknowledge this and indicated that they would be very interested in attempting to design a future study that could help develop understanding about what litigators mean by effectiveness in negotiation[308].

More recently Schneider has updated the Williams study surveying lawyers based in Milwaukee and Chicago[309]. She found that 36% could be characterised as competitive/adversarial and 64% as cooperative/problem-solvers[310]. Of the competitive/adversarials, only 9% were considered effective negotiators. However, 54% of the cooperative/problem-solvers were considered effective[311].

Schneider adapted the original Williams survey methodology in a number of ways. Firstly, she added new adjectives, bipolar pairs and goals that she considered more accurately reflected the current theoretical thinking in negotiation. This included changing the description of the two main styles from 'competitive' and 'cooperative' used in the original study to 'problem-solving' and 'adversarial'. In her analysis she refines these distinction to include the sub categories of 'true problem solving', 'cautious problem-solving', 'ethical adversarial', and 'unethical

[307] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p114

[308] Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310 at p279 Note 24

[309] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143

[310] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 163

[311] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 167 & p189

adversarial'[312]. Secondly, in order to attempt to control for respondents positively assessing those who had a similar negotiating style to themselves, she included a self-evaluation section[313]. Thirdly, she measured the respondent's exposure to ADR (Alternative Dispute Resolution) and the extent of their negotiation training to help to better understand their perspectives[314]. Finally, she removed any questions in the original study that did not feature in the final analysis[315].

Schneider considers her own study to have had three main weaknesses. Firstly, response is voluntary and therefore her respondents are self-selecting. This means it is not possible to know whether the ones that chose to reply are truly representative of attorneys in the survey area[316]. Secondly, the data collected relies on perception of behaviour rather than actual behaviour itself[317]. Finally, she also acknowledges the lack of a definition of 'effective' behaviour[318]. However, she concludes that perception of behaviour is still valuable and is an important measure of what actually happens in negotiation. She argues it is the closest we can get to objective conclusions about effective negotiation behaviour in lawyers[319].

Condlin, however, is highly critical of the methodology used by Schneider. He objects to the title of her study arguing that it is not an empirical study of effective

[312] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p143, p171, p179-181.

[313] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 152

[314] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 152-153

[315] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 153

[316] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 190

[317] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 192

[318] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 195

[319] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 196

negotiation style but rather of lawyers' perception of effectiveness[320]. Like the Williams study, he is critical of Schneider for not providing any further enlightenment as to the nature of 'effective negotiation'. He charges her with being partial when she assigns adversarial behaviour negative characteristics and describes it as unethical, and cooperative practices as possessing positive attributes and describes it as ethical and is critical of her for providing no insight into what she means by 'ethical' or 'unethical'[321].

He finds '*inexplicable*' Schneider's assertion that those lawyers who use the distributive strategies of making high opening demands and try to maximise objective outcomes are guilty of putting their own interests above those of their client[322]. In general terms, Condlin accuses Schneider of confusing and indeed associating aspects of adversarial style with ineffective negotiating behaviour, which he implicitly associates with her personal collaborative law sympathies[323].

He is also critical of Schneider for not clearing up the difficulties in understanding the Williams study. Her attempt to correct for respondents valuing negotiating partners who matched their own particular behaviour by including a self-assessment is criticised on the basis that individuals are generally not good at

[320] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p282

[321] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p283-284

[322] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p284

[323] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p285

reporting on their own social experience[324]. He links these criticisms directly back to his fundamental criticism that the study contains '*no direct data on bargaining'*[325].

McFarlane published an empirical study of collaborative lawyering in 2005. It was based on 150 interviews with lawyers, clients and other collaborative professionals involved in 16 separate cases, all involved in Collaborative Family Law (CFL), based Canada and the US. Her study identifies both the successes and problems of CLF[326], suggesting that CLF produces results that are fair and satisfactory to the parties, reduces posturing and gamesmanship and fosters more constructive distributive behaviour when it does occur[327]. Her study also found that there was no evidence to suggest that parties with low negotiating power negotiated away their right to receive a value or benefit provided by law, and that it produced generally high levels of client satisfaction. However, she also found no evidence to support any assertion that the substance or quality of outcomes using collaborative methods was any better than those achieved using traditional methods[328]. McFarlane also accepts that the sample size of cases used in the study was small and more work is required to validate her '*tentative conclusions'* and in particular that the influence

[324] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p288. Condlin supports his assertion by citing: Diekman, K. A., Tenbrunsel, A. E., & Galinsky, A. D., (2003) 'From Self-Prediction to Self-Defeat: Behavioral Forecasting, Self-Fulfilling Prophecies and the Effect of Competitive Expectations', 85 *Journal of Personality & Social Psychology*. 672, 672-83

[325] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p289

[326] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015)

[327]Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) at p77

[328] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) at p57

of the disqualification agreements that prevent lawyers from taking the case to trial need to be considered in more depth[329].

Condlin describes the McFarlane study as notable amongst empirical studies of legal bargaining for '*its balance and even-handedness*'[330]. He attributes this to the more open-ended nature of questions used, leading to more widespread answers[331] coupled with the capacity of McFarlane to interpret the answers from the self-identified sample of 'collaborative lawyers' surveyed rather than just accepting them[332]. He appreciates that McFarlane, an enthusiast of collaborative lawyering, looks at both the pros and cons of collaborative lawyering and seeks to contemplate how communitarian and adversarial behaviours might be integrated to be more effective than when used in isolation[333].

3.5 A re-evaluation of the empirical research – exploring a hybrid approach

Building on the empirical research and with particular reference to the Williams and Schneider studies, Craver[334] has argued that the findings in these studies on closer analysis support the existence of a third, hybrid category of negotiator.

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[329] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) at p78

[330] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p289

[331] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p291

[332] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p292

[333] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p293

[334] See both: Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337 and Craver, C. B., (2011) 'The Inherent Tension Between Value Creation And Value Claiming During

He argues that rather than being restricted to a bipartite distinction between cooperative/problem-solvers who he considers to '*move psychologically towards their opponents and working to maximise joint gains* [335] *'*, and competitive/adversarials who '*move psychologically against their opponents, seek to maximise their own return*' [336] , there is a third option he describes as competitive/problem-solvers who work for '*maximization their own side's returns but work to accomplish this goal in a non-adversarial way'*[337]. He argues that this can be deduced from further evaluation of the primary objectives provided in both the Williams and Schneider studies[338] and that this conclusion is supported by Professor Williams[339]. Indeed Williams now goes as far as to speculate:

'If we could create a third category consisting of competitive/problem-solvers, *this group might encompass a substantial portion of the lawyers labelled effective cooperative/problem-solvers'.*[340]

In his analysis, Craver highlights[341] that both Williams and Schneider found that competent competitive/adversarial and cooperative/problem-solver negotiators are thoroughly prepared and are good readers of other people but also that effective negotiators from both clusters shared the desire to maximise their own side's returns. This is the attribute that almost by definition defines competitive negotiators, and yet Craver points out that it was also uncovered as the primary

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Bargaining Interactions', 12 *Cardozo Journal of Conflict Resolution* 1. The potential effectiveness of 'Competitive/Problem-solvers' is also discussed in Chapter 2 of: Craver, C. B., (2001) 'Effective legal negotiation and settlement'. Fourth Edition, LEXIS Pub.

[335] Craver, C. B., (2011) 'The Inherent Tension Between Value Creation And Value Claiming During Bargaining Interactions', 12 *Cardozo Journal of Conflict Resolution* 1 at p4

[336] Craver, C. B., (2011) 'The Inherent Tension Between Value Creation And Value Claiming During Bargaining Interactions', 12 *Cardozo Journal of Conflict Resolution* 1 at p4

[337] Craver, C. B. (2011) 'The Inherent Tension Between Value Creation And Value Claiming During Bargaining Interactions', 12 *Cardozo Journal of Conflict Resolution* 1 at p6

[338] Craver, C. B. (2011) 'The Inherent Tension Between Value Creation And Value Claiming During Bargaining Interactions', 12 *Cardozo Journal of Conflict Resolution* 1 at p6

[339] Williams, G. R. & Craver C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p64-65

[340] Williams, G. R., & Craver, C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p53

[341] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337

objective of effective competitive/adversarials[342].

Craver also highlights that lawyers portrayed by the studies as effective cooperative/problem-solvers specified that their second highest objective was the maximisation of their own side's returns[343]. This, Craver argues, supports his assertion that many effective negotiators who are considered to be cooperative/problem-solvers are '*wolves in sheep skins*'[344] and are actually the hybrid competitive/problem-solvers.

Craver goes on to describe competitive/problem-solvers as those who:

1. Understand that the win-lose style is often ineffective and that the loss of credibility that may result from manifest misrepresentations may harm negotiation effectiveness[345].

2. Recognise the importance of the their opponent feeling that the negotiation 'process' has been fair and that they have been treated with respect and professionalism[346].

3. Understand that negotiators who endeavour to progress their own interests are more likely to achieve jointly efficient results than negotiators who act purely cooperatively[347].

4. Recognise that other people work hardest to satisfy the needs of negotiation partners that they like personally[348].

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[342] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p23; Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p188.

[343] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p20; Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p188

[344] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337 at p 346

[345] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337at p 347

[346] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337 at p 347

[347] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337 at p 348

[348] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337at p 348

Craver concludes that competitive/problem-solvers seek to maximise client returns but seek to achieve this by using apparently cooperative/problem-solving behaviour which is why he is of the opinion that Williams and Schneider found far more effective cooperative/problem-solvers than competitive/adversarials in their respective studies. [349] In the work that Craver co-wrote with Williams, the authors indicate that they consider the competitive/problem-solving approach to be the most effective over the long run.

'We believe that attorneys should work diligently to advance the interests of their own clients, but should not allow this objective to negate other equally important considerations, such as behaving ethically and professionally and seeking fair settlements that maximise the joint returns achieved by both sides. Once negotiators obtain what they think is appropriate for their own clients, they should look for ways to accommodate the non-conflicting interests of their opponents[350]*.*

Craver's hybrid approach draws support from earlier work by Gifford who considered 'problem-solving' to be a distinct group, independent from the traditional 'cooperative' and 'competitive' classification[351]. Craver indicates that under Gifford's categorisation, his competitive/problem-solvers would fall within the 'problem-solving' group[352]. Craver also cites other earlier work by Freund, Kritzer and Woolf, all of which he argues lend support to the assertion that successful negotiators are able to utilise together the most pertinent behaviours of both the cooperative/problem-solving and the competitive/adversarial approaches[353].

[349] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337 at p 349

[350] Williams, G. R. & Craver C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p53

[351] Gifford, D. G., (1989) 'Legal Negotiation: Theory and Application'. St. Paul, Minnesota: West Publishing Co at p8-11

[352] Craver, C. B., (2001) 'Effective legal negotiation and settlement'. Fourth Edition, LEXIS Pub at p21

[353] Craver, C. B., (2001) 'Effective legal negotiation and settlement'. Fourth Edition, LEXIS Pub at p19 where he cites: Freund, J., (1992) 'Smart Negotiating', Simon & Schuster at p24-27; Kritzer, H., (1991)

Craver's hybrid approach receives some support from empirical research published in 2000, which provides some evidence that the opponents of the most effective negotiators considered their effective counterparts to have used cooperative characterised behaviours when the effective negotiators considered themselves to have used more competitive characterised behaviours[354].

Indeed there is also arguably support for at least some aspects of Craver's '*wolves in sheep skins'* argument found in one of the few published empirical legal negotiation studies to have been conducted in the UK. In her 1987 book '*Hard Bargaining; Out of Court Settlement in Personal Injury Actions'*[355], Hazel Genn reports on an in-depth follow up study she carried out following the results of an earlier broader study looking at Personal Injury settlements in England[356]. Genn's methodology involved in-depth interviews of 30 solicitors, 20 barristers and 12 insurance claims inspectors, followed by a postal survey questionnaire of 200 legal firms involved in personal injury work in England (she got 131 completed surveys back) and observation of a very limited number of face-to-face negotiations. The objectives of the study was to: '*describe the process of preparation and negotiation of a personal injury claims'* and '*to analyse the significance of a number of factors which may affect the course of the claim and the way in which negotiation is conducted, and in so doing to suggest the implications this may have for plaintiffs seeking a fair settlement in personal injury actions'*.[357]

'Let's make a deal', University of Wisconsin Press, at p78-79; Woolf, B., (1990) 'Friendly persuasion', G.P. Putnam's Sons, at p34-35

[354] Allred, K. G., (2000) 'Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value'. *Negotiation Journal*, Vol 16, Issue 4, 387-397 at p394-395

[355] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press

[356] Harris, D. R., Maclean, M., Genn, H., Lloyd-Bostock, S., Fenn, P., Corfield, P., and Brittan, Y., (1984) 'Compensation and Support for Illness and Injury', Oxford: Clarendon Press.

[357] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press at p16

Although Genn's study provides some excellent insight into the process of negotiation and settlement of Personal Injury claims in England, she unfortunately does not attempt to analyse her findings in the context of the negotiation literature of the time, specifically perhaps in relation to BATNA analysis, relationship building and the effectiveness or otherwise of the distributive bargaining strategies she mentions in her chapter on '*Closing the Claim*'[358]. She does acknowledge the Williams study but does not seem to draw the obvious conclusion that her study might, in some respects, contradict his findings. Although Genn does not attempt to empirically test which type of negotiation behaviour is most effective, she indicates as much when she concludes that experienced solicitors favour a '*combative*' approach and inexperienced solicitors rely more often on a '*cooperative*' approach[359] and that experienced solicitors obtain better settlements for their clients[360].

Importantly, however, Genn found evidence to suggest that many of the highly experienced insurance companies encouraged cooperative behaviour rather than confrontation, but that they would seek to take advantage of their opponent if the opportunity arose. She goes on to characterise this cooperative behaviour of the insurance companies as '*largely opportunistic*'[361]. It could be argued that this type of behaviour by experienced (and by her conclusions also effective) negotiators lends some support to the concept of effective negotiators using cooperatively appearing behaviour to achieve highly competitive goals.

[358] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press Chapter 7 at p129

[359] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press at p53

[360] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press at p168

[361] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press at p166

Although Lande's '*Ordinary Legal Negotiation'* (OLN categorisation, discussed earlier)[362], incorporates elements of both cooperative and competitive behaviour that arguably adds some support to the existence of some type of hybrid model, it can perhaps be distinguished from the approach taken by Craver on the basis that its main driving force appears to be focused on a realistic understanding of the probable legal outcome in any given case and it is firmly based around legal norms rather than a more universal and distinct behavioural approach[363]. However, the table of goals, assumptions, process, and use of legal norms (reproduced below) that he produces gives a helpful indication of where a hybrid approach may fit within a conventional framework.

[362] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p118 (See Note 20 above)

[363] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p117 & p118

Table 2 - Goals, Assumptions, Process, and Use of Legal Norms in Positional, Ordinary Legal, and Interest-Based Negotiation by Lawyers[364]

	Positional Negotiation	**(OLN)**	**Interest-based Negotiation**
Lawyers' Goals	Maximum partisan advantage for their clients	Good result for their clients	Good result for both parties
Key Assumptions	Negotiation is zero-sum and clients must take tough positions to achieve their goals and avoid being disadvantaged	Most cases can be settled based on legal norms, which can produce good results and help preserve lawyers' and parties' relationships	Lawyers can achieve optimal, positive-sum, results by jointly analyzing clients' interests and a range of options
Process	Lawyers exchange offers, starting with extreme positions, and make small and slow concessions	Lawyers exchange information to figure out an appropriate result given the norms in their legal practice community	Lawyers and parties explicitly identify parties' interests and numerous options to select the option best satisfying the parties' interests
Use of Legal Norms	Lawyers use legal norms in tactical arguments to achieve the most favorable partisan result, ideally far exceeding legal norms rather than accepting legal norms as their goal	Lawyers use legal norms as the initial and principal standard in negotiation, which may be adjusted due to parties' needs and other factors	Lawyers use legal norms to calculate their "best alternative to a negotiated agreement" to serve as an outer limit on acceptable agreements (adjusted by factors such as transaction costs, risk preferences, and concerns about privacy, reputation, and relationships)

Ten years after completing her study on the effectiveness of negotiation styles, Schneider has more recently re-evaluated the emphasis on the use of '*labels*' to

[364] Reproduced in its entirety from: Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p120

describe negotiation style[365]. Schneider first highlights the '*label confusion'* that she considers to be now endemic in the negotiation literature, citing the ever growing number of terms that have been introduced by various academics and authors, which she suggests may be an on going attempt by scholars to '*finally be the one to clarify and categorize a messy collection of behaviours and strategies[366]'*.

Rather than focusing on any distinction that might be made between 'approach' and 'style', she goes on to argue that any given '*approach*' to negotiation (e.g. the choice between an 'integrative' approach or a 'distributive' approach) contains both a '*view*' of negotiation (zero sum or mutual gains) as well as the '*task*' involved (claiming or creating value)[367].

Her article lends support to the approach taken by Craver who also in effect argues that you need to separate the general overall negotiation approach being taken (moving towards your opponents seeking to maximise joint value or moving psychologically against your opponents seeking to maximise your own return)[368] from the way in which you choose to achieve it (in a competitive adversarial way or in a more cooperative non-adversarial way)[369].

Arguably Schneider in reality is also re-evaluating the conclusions reached in her 2002 study and appears to accept Craver's underlying argument that the use of labels to describe an overall approach to negotiation (and by implication the 'style'

[365] Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13

[366] Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13 at p19

[367] Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13 at p19

[368] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35. *American Journal of Trial Advocacy* 1 at p2

[369] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35. *American Journal of Trial Advocacy* 1 at p17

assessment used in her 2002 study) does not necessarily completely describe what is actually happening at the negotiating table[370]. Indeed she states:

'The current style framework does not take into account one's general sociability in the negotiation as well as one's level of ethical behavior. Neither of those are limited to one approach and yet many assume that being adversarial automatically includes being unpleasant and unethical. In fact, it may well be that the most effective negotiators are those who are friendly, ethical, and very firm'[371].

The central context of her paper is concerned with the teaching of negotiation, arguing that there should be a change of emphasis so that skills are now taught first, before then being subsequently placed in the context of a stylistic framework rather than the reverse approach that predominates now. She proposes that, as well as the established frameworks for deciding what style negotiators should engage, negotiators should also focus on determining the skills to be deployed in a given situation and she presents a skills determining model based on assessment of the three key 'C' variables. These she describes as 'the Client[372], the Counterpart and the Context'[373].

By refocusing the finding of her 2002 study on the difference in effectiveness perception between the two clusters she labelled '*cautious problem-solving'* and '*true problem-solving'* rather than the '*adversarial*' and '*problem-solving'* rates of effectiveness, Schneider highlights that 'true problem-solvers' (who had a high 75% effectiveness rating) had higher abilities in the areas of assertiveness, empathy, and

[370] Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13 at p20

[371] Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13 at p22

[372] Schneider highlights that if there is no client, the negotiator is then effectively the client.

[373] Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13 at p36

flexibility as well as strong ethical behaviour and a friendly, warm personality[374]. This she implicitly argues supports her latest argument for the separate flexible application of different skills used to support a desired overall negotiation approach, clearly a variation of what is argued by Craver[375].

Kuttner[376] offers an interesting alternative conceptual framing that can perhaps be applied to Schneider's 'view plus task' argument and arguably also to the hybrid outlined by Craver. Where Craver suggests that competitive/problem-solvers are actually appearing to be one thing when in fact they are something else, Kuttner uses the metaphor of the wave/particle duality found in quantum physics to explain '*the need to hold both seemingly contradicting negotiation approaches in a complementary manner*'[377]. Although Kuttner relates this to the negotiation duality of an interest-based approach and a relational approach[378] rather than the more established competitive/distributive and cooperative/integrative dichotomy, Kuttner goes on to implicitly lend support to Schneider's 'view plus task' approach[379] by proposing that the corresponding either wave-like or particle-like debate in a negotiation context should be replaced by an approach perspective that incorporates both 'mind-sets' and 'sets of skills'[380].

It is also perhaps relevant to the re-evaluation of the Williams & Schneider studies when Kuttner explores the link between what people are looking for and what they

[374] Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13 at p26

[375] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35. *American Journal of Trial Advocacy* 1

[376] Kuttner, R., (2011) 'The Wave/Particle Tension in Negotiation', 16 *Harvard Negotiation Law Review*. 331-366

[377] Kuttner, R., (2011) 'The Wave/Particle Tension in Negotiation', 16 *Harvard Negotiation Law Review*. 331-366 at p333

[378] Kuttner, R., (2011) 'The Wave/Particle Tension in Negotiation', 16 *Harvard Negotiation Law Review*. 331-366 at p337

[379] Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13

[380] Kuttner, R., (2011) 'The Wave/Particle Tension in Negotiation', 16 *Harvard Negotiation Law Review*. 331-366 at p337

find. In quantum physics, Kuttner suggests, if you look for a particle you will find a particle, but if you look at the same time and at the same thing for a wave, you will find a wave. Kuttner offers a quote[381] from Zohar and Marshal:

'The relationship between the observer's way of looking at a quantum experiment and the outcome of what he sees is very much like the link between our social expectations and what we perceive. If we look at a group of people as a collection of individuals, we will perceive them as individuals. But if we look at the same group as a collective unit, we will see a collective phenomenon. More strongly still, the way we look at a group of people can actually affect the group's behavior, or vice versa[382]'.

On one view, this may help to enlighten us as to why Williams and Schneider initially found what they found, perhaps because in part their studies were predicated on a search to distinguish between two distinct types of behaviour (akin to Kuttner's particle-like approach) rather than acknowledging the potential existence of something different that involved both (akin to Craver's hybrid or Kuttner's wave-like approach). By looking for particles they found them.

However, ultimately Kuttner's wave-like metaphor relates more to the description of a parallel process more akin to a mindfulness philosophy and the shaping of realities through interaction whilst at the same time maintaining the established duality of claiming value and creating value[383], rather than any notion of a redefining the nature of the duality itself.

[381] Kuttner, R., (2011) 'The Wave/Particle Tension in Negotiation', 16 *Harvard Negotiation Law Review*. 331-366 at p341

[382] Kuttner, R., (2011) 'The Wave/Particle Tension in Negotiation', 16 *Harvard Negotiation Law Review*. 331-366 at p341 where the author quotes directly from Zohar, D., & Marshal, I., (1993) 'The Quantum Society: Mind, Physics, And A New Social Vision' New York: Bloomsbury Publishing at p23

[383] Kuttner, R., (2011) 'The Wave/Particle Tension in Negotiation', 16 *Harvard Negotiation Law Review*. 331-366 at p346

3.6 Conclusion

It can be concluded from the literature that a negotiation framework has developed and evolved over the last half century primarily built around an interlinked duality of two diverse types of behaviour which have vied for pre-eminence over the decades.

On one hand there is competitive negotiation behaviour. These negotiators are variously described as value claimers, positional bargainers, win-lose fixed sum negotiators who seek (or obtain) distributive outcome and are associated with adversarial techniques and behaviour. On the other hand there is cooperative negotiation behaviour. These negotiators are variously described as value creators, interest-based bargainers, win-win variable sum negotiators, and problem-solvers that seek integrative outcomes and are associated with principled and ethical behaviour.

In the early stages of the development of the framework, the competitive value claimers were in the ascendency with early works focusing more on understanding and maximising distributive outcomes. As the quantity and scope of negotiation literature mushroomed in the 1970's and 1980's, the focus moved very much more to the pre-eminence of cooperative value creating behaviour, supported by the empirical Williams study and works such as the popular book 'Getting to Yes' by Fisher & Ury. For much of the 1980's and 1990's the emphasis in the literature and in negotiation teaching tended to entrench the supremacy of this approach.

Moving into the new century, the balance has arguably slowly been shifting back, led by those who demand that more attention is paid towards the role of value claiming in negotiation and that a more representative framework needs to be developed that accounts for the behaviour observed in practice.

In so far as it can be argued it is distinct, the development of legal negotiation theory over the same period has mirrored developments in general negotiation theory and indeed arguably has led the way in many respects.

A review of the literature supports a conclusion that legal negotiation theory appears to have arrived at a point where the hitherto widely accepted and generally understood interpretation of the Williams Study (reinforced by Schneider's work), which for decades has arguably provided the empirical underpinnings of legal negotiation theory, is now not only being challenged in the literature by an increasing number of unconvinced authors, but is also in the midst of being reinterpreted by both Williams and Schneider themselves.

The widely disseminated and broadly accepted argument that most effective legal negotiators are associated with cooperative/problem-solving behaviour has perhaps never rung completely true for many practitioners, even those who are acquainted with its theoretical and empirical underpinnings. However, the increasing support in the literature for the competitive/problem-solver described by authors such as Craver is a potentially more accurate description of effective negotiation behaviour and appears *ex facie* to offer a better framework to describe what is observed by lawyers engaged in everyday practice.

A reinterpretation of the Williams and Schneider study as well as evidence form studies such as those carried out by Allred[384] and arguably Genn[385] has lent empirical support to development of the framework in this direction.

The next chapter outlines the methodology to gather and analyse data that will seek to answer the research questions outlines in Chapter 1.

[384] Allred, K.G. (2000) 'Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value', *Negotiation Journal*, Vol 16, Issue 4, 387-397

[385] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press.

PART THREE – RESEARCH DESIGN

Chapter 4 – Methodology

4.1 Introduction

The design of the methodology is a highly significant step in any study and necessitates evaluation independently of the research results and conclusions. The research methodology described in this chapter is considered in terms of research philosophy and approach, data type and gathering strategy, data analysis approach, research credibility and ethical considerations and finally, its weaknesses.

The purpose of this chapter is to describe the key justifications for the decisions taken that relate to the establishment of the research methodology, which includes the research instruments used to gather, examine and analyse the most appropriate data in pursuit of the research questions developed in the first chapter of this thesis as detailed below:

Research Question 1 – *How do lawyers characterise what they understand by 'effectiveness' in the context of legal negotiation?*

Research Question 2 – *How do lawyers perceive their own effectiveness as negotiators and characterise their personal negotiation behavioural style?*

Research Question 3 – *What are the underlying motivations of lawyers when they are engaged in legal negotiation and are they related to perceptions of effectiveness or to a particular negotiation behavioural style?*

4.2 Methodology overview

4.2.1 Negotiation research methodologies

Buelens *et al* [386] examined the research methodology found in the broader negotiation literature by conducting a methodological analysis of 941 peer-reviewed negotiation articles published between 1965 and 2004. The authors divided the research methodologies of each of the identified papers into one of three broad schools of thought.

The first category they describe as '*Positivism and Postpositivism'*, which the authors portray as being typified by the '*scientific method'* described as being concerned with theory verification. This type of research relies heavily on statistical analysis of data collected through surveys and experiments. These studies have predominantly sought to measure objective realities and their key importance has been to identify the determinants of outcomes in negotiations[387].

The second category they describe as '*Constructivism and Interpretivism'*. This approach does not seek objective truths but looks to the meaning that humans construct as they interact with their surroundings. The objective of this type of research is not theory verification, but to understand the actual production of meanings and concepts used by social actors in real settings. This type of research seeks to '*describe how different meanings held by different persons or groups*

[386] Buelens, M., Van De Woestyne, M., Mestdagh, S., & Bouckenooghe, D., (2008) 'Methodological Issues in Negotiation Research: A State-of-the-Art-Review', *Group Decision & Negotiation* 17:321–345

[387] Buelens, M., Van De Woestyne, M., Mestdagh, S., and Bouckenooghe, D., (2008) 'Methodological Issues in Negotiation Research: A State-of-the-Art-Review', *Group Decision & Negotiation* 17:321–345 at p323

produce and sustain a sense of truth' and is stated to be better suited to qualitative research techniques[388].

The third category described is labelled '*Critical Postmodernism'*. This approach develops constructivism by incorporating a political and social agenda to the research and should seek to actively promote reform that changes the lives of those involved. The participants in this type of research seek to create political debate that will lead to social change[389].

Buelens *et al* conclude their paper by arguing that as negotiation theory develops, researchers increasingly need to move away from a mainly scientific positivism philosophy based on simple descriptive statistics to more complex research designs that will allow the development of more interesting theories. The authors identify a future challenge as reconciling the differing assumptions embedded in traditional quantitative methodologies, as opposed to non-traditional qualitative methodologies. They see the core of this dilemma as the clash between the positivists and constructivist theoretical paradigms[390].

The methodological philosophies described by Buelens *et al* are largely in line with those followed in the broader social sciences although Saunders, Lewis and Thornhill [391] identify only two main research philosophies they describe as '*positivism*' and '*phenomenology*'. Positivism is described as a scientific approach where the researcher interprets data in an objective and detached manner. This

[388] Buelens, M., Van De Woestyne, M., Mestdagh, S., and Bouckenooghe, D., (2008) 'Methodological Issues in Negotiation Research: A State-of-the-Art-Review', *Group Decision & Negotiation* 17:321–345 at p325

[389] Buelens, M., Van De Woestyne, M., Mestdagh, S., and Bouckenooghe, D., (2008) 'Methodological Issues in Negotiation Research: A State-of-the-Art-Review', *Group Decision & Negotiation* 17:321–345 at p325 & p326

[390] Buelens, M., Van De Woestyne, M., Mestdagh, S., and Bouckenooghe, D., (2008) 'Methodological Issues in Negotiation Research: A State-of-the-Art-Review', *Group Decision & Negotiation* 17:321–345 at p337

[391] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons

approach emphasises a highly structured methodology aimed at replicability, combined with quantifiable observations that are open to statistical analysis[392]. On the other hand, a phenomenological approach seeks to capture the rich complexity of social situations. This approach is not so concerned with generalisability and is generally focused on discovering underlying assumptions and the '*reality working behind the reality*'[393].

4.2.2 Quantitative versus qualitative research

An interconnected distinction directly related to the research philosophies described above, also of key relevance to the development of a research methodology, is the distinction between 'qualitative' and 'quantitative' research and data types.

At a basic level the difference has been described simply as:

'Quantitative research is empirical research where the data are in the form of numbers. Qualitative research is empirical research where the data are not in the form of numbers'.[394]

Perhaps more helpfully, Baxter *et al* provide a more expansive definition:

"Quantitative research is, as the term suggests, concerned with the collection and analysis of data in numeric form. It tends to emphasize relatively large-scale and representative sets of data, and is often, falsely in our view, presented or perceived as being about the gathering of `facts'. Qualitative research, on the other hand, is concerned with collecting and analysing information in as many forms, chiefly non-numeric, as possible. It tends to focus on exploring, in as much detail as possible,

[392] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p85

[393] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p86

[394] Punch, K., (1998) 'Introduction to Social Research: Quantitative and Qualitative Approaches', London, Sage at p4

smaller numbers of instances or examples which are seen as being interesting or illuminating, and aims to achieve `depth' rather than `breadth'."[395]

Saunders *et al* consider attempts at defining the distinctiveness of qualitative research and the ways it can be distinguished from quantitative research to be problematic [396]. However the authors do make three distinctions between quantitative and qualitative data that are helpful:

Quantitative data:

- *Based on meaning derived from numbers*
- *Collection results in numerical and standardised data*
- *Analysis conducted through the use of diagrams and statistics*

Qualitative data:

- *Based on meaning expressed through words*
- *Collection results in non-standardised data requiring classification into categories*
- *Analysis conducted through the use of conceptualisation*[397].

Burns describes a strong move since the 1960's towards a more qualitative approach to social science research leading to a division between two competing research philosophies that he labels the '*scientific empirical tradition'*, and the '*naturalistic phenomenological mode'*[398].

[395] Blaxter, L, Hughes, C and Tight, M., (1996) 'How to Research', Buckingham, Open University Press at p61

[396] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p381.

[397] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p381 – adapted from table 12.1

[398] Burns, R., (2000) 'Introduction to Research Methods', London, Sage at p3

He describes the scientific approach as being '*nomothetic'* based on an assumption that social reality is external to the individual and objective with an emphasis on quantitative research employed to establish general laws or principles.

He described the naturalistic approach to research as '*ideographic*', with the emphasis on the subjective experience and with a focus on qualitative analysis and where social reality is considered a construct of personal consciousness[399].

It is perhaps important to recognise that '*fierce battles have been fought*[400]*'* over the relative value of quantitative and qualitative research. In the past researchers have complained that qualitative research has, in effect, been discriminated against by prominent institutions that focus almost exclusively on quantitative methods[401].

Ultimately Miles and Huberman consider the qualitative versus quantitative argument to be '*unproductive*' and cite Salmon who points out '*the issue is not quantitative-qualitative but whether we are taking an "analytic" approach to understanding a few controlled variables, or a "systemic" approach to understanding the interaction of variables in a complex environment*'[402]*.* Indeed it is recognised that qualitatively based studies can include quantitative elements with Tam Tim-kui observing that '*the process of quantification, the interpretive stance and the subjective elements of the qualitative information are not distorted nor eliminated. Otherwise, the qualitative inquiry will be "engulfed" by the quantitative paradigm*'[403]*.*

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[399] Burns, R., (2000) 'Introduction to Research Methods', London, Sage at p3

[400] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p40

[401] Reinharz, S., (1993) 'Empty explanations for empty wombs: An illustration of a secondary analysis of qualitative data'. In Schratz, M., (Ed.) *Qualitative voices in education research*, London: Falmer

[402] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p41 citing: Salmon, G., (1991) 'Transcending the qualitative-quantitative debate: The analytic and systematic approaches to education research', *Educational Researcher, 20(6), 10-18*

[403] Tam Tim-kui, P., (1993) 'The Role of Quantification in Qualitative Research in Education', Educational Research Journal, Vol. 8, pp.19-27 at p19

As has been summarised in Table 3 below, ultimately quantitative and qualitative research approaches are both useful in different circumstances and in order to achieve different objectives.

Table 3 – Comparison of quantitative and qualitative research approaches[404]

	Quantitative	**Qualitative**
General framework	Seek to confirm hypotheses about phenomena Instruments use more rigid style of eliciting and categorizing responses to questions Use highly structured methods such as questionnaires, surveys, and structured observation	Seek to explore phenomena Instruments use more flexible, iterative style of eliciting and categorizing responses to questions Use semi-structured methods such as in-depth interviews, focus groups, and participant observation
Analytical objectives	To quantify variation To predict causal relationships To describe characteristics of a population	To describe variation To describe and explain relationships To describe individual experiences To describe group norms
Question format	Closed-ended	Open-ended
Data format	Numerical (obtained by assigning numerical values to responses)	Textual (obtained from audiotapes, videotapes, and field notes)
Flexibility in study design	Study design is stable from beginning to end Participant responses do not influence or determine how and which questions researchers ask next Study design is subject to statistical assumptions and condition	Some aspects of the study are flexible (for example, the addition, exclusion, or wording of particular interview questions) Participant responses affect how and which questions researchers ask next Study design is iterative, that is, data collection and research questions are adjusted according to what is learned

[404] Reproduced in its entirety from: Mack, N., Woodsong, C., Macqueen, K. M., Guest, G., Namey, E., (2005) 'Qualitative Research Methods: A Data Collector's Field Guide', Research *Triangle Park, NC:* Family Health International at p3

A helpful summary of some of the key strengths and limitations of both quantitative and qualitative types of research is provided by Burns[405]:

Strengths of *quantitative* research:

> Precision, control, the ability to produce causality statements, sophisticated analysis through advanced statistical techniques, and replicability[406].

Weaknesses of *quantitative* research:

> The difficulty in controlling all variables, the inherent inconsistency of human responses, the exclusion of choice and freedom and moral responsibility, complaints that qualitative research has, in effect, been discriminated against by prominent institutions that focus almost exclusively on quantitative methods [407].

Strengths of *qualitative* research:

> It can lead to more positive enquiry allowing the researcher to find issues that are missed by the scientific approach, it can play a role in generating possible causal relationships, it allows the data to be interpreted in more than one way, and it adds richness and depth to social analysis[408]. Kates concludes that the methodology has the ability to '*penetrate, understand and illuminate the subjective world view of the participants'* and has '*the advantage of being able to explore the whole of a phenomenon among smaller samples to arrive at enlightening and useful observations.*'[409]

[405] Burns, R., (2000) 'Introduction to Research Methods', London, Sage

[406] Burns, R., (2000) 'Introduction to Research Methods', London, Sage at p9 & p10

[407] Burns, R., (2000) 'Introduction to Research Methods', London, Sage at p9 & p10

[408] Burns, R (2000) 'Introduction to Research Methods', London, Sage at p13 & p14

[409] Kates, S., (1998) 'A qualitative exploration into voters' ethical perceptions of political advertising: Discourse, disinformation and moral boundaries'. *Journal of Business Ethics,* 17, 1871-1885 at p1874

Weaknesses of *qualitative* research:

> The difficulty of applying conventional standards of reliability and validity due to the subjective nature of the data, the inability to replicate or generalise into a wider context with any confidence, the time required for data collection and analysis and interpretation, that the researchers presence has a significant effect on the subjects of study, there can be issues with confidentiality and anonymity, and it can be difficult to control for bias[410].

4.2.3 Legal negotiation research

As has been discussed earlier in this thesis, Hollander-Blumoff concludes that a large majority of legal research has traditionally relied upon a non-empirical methodology she characterised as:

'The classic law review article more often appears to be theoretical, or almost philosophical, in its normative approach to problems - an author presents (in the third person, almost always) a picture of the landscape of a certain topic, what others have said and thought about it, and finally the "way" that things should be seen. The author typically draws mostly on legal authorities in support of his or her propositions'[411].

However, she goes on to acknowledge that legal research in the field of negotiation is not well suited to this type of methodology, indicating that there has been an increase in both quantitative and qualitative empirical negotiation research over the last two decades[412]. In doing so, she also outlines a number of empirical

[410] Burns, R., (2000) 'Introduction to Research Methods', London, Sage at p13 & p14

[411] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p150

[412] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p152-153

methodological obstacles that the structure of the legal profession presents as follows:[413]

1. *Confidentiality/Privilege* – this can make it very difficult for researchers to gain access to primary data and almost impossible for researches to observe real time negotiations as they happen.

2. *Selection bias* – lawyers who are of the type who agree to take part in interviews or surveys might behave very differently from those that do not.

3. *Internal validity* – lawyers might be less willing to discuss negative characteristics or outcomes and be shown up in a bad light. Even when the results are anonymised, the identity of the lawyers will be known to the researcher, with the effect made worse if the researcher is also a member of the legal profession.

4. *External validity* – smaller scale qualitative studies are usually anecdotal and illustrative, rather than statistically significant and dispositive and therefore are not statistically generalisable.

5. *Challenges to experimental or quasi-experimental studies* – field research cannot offer any prospect for experiments with built in scientific controls. Controls can be introduced using multiple groups of students using role-play simulations but these are open to the criticism that they are not practising lawyers exhibiting real life behaviour.

Hollander-Blumoff concludes: *'It remains the great challenge for legal academics interested in negotiation research: how to extend social science methodology into a remarkably conservative, risk-averse field, so that we are able to amass more*

[413] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p157-160.

research on real attorneys and enable our empirical findings to become more generalizable.[414]'

Clearly the obstacles described by Hollander-Blumoff have had a significant effect on the type of legal negotiation research that has been produced over the years. Arguably the strict requirement for confidentiality within the legal profession has had the most significant effect on research methodology, leading to very few studies that have been able to analyses real time negotiations conducted by lawyers in the field.

4.3 Significant research methodologies within the legal negotiation literature

Having considered the overall methodological landscape, it is important to also consider carefully the methodologies used in some influential legal negotiation studies found within the literature.

Empirical research into legal negotiation behaviour over the last 30 years has been heavily influenced by the widely cited empirical study carried out by Williams[415] (and later updated by Schneider[416]) published in 1983. However, as has been outlined in the previous chapter, this study has been criticised for a number of reasons. The following two criticisms are fundamental to the objectives of this research study:

Firstly, the failure to make any attempt to discover what the respondents to the survey questions actually understood by the notion of 'effectiveness', the key factor they were being asked to assess.

[414] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p161

[415] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West

[416] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143

Secondly, for arguably misinterpreting the results of the research by failing to uncover the underlying motivations of those negotiators that the respondents were asked to assess and therefore in effect failing to distinguish between negotiation strategies and the personal negotiation style of the individual.

The limitations of the particular methodology used in the Williams study are likely to have been a significant contributor to these failures and are clearly relevant to the research design of this research study.

4.3.1 The Williams methodology

The methodology used in the most widely cited part of the Williams study (and repeated in the Schneider study with some modifications discussed earlier and below) was based around the use of a questionnaire sent out to a large sample of around 1000 attorneys in 1976. The attorneys were instructed to describe their counterpart in their most recent completed case or transaction according to 137 characteristics listed in the survey and arranged in bipolar pairs. After completing the description they were then asked to rate the 'effectiveness' of the attorney on a scale that categorised them as ineffective, average or effective. The results were then subject to standard forms of statistical analysis that included R-factor analysis, Q-factor analysis, multiple regression analysis and discrimination analysis[417].

Although the study was designed to produce statistically valid results, it was in the end arguably not able to generate empirical data regarding what was objectively 'effective' negotiation behaviour. It is important to note that the methodology chosen was also not able to control for observer bias (although Schneider attempts to do this in her later study) which was particularly important since the survey respondents were tasked both with collecting data (perception of their negotiation counterparty's behaviour) and then evaluating it (deciding if the behaviour was effective).

[417] For a summary of the methodology see: Williams, G. R. & Craver C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p13 & p14

The methodology chosen by Williams was also criticised for not being able to distinguish between negotiation strategy and the personal negotiation style of the individual being assessed[418]. In the light of the recent reinterpretation of the study's results (discussed in the previous chapter), it is clear that a failure to properly understand the underlying motivations that lay behind the reported observed behaviour of the assessed negotiators undermined the core finding that 65% of the attorneys exhibited a 'cooperative' approach to negotiation whilst only 24% engaged in a 'competitive' approach and that the majority of *effective* negotiators (58.5%) were 'cooperative' compared with only 25% of competitive negotiators[419].

Arguably then, the most significant weakness of the Williams study was that, as a quantitatively grounded empirical study, it failed not only to test objectively measured effective negotiation behaviour, but it also failed to control for (or indeed even provide any insight into) what the respondents themselves meant by the concept of effectiveness insofar as it related to negotiation. In addition, as a study it failed to provide any meaningful insight into what lay behind the observed behaviour, which ultimately is likely to prove crucial in understanding what lawyers are actually considering when they negotiate. This area of criticism is highlighted as it is of central importance to the focus of the current research study. Whereas Williams asked his respondents to rate their perception of their negotiating counterparties as effective, average or ineffective without any assessment criteria being offered, the current study quite distinctly seeks to understand what individual lawyers actually mean and the criteria they use when they describe someone as either effective or ineffective. A central objective of the current study is therefore to provide insight into what lawyers themselves perceive to be the constituent element of effectiveness in legal negotiations, an approach endorsed by Heumann

[418] Gifford, D. G., (1985) 'A Context-Based Theory of Strategy Selection in Legal Negotiation', 46 *Ohio State Law Journal* 41 at p47

[419] See: Williams, G. R., & Craver, C. B., (2007) Williams, G. R. & Craver C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p15

and Hyman when they recognised the value of designing a future study that could help develop understanding about what lawyers actually mean by the concept of effectiveness in negotiation[420].

There is no doubt that the design of the Williams study as a quantitative empirical survey of effective negotiation behaviour in lawyers was challenged by the limitations imposed by the significant barriers to research, particularly legal privilege and confidentiality. However, the eventual choice of methodology used by Williams was flawed because it arguably focused excessively on attempting to preserve empirical scientific rigour and statistical significance at the expense of obtaining richer and indeed more meaningful data that may have provided greater insight into what was being studied. Ultimately the barriers to research in this area meant Williams was arguably unable to reconcile the desire to achieve quantitative rigour with the objectives sought and therefore alternative types of methodology may have been more effective at working around these research barriers and at the same time producing more significant conclusions.

It is important to recognise that Williams did supplement the survey questionnaire with alternative methodologies. Firstly, forty-five one-hour interviews were undertaken with practising attorneys which were transcribed and analysed. Secondly, audio diaries were kept by a number of attorneys engaged in the preparation of cases coming close to trial narrating the steps taken. Finally, seven pairs of attorneys were video taped negotiating a simulated negotiation scenario. Unfortunately the data obtained from these methodologies does not appear to have been analysed (or perhaps was not capable of being analysed) in a way that addressed the fundamental criticisms of the overall study and was largely overlooked in the conclusions of the research.

[420] See footnote 307 above and: Heumann, M., & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310 at p279 Note 24

Overall it should be acknowledged that perhaps part of the reason the Williams study has had such an impact in the field of legal negotiation may be at least in part because it was seen by the wider academic community as being statistically valid and therefore carried more weight, even if it does turn out that the original conclusions were incorrect and the methodology was '*fatally flawed'*[421]. This perhaps helps highlight the dilemma researchers face when choosing either a quantitative or qualitative design for their research studies.

Although there is criticism of the Williams study methodology highlighted in this research study, it is done so in an attempt to identify and then potentially partially address a particular area of weakness within his research that has been identified within the literature. It is however fully recognised and acknowledged that the Williams study is a very important piece of work and remains one of the most influential and important pieces of empirical research that has been conducted in the field of legal negotiation with any focus on criticisms made in the context of that clear understanding.

4.3.2 The Schneider methodology

As has been outlined in Chapter 2, Schneider sought to update the original Williams study and surveyed 1,000 practising attorneys in Milwaukee and 1,500 attorneys in Chicago in January 1999[422]. Her survey questionnaire was based on the one used by Williams with the addition of some updated bipolar pairs, adjectives and goals. She also included questions to measure the extent of any negotiation training and ADR experience of the respondents. Arguably, however, the most significant change that Schneider made to the original Williams methodology was her attempt to control

[421] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p280

[422] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 157

for the respondents positively assessing those who had a similar negotiating style to themselves and to this end she included a self-evaluation section[423].

Although she considered her findings to be empirically valid, she described the weakness of her own methodology to be: the self-selecting nature of the respondents, that the data relied on perception, and the lack of a definition of what constituted effective behaviour[424]. Her methodology was roundly criticised by Condlin, not only for the weaknesses acknowledged within the study itself, but particularly for being partial when she pre-assigned negative and ineffective characteristics to adversarial behaviour which he considered emanated from her own ideological viewpoint.[425]

Ultimately Condlin argues that Schneider missed the opportunity to address the key methodological deficiencies of the Williams study and failed to assist in the understanding of what it meant[426]. Perhaps not unsurprisingly her results and conclusions (described in the previous chapter) reinforced those found by Williams.

4.3.3 The Macfarlane methodology

Some useful insight was gained by considering the methodology used in the Macfarlane study[427], also discussed in the previous chapter.

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[423] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 153-157

[424] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p 190-195

[425] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p285

[426] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p288

[427] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015)

The Macfarlane study into Collaborative Family Law (CFL) has not attracted the criticism levelled at both Williams and Schneider. Indeed, as has already been highlighted, Craver singles the study out amongst empirical legal negotiation research for its balance and even-handedness[428] that he in part attributes to the more open-ended nature of questions used and the way the author interpreted the answers[429]. It is of particular relevance to note in the context of this research study that one of the objectives of the Macfarlane research was to add to the understanding about the '*quality'* of negotiation outcomes obtained by the clients when using CFL[430]. This is arguably similar in character to the attempt to gain an understanding of the notion of 'effectiveness' by practising lawyers, one of the research objectives of this research study.

Macfarlane describes her methodology as '*qualitative'*, using interviews as the primary method of gathering data over a four-year period[431]. With no control group or comparison group set up for the study, the participants (lawyers and clients) in a total of sixteen CFL cases were interviewed at various stages of each individual case as it progressed. The standard interview questions used in each of the case studies were developed and piloted during more general interviews conducted during the first year of the study. Following that, the early-stage case study interviews were

[428] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p289

[429] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)', 23 *Ohio State Journal on Dispute Resolution*. 231 at p292

[430] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) at p13

[431] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) at p13

conducted in person, with the mid-point and exit interviews being generally conducted by phone[432].

The author considers that the methodology provided '*an intimate picture of the tensions, dynamics and relationships*'[433] within the cases but accepted that '*The limitations of the case study approach are obvious—it cannot provide sufficient data to allow researchers to make significant correlations or conduct a probability analysis*'[434].

Perhaps of particular relevance to this research study, the following questions designed to explore outcome in the CFL negotiation were used in the early-stage case study interview with the lawyers:

Outcomes

How do you measure "success" in a collaborative law case? For example, what does a "good outcome" look like? Does it differ from the way you measured "success" in a traditional litigation case?

Do the outcomes achieved by these approaches differ qualitatively from those achieved via traditional negotiations in the shadow of the law? (Please give some examples from other cases.)

What would a "good outcome" look like in this case?[435]

[432] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) at p14

[433] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) at p15

[434] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) at p16

[435] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) Appendix A at p88

Macfarlane's methodology contrasts with that used by Williams and Schneider in that it was fundamentally qualitative in nature and did not strive to achieve statistical validity or generalisability. However, because of that, it arguably provided more insightful and ultimately useful conclusions, particularly in areas such as the underlying objectives, expectations and motivations[436] of the lawyers involved, which is relevant to the research questions and objectives of this research study.

4.4 Developing a research approach to meet the research objectives

Having considered carefully the relevant methodological landscape and the significant legal negotiation methodologies in the literature, it was important to also remember that the overriding concern was that the research undertaken in this research study should be conducted in the most appropriate and valid way to answer the research questions and meet the study objectives.

In developing a design for the methodology, particular significance was also attached to the arguments discussed above advanced by both Hollander-Blumoff referring to the great challenge in extending the social science methodologies into the field of legal negotiation research[437], along with the recommendation by Buelens *et al* for the need to move away from a scientific positivism approach embracing the challenge of reconciling the differing assumptions of traditional quantitative methodologies, as opposed to non-traditional qualitative methodologies[438].

[436] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015) Chapter 3 at p17 to p27

[437] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p161

[438] Buelens, M., Van De Woestyne, M., Mestdagh, S., & Bouckenooghe, D., (2008) 'Methodological Issues in Negotiation Research: A State-of-the-Art-Review', *Group Decision & Negotiation* 17:321–345 at p337

4.4.1 Data Type

One of the key decisions was clearly whether to use a predominantly qualitative or a quantitative methodological approach. To that end, in addition to all the considerations detailed above, the six factors outlined by Punch and detailed below were found to be helpful[439]:

1. Research Questions: What is the exact nature of what the research is trying to establish.

> The research questions are essentially aimed at developing an understanding of what lawyers mean when they describe negotiation behaviour as 'effective' as well as gaining a deeper understanding of lawyers' negotiation motivations, in order to provide insight into the more recent reinterpretation of the conclusions drawn from the literature. The essence of the research objectives can therefore be characterised as looking for the '*reality working behind the reality*'[440]. This suggested the use of a qualitative methodology.

2. Are we interested in making standardized and systematic comparisons or do we really want to study this phenomenon or situation in detail?

> The research questions and overall objectives are based around obtaining a more detailed understanding of certain aspects of how lawyers negotiate rather than engaging in a standardised and systematic comparison. This again supported the use of a predominantly qualitative approach.

[439] Punch, K., (1998) 'Introduction to Social Research: Quantitative and Qualitative Approaches', London, Sage at p244-245

[440] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p86

3. The Literature: Consider how other researchers dealt with similar subject matter and to what extent it is desirable to align the proposed research with any identified standard approaches to the topic.

> Given the criticisms of the Williams (and Schneider) studies and the insight gained from the Macfarlane methodology, considered alongside the empirical methodological obstacles that the structure of the legal profession presents identified by Hollander-Blumoff[441], a qualitative methodology was likely to offer the best prospects of providing the type of data that would most effectively address the research questions and objectives and complement the existing literature.

4. Practical Considerations: Look at issues of time, resources, accessibility of samples and data, familiarity with the subject matter, and securing co-operation.

> Clearly there are challenges in implementing a qualitative methodology but the writer felt that as long as the research undertaken was realistic and not over ambitious for a PhD thesis then time and resources would be manageable. The writer also felt that he had good familiarity with the subject matter and had a reasonably good prospect of securing co-operation.

5. Knowledge payoff: Consider which approach will produce more useful knowledge and insight.

> As has been highlighted earlier and in this thesis, there are areas in the existing literature that it is argued would clearly benefit from a qualitative approach, rather than a quantitative approach, producing further insight that is likely to produce a more useful knowledge payoff.

[441] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p157-160

6. Style: Does the researcher have a personal preference; this may involve philosophical issues or different ideas about what a worthwhile piece of research looks like.

> The writer, coming from a scientific background[442], was originally more predisposed to the use of a quantitative research approach. However, for the above stated reasons, it was evident that a qualitative approach was indicated in order to meet the proposed research objectives. The writer was entirely comfortable with this approach after having been introduced to qualitative research concepts and techniques. The writer felt that the professional interviewing, data process and analysing skills he had developed over his career as a lawyer were compatible with and indeed complimentary to those skills required to implement a qualitative research methodology.

For the purpose of this research study, it is therefore argued that a fundamentally qualitative methodology afforded the best opportunity to answer the research questions and achieve the research objectives.

4.4.2 Approach to primary data analysis

In the context of the overall methodology, the primary approach to *analysing* any qualitative data gathered also needed to be considered.

Saunders *et al* describe two primary approaches to *analysing* data, labelled as '*deductive*' and '*inductive*'[443].

[442] Although the writer is a lawyer, his first degree is a Bachelor of Science Degree in Agricultural Science. His honours thesis involved laboratory based quantitative research (See: T.C. Hutcheson, T. McKay, L. Farr & B. Seddon, (1988) 'Evaluation of the stain Viablue for the rapid estimation of viable yeast cells', *Journal of Applied Microbiology*, Volume 6, Issue 4 p85-88)

[443] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p87

A *deductive* approach invariably involves the development of a hypothesis from theory, which invariably describes a causal relationship between two or more variables. This hypothesis is then tested through some type of experimentation or empirical enquiry. The researcher should be independent of what is being observed. The subject matter also needs to be '*operationalised*' so facts can be measured quantitatively with a need to use sufficient sample sizes so that the results can be statistically generalised[444].

The *inductive* approach is based around developing an understanding of how humans interact with and interpret the social world. It invariably involves the collection of richer data types, often in the form of interviews, which are then analysed often leading to the identification of relationships and the formulation of a theory or theories. It is often concerned with specific contexts and uses smaller sample sizes than a deductive approach[445]. Table 4 below summarises the main features of each approach.

[444] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p87 & p88

[445] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p88 & p89

Table 4 – Major differences between purely deductive and purely inductive approaches to research[446]

Deductive Emphasises	Inductive Emphasises
• Scientific principles • Moving from theory to data • The need to explain causal relationships between variables • The collection of quantitative data • The application of controls to ensure validity of data • The operationalisation of concepts to ensure clarity of definition • A highly structured approach • Researcher independence of what is being researched • The necessity to select samples of sufficient size in order to generalise conclusions	• Gaining an understanding of the meanings humans attach to events • A close understanding of the research context • The collection of qualitative data • A more flexible structure to permit changes of research emphasis as the research progresses • A realisation that the researcher is part of the research process • Less concern with the need to generalise

However, it has been acknowledged in the literature that often the research approach taken is not as clear as the classification suggests and that it can be appropriate to combine both approaches within the same research methodology[447].

Although an inductive approach is best suited to analysing qualitative data with little or no predetermined structure, framework or theory and utilises the data itself to develop the structure of analysis[448], and a deductive approach generally involves using a structure or pre-assigned framework to analyse data usually associated with quantitative data and generating statistically significant findings, a deductive

[446] Reproduced in its entirety from: Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p91

[447] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p90

[448] Lathlean, J., (2006) 'Qualitative analysis'. In Gerrish, K., Lacy, A. (eds*) The research process in nursing*. Oxford: Blackwell Science

approach can also be used with qualitative data where a structure or theory is imposed on the qualitative data, often in the form of interview transcripts, which is then used in its analysis.[449]

Therefore although a fundamentally qualitative methodology was chosen for this research study, both inductive and deductive data analysis approaches were also deemed to be appropriate to the methodology.

In respect of the first research question, the approach is broadly inductive as it seeks to provide insight into lawyers' understanding of the concept of 'effectiveness' in legal negotiation. Ultimately, the aim is to identify common elements of understanding as well as areas of divergence relating to the concept of effectiveness in legal negotiations as understood by practising lawyers that assists in our understanding of this concept.

The second question is also broadly inductive as it seeks to provide insight into how lawyers both perceive their own effectiveness as negotiators and how they perceive their own negotiation behavioural style.

In respect of the third research question, this was deemed appropriate to include both inductive and deductive data analysis approaches. Inductive as it seeks to provide insight, understanding and underlying meaning to inform the formulation of a framework that considers effectiveness in legal negotiation in the context of underlying motivations, but also deductive insofar as it related to the aspect of the third research question that explore potential links between a negotiator's underlying motivations and the negotiator's perceptions of effectiveness and behavioural style.

[449] Williams, C., Bower, E. J., & Newton, J. T., (2004) 'Research in primary dental care. Part 6: Data analysis', *British Dental Journal* 197: 67-73

4.4.3 Summary of research approach

In summary, a fundamentally phenomenological methodology based on qualitative data was clearly indicated when the research was considered in the context of the general and legal methodological landscape, the strengths and weaknesses of significant legal negotiation studies methodologies found within the literature, the aims and objectives of this research study, and the six factors outlined by Punch[450].

A combination of inductive and deductive approaches was used in relation to the data analysis. This allowed qualitative data to be collected that could be analysed to inform the understanding of 'effectiveness' in legal negotiation, formulate a framework that describes and provides deeper insight into the underlying motivations of legal negotiators, and be tested in relation to existing legal negotiation theories within the literature.

4.5 Data Collection using In-Depth Interviews

4.5.1 Primary data collection

Whatever approach is used in research, data needs to be collected. There is no inherently better or worse method of collecting data and therefore the data collection method chosen will always depend upon the research objectives and the relative advantages and disadvantages of each method[451].

There are different classifications of data gathering techniques[452] but qualitative researchers generally rely on four methods for primary data gathering: *(1)*

[450] Punch, K., (1998) 'Introduction to Social Research: Quantitative and Qualitative Approaches', London, Sage at p244-245

[451] O'Leary, Z., (2004) 'The Essential Guide to Doing Research'. London: SAGE Publications at p150

[452] For example: Heaton, J., (2004) 'Reworking Qualitative Data', London: SAGE Publications at p 37 describes a number of methods which include a number of methods, which include interviews, focus groups, surveys, telephone interviews, field notes, taped social interaction or questionnaires.

participating in the setting, (2) observing directly, (3) interviewing in depth, and (4) analysing documents and material culture[453].

Given both the nature of the negotiation process itself and also the limitations imposed by the methodological obstacles that the structure of the legal profession presents[454] (perhaps most significantly that of legal privilege and confidentiality), this effectively ruled out (or made very difficult) *participating in the setting*, *observing directly* and *analysis of documents*. It was therefore considered that *interviewing* was the most appropriate method for primary data collection for this research study.

Although Kahn and Cannell define interviewing simply as '*a conversation with a purpose*'[455], and Kvale as '*an interchange of views between two or more people on a topic of mutual interest*'[456], there exists a number of different types of interviews that may be used to gather data.

Saunders *et al* refer to a commonly used typology based around formality and structure that categorises interviews as belonging to one of the following[457]:

1) *Structured interviews*
2) *Semi-structured interviews*
3) *Unstructured interviews*

[453] Marshall, C. & Rossman, G. B., (1999) 'Designing Qualitative Research' (3rd Edition), Thousand Oaks, CA, Sage at p97

[454] Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p157-160

[455] Kahn, R. L., & Cannell, C. F., (1957) 'The dynamics of Interviewing: Theory, Technique and Cases', New York: Wiley at p149

[456] Kvale, S., (1996) 'Interviews', London: SAGE Publications at p14

[457] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p243

Structured interviews

Structured interviews (also know as the standardised interview) use predetermined identical standardised questions that are read out by the researcher who then records the answers on a standard form[458]. Corbetta describes structured interviews as '*interviews in which all respondents are asked the same questions with the same wording and in the same sequence*'[459]. They are in reality closer in style to the use of a questionnaire than to the other types of interviews and are considered effective for descriptive or explanatory research[460].

Semi-structured interviews

Dicicco-Bloom & Crabtree state that semi-structured interviews are the most common type of interviews used in qualitative research and generally last from between thirty minutes to several hours[461]. They are usually structured around '*a set of predetermined open-ended questions, with other questions emerging from the dialogue between interviewer and interviewee/s*'[462]. Saunders *et al* describe the use of prepared lists of themes and questions to be covered although also indicate that these may vary between interviews with some questions being omitted or added depending on the context of each particular interview[463].

[458] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p243

[459] Corbetta, P., (2003) 'Social Research Theory, Methods and Techniques', London: SAGE Publications at p269

[460] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p279

[461] Dicicco-Bloom, B. & Crabtree, B. F., (2006) 'The qualitative research interview'. *Medical Education*. 40: 314–21 at p315

[462] Dicicco-Bloom, B. & Crabtree, B. F., (2006) 'The qualitative research interview'. *Medical Education*. 40: 314–21 at p315

[463] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p244

> Corbetta says of semi-structured interviews: '*The order in which the various topics are dealt with and the wording of the questions are left to the interviewer's discretion. Within each topic, the interviewer is free to conduct the conversation as he thinks fit, to ask the questions he deems appropriate in the words he considers best, to give explanation and ask for clarification if the answer is not clear, to prompt the respondent to elucidate further if necessary, and to establish his own style of conversation*[464]'.

Unstructured interviews

> Unstructured interviews (also sometimes known in their right as '*in-depth interviews*'[465]) are conducted in an informal way with no list of questions to work through. The interviewee is generally allowed to talk freely about the topic area. Although Dicicco-Bloom & Crabtree express the view that no interview can truly be considered unstructured, they indicate that some can be described as relatively unstructured and are akin to a guided conversation[466].

For the purpose of this research study an unstructured interview approach was discounted, as it would have made data analysis and comparisons between different interviewee's potentially difficult on the basis that some interviewees may have chosen to talk about subject areas unrelated to the research objectives. The ability to influence the direction of the conversation and address particular topics and concepts was deemed necessary in order to address the objectives of this study.

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[464] Corbetta, P., (2003) 'Social Research Theory, Methods and Techniques', London: SAGE Publications at p270

[465] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p244

[466] Dicicco-Bloom, B., and Crabtree, B.F., (2006) 'The qualitative research interview'. *Medical Education*. 40: 314–21 at p315

The use of structured interviews would have risked missing the opportunity to develop themes of relevance and interest that occur during the interview, helping uncover the deeper insight that is sought as part of the research goals.

Semi-structured interviews provided the best opportunity to explore, clarify and develop responses, which are important where the researcher is concerned with '*understanding the meaning which respondents ascribe to various phenomena*'[467]. This was clearly highly relevant to the research objectives of this research study.

It was therefore decided that the use of semi-structured interviews allowed the desired mix of flexibility and structure that would provide the best prospects of obtaining data of sufficient depth, quality and relevance to produce meaningful research conclusions.

4.5.2 Developing the interview schedule

In qualitative research which use semi-structured interviews, a pilot study involving respondents possessing the same characteristics as those used in the main investigation is deemed to be helpful in developing the interview schedule and determining whether relevant data is likely to be obtained from the sample group[468]. Neuman maintains that improvement in the reliability of research findings can be achieved by conducting such a pilot study, carried out before the main study is conducted[469].

A provisional interview schedule was therefore initially developed, shaped using the research questions and objectives outlined in Chapter 1. Also considered during the

[467] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p247

[468] Neuman, W. L., (2000) 'Social Research Methods: Qualitative and Quantitative Approaches', 4th ed. Boston: Allyn & Bacon at p166

[469] Neuman, W. L., (2000) 'Social Research Methods: Qualitative and Quantitative Approaches', 4th ed. Boston: Allyn & Bacon at p166

development of the schedule were the original research questions that Williams sought to answer, which were as follows[470]:

- *What are the characteristics of effective legal negotiators?*
- *Are there identifiable patterns to their negotiating behaviour?*
- *What strategies do lawyers most commonly use?*
- *What objectives do lawyers have in mind when they negotiate?*
- *What attitudes do they display?*
- *What combinations of traits are found in the most effective (and most ineffective) negotiators?*
- *What are their strong points, and what are their weak points?*

In addition, the elements of Craver's descriptions of the type of behaviour and motivations that he attributes to effective competitive problem-solvers, outlined in the first chapter of this thesis, were also considered to be of relevance in the development of the schedule.

Finally, the guide produced by the University of Strathclyde Faculty of Humanities and Social Sciences on Semi-Structured interviews also helped informed development of the interview schedule. The following extracts from the section titled '*Process of Developing Interview Schedule'* within the guide was particularly helpful in this task[471]:

- *Look at your research questions and identify the information from respondents that will address these questions.*

[470] Williams, G. R. & Craver C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p13 & p14

[471] See: http://www.strath.ac.uk/aer/materials/3datacollection/unit1/semiunstructuredinterviews/ (last visited 5.6.2015). The guide itself refers to: Drever, E. (1995) 'Using Semi-Structured Interviews in Small Scale Research' Glasgow: SCRE

- *Prepare an introduction or pre-amble which explains your research and covers practical issues of consent and recording*
- *Prepare some starting questions to get people used to the interviewer and talking, i.e. questions that are non-threatening and easy to answer.*
- *List the topics that you want your respondent to discuss in an order that will keep them talking comfortably. This can be achieved by a series of invitations to talk plus prompts and probes.*
- *With semi-structured interviews, it is usually accepted that the order of asking the questions is flexible and the themes and related topics can be addressed in line with the 'flow' of the interview.*
- *Invitations to talk or 'modal' expressions rather than direct questions encourage people to talk more. So you should avoid questions such as 'What do you like about the new guidelines?'*
- *Use of prompts i.e. further questions or invitations to talk that introduce something not mentioned by the interviewee or encourage them to talk more. You may ask a broad question to allow people to speak about the issues they see as important, but you may want them to talk about specific things. Therefore, in your schedule you would include reminders of these topics and if the interviewee does not talk about them, then you would 'prompt' them.*
- *Use of probes i.e. further clarification of something interviewee has said.*
- *Finish up*
    - *'Is there anything you would like to add?'*
    - *'Is there anything I've left out you think is important?'*

After completion of the initial provisional draft schedule, it was later refined and developed further following five pilot interviews carried out ahead of the main study, leading to the completion of the final version of the interview schedule used

in the main study[472]. A further adjustment was carried out to the interview schedule following a preliminary analysis of the first ten interviews.

4.5.3 Recording data

Many authors agree that a full record of the interview should be completed as soon as practicable after it takes place to prevent the loss of data or the mixing up of transcripts, reducing its trustworthiness.[473] Recording can essentially either be done by making written notes or by audio recording.

Writing notes requires the interviewer to either have or to develop the skill to take notes during the interview, something that can be highly challenging and usually require the notes to be extended after the interview is competed. Saunders *et al* caution that the research interview process is not the place to learn or seek to develop this skill[474].

As far back as 1956 the advantages and disadvantages of recording interviews in social research has been discussed. At that time Bucher *et al* considered the advantages to be[475]:

- No verbal productions are lost
- It eliminates interviewer bias on the part of the interviewers decision as to what to note down
- Permits a critical assessment of the interviewers effect on the data
- Allows the interviewer to devote their full attention to the interviewee
- Allows more data to be gathered in a given time frame

[472] See Appendix I for the final versions of the Interview Schedule

[473] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p258.

[474] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p261

[475] Bucher, R., Fritz, C. E. & Quarantelli, E. L., (1956) 'Tape Recorded Interviews in Social Research', *American Sociological Review*, Vol. 21, No. 3 pp. 359-364 at p359 to p360

The same study raised a number of potential disadvantages in the form of questions that the authors attempted to address. Firstly the researchers addressed the concern that the use of tape recording increases the refusal rate to take part in the interviews. To this end the authors provided some evidence that it does not[476]. Secondly, they asked whether the presence of a tape recorder would decrease interviewer-respondent rapport and concluded that its use usually increases rapport by enhancing free flowing conversation[477]. Finally, they considered whether the presence of a tape recorder altered the responses of the interviewee. They could not give a definitive answer to this question but provided some empirical evidence that it did not[478].

Arguably these reflections are still as relevant today as they were nearly 60 years ago. Saunders *et al* have composed their own list of advantages and disadvantages (reproduced in Table 5 below) and caution that permission should always be sought to record an interview as well as suggesting that the interviewee explains why they wish it to be recorded. They also suggest that notes should continue to be taken to help maintain concentration and focus[479].

[476] Bucher, R., Fritz, C. E. & Quarantelli, E. L., (1956) 'Tape Recorded Interviews in Social Research', *American Sociological Review*, Vol. 21, No. 3 at p360

[477] Bucher, R., Fritz, C. E. & Quarantelli, E. L., (1956) 'Tape Recorded Interviews in Social Research', *American Sociological Review*, Vol. 21, No. 3 at p361

[478] Bucher, R., Fritz, C. E. & Quarantelli, E. L., (1956) 'Tape Recorded Interviews in Social Research', *American Sociological Review*, Vol. 21, No. 3 at p361

[479] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p262

Table 5 - Advantages and disadvantages of recording interviews[480]

Advantages	Disadvantages
• Allows interviewer to concentrate on questioning and listening • Allows questions formulated at an interview to be accurately recorded for use in later interviews as appropriate • Can re-listen to the interview • Accurate and unbiased record provided • Allows direct quotes to be used • Permanent record for others to use	• May adversely affect the relationship between interviewee and interviewer (possibility of 'focusing' on the recorder) • May inhibit some interviewee responses and reduce reliability • Possibility of a technical problem • Time required to transcribe recordings

Having considered the relative advantages and disadvantages of recording versus note taking, for the purpose of this research study it was decided to digitally record all interviews with the following safeguards:

1. Additional reassurances will be given to the interviewees concerning the confidentiality and anonymity of the data.

2. It will be made clear that no questions will be asked which require interviewees to divulge information that is likely to be specific to an individual client or may make identification of that client likely or possible.

3. If there is an answer to any specific question that the interviewee does not want recorded, the recorder will be switched off for that answer, and the answer will be recorded in writing instead.

4. The interviewee can pull out of the project at any time up to the submission of the thesis.

[480] Reproduced from: Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p262

4.6 Criteria used to select study participants

4.6.1 Qualitative sampling

In research studies it is very unusual to be able to include every individual or element in any given population. Instead, a portion of the population is identified and selected and this is known as a sample. This sample is studied in an attempt to understand the wider population from which it is derived. A sample can therefore be defined as '*a subset or portion of the total population*'[481]. Selecting a sample therefore involves '*determining who will be the participants in the study*'[482].

Both Williams and Schneider surveyed a relatively large sample of attorneys selected from a specific geographical area. Neither sought to distinguish between legal practice areas (i.e. the type of law practiced by the lawyers involved in the survey) and both introduced a degree of randomisation regarding the selection of those to whom the survey was sent.

However, because this research study uses a primarily qualitative methodology, the sample selection uses different criteria from that found in a predominantly quantitative study.

'*Qualitative researchers usually work with small samples of people, nested in their context and studied in depth – unlike quantitative researchers who aim for larger numbers of context-stripped cases and seek statistical significance*'[483]

Sampling in qualitative studies is usually *purposeful* rather than *random* primarily because of the need to use small sample groups which if selected randomly, may produce unproductive or unrepresentative samples[484].

[481] Bailey, K. D., (1994) 'Methods of Social Research', (4th Edition) New York: The Free Press at p 83

[482] Marlow, C., (1993) 'Research methods'. Pacific Grove, CA: Brooks/Cole at p134

[483] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p27

Hardon *et al* state that: '*In qualitative studies they aim to identify information-rich cases or informants. Information-rich cases are those from which one can learn a great deal about issues of central importance to* the *purpose of the research, so the term purposeful sampling is used when such people are selected*'[485].

Ultimately Curtis *et al,* citing the argument put forward by Miles and Huberman[486] that qualitative sampling can offer the chance to select and examine observations of general processes which are crucial to our understanding of developing or established theory relevant to the area being studied, argue themselves that this implies theory will drive the selection of cases to be studied which, under careful examination, has the potential to lead to elaboration or reformulation of theory[487].

4.6.2 Developing the sample selection strategy

In order to develop a sampling strategy, it was considered of value to take into account the six different evaluation attributes suggested by Miles and Huberman[488]. Curtis et al specifically assessed these criteria in a study which specifically considered their usefulness and who concluded:

'Careful consideration of these [criteria] *can enhance the interpretive power of a study by ensuring that the scope and the limitations of the analysis is clearly specified. Arguably, sample selection can also be made more 'efficient' if more*

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[484] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p27 citing: Kuzel, A., (1992) 'Sampling in qualitative inquiry'. In: Crabtree, B., Miller, W. (Eds.), *Doing Qualitative Research*. Sage, Newbury Park, CA, pp. 31 - 44.

[485] Hardon, A., Hodgkin, C., Fresle, D., (2004) 'How to investigate the use of medicines by consumers', *World Health Organization and University of Amsterdam* available for download at http://apps.who.int/medicinedocs/en/d/Js6169e/7.html (last visited 26.5.2015) at p58

[486] Miles, M. B., & Huberman, A. M., (1994) Qualitative Data Analysis', 2nd Edition, Sage Publications at p27 & p28, themselves citing Firestone, W. A., (1993). 'Alternative arguments for generalizing from data as applied to qualitative research', *Education Researcher,* 22(4), 16-23

[487] Curtis, S., Gesler, W., Smith, G., Washburn, S., (2000) 'Approaches to sampling and case selection in qualitative research: examples in the geography of health', *Social Science & Medicine* 50 at p1002

[488] Miles, M. B., & Huberman, A. M., (1994) Qualitative Data Analysis', 2nd Edition, Sage Publications at p34

attention is paid to accountability in term of these criteria, since this will also help to ensure that effort is expended mainly on gaining access to the most pertinent cases'[489].

Outlined below are the details of how six evaluation criteria adapted from those described by Miles and Huberman were used to assist in development of the sampling strategy used for this PhD study:

1. Is the sampling strategy relevant to the conceptual framework and the research questions addressed by the research?

The sample chosen has to provide data that will be helpful within both an inductive and deductive framework. The subjects chosen for the interviews needed to be able to speak to what their actual underlying motivations are in a typical negotiation setting, as well as being able to conjecture about the concept of effectiveness in negotiation. The sample subjects therefore had to engage regularly in legal negotiations and also had to have the ability to think more deeply about what they had been doing. It is also relevant to consider what types of legal negotiation the sample would routinely be involved in. This raises the question of whether it would be more advantageous to sample lawyers from only one practice area (e.g. construction lawyers or personal injury lawyers) or to take the sample from across a variety of different legal practice area. This is considered in more detail later in this chapter.

2. Is the sample likely to generate rich data on the phenomena that is being studied?

Miles and Huberman[490] talk about this in terms of the likelihood of *areas of interest* appearing in the data. As long as the sample chosen consisted of lawyers who are

[489] Curtis, S., Gesler, W., Smith, G., Washburn, S., (2000) 'Approaches to sampling and case selection in qualitative research: examples in the geography of health', *Social Science & Medicine* 50 at p1013

[490] Miles, M. B., & Huberman, A. M., (1994) Qualitative Data Analysis', 2nd Edition, Sage Publications at p34

routinely engaged in negotiation and provided that they are able to think about it in the depth required, then there is a strong likelihood that rich data of the type required would be captured.

3. Does the sample improve the '*generalizability*' of the findings of the research?

Curtis *et al* argue that '*qualitative samples are designed to make possible analytic generalizations (applied to wider theory on the basis of how selected cases 'fit' with general constructs), but not statistical generalizations (applied to wider populations on the basis of representative statistical samples)*'[491].

This raised the question of whether selecting a sample from one particular legal practice area or from a particular geographical area or number of years in practice is likely to effect the generalisability of this research study. Again, this is considered later in this chapter.

4. Does the sample produce believable descriptions and explanations that are recognisable as being true to real life?

Curtis *et al* observed *'one aspect of the validity of qualitative research relates to whether it provides a really convincing account and explanation of what is observed. This criterion may also raise issues of 'reliability' of the sources of information, in the sense of whether they are complete, and whether they are subject to important biases which will influence the type of explanation which can be based upon them'*[492].

It was clearly worth considering whether the experiences of the sample group were likely to be typical of other members of the legal profession. On that basis it was deemed worth considering excluding individuals from the sample that may have

[491] Curtis, S., Gesler, W., Smith, G., Washburn, S., (2000) 'Approaches to sampling and case selection in qualitative research: examples in the geography of health', *Social Science & Medicine* 50 at p1002

[492] Curtis, S., Gesler, W., Smith, G., Washburn, S., (2000) 'Approaches to sampling and case selection in qualitative research: examples in the geography of health', *Social Science & Medicine* 50 at p1003

had very unusual or 'exotic' experience (working predominantly overseas for large companies or in very high profile cases) although at the same time care had to be taken not to exclude individuals that may offer particular insight into the area of study. This is relevant to the general reliability of the methodology considered in greater detail later in this chapter.

5. Is the sampling plan feasible in terms of the available resources?

Scotland is a relatively compact geographical area with a large percentage of lawyers practising within Edinburgh and Glasgow. Travel time and costs were therefore not a major concern or limiting factor.

Curtis *et al* expand this particular criteria as follows: '*We would add, that competencies of the researcher may also be important for feasibility, for example, in terms of linguistic and communication skills, ability to relate to informants and their experiences, or the researcher's (or informant's) capacity to cope with the circumstances under which data collection may take place.*'[493]

The writer believes himself to have good linguistic and communication skills and considers that his experience of taking *precognitions*[494] as a practising lawyer (and legal consultant) over an almost 20 year period would be of assistance in conducting the semi-structured interviews in an effective way. The ability of the sample group themselves to express themselves clearly in English was unlikely to have been a factor since the vast majority of lawyers practising in Scotland will have obtained a law degree from a UK University taught in English.

[493] Curtis, S., Gesler, W., Smith, G., Washburn, S., (2000) 'Approaches to sampling and case selection in qualitative research: examples in the geography of health', *Social Science & Medicine* 50 at p1003

[494] A precognition is a Scots Law term for a form of semi-structured interview used to record the factual position of a witness ahead of a trial or proof (and therefore it provides a written record of the evidence that he or she is likely to give as a witness)

6. Is the sampling strategy ethical?

Clearly as far as the sampling strategy is concerned, anyone who is likely to have had particular difficulties or issues regarding assurances of confidentiality or anonymity or is engaged in particularly sensitive or high profile work would require to be excluded. It is also possible that since the writer (who will be conducting the interviews) has a presence in the profession as a lawyer[495], that some members of the profession would not wish to discuss their negotiation strategy openly if they felt it might potentially prejudice future interactions with him or with colleagues from the organisation he is associated with. On that basis the sample group excluded anyone with whom the writer has had recent professional contact or who works within the area of medical negligence litigation. The ethical considerations relevant to this research are discussed in more detail later in this chapter.

4.6.3 Sampling strategy – legal practice areas

Given the qualitative nature of the methodology used in this research study that necessitates the use of low sample numbers, one of the most difficult sampling decisions encountered was whether the sample group should be drawn from one single practice area (e.g. construction lawyers) or from a number of different practice areas (e.g. construction lawyers, personal injury lawyers, contract lawyers, residential property lawyers).

As discussed above and earlier in Chapter 2, Williams did not control for practice area in his research despite acknowledging that legal negotiation settings vary considerably and offering a broad classification dividing legal negotiation settings into four groups (transactions, civil disputes, criminal disputes and labour/management negotiations) [496] . Having made the distinctions and acknowledged that each group within the classification has unique characteristics, Williams then specified that for the purpose of his study he would assume a civil

[495] Although only as a part-time legal consultant for the last 10 years

[496] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p2

legal dispute setting on the basis that he considered the information and principles he describes could be applied equally well to all four group classifications[497]. He provides no explanation or justification for this assertion, which would appear to be another limitation of the methodology used in his study.

Schneider, in her study, asked the Wisconsin State Bar to generate a random list of 1000 lawyers who practiced in the State[498]. All lawyers practising in the State are required to be a member of the State bar so the sample would have potentially included practitioners from all the legal practice areas represented in the state. Although she provides a breakdown of the number of respondents belonging to each *'area of primary emphasis/specialization'* [499], she does not provide any analysis of any differences in behaviour that may have been found between the different practice areas.

In her qualitative study, Macfarlane used a sample based on lawyers practising wholly within one practice area, namely family law. However, this was because the population she was studying (collaborative family lawyers) worked wholly within that one practice area. Indeed, Macfarlane appeared to purposefully select her sample group within that practice area to meet the objectives of her research.

It could be argued that controlling for the differences between legal practice areas might increase the validity of a quantitatively grounded study (despite the fact that Williams and Schneider did not do this). However, given that the qualitatively based methodology used in this research study does not seek to achieve *statistical generalization* but rather *analytic generalization,* it was felt that purposefully

[497] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p5. See: Hollander-Blumoff, R., (2010) 'Just Negotiation', 88 *Washington University Law Review*. 381 at p385 Note 9 (2010) describing the differences between "dispute resolution" and "transactional negotiation".

[498] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p157

[499] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p161

including in the sample practising lawyers from each of the four practice areas identified by Williams would help to provide more *analytic* generalisable insight into existing and developing legal negotiation theory. The influential paper on analytic generalisation by Firestone[500] argues that '*analytic generalisation does not rely on samples and populations'*[501]*,* with the author arguing that researcher look to generalise findings to a broader theory by providing evidence that supports the development of that theory but that such evidence does not conclusively prove or indeed disprove that theory[502]. Firestone goes on to conclude '*Qualitative research is best for understanding the processes that go on in a situation and the beliefs and perceptions of those in it. Still, qualitative researchers can do things to increase the broad applicability of their findings. Some of these like providing rich, "thick" description contribute to case-to-case reasoning. Others like intentionally sampling for theoretically relevant diversity and replicating cases through multi site designs are particularly useful in a more analytic approach'*[503]*.*

The key modification made in order to adapt the broad Williams criteria to direct the selection of legal practice areas in the current study was to omit criminal lawyers from this study. This was done primarily on the basis of the key structural differences that exist between the US and the UK jurisdictions in the area of criminal plea bargaining leading to arguably fundamental differences in the nature of the negotiation process and crucially the difference in controls on prosecutor discretion that exist between the US and Scotland [504]. It was therefore considered that because of these key differences that negotiations carried out by criminal lawyers should be excluded from the current study.

[500] William A. Firestone, Professor of Educational Policy and Leadership, Rutgers University

[501] Firestone, W., (1993) 'Alternative Arguments for Generalizing from Data as Applied to Qualitative Research', Educational Researcher, Vol. 22, No. 4, pp. 16-23 at p17

[502] Firestone, W., (1993) 'Alternative Arguments for Generalizing from Data as Applied to Qualitative Research', Educational Researcher, Vol. 22, No. 4, pp. 16-23 at p17

[503] Firestone, W., (1993) 'Alternative Arguments for Generalizing from Data as Applied to Qualitative Research', Educational Researcher, Vol. 22, No. 4, pp. 16-23 at p22

[504] See: Henham, R.J., (2000) 'Truth in Plea-bargaining': Anglo-American Approaches to the use of Guilty Plea Discounts at the Sentencing Stage', 29 Anglo-Am. L. Rev;

Although arguably not as immediately apparent, it is accepted that differences are also likely to exist between the US and Scotland in the other practice areas identified by Williams and it is also acknowledged that Williams chose his practice areas over thirty five years ago from only one geographical area within the US, all of which is recognised as a weakness of the methodology of the current study.

However, obtaining data from across a range of legal practice areas chosen by referencing and adapting those identified by Williams was felt would increase the likelihood of uncovering rich data which would generate deeper insight and help generalise that insight back to a theoretical landscape that has been heavily influenced by the Williams research. Unlike in quantitative studies, with a qualitative methodology there is no methodological requirement to control for variables in order to achieve generalisability by statistical means, something that would have arguably been the main argument to restrict the sample group to one particular practice area.

4.6.4 Sampling strategy – size matters

Consideration was also given to the most appropriate sample size, a factor that is directly related to the concept of *'adequacy of the data*[505]*'* and the requirement for validity and reliability discussed further below.

In the context of sample size, methodologies that rely on interviews are sometimes criticised because of the often very small sample numbers involved[506]. However, arguably such criticism is based on a fundamentally quantitative understanding predicated upon concepts of representativeness required for statistical validity[507].

[505] Morrow. S. L., (2005) 'Quality and Trustworthiness in Qualitative Research in Counseling Psychology', *Journal of Counseling Psychology*, Vol. 52, No. 2, 250–260 at p255

[506] Deem, R., (2001) 'Globalisation, New Managerialism, Academic Capitalism and Entrepreneurialism in Universities: Is the Local Dimension Still Important?' *Comparative Education* 37(1), 7–20 at p14 & p16

[507] Diefenbach, T., (2009) 'Are case studies more than sophisticated storytelling?: Methodological problems of qualitative empirical research mainly based on semi-structured interviews', *Quality & Quantity* 43:875–894 at p882

Diefenbach writes '*In this sense, the complaint is irrelevant since there are no quantitative relations whatsoever between interview data and their interpretations, no algorithm that links the number of interviews and interview data to generalised statements and conclusions.*'[508] However, it is recognised that there is no guarantee that any individual interviewee will necessarily provide all the information required and therefore obtaining data from a number of interviewees is '*likely to provide a broader perspective allowing cross checking, comparison and ultimately deeper and better insight*'[509].

From that perspective, Diefenbach argues that more interviewees increase the quality of the data but that there is no way of determining how many is enough and that ultimately '*the number of interviews carried out and interview data gained might be more reassuring and convincing in a daily sense but it does not increase their validity in a methodological sense*'[510].

Morrow acknowledges that views as to the numbers required for adequacy of data expressed in the literature vary dramatically and cites Patton (1990) who recommends that '*validity, meaningfulness, and insights generated from qualitative inquiry have more to do with the information-richness of the cases selected and the observational/analytical capabilities of the researcher than with sample size*'[511]. In relation to her own qualitative interview based research, Morrow suggests that '*the magic number is 12'* but that she tends '*toward a larger sample size—as many as 20*

[508] Diefenbach, T., (2009) 'Are case studies more than sophisticated storytelling?: Methodological problems of qualitative empirical research mainly based on semi-structured interviews', *Quality & Quantity* 43:875–894 at p883

[509] Diefenbach, T., (2009) 'Are case studies more than sophisticated storytelling?: Methodological problems of qualitative empirical research mainly based on semi-structured interviews', *Quality & Quantity* 43:875–894 at p883

[510] Diefenbach, T., (2009) 'Are case studies more than sophisticated storytelling?: Methodological problems of qualitative empirical research mainly based on semi-structured interviews', *Quality & Quantity* 43:875–894 at p883

[511] Morrow. S. L., (2005) 'Quality and Trustworthiness in Qualitative Research in Counseling Psychology', *Journal of Counseling Psychology*, Vol. 52, No. 2, 250–260 at p255 citing Patton, M. Q. (1990). 'Qualitative evaluation and research methods' (2nd ed.). Newbury Park, CA: Sage at p185

or 30 participants' which she bases on using single forty-five to ninety minute interviews[512]. This is broadly in line with the Macfarlane methodology described earlier that used a total of sixteen cases, interviewing at various stages of each individual case as it progressed. In the end a total of five pilot interviews were conducted leading into a further thirty principal interviews each at an average of around 50 minutes of recorded length. The length was deemed optimal since it allowed interview appointments of one hour to be schedule. This was considered an optimal balance, long enough to collect sufficient data but not too long to discourage participation in the study.

4.6.5 Implementing the sampling strategy

In order to implement the selection strategy developed and outlined above, the first step was to associate each of the legal practice areas represented in Scotland with one of the four Williams broad categories. In order to assist in the identification of distinct practice areas, reference was made to the 28 areas of legal specialism recognised by the Law Society of Scotland[513]. This list of specialisations allowed the generation of a credible list of legal practice areas operating within the Scottish jurisdiction. It is relevant to note that domestic conveyancing was not included as a legal practice area in the sample group. This is primarily because it does not appear as a recognised specialism by the Law Society of Scotland which was used to generate the list of Scottish practice areas when cross referenced with those practice areas identified by Williams. However, it is recognised that domestic conveyancing is a key area of legal practice in Scotland and that its omission represents a potential weakness in the methodology.

From this list, with particular reference to the second Miles and Huberman criteria outlined above, a small number of practice areas were purposefully selected as the

[512] Morrow. S. L., (2005) 'Quality and Trustworthiness in Qualitative Research in Counseling Psychology', *Journal of Counseling Psychology*, Vol. 52, No. 2, 250–260 at p255

[513] See: http://www.lawscot.org.uk/members/membership-and-registrar/accredited-specialists/accredited-specialists (last visited 5.6.2015)

most likely to provide interviewees that would fit the developed sampling strategy and provide data that would meet the research objectives. It was initially identified that lawyers practising in the areas of Commercial Property Law, Construction Law, Planning Law, Personal Injury Law, Family Law and Employment Law would be most likely to combine potential accessibility, primarily due to the relative high numbers of lawyers practising in each group, with likely exposure of individual lawyers to a sufficient number of legal negotiations to increase the potential for *'areas of interest'* appearing in the data.

The decision to include the practice area of 'Family Law' which falls within the broad Williams category of 'Civil Disputes' was considered carefully given their perceived bias towards the use of a collaborative law based approach to negotiation. However, given that these lawyers represent a significant body of civil dispute legal practitioners and that the aim of the study is to uncover insight into the negotiation process, it was though desirable to include representatives from this practice area in the sample group alongside personal injury litigators and contentious planning lawyers.

Following additional evaluation using the six Miles and Huberman criteria discussed earlier, it was also decided to only include individuals within the sample from the identified practice areas with more than two years experience as well as excluding any lawyers who spend more than 50% of their time working abroad.

The total list of practice areas generated (excluding criminal law) and the practice areas selected are identified in Table 6 below.

Table 6 – Legal practice areas included in the sample

Williams Study Classification[514]	Law Society of Scotland Accredited Specialisations[515]	Identified Sample Practice Areas[516]
Transactions	Agricultural Law Charity Law Commercial Leasing Construction Law Crofting Law Environmental Law Immigration Insolvency Law Incapacity & Mental Disability Law Intellectual Property Law Liquor Licensing Law Pensions Law Planning Law Private Client Tax Public Procurement Law Trusts Law	Commercial Property Law Construction Law
Civil disputes	Arbitration Child Law Construction Law Debt & Asset Recovery Discrimination Law Environmental Law Family Law Freedom of Information and Data Protection Personal Injury Law Immigration Incapacity & Mental Disability Law Intellectual Property Law Medical Negligence Law Mental Health Law Planning Law Professional Negligence Law Family Law Mediation Commercial Law Mediation	Planning Law Personal Injury Law Family Law
Labour/management negotiations	Employment Law	Employment Law

[514] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p2

[515] Some of the Specialisations appear a number of times in the column since they may be contain both contentious and non-contentious elements or may include both civil and criminal dispute elements.

[516] Practice areas of Residential Conveyancing and Criminal Law are large practice areas that do not appear as a specialisation.

4.6.6 Gathering the data

A number of legal firms in Scotland were then purposefully identified as likely to include lawyers from the selected legal practice areas. In order to increase the likely response rate to a request to participate in the study, larger firms were selected with over 20 partners and which had a number of separate defined practice area departments within the firm. It was anticipated that larger firms would be more likely to be able to arrange cover for and therefore would be able to release potential interviewees to take part in the study during working hours rather than in smaller firms with fewer lawyers. The author of the current study used his experience of the legal profession within Scotland to identify such firms that were likely to contain lawyers who practiced in the selected practice areas which were then checked against their website to ensure the relevant practice areas were represented within the firm. Although the firms approached had offices in many of the main cities and major towns in Scotland, and a number of the firms had multiple offices in cities and towns throughout Scotland, the only interviewees that agreed to take part in the study were all based in legal offices located in Edinburgh, Glasgow or Dundee.

A point of contact at each firm was then identified based of an assessment of their likelihood to be in a position to assist in facilitating participation of lawyers from within their firm. These points of contacts were often senior partners, managing partners or training partners who, by endorsing the participation in the study by other members of their firm, were perceived as individuals who would be able to help secure participation when otherwise individuals (especially more junior member of the firm) might have been concerned about or felt they lacked the authority to agree to do so.

After explaining the purpose of the study and the methodology, the point of contact was asked to put forward potential interviewees to participate. The list of suggested practice areas was communicated to the point of contact who was advised that the

interview subjects should routinely engage in negotiation as part of their role within the firm, that they must be at least 2 years qualified and that they should not spend more than 50% of their time working in another jurisdiction. Potential interviewees were proposed by approximately 50% of the law firms approached.

At this stage it became clear that a number of interviewees being proposed were engaged in what their firms described as 'Corporate Law'. On the basis that corporate law appears to be regarded within the profession itself as a recognised area of practice, despite not being recognised as specialisation by the Law Society, and it was anticipated that these interviewees would potentially provide valuable insight into the negotiation process, it was decided to include them as a sample practice area. The total number of legal practice areas represented by the interviewees that took part in the study was therefore those identified in Table 6 above, together with the additional practice area of Corporate Law.

The final list of practice areas represented in the sample was therefore: Corporate Law, Commercial Property Law, Construction Law, Planning Law, Personal Injury Law, Family Law and Employment Law.

The sample group can therefore be described as a purposefully selected group of single practice area lawyers drawn from a cross-section of pre-selected practice areas (extrapolated and adapted from those contained in the Williams study) working in large law firms all based within Dundee, Edinburgh and Glasgow in Scotland.

These potential interviewees were then sent an invitation by email with a follow up email sent one week later[517]. Interviews were then arranged with those who indicated they would be willing to take part at a convenient time at their place of work. The interviewees were advised to leave 60 minutes free for the interview to take place.

[517] See Appendix II for a copy of the relevant email.

This yielded a total of thirty-five interviews, which included the five pilot interviewees who were used in the five pilot interviews that were conducted approximately eight months before the main interview data gathering. In addition, each of the interviewees was asked to indicate whether the work they carried out was either 'contentious' or 'non-contentious' in nature, as well as years qualified, gender and exposure to negotiation training. They were also asked themselves to define their area of practice which was the sole method used to record their areas of practice.

It is recognised that by restricting the sample of law firms to larger firms with over 20 partners that this is likely to be a relevant factor when considering the overall findings of the study. There is evidence in the literature that in other jurisdictions the legal profession can be divided into two hemispheres based on either predominantly large firms that represent large organisations, or predominantly smaller firms and sole practitioners that represent small businesses and individuals[518]. Although it is not clear whether this distinction applies in Scotland or indeed what the implications of this distinction might be in relation to negotiation behaviour, it is acknowledged that the sample group in the current study was drawn from larger firms that tended to represent organisations rather than individuals. In this regard, with reference to interviewees who represented the personal injury law practice area, it is recognised that they were drawn for firms that almost exclusively engage in defender orientated work although the interviewees did have experience of both Court of Session and Sheriff Court based work.

It is also recognised that an additional area of bias was likely to be present through the selection of both the firms themselves and the point of contact selected by the author of the study. His past experience as a member of the legal profession primarily engaged in commercial legal work is likely to have had influenced the

[518] See: Heinz, J.P., Nelson, R.L., Sandefur, R.L., & Laumann, E.O., (2005) 'Urban Lawyers: The New Social Structure of the Bar', University of Chicago Press.

selection of the sample group and it is acknowledged that this is another weakness of the methodology. However, it is also contended that knowledge of the profession may also have helped the purposeful selection of appropriate interviewees who then ultimately agreed to participate in the study.

On completion of each interview, each interviewee was then emailed a copy of the TKI assessment and was asked to complete and return it by email. The decision to administer the TKI assessment after each interview was taken in order to avoid influencing the responses received within the main interviews. The TKI assessment necessarily contains terminology and concepts that it was considered might have been transposed by the interviewees into the interviews had it been administered first. It was considered important to get an initial uncontaminated understanding from the interviewees within the first part of the interview as to how they described and understood the concepts under discussion in their own words. It was also considered that there would be little if any effect on the outcome of the TKI results by administering it after the interview as nothing within the interview process itself was designed in any way to suggest that one approach to handling conflict is inherently better or more effective than any other.

4.7 Research credibility

4.7.1 Validity and reliability

'*Without rigor, research is worthless, becomes fiction, and loses its utility*[519]'

The rigour of the methodology used to answer a research question is key to establishing the credibility of the research findings[520]. Research credibility can perhaps most succinctly be described as the ability of a research process to

[519] Morse, J. M., Barrett, M., Mayan, M., Olson, K., Spiers, J., (2002) 'Verification Strategies for Establishing Reliability and Validity in Qualitative Research', *International Journal of Qualitative Methods,* 1(2) at p14

[520] Brockopp, D. Y., & Hastings-Tolsma, M. T., (2002) 'Fundamentals of Nursing Research', (2002) Jones and Bartlett Publishers, Inc; 3rd Revised edition at p371

generate findings that elicit belief and trust[521]. The two central concepts of research credibility are *validity* and *reliability*.[522]

There has, however, been debate within the literature over whether validity and reliability are in fact fundamentally quantitative in nature and are therefore not as applicable, or indeed are applicable at all, in qualitative research.

Most quantitative definitions of *reliability* are centered on concepts of replicability or repeatability of results, with ideas of *validity* focused on whether methods of measurement are accurate and are actually measuring what they think they are measuring[523].

However, Krefting argues '*Too frequently, qualitative research is evaluated against criteria appropriate to quantitative research and is found to be lacking. Qualitative researchers contend that because the nature and purpose of the quantitative and qualitative traditions are different, it is erroneous to apply the same criteria of worthiness or merit'*[524]. Silverman supports this by contending that '*we should not assume that techniques used in quantitative research are the only way of establishing the validity of findings from qualitative or research field*'[525].

Rubin and Babbie write '*reliability and validity are defined and handled differently in qualitative research than they are in quantitative research. Qualitative researchers disagree about definitions and criteria for reliability and validity, and some argue that they are not applicable to qualitative research at all.*[526]' The authors argue that

[521] O'Leary, Z., (2007) 'The Social Science Jargon Buster' at http://srmo.sagepub.com/view/the-social-science-jargon-buster/n114.xml (last visited 26/5/2015)

[522] Silverman, D., (2006) 'Interpreting Qualitative Data', (3rd ed.) London: Sage at p281

[523] Golafshani, N., (2003) 'Understanding Reliability and Validity in Qualitative Research', *The Qualitative Report*, Volume 8 Number 4, 597-607 at p599

[524] Krefting, L., (1991) 'Rigor in Qualitative Research: The Assessment of Trustworthiness', *The American Journal of Occupational Therapy*, 45*(*3*),* 214-222 at p214

[525] Silverman, D., (2006) 'Interpreting Qualitative Data', (3rd ed.) London: Sage at p43

[526] Rubin, A., & Babbie, E., (2010) 'Essential Research Methods for Social Work', United States: Brooks/Cole at p111

the purpose of qualitative studies are to '*study and describe things in such depth and detail and from such multiple perspectives and meanings, that there is less need to worry about whether one particular measure is really measuring what it's intended to measure*'[527]. They go on to contrast this with quantitative studies, which rely on one or a small number of indicators used to determine whether a hypothetical construct applies to a large number of people and thus requires critical assessment of reliability and validity[528].

This leads the authors to assert the necessity to '*take a different perspective on the role of reliability and validity in qualitative studies*' and that '*one could argue that the directness, depth, and detail of its observations often give* [qualitative measurement] *better validity than quantitative measurement*'[529].

Interestingly, Morse *et al* indicate that '*While researchers have continued to use the terminology of reliability and validity in qualitative inquiry in Great Britain and Europe, those who do so in North America are a minority voice*[530]'. Newman perhaps sheds light on this by asserting that '*most qualitative researchers accept principles of reliability and validity, but use the terms infrequently because of their close association with quantitative measurement*'[531].

Although Golafshani, in his review of reliability and validity in qualitative research, indicates that the concepts of validity and reliability when viewed from the qualitative paradigm appear to vary depending on the perspective of the qualitative

[527] Rubin, A., & Babbie, E., (2010) 'Essential Research Methods for Social Work', United States: Brooks/Cole at p109

[528] Rubin, A., & Babbie, E., (2010) 'Essential Research Methods for Social Work', United States: Brooks/Cole at p109

[529] Rubin, A., & Babbie, E., (2010) 'Essential Research Methods for Social Work', United States: Brooks/Cole at p109

[530] Morse, J. M., Barrett, M., Mayan, M., Olson, K., Spiers, J., (2002) 'Verification Strategies for Establishing Reliability and Validity in Qualitative Research', *International Journal of Qualitative Methods,* 1(2) at p14

[531] Neuman, W. L., (2003) 'Research Methods: Qualitative and Quantitative Approaches' (5th ed.), New York: Pearson Education, Inc. at p 184

researcher[532], he goes on to argue that that the concepts of '*reliability, validity, trustworthiness, quality and rigor*' are all important in fundamentally distinguishing good qualitative research from bad qualitative research.[533]

Golafshani concludes that the conventional meaning of reliability and validity taken from a quantitative research tradition has therefore now been conceptualised as concepts of '*trustworthiness, rigor and quality'* when applied within a qualitative paradigm. This in turn affects the means by which qualitative researchers seek to achieve validity and reliability. Golafshani determines that is most appropriately achieved through '*bias elimination'* and by *increasing truthfulness of a proposition through triangulation'*[534].

Finally, it is perhaps interesting to note that Patton argues that '*since there can be no validity without reliability, a demonstration of the former is sufficient to establish the latter'*[535]. In other words, he argues that in qualitative research credibility depends on establishing validity.

4.7.2 Establishing trustworthiness, rigour and quality

Although it is clear from the literature that there is some debate over how to establish validity and reliability within the qualitative paradigm, it is also clear that whatever the view of the individual author, most agree that qualitative research requires to be credible. In relation to the methodology design of this research study, reference is first made to the conclusions reached by Golafshani who advocates enhancing validity and reliability in qualitative studies through the

[532] Golafshani, N., (2003) 'Understanding Reliability and Validity in Qualitative Research', *The Qualitative Report*, Volume 8 Number 4, 597-607 at p600

[533] Golafshani, N., (2003) 'Understanding Reliability and Validity in Qualitative Research', *The Qualitative Report*, Volume 8 Number 4, 597-607 at p602

[534] Golafshani, N., (2003) 'Understanding Reliability and Validity in Qualitative Research', *The Qualitative Report*, Volume 8 Number 4, 597-607 at p604

[535] Patton, M. Q. (2002) 'Qualitative evaluation and research methods' (3rd ed.). Thousand Oaks, CA: Sage Publications, Inc. at p316

concept of *trustworthiness, rigor and quality* achieved through *bias elimination* and *triangulation*.

1. Bias Elimination

There are two main forms of bias to be considered in a methodology based on semi-structured interviews. These are *interviewer bias* and *interviewee bias*[536].

Interviewer bias

Interviewer bias is where the researchers' own theoretical viewpoint biases the questions being asked and the interpretation of the answers, potentially having a significant impact on the results[537]. Saunders *et al* describe it as '*where the comments, tone or non-verbal behaviour of the interviewer creates bias in the way that interviewees respond to the questions being asked. This may be when you attempt to impose your own beliefs and frame of reference through the questions you ask. It is also possible that you will demonstrate bias in the way you interpret responses'*[538]

Kvale suggests that such biases cannot be completely eliminated but advise that steps should be made by the researcher to articulate clearly and then reflect carefully upon any presuppositions and prejudices identified as a step towards neutralising their unconscious influence on the research findings[539]. Kvale also discusses the role of leading questions and concludes that their use is not what is at

[536] See: Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p251

[537] Kvale, S., (1994) 'Ten standard objections to qualitative research interviews', *Journal of Phenomenological Psychology,* 25, No 2, 147-173 at p155

[538] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p251 citing Easterby-Smith, M., Thorpe, R. & Lowe, A., (1991) 'Management Research: An Introduction', Sage Publications, London

[539] Kvale, S., (1994) 'Ten standard objections to qualitative research interviews', *Journal of Phenomenological Psychology,* 25, No 2, 147-173 at p155

issue but rather that interviewers should consider carefully where the use of such questions actually leads.[540]

Taking Kvale's advice, the writer is aware that he has a predisposition towards agreeing with Craver's hybrid theory and the existence of the competitive problem solver as this accords with his own experience as a lawyer. Particular care was therefore taken not to allow this to influence both the questions posed and the interpretation of the answers received, or the direction in which the interviews proceeded. This was done firstly by attempting to be constantly aware of this potential bias, and secondly by carefully wording questions in an attempt to maintain neutrality. As far as the research objective concerned with what lawyers mean by effectiveness in negotiation, the writer considers himself to be less predisposed to a particular viewpoint and was therefore less concerned about interviewer bias in this regard.

Interviewee bias

Interviewee bias, on the other hand, is a bias that is attributable to the subject of the interview. It may be as a result of a perception by the interviewee regarding the particular interviewer or indeed a perceived interviewer bias. It may also have its foundation in the interviewee not wanting to divulge information about a sensitive area or something that might cast him or her in a poor light[541].

This type of interviewee bias is raised by Hollander-Blumoff in her discussion of the empirical methodological obstacles intrinsic to the study of legal negotiation[542] referred to earlier in this chapter. Under '*Internal validity'* she indicates that lawyers might be less willing to discuss negative characteristics or outcomes and be shown

[540] Kvale, S., (1994) 'Ten standard objections to qualitative research interviews', *Journal of Phenomenological Psychology,* 25, No 2, 147-173 at p156

[541] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p251

[542]Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164 at p157-160

up in a bad light. She argues that even when the results are anonymised, since the researcher clearly knows the identity of the lawyers the effect is still possible and is made potentially worse if the researcher is also a member of the legal profession.

Interviewees might also have an unconscious desire to tell the interviewer what they think the interviewer wants to hear or what they deem to be the 'right' answer. This is expressed by Polit and Beck as '*a bias in self-report instruments created when participants have a tendency to misrepresent their opinions in the direction of answers consistent with prevailing social norms'*.[543]

Another form of interviewee bias, referred to by Hollander-Blumoff as '*selection bias*', recognises that lawyers who are of the type who agree to take part in interviews or surveys might behave very differently from those that do not. Indeed the self selecting nature of the sample was one of the methodological weaknesses identified by Schneider in her own study and she accepted that it was not possible to know if the opinions expressed by her respondents were truly representative of the attorneys in the survey area[544]. For the purpose of the methodology used in this research study it is suggested that since the sample group is small and the individuals were purposefully selected, this may reduce the overall effect of *selection bias* although it is accepted that it is likely still to be present in some form.

Although it is not possible to have eliminate all of the forms of bias intrinsic to the methodology selected for this research study, Saunders *et al* provides a number of key overall measures that they suggest should be considered to help overcome bias in qualitative interviews. These measures have been reproduced and adapted and are shown in Table 7 below. As far as possible, these were taken into account in the conduct of the interviews undertaken for the purpose of this research study.

[543]Polit, D. F., & Beck, C. T. (2004), 'Nursing research: Principles and methods' (7th ed.). Philadelphia: Lippincott, Williams, & Wilkins at p723

[544] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* at p 190

Table 7 – Measures to assist in the management of bias in qualitative interviews[545]

Points to be considered in an attempt to overcome sources of bias in qualitative interviews
The interviewer's preparation and readiness for the interview
The level of information supplied to the interviewee
The appropriateness of the interviewer's appearance at the interview
The nature of the opening comments to be made at the commencement of the interview
The interviewer's approach to questioning
The impact of the interviewers behaviour during the interview
The ability of the interviewer to demonstrate active listening skills
The interviewer's ability to test understanding
The approach taken to recording information

2. Triangulation of data

It has been argued that it is appropriate, and even desirable, to combine different types of data collection within a single study as not only does this allow different types of data to be used for different aspects of the study, but it also provides an extra check to ensure that the data is being interpreted in the appropriate way[546]. The later point is known as triangulation and it can help with '*method error*' leading to greater confidence in the conclusions of a study[547].

[545] Adapted from Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p252

[546] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p98

[547] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p99

'Stripped to its basics, triangulation is supposed to support a finding by showing that independent measures agree with it, or at least, do not contradict it[548]*'.* Miles and Huberman go on to outline five types of triangulation:

- By data source (includes persons, times and places)
- By method (observation, interview document)
- Researcher (interviewer A, B etc.)
- By data type (qualitative texts, recordings, quantitative)
- By theory (a particular theory predicts the results)[549]

On the basis that triangulation would assist with credibility, it was proposed to triangulate this research study in two ways:

Firstly, to administer a negotiation style questionnaire to the interview subjects following each semi structured interview[550]. This is a variation of the most common form of triangulation known as *triangulation by data methods* in which data are collected by different means and then compared.[551] The most widely recognised conflict management assessment style questionnaires available is the Thomas Kilmann Instrument (TKI) introduced earlier in Chapter 2 and described in detail below in Chapter 6. The TKI framework '*permits a more nuanced discussion of how negotiation behavior can vary over the course of a single negotiation*'[552] and is one of the most widely used research instrument in the field of negotiation research[553]

[548] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p266

[549] Miles, M. B., & Huberman, A. M., (1994) Qualitative Data Analysis', 2nd Edition, Sage Publications at p267

[550] See Appendix III for the email sending out the Thomas-Kilmann Conflict Mode Instrument

[551] Krefting, L., (1991) 'Rigor in Qualitative Research: The Assessment of Trustworthiness', *The American Journal of Occupational Therapy*, 45*(3),* 214-222 at p219

[552] Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13 at p24

[553] See for example: Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1; Shell, G. R., (2001) 'Bargaining styles and negotiation:

as well as being referred to extensively in both business school textbooks and law school textbooks[554].

Since the semi-structured interviews used in this research study are in part designed to look for evidence of the underlying motivations associated with negotiation behaviour and style, and the TKI is designed to uncover aspects of an individual's underlying negotiation style and behaviour, the use of the questionnaire was considered appropriate as a separate data collection method to triangulate the interview data[555].

Secondly, there is scope to broadly triangulate the interview data by using *theory triangulation,* which is where the data is tested against '*diverse or competing'* theories[556]. If Craver's theory is ultimately correct, then this research study would expect to find that many of the research subjects exhibit the characteristics of the competitive problem-solver he describes. However, if Williams and Schneider were initially correct in their theoretical perspective, only a small number of competitive problem-solvers should be apparent, if any. Although the small sample size would mean this could not be established with any statistical significance, it can still be considered a valid method of triangulating the interview data.

The Thomas–Kilmann Conflict Mode Instrument in negotiation training', *Negotiation Journal*, 17, 155–174

[554] See for example: Korobkin, R., (2009) 'Negotiation Theory and Strategy', 2nd Edition, Aspen Publishers; Thompson L., (2005) 'The mind and the heart of the negotiator', Prentice Hall, Upper Saddle River, New Jersey, Third Edition; Shell, G. R., (2006) 'Bargaining for Advantage', 2nd Edition, Penguin Books.

[555] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p99 gives the opposite example of using semi-structured interviews to triangulate questionnaire data.

[556] Krefting, L., *(*1991) 'Rigor in Qualitative Research: The Assessment of Trustworthiness', *The American Journal of Occupational Therapy*, 45*(*3*),* 214-222 at p219

4.7.3 Generalising generalisability

Although Miles and Huberman[557] specifically consider generalisability as a feature of qualitative research, it is fitting to be reminded that much has been written on the applicability of generalisability within qualitative research. The term '*generalizability*' has been described as the degree to which the findings can be generalised from the research sample to the entire population[558].

What appears to be apparent from the literature is that generalisability of findings is applicable in the qualitative paradigm but that it is not the same kind of generalisability as is desired in quantitative research.

Kvale writes '*a demand for generalization has loomed heavily in the social sciences. To the critical question "Why generalize?" the answer would probably be: in order to predict and control, or because science aims at universal knowledge'*.[559]

The author goes on to answer what he describes as one of the standard objections to qualitative research interviews, namely that such studies contain too few subjects to allow generalization. He replies as follows:

'First, if you want to generalize, then in some cases a few intensive case studies may provide generalized knowledge. Second, if assertions of generalization are based upon a strong theory, a few subjects may in some cases be sufficient. And third, why generalize?'[560]

As has been discussed earlier in this chapter, some authors make the distinction between *statistical* generalisation and *analytic* generalisation. '*Analytical*

[557] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p279.

[558] Polit, D. F., & Beck, C. T. (2004), 'Nursing research: Principles and methods' (7th ed.). Philadelphia: Lippincott, Williams, & Wilkins at p645.

[559] Kvale, S., (1994) 'Ten standard objections to qualitative research interviews', *Journal of Phenomenological Psychology,* 25, No 2, 147-173 at p164

[560] Kvale, S., (1994) 'Ten standard objections to qualitative research interviews', *Journal of Phenomenological Psychology,* 25, No 2, 147-173 at p166

generalization is a process separate from statistical generalization in that it refers to the generalization from empirical observations to theory, rather than a population'[561].

In her influential paper that describes the process of inducting theory using case studies, it is perhaps relevant to note that Eisenhardt considers that between four and ten cases is the most appropriate number[562]. Although this research study is not primarily aimed at developing new theory but rather testing and developing existing theory, her work does suggest that analytic generalisation can be achieved with relative few information rich samples.

Finally, the argument made by Saunders *et al* is perhaps of particular relevance to the objectives of this research thesis when considering generalisability. They indicate '*where you are able to relate your research project to existing theory you will be in a position to demonstrate that your findings will have a broader significance than the case or cases which form the basis of your work*'[563]. They go onto say that it is down to the researcher to determine any relationship to existing theory in order to demonstrate the wider significance of the specific research outcomes.

4.8 Analysis of the data

4.8.1 Three flows of activity

The transcript data was stored and organised using Nvivo for Mac software. This tool ultimately allowed the data to be organised and handled more efficiently than

[561] Gibbert, M., Ruigrok, W., and Wicki, B., (2008) 'What passes as a rigorous case study?' *Strategic Management Journal* 29: 1465–1474 at p1468. See also: Curtis, S., Gesler, W., Smith, G., Washburn, S., (2000) 'Approaches to sampling and case selection in qualitative research: examples in the geography of health', *Social Science & Medicine* 50 at p1002 cited above.

[562] Eisenhardt, K. M., (1989) 'Building theories from case study research', *Academy of Management Review* 14(4): 532 – 550 at p545

[563] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p259 citing: Marshall, C. and Rossman, G. B. (1999) 'Designing Qualitative Research' (3rd Edition), Thousand Oaks, CA, Sage

if it had been carried out manually although the coding development and analysing process essentially proceed in a similar way. The remainder of this section will consider the development of the approach taken to the detailed analysis of data in the context of the methodological development of this research study.

Miles and Huberman consider the analysis of qualitative data as consisting of '*three concurrent flows of activity*'. These are described as: *data reduction*, *data display*, and *conclusion drawing/verification*[564].

The authors describe data reduction as '*the process of selecting, focusing, simplifying, abstracting, and transforming the data that appears in the written-up field notes or transcriptions*' and go on to say '*data reduction is a form of analysis that sharpens, sorts, focuses, discards, and organizes data in such a way that 'final' conclusions can be drawn or verified.'*[565]

They describe the second major flow of analysis activity as data display described as '*an organized, compressed assembly of information that permits conclusion drawing and action*.'[566]

Finally, conclusion drawing and verification is the process of attaching meaning to the analysis and is *'noting regularities, patterns, explanations, possible configurations, causal flows, and propositions*[567]*'*. The authors also determine that conclusions should be '*verified*' as part of the final process. This can be a simple

[564] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p10

[565] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p10-p11

[566] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p11

[567] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p11

internal cross-referencing process within the data or a more lengthy and elaborate process that may include external review amongst colleagues[568].

4.8.2 Data coding

Central to the three flows of activity is data coding. Saldana describes a data code in qualitative data as '*most often a word or short phrase that symbolically assigns a summative, salient, essence-capturing, and/or evocative attribute for a portion of language-based or visual data'*[569].

Miles and Huberman describe codes as '*tags or labels for assigning units of meaning to the descriptive or inferential information compiled during a study. Codes usually are attached to 'chunks' of varying sizes – words, phrases, sentences, or whole paragraphs, connected or unconnected to a specific setting.*'[570]

Although Miles and Huberman indicate that '*coding is analysis',* other authors indicate that although coding is a fundamental feature of qualitative analysis, coding and analysis are not synonymous[571].

Ultimately coding can perhaps be best described not simply as labelling, but also as a process of linking data to an idea[572], which takes place cyclically both during and after data collection as an analytical device[573]. Thereafter the process of coding will lead to categorisation, which may lead to recoding and then recatagorisation, and

[568] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p11

[569] Saldana, J. (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p3

[570] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p56

[571] Basit, T. N., (2003) 'Manual or electronic? The role for coding in qualitative data analysis', *Education Research* 45(2) 143-153 at p145

[572] Richards, L., & Morse, J. M. (2007). 'Read me first for a user's guide to qualitative methods'. (2nd Edition). Thousand Oaks, CA: Sage at p137.

[573] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p7-8

then finally to a process of theory generation or theory validation[574]. Miles and Hubert write: '*The organizing part will entail some system for categorizing the various chunks, so the researcher can quickly find, pull out, and cluster the segments relating to a particular research question, hypothesis, construct, or theme. Clustering and…displays of dense chunks, then sets the stage for drawing conclusions.'*[575]

Saldana describes both *first* and *second* cycle coding with the distinction being referred to as *first-level coding* and *pattern coding* by Miles and Huberman[576].

First cycle or first level coding assigns labels to segments of data whereas second level or pattern coding groups the first cycle codes into '*smaller numbers of sets, themes or constructs'*[577]. Saldana describes the purpose of second cycle coding as '*to develop a sense of categorical, thematic, conceptual and/or theoretical organization from your array of first cycle codes'*[578] although he also makes it clear that second cycle coding is not always necessary.

There are a number of coding approaches described in the literature and therefore a decision requires to be made as to which approach or combination of approaches should be taken in any given qualitative study. Saldana suggests keeping an open mind during initial data collection allowing review before deciding which coding method or methods will be most applicable and are likely to generate a substantive analysis, a process he labels '*pragmatic eclecticism'*.[579] He offers a number of coding

[574] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p11-p13

[575] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p57

[576] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p69

[577] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p69

[578] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p149

[579] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p47

approaches but acknowledges that multiple approaches may be warranted (*mix and matched*) and also that some of the approaches he describes overlap.[580]

Authors such as Flick have developed a checklist to assist researchers in deciding which coding approach to take[581]. However, Saldana suggests first doing a pilot test on the initial choice of coding approach by reflecting on Flick's checklist after coding a few pages of interview transcripts[582].

4.8.3 Initial pre-data collection coding choices

After carefully considering the nature of the study itself, the methodology chosen and the research questions under consideration, a number of coding approaches were initially identified as being potentially suitable for this research study in advance of any data gathering. As part of this pre-data selection process, it became clear that some approaches were suited to all the interview data, whilst other approaches were likely to be suitable to the analysis of data relevant to a particular research question.

First cycle coding approaches

The first cycle coding approaches that were initially though to be of potential relevance to this research study ahead of data collection were: -

Structural Coding – this identifies content based or conceptual phrases in a segment of data that relate to a specific research question. The similar coded data are then collected together and subject to further coding and more detailed analysis[583]. This approach to coding can be used to separate out data relevant to the three primary research questions.

[580] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p47

[581] Flick, U., (2002) 'An introduction to qualitative research', (2nd Edition). London: Sage p216

[582] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p47

[583] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p66

Initial Coding – this is a different approach to *Structural Coding* when initially dealing with the data in that it does not seek to impose any preconceived structure onto the data but rather allows the researcher to reflect deeply on what it contains and potentially develop categories not previously envisaged[584]. This approach might allow new insight concerning negotiation between lawyers to emerge from the data, which in turn may help to answer all the research questions posed or allow the formulation of potential future research.

In Vivo Coding – refers to a word or short phrase used by the interviewee themselves. The terminology actually used by the interviewee in the data is used to create the codes[585]. In the context of this research study, this type of coding was identified as being potentially particularly applicable when analysing what lawyers mean by effectiveness in negotiation. A concept of effectiveness could be built up using the language of the interviewees themselves.

Emotional Coding – labels the emotions recalled or experienced by the interviewees[586]. This was thought to be potentially relevant to potentially all three of the research questions but perhaps most specifically to providing insight into the motivation, aspirations and objectives of lawyers when they negotiate.

Value Coding – labels data with codes that '*reflect a participant's values, attitudes, and beliefs, representing his or her perspective or world view'*[587]. For the purpose of this study, it was thought that it might help to provide insight into interface between stated values, attitudes and beliefs, and what individuals actually do in practice. Again, this approach was identified as potentially helpful in providing insight into all three research questions.

[584] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p81
[585] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p74
[586] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p86
[587] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p89

Provisional Coding – uses a predetermined provisional set of codes developed by the researcher from '*literature reviews, related to the study, the study's conceptual framework and research questions, previous research finding, pilot study fieldwork, the researchers previous knowledge and experiences (experiential data), and researcher-formulated hypotheses or hunches.*' [588] The concept is that as the research progresses, provisional codes can be reassessed and revised as necessary. Again this approach was though to be potentially relevant to all three research questions although potentially most applicable to exploring the existence of the effective competitive problem-solving negotiator hybrid approach described in the literature.

Hypothesis Coding – is where the researcher creates predetermined codes that are specifically formulated to test a hypothesis generated by the researcher. The codes are developed from a prediction about what may be found in the data generated from a theory before the data is collected[589]. Clearly this approach would be most relevant to the testing for the existence of the hybrid 'competitive problem solver' described in the literature and which forms the basis of the third research question.

Second cycle coding approaches

Insofar as second cycle coding is concerned, the earlier work on this subject by Miles and Huberman refer to only one, *Pattern Coding*[590], whereas the more recent work by Saldana describes the following second cycle coding approaches: *Pattern Coding, Focused Coding* and *Theoretical Coding*, as well as *Elaborative Coding* and *Longitudinal Coding*[591].

[588] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p120 & p121

[589] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p123

[590] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p69

[591] Saldana, J., (2009) 'The coding manual for qualitative researchers'. Los Angeles, CA: SAGE at p150 – p151

Coding in practice

The coding and analysis of the transcripts was carried out both inductively and deductively as has been outlined earlier in this chapter. After considering the frameworks described above, initial codes were developed with reference to the literature, the research questions and using insight gained following an initial reading through of all the transcripts. The interview data were then subject to an initial coding process carried out across all the transcripts from start to finish. During this initial process, new codes were developed and introduced, and existing codes were merged or eliminated. During this coding process memos were written and notes made as insight began to emerge from the interview data. After reflecting further on the data, further rounds of coding were carried out and notes taken.

As has been stated earlier, the purpose of all second cycle coding is to reorganise the first cycle codes into a smaller number of groups that assist the analysis of the whole data by creating a number of themes, concepts that can be linked into either an existing or a developed theory. It was considered that of particular relevance to the coding of the data would be elements of Craver's descriptions of the type of behaviour and motivations that he attributes to effective competitive problem-solvers together with the categories and groupings developed in the original Williams and subsequent Schneider studies.[592]

The TKI assessments described earlier in this chapter that were used as an additional source of data were each scored with the score for each of the five conflict handling modes for each interviewee entered as a 'node classification' in the 'Nvivo for Mac' software programme that was used to assist in coding and analysing of the interview transcript data.

[592] See Appendix IV for the list of coding nodes developed during the NVIVO analysis

4.9 Ethical considerations

The word 'ethics' is derived from the Greek word '*ethos*' which refers to a person's character or disposition[593] and is defined by The Oxford Dictionary as '*moral principles that govern a person's behaviour or the conducting of an activity*'[594].

It is evident that in almost all research there are ethical considerations to take into account, a concept defined by Wells as *'a code of behavior appropriate to academics and the conduct of research'*[595].

Miles & Huberman state that the researcher '*must also consider the rightness or wrongness of our actions as qualitative researchers in relation to the people whose lives we are studying, or to our colleagues, and to those who sponsor our work*'[596].

Saunders *et al* advise that various key ethical issues are likely to arise throughout the extent of any research project and summarise the main ethical issues to be considered as follows[597]:

- *Privacy of possible and actual participants*
- *Voluntary nature of participation and the right to withdraw partially or completely from the process*
- *Consent and possible deception of participants*
- *Maintenance of the confidentiality of data provided by individuals or identifiable participants and their anonymity*

[593] Rogelberg, S. G., (2002) 'Handbook of research methods in industrial and organizational psychology' Blackwell Publishers at p34

[594] Taken from the online version at: http://oxforddictionaries.com

[595] Wells, P. (1994) 'Ethics in business and management research'. In Wass, V. J. and Wells, P. E. (eds), *Principles and practice in business and management research*, Aldershot: Dartmouth 277-297 at p284

[596] Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications at p288

[597] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p132

- *Reactions of participants to the way in which you seek to collect data*
- *Effects on participants of the way in which you use, analyse, and report your data*
- *Behaviour and objectivity of the researcher*

Although '*privacy*' has been described as '*the cornerstone of the ethical issues that confront those that undertake research*'[598], given that the research subjects in this research study are all practising lawyers, the issues of consent, confidentiality, reaction to the way the researcher seeks to collect data, and the effect on the participant of how the research findings are used were perhaps even more pertinent than in some other research fields.

Having considered the broader key ethical issues described by Saunders *et al,* the authors provide a more detailed summary checklist that was used to develop a more focused ethical strategy for this research[599]. Below is an edited version of their checklist showing the particular considerations that were deemed relevant to this research:

1. *Attempt to recognise potential ethical issues that will affect your proposed research.*
2. *Utilise your university's code on research ethics to guide the design and conduct of your research*
3. *Anticipate ethical issues at the design stage of your research and discuss how you will seek to control these in you research proposal*
4. *Seek informed consent through the use of openness and honesty, rather than deception*

[598] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p132

[599] Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons at p141

5. *Do not exaggerate the likely benefits of your research for participating organisations or individuals*
6. *Respect others' right to privacy at all stages of your research project*
7. *Maintain objectivity and quality in relation to the process you use to collect data*
8. *Recognise that the nature of a qualitatively based approach to research will mean there is greater scope for ethical issues to arise, and seek to avoid the particular problems related to interview and observation*
9. *Avoid referring to data gained from a particular participant when talking to others, where this would allow the individual to be identified with potentially harmful consequences to that person*
10. *Maintain your objectivity during the stages of analysing and reporting your research*
11. *Maintain the assurances that you gave to participating organisations with regards to confidentiality of the data obtained and their organizational anonymity*
12. *Protect individual participants by taking great care to ensure their anonymity in relation to anything that you refer to in your research project report, dissertation or thesis*
13. *Consider how the collective interests of your research participants may be adversely affected by the nature of the data that you are proposing to collect and alter the nature of your research question and objectives where this possibility is likely to be the case. Alternatively, declare this possibility to those who you wish to participate in your proposed research*

Many of the above points refer to behaviour or conduct and every attempt was made to adhere strictly to and comply with the recommendations during the conduct of this research study. However, some key points required specific action as part of the research design and methodological evaluation.

In terms of point 1 it was recognised that the need for confidentiality was of particular relevance to this research methodology. It was therefore decided to emphasise this in the covering letter requesting each interview, and again at the beginning of every interview, communicating that all the data would be collected under strict conditions of anonymity and that every effort would be taken to ensure that the identity of the participants or their organisation would not be able to be inferred from anything that appears in the final thesis or in any of the data made available to others (see also points 10, 11 and 12).

In terms of point 2, the research methodology was approved by the University of Strathclyde Ethics Committee and the conduct of the study was carried out in compliance with their '*Code of Practice on Investigations Involving Human Beings*' approved by the University Court on 11 March 2008 and updated in September 2009[600]. An ethics checklist available from the University of Strathclyde was also completed as a further check[601].

In terms of point 3, it was anticipated that some interviewees might not want parts of the interview recorded. In anticipation of this, as indicated earlier in this chapter, it was decided to agree to turn the recorder off as required and take written notes for the relevant passages instead. It was also anticipated that participants in the study might decide that they no longer wish to participate in the study following completion of their interview. It was decided that this would be allowed up until a date 6 months before submission of the thesis.

Finally, it was decided that any ethical considerations that the writer had failed to anticipate arising during the conduct of the study would firstly be referred to

[600] Available from: http://www.strath.ac.uk/ethics/ (last visited 5.6.2015)

[601] Available from: http://www.strath.ac.uk/aer/materials/1educationalresearchandenquiry/unit6/researchersresponsibilities/ (last visited 5.6.2015)

Professor Bryan Clark (PhD supervisor) and then if necessary to the University of Strathclyde Ethics Committee for additional guidance as required[602].

4.10 Methodological weaknesses

In general terms, the literature clearly discloses a tension between methodologies that are founded upon quantitative rigour that generate statistically significant conclusions generalisable to a wider population, and methodologies that are qualitative in nature that seek to provide deep insight from rich data leading to analytic generalisations.

On the basis that the overall qualitative methodological approach taken in this study is fundamentally valid, it is still important to consider in this context the weaknesses of the particular methodology used in this particular research study.

Firstly, it is not possible to eliminate self-selection bias since it is not possible to force individuals to participate in any given study. As such, it will always be difficult to know conclusively whether the sample group is representative of the broader population. However, given that the qualitative methodology is designed to collect rich data, it is at least arguable that this methodology is not as susceptible to self-selection bias as for large-scale questionnaire studies that seek to be statistically generalisable.

Secondly, there will be criticism that this methodology does not address the need to measure objectively the effectiveness of behaviours engaged by lawyers when they actually negotiate. Williams and Schneider were criticised because their methodology was based on the perceptions of the sample group, assessing both the behaviour and the effectiveness in others. However, the methodology used in this research study is not designed to observe behaviour and assess effectiveness independently and objectively. It is designed to add to the theoretical framework by seeking to uncover perceptions of effectiveness together with the underlying

[602] See Appendix V for the Interview Candidate Information and Consent Sheet given to interviewees

motivations that underpins negotiation behaviour, regardless of actual effectiveness, and therefore does not hold itself out as an empirical measurement of effective negotiation behaviour.

Thirdly, given that Scotland is a relatively small jurisdiction, it is likely that there will remain an element of *interviewee bias* in relation to how questions are answered given that the interviewer is also a member of the legal profession. This may have resulted in some members of the sample group not wanting to be as forthcoming as they might have been, or they might have altered their answers to accord with a preconceived ideal of what a highly effective negotiator might think or feel to create a good impression before a professional peer. The effect of this bias was reduced as much as practicable by primarily making sure that interviewees had as little professional connection to the writer as possible but it could not be eliminated.

4.11 Summary

This chapter has presented a detailed explanation and justification of the research philosophy, approach and methodology used to conduct this research.

This research is primarily phenomenological in its approach, utilising qualitative data gathered through the use of semi-structured interviews. It has a positivist dimension in the use of a survey questionnaire although this is primarily used for triangulation of the primary data.

This research is both inductive and deductive in its approach to analysing the data. It is inductive insofar as it relates to the formulating frameworks and providing insight and deeper understanding, and deductive insofar as it relates to the use of existing frameworks to organise the research data and to the testing of existing theories and frameworks.

Understanding the strengths and weaknesses of the methodology used in previous studies found in the relevant literature has been of particular relevance to the

development of the methodology since this research study seeks to add to the understanding of earlier influential research by deliberately adopting a dissimilar but complimentary methodological approach to gain further insight into that earlier research.

The value of this study methodology is that it seeks to add to the understanding of the earlier research carried out by Williams and Schneider by providing qualitative data that can inform the key assumptions regarding the underlying motivations of lawyers that are key to developing theory that is leading to a new understanding of how we view effective negotiation behaviour in lawyers. It also seeks to advance our understanding of what lawyers mean by 'effectiveness' in negotiation, a lack of understanding of which is a fundamental criticism of earlier influential research. Finally, it seeks to test insight gained against the developing literature and in particular the hybrid behaviour model proposed by Craver [603].

Further operational details of the research methodology are discussed in the next chapter and the methodology is revisited in the final chapter in the context of the completed research discussing its appropriateness for this type of research in the future.

[603] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337

PART FOUR – RESULTS

Chapter 5 – The concept of effectiveness

5.1 Overview of the presentation of results

The next three chapters of this research study present the results that are relevant to each of the three research questions unlined in Chapter 1 and reproduced below.

> **Research Question 1** – *How do lawyers characterise what they understand by 'effectiveness' in the context of legal negotiation?*
>
> **Research Question 2** – *How do lawyers perceive their own effectiveness as negotiators and characterise their personal negotiation behavioural style?*
>
> **Research Question 3** – *What are the underlying motivations of lawyers when they are engaged in legal negotiation and are they related to perceptions of effectiveness or to a particular negotiation behavioural style?*

This chapter presents the results from the analysis of the interviews specifically in the context of the first research question, which is concerned with the concept of effectiveness in legal negotiation. Chapter 6 then presents the results in the context of the second research question, focusing on how interviewees perceive their own effectiveness and characterise their own overall negotiation style, incorporating the data from the Thomas Kilmann Conflict Mode Instrument (TKI) survey negotiation style questionnaire[604]. The final results chapter, Chapter 7, presents the results in the context of the third research question by considering motivations and exploring how these might relate to effectiveness and behavioural style. All the results are then discussed in detail in Chapter 8, with the final conclusions presented in Chapter 9.

[604] Kilmann, R. H., & Thomas, K. W., (1977), 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument,' *Educational and Psychological Measurement*, 37, 309-325

This chapter is structured around the variables identified as being relevant to the analysis of the concept of effectiveness. Section 5.2 starts off by outlining some of the practicalities relating to the general nature of the interview data itself and how it was collected and analysed, and goes on to provide a preliminarily consideration of how the interviewees appeared to define legal negotiation.

Section 5.3 then identifies the major themes that emerge from the interview data relating to effectiveness in terms of negotiation outcome. Section 5.4 then identifies the major themes that relate to effectiveness in terms of negotiation behaviour.

Section 5.5 then presents the analysis of the results that emerge, with Section 5.6 considering the link between effective outcome and behaviour. Finally Section 5.7 presents a summary of the key finding of this chapter.

Interview data extracts have been included from the transcripts at various points throughout this chapter. These have been printed in a smaller typeface and are preceded by an interviewee transcript reference. These are intended to be representative examples of the interview data drawn upon and do not represent the totality of the interview data analysed.

5.2 Some initial considerations

5.2.1 Conceptual difficulties

It is perhaps relevant to recognise at the outset that it was evident during the conduct of the interviews that some of the interviewees had difficulty in conceptualising the themes under discussion. This was not only evident in their ability to differentiate between negotiation outcomes and behaviours, but also sometimes in respect of finding the vocabulary and conceptual framework to effectively communicate their thoughts on negotiation in general. A number of the interviewees expressed informally on completion of their interview that they had found the process very thought provoking indicating that they had not previously

thought about negotiation in such depth. Some of the interviewees also exhibited frustration during the interviews at not being able to communicate effectively the thoughts they were trying to convey. This may possibly have been related to the generally low levels of negotiation education and training present amongst the sample group[605], education that arguably might have equipped many of them with a more effective set of vocabulary to express their thoughts.

IC 003: I'm trying to think of a good word for it. You're probably not allowed to tell me.

IC 006: It's quite difficult, actually, because I've never thought about it like this at all.

IC 024: I don't know if I can characterise it, I find that quite difficult…I could say what I tend to think I do, and I don't know if I could classify it in any way, through ineloquence.

5.2.2 Defining negotiation in a legal context

After a review of the first 10 interview transcripts, it became apparent that it might provide a useful overview as to how the interviewees view the negotiation process if they were to be asked how they define negotiation in in a legal context. They were therefore asked the question:

'How would you define the process of negotiation in a legal context – what is it and what is its purpose?'

Some interviewees had difficulty conceptualising the question and, despite prompting, focused their answers on *how* they negotiated rather than describing what the process fundamentally is. However, many of the answers did provide some useful insight.

[605] Only 5 of the 30 interviewees had received any significant negotiation or mediation training, with 12 of the group having received none at all. The remainder has been exposed to a very limited amount of training, generally in the nature of a one hour lunch seminar or something similar t some point in their career.

A number of themes emerge from the interview data in answer to the question. Firstly there is a strong theme based around an essential requirement to make concessions or to move away from a starting point towards some middle position.

IC 026: But very often it's probably about elements of compromise, conceding certain points and winning certain points and by the end of it ending up with a situation that your client's happy with.

Implicit within this idea of concession behaviour is a recognition that the other party in a legal negotiation needs to get at least some of what they want or need.

IC 017: I would view negotiation as the opportunity to reach an agreement with, usually if you're acting for a client, the opposite side on that transaction, to reach an agreement which is principally in your client's interest, but in reality in the interest, as much as you can, of both parties, is how I would define negotiation.

The interview data also identifies a requirement to understand what the client wants, followed by a process of working to achieve that for them.

IC 021: Negotiation is finding out either what your client wants or, or and, once you've got there, it's getting from where you are to the point where you've successfully achieved what you identified at the beginning or actually you've changed it.

There is also a prevalent characterisation of the legal negotiation process as being fundamentally concerned with the reaching of a mutually acceptable, consensual agreement.

IC 027: To my mind it's the process of mutually agreeing a common acceptable or agreeable position.

Finally, there is an acknowledgement that the process involves communication and the sharing of information, and is often concerned with working towards some sort of documented binding agreement.

IC 030: Negotiation is the process by which two or more parties start from differing positions and go through the process of reaching an agreement which they are both ultimately willing to regularise in a formal, binding document in a legal context.

Implicit within the descriptions that emerges is recognition that the wants, needs or indeed feelings of the other party are at least in some way relevant. Only one interviewee introduced the concept of 'winning' in relation to a definition of the process. None of the interviewees make any explicit distinction between 'negotiation' and 'negotiation in a legal context' although almost all referred directly or indirectly to a context where they were negotiating on behalf of their clients.

In summary, an overall description of legal negotiation emerges from the interviewees that portrays a process that involves working out what the client wants and then trying the achieve that for them, and that the process of negotiation itself necessarily involves compromise and giving the other party at least some of what they want as the parties work towards a mutually acceptable, consensual, agreement which is generally documented in a legally binding format.

5.3 Effectiveness in the context of outcome

5.3.1 Introduction

The first research question identified in Chapter 1 is directly drawn from the literature explored in Chapter 3 that identifies 'effectiveness' as being an important variable of interest in this research study, and which is primarily concerned with attempting to understand what interviewees actually mean when they refer to 'effectiveness' in the context of a legal negotiation.

Question 1 - *How do lawyers characterise what they understand by 'effectiveness' in the context of a legal negotiation?*

When conducting the pilot interviews and developing the initial interview schedule it became evident that when asked about effectiveness in the context of legal negotiation interviewees would invariably talk about effective *behaviour.* It became clear that interviewees were often describing *how* they would attain '*effectiveness*' rather than describing what '*effectiveness*' is or amounts to. Once this had been

explored in more detail with the pilot interviewees, it became apparent that the effective behaviours being described were considered effective primarily because they were linked to what the interviewees considered to be effective *outcomes.*

On that basis, to allow the interview discussions to be focused more effectively and to best utilise the amount of time available for each interview, it was decided to design the interview schedule to help the interviewees discuss their understanding of the concept of effectiveness by asking them to firstly discuss 'effectiveness' in terms of negotiation *outcome*, and then secondly to ask them to discuss it in terms of negotiation *behaviour*. This made more effective the task of both extracting the interview data from the interviewees and then in analysing it to reflect on what interviewees considered to be associated with an overall concept of effectiveness.

5.3.2 Effective outcome - themes identified from the interview data

Following an examination of interview data, a number of themes emerge which the interviewees associate with what might be characterised as an effective legal negotiation outcome.

How the client feels

By far the most common association made by the interviewees in the study in relation to effectiveness of outcome is with the happiness of the client, a theme that is almost always the most immediate response received from a large majority of the interviewees when asked to consider the concept. This is sometimes expressed in terms of client satisfaction or client contentment and is also on occasions framed in the negative in terms of a concern that the client isn't unhappy. This concept of happiness specifically does not appear to relate directly to any objective measures of effectiveness and is very much focused on the interviewees' subjective perception of how a particular client feels about a particular outcome.

IC 020: Success to me would be the client coming away happy with the result, in short.

IC 026: The client being happy with the result.

Meeting client needs, objectives and desires

The next concept that emerges from the interview data moves away from purely how the client feels about the outcome towards a more objective assessment of the outcome of the negotiation process. This is often described in terms of whether the outcome has met the clients' broad needs, objectives and desired outcomes. With some interviewees the focus is more specific and is expressed in terms of achieving fixed and measurable outcomes and parameters such as bottom lines, financial objectives or achieving certain defined obligations such as the inclusion of certain warranties.

IC 019: I suppose, clearly for your client they are going to have objective measures which frame what they want from a situation. There would be an objective assessment of that in the sense that you will probably have had at the outset a list of what your client is looking to achieve. Some of that might be financial, some of that might be to do with time, some of that might be to do with obligations or statements or warranties that they have made.

Meeting the interviewees' organisational goals and objectives

Related to the meeting of client needs is the reported desire by interviewees to meet their own organisational goals and objectives. Although there is the potential for a conflict of interest between client and lawyer, particularly in relation to fees charged which are inevitably linked to the time taken over disputes and transactions[606], the picture that emerges from the interview data is one of interviewees perceiving that their interests are reasonably aligned since they are focused on optimising the satisfaction of the client, even if the motivations for such a focus is ultimately to achieve their own goals, something that is considered in detail in Chapter 7 in the context of motivations.

IC 013: It comes back to ensuring that you have a good outcome for the client because a good outcome for the client means a good outcome for the firm. Which is an awful lot easier to get paid and negotiate decent fee levels if the client is happy with your service.

[606] See: Hay, B. L., (1996) 'Contingent Fees and Agency Costs', *Journal of Legal Studies* Vol. 25 503; Miller, G. P., (1987) 'Some Agency Problems in Settlement', 16 *Journal of Legal Studies* 189

IC 017: I think client retention absolutely. You want to make sure that the client does go away from a deal thinking that they have got, or that they've been impressed with the service you've provided and they feel that they've reached a settlement or a deal which they are happy with, or they're certainly content with.

Understanding and influencing client expectations

Understanding the requirements of the client is also revealed as being clearly related in the minds of interviewees to effectiveness in terms of outcome. This is reported to be achieved by either explicitly asking what the client wants to achieve, or else is assumed or estimated using a interviewees experience in a particular field or derived from a thorough knowledge of a particular client. In certain circumstances this appears to include the managing of client expectations which appears to amount to the reframing of a certain potential outcome as effective by the interviewee, when the client otherwise might not have considered such an outcome in such positive terms.

IC 003: Before I start a negotiation I'll spend a lot of time speaking to the client, working out what we want, adopting our position, working out what we could live with and what we couldn't live with.

IC 008: A part of the lawyer's job is to manage those expectations and ensure that their client understands what the possible outcomes are, what the likely outcomes are, what his entitlement might be legally, and whether or not those various factors justify the expectation which the client has. And part of the difficulty in litigation at least is in managing the expectations.

The nature and structure of the client

The nature and structure of a client either as an individual or organisation also appears from the interview data to be relevant in the context of establishing and understanding what might constitute an effective outcome. The interview data suggests that interviewees consider different types of client organisations to value different types of outcome and to focus on different elements of an outcome. Public sector clients may have different interests when compared to an insurance company, institutional investor or indeed a private individual either purchasing a commercial building or suing an employer in a personal injury action. A public

sector client might have political interests it needs to protect whereas a commercial investor may have bureaucratic or regulatory priorities or requirements. The type or nature of the client therefore appears to be an element that influences what an effective outcome might look like.

IC 001: And the extent of the client involvement, I guess, is dictated by who it is that's giving me instructions. If it's an in-house lawyer, who's got a lot of experience in litigation, the chances are he or she will have their own take on things, will have their own opinion. If it's for property, it tends to be just asset managers, surveyors. They might say, you're the lawyer, that's why we pay the money. Happy to go with it if you think that's the way it should be dealt with.

IC 030: But it's more an issue of if you're dealing with a PLC client, they have a huge amount of regulation, for example, to comply with, and they are usually strictly regulated internally in terms of their own reporting, they have to report upwards to their own line manager, etc.

Concluding a balanced commercial agreement

A concept emerges from the interview data where some interviewees interpret the creation of commercially balanced outcome as constituting what might be considered an effective outcome. This is characterised by some interviewees as an agreement that balances the obligation and rewards of each party with the risks associated with their respective commercial undertakings. This appears to stem from a highly commercial view of negotiation as a process involving the creation of an agreement that fundamentally seeks to apportion risk and reward between the parties and allows mutually beneficial commercial activity to then flow from the relationship that has been formalised. From the interview data it also appears to be based on a fundamental conceptualisation of the negotiation process as a fair process where both parties are essentially working together to achieve this common goal. This concept appears to be linked to relationships and personal reputation, it being suggested that in certain circumstances an outcome that is not balanced may ultimately damage important relationships and cause personal reputational damage to the lawyer involved.

IC 006: To me it's about making sure that risk and reward for everyone is at a level that they're comfortable with so that people are sufficiently incentivised to do a good job or to perform their contract, and appropriately penalised if they don't.

IC 018: Generally you come away thinking that everybody got what they should have got in a fair world, if you like, there's been reasonable allocation of risk, reasonable prices being paid.

The act of concluding an agreement

A number of interviewees appear to take the concept of reaching a balanced agreement a step further and conclude that the act of simply reaching an agreement in itself leads to the conclusion that the negotiation outcome has been effective. This appears to be related to a view held by some interviewees that the parties as commercial entities are fundamentally aiming at the same outcome (a concluded transaction or agreement) and would only in reality conclude an agreement if the terms were mutually beneficial.

IC 007: I think at the end of the day getting that agreement signed is what I would consider success in that it's a legal agreement and therefore the lawyer has to achieve the agreement.

IC 024: So I would say it's more about actually getting the deal done.

The efficiency of reaching the agreement

The efficiency of the negotiation process appears to be directly related to the concept of outcome. How the parties view the way the negotiation is conducted in terms of time, ease and cost appears to be linked directly to how they perceive the final outcome in terms of effectiveness. This is arguably important because it directly links negotiation behaviour and therefore how the negotiation is actually conducted, with outcomes and therefore with what might be considered to be an effective outcome.

IC 002: My job is just trying to make the thing as efficient as possible.

IC 015: That I feel that we have got to a conclusion in as efficient a way as is possible… and that the whole process is cost effective, and emotionally effective.

Relationships

An important variable that emerges from the interview data appears to be the role that continuing relationships between the parties have following any concluded negotiation. Where the parties continue to deal with each other following the negotiation then one important measure of the effectiveness of the negotiation outcome is reported to be how the actual terms of the outcome achieved effects these relationships.

IC 010: So success is not necessarily measured in monetary terms, it's sometimes measured in how the parties come out of it as far as their relationships are concerned and their ability to interact with each other.

IC 014: There are occasions where I've done things where I know their continuing relationship is important, and where the continuing relationship is important it does matter to me to come away from it with everybody feeling that was a positive thing.

An additional factor identified is that such continuing relationships appear not only to be those between the respective clients, but also potentially between the sets of lawyers involved. It appears from the interview data that in certain legal environments, especially these characterised by what is perceived by the interviewees to be a relatively small number of repeat player interviewees, the perception of the effectiveness of outcome by the lawyer will be influenced by a need to protect the relationship with the lawyer on the other side of the negotiation, irrespective of whether there is any continuing relationship between the clients.

IC 022: So success, getting it done painlessly, still speaking to the other side, could work with the other side again because it's a small market up here and we have to work with the same people again and again.

Because of the specific context they operate in, it might have been expected that litigation interviewees would not have valued preserving or enhancing inter-client relationships as highly as non-contentious transactional interviewees due to the

very often lack of continuing working relationship between both sets of clients following litigation. However, it is suggested by the interview data that interviewees involved in litigation are often motivated to maintain a good relationship with the lawyer on the other side of the dispute since they would typically have a great deal of repeat contact over numerous and often simultaneously conducted settlement transactions. This therefore is likely to influence the nature of their characterisation of what they consider to be an effective outcome and indeed the type of behaviour used, discussed later in this chapter.

IC 020: So I always remember that. And you have to deal with the same people on the other side of cases. And when I was doing the insurance based litigation, that was very much true because to an individual client who had, say, a very minor personal injury claim or something of that nature, this case was the world to them, the biggest thing that they had going on. For me, it was one of hundreds. And to the person I was dealing with on the other side, it was one of about twenty or thirty that I might have with that individual alone. And so what the client might want and what I know can reasonably be achieved will be two different things sometimes. And I know that I can't go hammer and tongs, go for the throat every time, because I'll hang up the phone once I've completed that deal and then ten minutes' time I'll have to pick it up again to the same person and try it all over again for a different client.

IC 028: My cases are different in that there's not really an on going relationship between any of my clients because I have personal injury victims on the other side or folk that have got a dispute with a public authority, but I suppose on the point of view, you wouldn't want the other solicitor to think they've been really shafted in case you come up against him again and they don't feel they've been dealt with fairly.

Fairness and reasonableness

The perception of the fairness of negotiated outcomes appears to be important in the overall characterisation of effectiveness to some interviewees and appears to be closely related to the concept of reasonableness. The reasons behind any desire for an outcome to be broadly fair or reasonable appear to be complex. In many instances it is arguably closely associated with maintaining relationships, as well as having a link to the desire to achieve a balanced commercial outcome, both of

which have been discussed above. There also appears to be amongst a small number of interviewees a personal desire to be fair, something that may be linked to the ethical perspective of the individual lawyer, a theme that is discussed below in the context of effective behaviour and motivations.

IC 010: I've got to say I always try and get to a situation which is fair to both parties.

IC 018: But generally it is trying to get what you would consider to be a fair result where both parties feeling they can hold their heads high, I guess… But I think in common parlance, I would say most deals that I've been involved with are probably fair.

The interview data does, however, recognise a distinction between fairness of process and fairness of outcome, and that many interviewees do not consider that fairness of outcome is relevant to effectiveness.

IC 007: I was really not interested in fairness at all of the end result, and, to be honest, once the case was finished and done and dusted it was shoved into the filing cabinet and then it was forgotten about and then another one took its place. So fairness I don't think really troubled me too much.

How the other side feels about the agreement

The concept of 'fairness' discussed above is a concept that is arguably closely linked to a consideration of the attitudes of individual interviewees towards how those on the other side of a negotiation feel at the end of the negotiation process about the outcome achieved. A significant proportion of the interviewees in the sample express some link between the concept of an effective outcome and the other party feeling good or at least positive about the outcome. Indeed a number of interviewees express the opinion that it is important to them that the other side feels good or indeed happy about the outcome.

From the interview data it is also evident that the existence of these opinions is very likely to be influenced by whether there are any continuing relationships, either between the clients or between the interviewee and the other lawyer. Indeed a number of interviewees explicitly make reference to continuing relationships in this context and allude to an improved ability to resolve future problems together or

improved commercial performance when both parties feel positive about a negotiated outcome.

IC 002: It is important, yes, you want them to feel good about it too. You want everyone involved, agents and principles to feel that the outcome was good for everyone concerned.

IC 017: As much as my main concern is my client, I think if my client was happy but the other client wasn't happy, I still don't feel that I've entirely done my job as best I can. I would just feel a little bit uncomfortable because I feel then that we maybe didn't achieve everything that we possibly could have achieved.

IC 031: A good outcome, an outcome which everyone can walk away from feeling it is a good outcome.

Feelings of wanting to beat or win against the other side

A concept related to how a interviewee might feel about the other side of a negotiation is whether the interviewee has specifically what might be considered more competitive feelings of wanting to win against or indeed beat the other party. The interview data reveals that the majority of the sample group have no such feelings.

IC 002: I think in transactional terms you can't have a situation where someone's a winner and someone's a loser, I don't think, maybe that's just me.

IC 014: Probably not beating the other side, no. I think reaching a reasonable position, so no, not beating them. I think never beating them, regardless of how strong my negotiating position.

IC 023: We don't really win in commercial property, as such. You either get the deal done or you don't.

There is, however, evidence that some interviewees do sometimes see legal negotiation outcomes in a win and lose context, with some of this group appearing to suggest that such feelings occurs as a response to a particular type of behaviour or stance being taken by the other party.

IC 015: And negotiation, perhaps by definition, means there will be some wins and losses through the process.

IC 020: Absolutely. I wouldn't be very good at contentious litigation if it didn't. You have to have a desire to win, to get the best possible result.

Nature of the legal interaction

Finally, it does appear that the area of legal practice may be indirectly relevant to how individual interviewees perceive effective outcomes. Arguably what appears to influence interviewees is not necessarily the legal practice area itself but rather the legal environment and type of interaction that the interviewees are engaged in. Interactions can perhaps most usefully be broadly characterised as those that create or maintain relationships, those that end relationships and those that are transactional in nature. Although interviewees engaged in litigation negotiation might most easily be categorised as engaged in a process that predominantly ends relationships, when litigation negotiations take place in a legal environment that involves repeat player lawyers in what they perceive to be a relatively small legal market then the nature of the interaction means that the existence of the continuing relationship between the lawyers themselves becomes important and arguably changes the nature of the interaction to one that resembles an interaction that creates or maintains relationships. On that basis there is a strong argument that the area of legal practice is only relevant to the perception of effective outcome insofar as it might say something about the nature of the legal interaction and relationships involved.

IC 020: And you have to deal with the same people on the other side of cases. And when I was doing the insurance based litigation, that was very much true because to an individual client who had, say, a very minor personal injury claim or something of that nature, this case was the world to them, the biggest thing that they had going on. For me, it was one of hundreds. And to the person I was dealing with on the other side, it was one of about twenty or thirty that I might have with that individual alone. And so what the client might want and what I know can reasonably be achieved will be two different things sometimes. And I know that I can't go hammer and tongs, go for the throat every time, because I'll hang up the phone once I've completed that deal and then ten minutes' time I'll have to pick it up again to the same person and try it all over again for a different client.

IC 028: My cases are different in that there's not really an on going relationship between any of my clients because I have personal injury victims on the other side or folk that have got a dispute with a public authority, but I suppose on the point of view, you wouldn't want the other solicitor to think they've been really shafted in case you come up against him again and they don't feel they've been dealt with fairly.

5.4 Effectiveness in terms of legal negotiation behaviour

5.4.1 Introduction

Having now presented the interview data on effectiveness in terms of negotiation *outcome*, this section goes on to present the interview data relevant to the consideration of effectiveness in terms of effective *behaviour*.

5.4.2 Effective behaviour in legal negotiations – types of behaviours identified

The examination of the interview data on effectiveness in the context of negotiation behaviour reveals a number of arguably distinct types of behaviour that interviewees report as being associated with either effectiveness or non-effectiveness.

Reasonable and fair behaviours

Arguably the overall concept of 'reasonableness' has the strongest association with effective negotiation behaviour in the minds of the interviewees in the study group. Reasonableness appears to be an overarching term that encompasses a number of other concepts that are also considered separately below. However, as a distinct concept, it appears that reasonableness is expressed both in relation to the substance of the behaviour discussed in this section, as well as in relation to the general tone of the behaviour considered later in the context of the discussion on 'aggressive' behaviour.

In terms of substance, reasonableness appears to be used most to convey the idea of being realistic about what might be possible to achieve for the client, and includes a desire to make appropriate concessions and not to hold onto positions unnecessarily. Reasonableness also appears to include an acknowledgement by the interviewees that the other party in the negotiation has their own needs that require to be met and that any agreement reached has to be necessarily a balance between the needs and wants of both parties.

IC 001: I mean, I always find being reasonable is the best way – the most effective way to negotiate.

IC 006: Reasonableness, I think, is crucial.

IC 013: Reasonableness is understanding what is important and therefore not failing to give way on every single point and just not backing down because you think that maybe in isolation you have the better argument on that point if in the overall context the reasonable thing to do would be to give a little bit of give and take.

Reasonableness also appears to be closely associated with a concept of fairness of process that relates to the way the negotiation is carried out. This looks to be directly linked in the minds of many interviewees to concepts of both professional behaviour and personal ethics.

IC 013: Fairness and reasonableness are fairly interchangeable.

IC 006: Fairness is a bit more difficult because I think fairness means everybody should have the opportunity to put their case, should be appropriately represented, but fairness doesn't necessarily mean that everyone gets exactly what they want out of the negotiation.

IC 017: I think it matters to me maybe more that the negotiation is done fairly.

However, it is perhaps relevant to note that although almost all the sample group strongly link the concept of effectiveness with that of reasonable behaviour, there is a small number of interviewees who don't think fairness is directly related to reasonableness in the same way. This view is arguably linked to a notion held by some interviewees who feel that where both sides are legally represented, and professional and ethical rules of negotiation are being observed, then there is no

obvious requirement for a separate notion of fairness of process, unless, as recognised by some interviewees, it can be used strategically to gain some advantage or exert influence.

IC 020: It doesn't necessarily matter, except where it can be used as a selling point of a deal.

However, this does little to weaken the clear impression from the interview data that reasonableness in terms of the substance of behaviour emerges as an important factor that is linked to the perception of effectiveness in relation to negotiation behaviour.

Concession behaviour

Perhaps arguably also a manifestation of 'reasonableness', the ability and indeed desire to make reasonable, appropriate and timeous concessions emerges strongly from the interview data as being an important element of effective negotiation behaviour.

Interviewees, however, often describe such a desire as being distinct from a general concept of reasonableness and something that appears arguably to be closely linked to the concept of efficiency of process discussed in the first section of this chapter in relation to outcomes, a concept that is centred on the idea that reaching an agreement in a timeous, cost effective and efficient way is part of what constitutes an effective legal negotiation outcome. Such concession behaviour therefore appears to link effective outcome directly to effective behaviour.

It is also perhaps relevant to note from the interview data that this particular component of effective behaviour is often framed in the negative, with a failure to vary positions and make concessions often being characterised as obstructive and actively detrimental to an effective negotiation process.

IC 013: In some way, that's part of the job of the lawyers, to try and find a compromise.

IC 024: Negotiation is a series of compromises between parties to achieve an end result.

IC 025: Being able to get to a compromise as quickly as possible that allows everyone to move on.

Manipulative behaviours

Many of the interviewees report to strongly feel that manipulative behaviour is fundamental to the nature of the legal negotiation process. Rather than being untruthful in character, manipulative behaviour is viewed as an attempt to change perceptions and to focus on areas of strengths and avoid areas of weakness.

IC 001: Negotiations are manipulations… I think you're trying to manipulate someone in to your way of thinking.

IC 008: Well, I suppose you're always trying to manipulate people in one way or another. You want them to do something different from what they have said they're going to do. So you are trying to manipulate them in one form or another. So I think that's just part of the negotiation.

IC 023: I mean, we all manipulate as part of negotiation, that's just the reality.

However, it is recognised that a number of other interviewees do appear to consider such behaviour as more ethically ambiguous and don't feel it is behaviour that is likely to be effective.

IC 010: Again, I don't think it's very effective because sometimes you might not know you're being manipulated, I suppose.

IC 019: I don't want a reputation of being manipulative, back-stabbing or slow… I wouldn't think that that would be an acceptable approach, a deliberate attempt to manipulate facts or situations or impressions, I think is not a tool that a commercial lawyer could use

Deceitful behaviours

Deceitful behaviour is almost universally considered to be materially different in nature to manipulative behaviour, although some interviewees consider that there is sometimes a fine line between the two. It is characterised as encompassing lying, misrepresentations and dishonesty and is almost universally associated with ineffective negotiation behaviour. However, this is behaviour that the interviewees report encountering very rarely and it is perhaps important to note that what is in

reality being reported is that the interviewees have not been aware of its occurrence within their own legal negotiations[607].

This is arguably linked to a general belief expressed by many of the interviewees that such behaviour can be effective, but only when it is not discovered. Although none of the interviewees indicate they would ever use deceitful behaviour themselves, it should be recognised that this is perhaps something they would be very unlikely to admit[608]. It is therefore possible that such behaviour is used by interviewees within the sample group and simply wasn't discovered. However, it is evident from the interview data that the risk associated with use of this type of behaviour is perceived by the majority of the interviewees to be high.

IC 005: I think that, unfortunately, it can be successful, because you're the party that the person does the deceit, and if you like, you're fooled by it and then suddenly you've got an outcome, and then it's too late. So it can actually work.

IC 008: So it's not something I would ever have dreamt of doing, certainly not deliberately.

IC 014: I think deceit, if it was spotted would be ineffective. It's the sort of thing that leads to breakdowns in relationships.

Hard behaviour

A type of behaviour characterised as 'hard' emerges from the interview data as being sometimes associated with potentially effective behaviour. Hard negotiation behaviour seems to be associated with the ability to stand ones ground, argue points effectively on behalf of clients, and not be pushed around. In addition 'hard'

[607] It is recognised that individuals have difficulty in recognising deceit. See: Vrij, A., & S. Mann., (2004) 'Detecting deception: The benefit of looking at a combination of behavioral, auditory and speech content related cues in a systematic manner' *Group Decision and Negotiation* 13(1): 61–79.

[608] See: Fleck, D., Volkema, R., Pereira, S., Levy, B., & Vaccari, L., (2014) 'Neutralizing Unethical Negotiating Tactics: An Empirical Investigation of Approach Selection and Effectiveness', *Negotiation Journal* January 23-48 at pp25-26 where the authors cite a number of studies from the negotiation literature in support of their assertion of '*fairly widespread use of questionable or unethical tactics*' across a number of negotiation contexts.

negotiation behaviour also arguably appears to share some of the characteristics that are associated with some aspects of aggressive behaviour discussed below, particularly in terms of adopting more extreme positions accompanied by reluctance to compromise. However, it appears that the tone of 'hard' behaviour is much more moderate and is characterised as neutral, reasonable or even polite when contrasted with aggressive types of behaviour.

IC 003: I think that you can be assertive and play hardball if you like with someone without being aggressive… I think you can have short timescales, you can put your point over clearly and succinctly and not really budge from that if that's your client's instructions without being rude.

IC 016: Yes, you can make your point forcefully but you can do it politely as well.

IC 028: Some people can play hardball and can be perfectly polite about it and respectful.

A type of behaviour often described as 'grandstanding' or 'points scoring', sometimes associated with a hard type of negotiation behaviour, also emerges from the interview data. It appears that although not viewed as negatively as aggressive behaviour, this is generally seen as being tiresome, irritating and ultimately inefficient, and almost universally is considered to be ineffective.

IC 002: The kind of point scoring I suppose, should really be minimised.

IC 014: I think you do see "look at me" behaviour, I don't think that's helpful.

IC 018: I just think unnecessarily combative, people trying to score silly cheap points, people grandstanding. So it's the opposite of all of the words I used to describe the effective approach.

IC 026: I think what doesn't work is posturing, it's arguing, one-upmanship, it's nit-picking.

Although throughout the interview data there is clear evidence that certain 'hard' types of negotiation behaviour are viewed as potentially effective, it is recognised that some interviewees simply considered that all types of hard negotiation behaviour are fundamentally ineffective.

IC 016: Ineffective behaviour is adopting extreme positions, refusing to compromise, prolonging the negotiations just for the sake of it and acting in a way which is less likely to result in a harmonious relationship going forward.

Aggressive behaviour

Finally, aggressive behaviour reveals itself as being very strongly associated by interviewees within the sample group as being highly ineffective. It is nearly always the first type of behaviour that interviewees identify as being ineffective, with interviewees often expressing a personal dislike and even contempt for its use and for those that use it. It is associated with behaviour that is characterised as being unreasonable or indeed highly unreasonable.

IC 013: Generally speaking I would probably say the most ineffective behaviour is being overtly aggressive.

IC 019: But I think the one thing in a lawyer or other professional that doesn't work is aggression…from my point of view in terms of what I come across and observe, I think aggression is probably the number one.

Descriptions of the behaviour itself almost always relate primarily to the 'tone' of the communication or interaction and are strongly associated with unreasonable tones of communications such as displays of anger including raised voices and on occasions to physical aggression. Some interviewees describe hectoring and bullying behaviour in the same context.

IC 005: Its behind that, what tone of voice you raise… I think aggressiveness, it could be vocal, it could be in terms of the written language, it can be both, and in terms of face to face as well.

IC 008: So from my perspective, a kind of bullying, hectoring style, I found very off-putting, I didn't really enjoy dealing with people like that, and I tend to put my back up, I think…. the ones I would say are not effective are the kind of bullying, hectoring type approach.

IC 019: But I think what I'm saying is an aggressive stance in terms of your tone and interaction is always going to be ineffective, almost regardless of the content.

Aggressive behaviour is also arguably linked to a lesser extent in the minds of some interviewees to behaviour that is characterised as being highly unreasonable in substance rather than in tone, behaviour that included taking unreasonable or unsubstantiated positions, refusing to compromise, and issuing threats and ultimatums. However, it appears that a number of the interviewees feel that if this type of behaviour is delivered in a more moderate, reasonable or even pleasant tone it would change the nature of the behaviour to something more acceptable and that perhaps resembles the 'hard' behaviour described above.

IC 012: But I think that there's no need to be aggressive. Sticking to your guns is different but that doesn't need to be aggressive.

However, although in general terms aggressive behaviour is almost universally associated with ineffective legal negotiation behaviour, a significant minority of the sample group do concede that such behaviour can be effective in circumstances often linked to either the personalities of the lawyers involved in the negotiation or where the behaviour is being used in a highly targeted or strategic way. A number of the interviewees that recognise that aggressive behaviour can be effective also express the view that they consider aggression to be generally highly ineffective.

IC 12: I mean, I have seen people just beating other people into submission through force of their personality. And that works for them but that's not my style.

C 020: But you do get some successful negotiators who have found that the more aggressive tactic works for them… their more aggressive tactics wouldn't necessarily work with me, I wouldn't find that I would want to necessarily reach a deal with them. It would be more inclined to get my back up. But that's not to say that it's not successful with other people.

5.4.3 Effective behaviour in legal negotiations – influencing variables

The examination of the interview data on effectiveness in the context of negotiation behaviour also reveals a number of what might be considered influencing variables that appear to be important in determining what types of behaviours might to be effective in any given legal negotiation situation.

Reputation

Reputation is a concept that emerges as being very important in the context of effective legal negotiation behaviour. Although reputation has already been identified as being important in relation to effective outcome, it is arguably even more influential in the context of effective negotiation behaviour, with many interviewees in the study reporting that maintaining a reputation amongst their peers strongly influences their behaviour in negotiations.

IC 005: I think, generally in this line of work, you come across the same people a little bit, and it's important to me to know that the other side know that I'm a reasonable person when it comes to negotiations.

The type of behaviour that the majority of interviewees generally associate with what might be considered a beneficial reputation is again centred on a concept of reasonableness and tends to be framed in terms of being a good person to deal with and not being seen as obstructive. It seems very important to many of the interviewees that they are not seen as being a person that is in any way difficult or awkward to deal with. This looks to be connected to the concept of efficiency and of a interviewee being someone who will get the deal done.

IC 013: It helps build the personal reputation as being somebody who can actually get deals done…You don't want a reputation that says they are obstructive or they are not actually going to assist in this process.

Being considered trustworthy also appears to be a very important element of a desirable reputation although, in reality, it appears from the interview data that the concern is perhaps focused more on avoiding a negative reputation for being actively untrustworthy.

IC 012: Yeah. I think if certain people have reputations for being slippery customers, and I guess that must make you wary.

Not only is having a reputation for being reasonable, easy to deal with and not being untrustworthy seen as personally desirable, it is also clear that many of the

interviewees also consider that it actually assists them to negotiate more effectively. However, given that it appears interviewees like to deal with negotiators who share a similar reputation, it can't be excluded that interviewees may simply want to conduct negotiations with those similar to themselves for reasons of personal preference rather than it necessarily being effective from any objective perspective.

It is perhaps not surprising to observe that a reputation for being difficult to deal with, obstructive or aggressive is almost universally considered by the interviewees as being undesirable and something that is associated with being a less effective negotiator. However, what is also relevant to note is that when interviewees are specifically asked how they would like their peers to see them as negotiators, as well as highlighting the positive attributes already discussed above in relation to reputation, a significant number of the sample group introduce an additional concept best characterised as firmness. Interviewees often express a strong desire not to be seen as a 'pushover' or a 'soft-touch' and as having the ability to be 'firm', to be strong where necessary and to be able to stand their ground and argue their clients' point effectively. When combined with the reputational elements of fairness and ease of dealing with discussed above, this overall approach can probably best be characterised by the phrase 'firm but fair'. This introduces elements of what might be considered a harder type of behaviour, something that is considered in more detail below.

IC 010: Somebody who is approachable and realistic. But not a pushover.

IC 011: But I think you can still be firm but fair. I think there's definitely a balance to have.

It is of relevance to note that the 'firm but fair' characterisation that a number of the sample group appear to value in relation to their own reputation is not necessarily a trait that they want their negotiating partners to possess. This arguably might indicate that interviewees feel that 'firmness' potentially confers an advantage in a negotiation, especially if it is not possessed by their negotiation

counterparty. Additionally, a number of interviewees also specifically wish to be considered as technically competent and as well prepared.

The interview data appears to suggest that reputation is primarily directed at other lawyers in their legal practice area, people they would routinely negotiate with. As has already been identified in relation to relationships in the context of effective negotiation outcome, the perceived size and structure of the legal environment appears to be important in relation to reputations and effective legal negotiation behaviour. A number of the sample group comment that because the Scottish legal market is perceived to be small, they considered that various practice areas are often dominated by a relatively small number of repeat play lawyers which makes it particularly important to their ability to negotiate effectively that they negotiate using behaviour that protects their reputation. This is arguably closely linked to the role that relationships play in legal negotiations, discussed earlier and again below. It suggests that the reputational influence on negotiation behaviour may be more pronounced in what are perceived to be small legal markets that are characterised by single practice area repeat player lawyers.

IC 018: Ultimately Scotland is a small place, the UK is a fairly small place, particularly doing business in Scotland and across the Central Belt,… and you don't want people to be thinking "oh, no, last time I dealt with him he was a bit of a shark, he pulled a fast one." You don't want that.

IC 023: And again it's because it's a very small community. Not just legal work in general but when you split it down to just the real estate lawyers in Edinburgh, Glasgow, who are the ones we work with fairly regularly, everybody knows everybody. And the difficult lawyers are very well known as being difficult and I personally would not like to be on that list.

Finally, there is also evidence from the interview data that interviewees consider having a reputation for reasonableness, ease of dealing with and trustworthiness may also beneficial in helping to retain clients and attract new business.

Relationships

As with negotiation outcomes discussed earlier, relationships emerge as being as important variable in determining what might be effective negotiation behaviour. Many of the interviewees indicate broadly that the behaviour used in a legal negotiation should not damage the relationship between the respective clients. However, this is seen to be particularly important where there is expected to be a direct continuing relationship between the respective clients following the conclusion of the negotiation.

IC 015: But it's more making certain that it's a joint venture or whatever, that the parties have got to work together after the event and therefore you can't be too confrontational because you might destroy the going forward relationship.

IC 023: Most of the time transactions we do involve what is going to be an on going relationship between the parties, so you ideally want to get to the end of having the lease, for example, in place, without the parties having had a major falling out if they're then going to be dealing with each other for the next ten years, that doesn't help anybody.

The interview data suggests that this might be less relevant when the interaction is in the nature of a one-off transaction such as a sale and purchase of a property, although even then there appears to be a predominant feeling amongst the interviewees that it is desirable for the negotiation process not to undermine the relationship between both clients, whatever the nature of the legal interaction.

IC 014: If you're selling something, retiring and disappearing off the face of the planet to an island somewhere then it's probably not important, you can have a full-on scrap and it probably doesn't matter.

As has been discussed in terms of outcomes and indeed in terms of reputations, it appears that even in situations where there is no prospect of a continuing relationship between the respective clients, there is often a relationship between repeat player lawyers to protect and this appears to have an influence on the type of behaviour that is considered effective in any given negotiation. This is clearly

linked to the suggestion made earlier that concern for reputation is a factor in determining the effectiveness of behaviour and to effectiveness of outcome.

IC 006: And I think actually the Scottish legal market, that probably happens an awful lot in terms of the individual lawyers because the Scottish legal market is not particularly large, and particularly the work that I do there are only a few firms, really, who operate in it all the time. So I know the other lawyers very, very well, and I'll go for lunch with them or see them socially… Because quite often your clients might get a better deal purely because you can have a conversation with the other lawyer outside away from the perhaps sometimes tense aspects where the clients are in the room and they have a commercial objective.

IC 028: My cases are different in that there's not really an on going relationship between any of my clients because I have personal injury victims on the other side or folk that have got a dispute with a public authority, but I suppose on the point of view, you wouldn't want the other solicitor to think they've been really shafted in case you come up against him again and they don't feel they've been dealt with fairly.

Trust

Trust is not only revealed in the interview data as being an important factor in terms of relationships and reputation, but also in its own right as a variable that influences effective behaviour. Trust appears be considered an important factor in fostering an open and honest exchange of information between parties, arguably on the basis that it reduces the risk that information disclosed will be in some way used against the party disclosing it.

IC 014: I think you can be frank and open with someone who you trust.

The existence of trust also arguably emerges from the interview data as a factor in creating an efficient process by effectively cutting down the amount of time and resources that might otherwise be expended in verifying the factual basis of certain statements and information, or in securing compliance in undertakings, all conduct that occur routinely during nearly every legal negotiation and which is arguably made harder and less efficient in the absence of trust.

IC 018: I think if there wasn't trust amongst solicitors it wouldn't take long before the whole system of carrying out commercial transactions, whether it's buying and selling a company or buying and selling a house, before it all just collapsed.

IC 023: Yes. I think it all goes back to trust, professional trust, I suppose. I mean, if you find out somebody on the other side is acting unethically then how would you ever be able to trust anything they told you again? And I think at that point it would be almost impossible to effectively negotiate because you wouldn't be able to rely on any of the statements they were giving you.

IC 024: If you have a good relationship, and by good relationship, a trusting relationship with a lawyer you are much more likely to get through the transaction faster. You may be more inclined to accept a point that you may otherwise have required some form of substantive evidence for in the past.

Nature of the client

The nature and structure of the client as an individual or organisation has already been discussed above in the context of negotiation outcome. In the case of behaviour it is evident from the interview data that some clients either have their own reputations to consider or have strong ethical considerations that would preclude their lawyer engaging in certain types of negotiation behaviour. It is also evident from the interview data that some clients require the interviewee to engage in specific kinds of negotiation behaviour during the negotiation.

IC 010: Sometimes the client does want a more aggressive approach. So you have to modify it sometimes.

IC 032: So clients come in all different guises and that is another thing you have got to adapt your style for the client.

Professionalism and ethical perspective

It is perhaps not surprising that there is an association in the minds of the interviewees between trust and standards of professional ethical behaviour. Interviewees see the existence of a professional ethical framework as being important in the context of effective negotiation behaviour, primarily on the basis

that it allows each side to trust that the process will be conducted according to certain rules. This appears to be related again to process efficiency discussed earlier. The professional ethical framework is clearly related to the interviewees' own ethical perspective which appears also to be an influencing factor in determining what type of behaviour might be deemed to be effective.

IC 019: And I suppose, in some ways, it's why people come to lawyers to have them run negotiations like this rather than just doing it themselves. Because they know that we work within a professional framework. It's a framework of trust and ethics.

Personality and experience

Over two thirds of the interviewees perceive there to be a link between what they describe as their '*personality type'* or an individuals '*character*' with the type of negotiation behaviour that might be effective for that particular individual. These interviewees appear to consider personality type or an individuals character to be essentially '*just the way you are'* and there is a strong suggestion within the interview data that individuals need to match their personality type (i.e. their overall personality or character as a person) to a particular style of negotiation behaviour (i.e. the type of behaviour they choose to use when they negotiate) in order to be effective.

The interview data does not goes as far as to describe the nature of the different personality types or personal characters that might be associated with any particular negotiation behaviour but there is clearly a perceived association not only between the personality of the negotiator and their choice of negotiation behaviour, but also between the personality of the negotiator and the type of negotiation behaviour that the individual actually perceives to be effective.

Implicit within this interview data is therefore the perception by interviewees that an individual legal negotiator can only be effective if they use behaviour that suits their own character and personality type. This leads to an important conclusion that effectiveness of negotiation behaviour may not necessarily be able to be assessed

in isolation from the personality of the lawyer who delivers it, or indeed is subject to it.

IC 019: I think my negotiating style is effectively just a representation of my personality.

IC 029: I think you can only really effectively negotiate if you're being true to yourself and to try and adopt some sort of persona doesn't feel terribly authentic.

IC 030: And I suppose elements of your own personal nature, the people who are bullies around the negotiating table tend to be bullies around the dinner table as well.

Another factor that emerges in relation to the type of behaviour a interviewee might use in legal negotiations is their experience, both in terms of length and in particular their exposure in their early career to particular negotiation styles, behaviours and personalities. The interview data suggests that interviewees perceive that as they get more experience they both get better at negotiating and tend to be less confrontational in their approach.

IC 016: Well, I don't really see it as a contest, to be honest. Maybe when I was younger I saw it as more of a contest, but I think as you get older you see it as another transaction which is important for the client.

IC 024: If you'd asked me maybe five years ago, I would probably have said "yes, I want to point score." Now, maybe beyond that, hopefully. It enters your head, I'm not going to deny it, it enters your head. But hopefully internal reason puts you beyond that.

However, it appears that the majority of interviewees consider that their personality type is more influential than their experience in relation to negotiation behaviour.

IC 027: I think that my particular boss has a more collaborative approach and I think that has informed a lot of my negotiation style… Clearly your own personality does inform your behaviour to a large extent and I am very much of a, I prefer a peaceful situation, I'm not competitive at all.

Reciprocation

Finally, evidence of the role of reciprocation[609] emerges from the interview data as being potentially significant. In the context of negotiation behaviour, reciprocation is when a negotiator adopts the same type of negotiation behaviour as is exhibited to them as a direct response. The interview data suggests that many interviewees consider that they will only engage in hard or aggressive types of negotiation behaviour as a direct reciprocal response to it being used by the other party, even when the interviewee reciprocating the behaviour considers that it may not be effective. However, the interview data also suggests that many of the interviewees in general consider that in order to be effective they need to adjust their own negotiation behaviour in response to the type of behaviour exhibited by the other party in a negotiation.

IC:002 Well, it depends on the person you're dealing with, absolutely. I mean, you can't just have one size fits all… So, you need to react to their mode of behaviour in the way that you think is going to be most effective to deliver what your client wants.

IC 007: I think I can participate in a negotiation with those, all of that spectrum of behaviour. I think I would adjust my own behaviours to deal with them.

IC 019: Yes, if somebody is being aggressive, pig-headed or is clearly completely out of their depth and is the wrong person to be dealing with this transaction then do I lose my temper, do I run out of patience? Definitely.

5.5 Perceptions of effectiveness in legal negotiations

5.5.1 Analysis summary – effective legal negotiation outcome

The results presented show that there are a number of elements that come together to influence what the interviewees consider to be an effective outcome in the context of a legal negotiation. These elements can arguably be usefully

[609] See: Brett, J. M., Shapiro, D. L., Lytle, A. L., (1998) 'Breaking the bonds of reciprocity in negotiations'. *Academy of Management Journal* 41, 4; 410-424 and also: Putnam, L. L., & Jones, T. S., (1982) 'Reciprocity in negotiations: an analysis of bargaining interaction' *Communication Monographs* 49:171–191

categorised as factors that are subjective in nature and those that are objective in nature. In addition, there is also a set of variables that influence these factors.

Before consideration is given to these categories it should be clarified how the terms 'subjective' and 'objective' are specifically defined and understood for the purpose of the current study. The term 'subjective' is used in the context of this study to describe any assessment of effectiveness that is made by either lawyer or client that is fundamentally based on or reflects how the individual 'feels' about the negotiation process they have experienced, their general attitude towards the outcome or how the outcome was generally perceived by the individual[610], and relates fundamentally to an individuals positivity or negativity towards both the negotiation process and outcome[611].

This is in contrast to what is classified in the current study as 'objective' assessments criteria, which are in the nature of economic outcomes '*which are the explicit terms or products of a negotiation'*[612] and which might include specific monetary, strategic or contractual objectives that are clearly defined and measurable. Such criteria are classified as 'objective' within the current study when such a characterisation is felt to reflect the essence of the nature of the evidence being drawn upon by the interviewees irrespective of the fact that all the interview data is self reported perception and therefore might strictly speaking be considered as subjective.

Indeed, conversely, although strictly speaking client retention or the referral of new business might be considered 'objective' evidence, for the purpose of this research study it is considered to be evidence of a client's subjective satisfaction and their

[610] See: Thompson, L., (1990) 'Negotiation behavior and outcomes: Empirical evidence and theoretical issues', *Psychological Bulletin*, 108, 515–532

[611] See: Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512 at p494

[612] Curhan, J. R., Elfenbein, H. A., & Eisenkraft. N., (2010) 'The objective value of subjective value: A multi-round negotiation study'. *Journal of Applied Social Psychology* 40(3): 690–709 at p 691

positive feelings and thus characterised as 'subjective' which it is felt goes to the essence of nature of the evidence being drawn upon. In the same vein, for the purpose of the current study, client satisfaction surveys issued by a law firm and completed by their clients would be deemed to contain evidence of both subject and objective measures of satisfaction, depending on the particular questions being asked. However, it should be noted that despite often detailed and probing questions around the area of effectiveness and evidence of effectiveness, none of the interviewees that took part in any of the interviews made any reference at any point to the use of client surveys or indicated they were in anyway influenced by any such survey.

Subjective Criteria

The interview data suggests that a interviewee's subjective perception of their client's satisfaction and happiness is the most important determinant of what a interviewee perceives to be an effective outcome. Put simply - does the client appear to be happy with the outcome?

However, it is also evident from the interview data that the interviewees' subjective assessment of how the outcome is perceived by the both the other lawyer and the client on the other side of the negotiation is also very often important in this context, although the extent appears to depend on a number of the contextual variables identified below.

Subjective perception both of fairness and of reasonableness of outcome by all the parties involved in a negotiation is also shown to be relevant, as are the reputational implications of particular outcomes to the interviewees, although again the extent of the relevance of these factors appears to be dependent on the variables identified below.

Objective Criteria

Meeting the broad needs, objectives and interests of clients are often cited as important. Some interviewees talk of meeting more specific criteria such as set targets, parameters and bottom lines as being relevant to achieving an effective outcome.

Other objective criteria such as producing a balanced agreement that appropriately allocated risk and return is deemed relevant as well as the efficiency of the process itself. Indeed there is some evidence that simply concluding any agreement constitutes an effective outcome in the minds of some interviewees.

Finally, it is evident that achieving both their own organisational goals and personal goals also has at least some impact on what interviewees considered to be an effective outcome.

Contextual Variables

The interview data suggests that there are a number of variables that appear to have an important influence on both the subjective and objective factors that have been identified.

The nature of the legal interaction that is taking place appears to of particular importance. This can perhaps be most usefully considered in terms of whether the interaction creates or maintains a relationship, ends a relationship or is transactional. The main effect of the type of legal interaction arguably relates directly to the nature of the continuing relationship after the negotiation is complete which appears to one of the key variables that influence both the subjective and objective considerations identified.

The nature of the continuing relationship between the interviewees themselves is also identified as important and this appears to be influenced most by their perception of the size and structure of the legal market that interviewees operate in with particular reference to the existence of repeat players. Arguably the existence of a particular legal environment dominated by what is perceived to be a relatively

small number of single practice area repeat players appears to be an important factor.

The structure and nature of the client also appears to have emerged as a relevant variable, acknowledging that different type of clients will have different subjective and objective requirements from their negotiation outcomes.

The interview data suggests that the type of behaviour exhibited by the other lawyer is a relevant variable in that it might induce a reciprocal type of response to either 'win' the negotiation, or indeed to be more motivated towards a 'fair' outcome, both of which would be directly relevant to the type of outcome that would be considered effective in the particular circumstances.

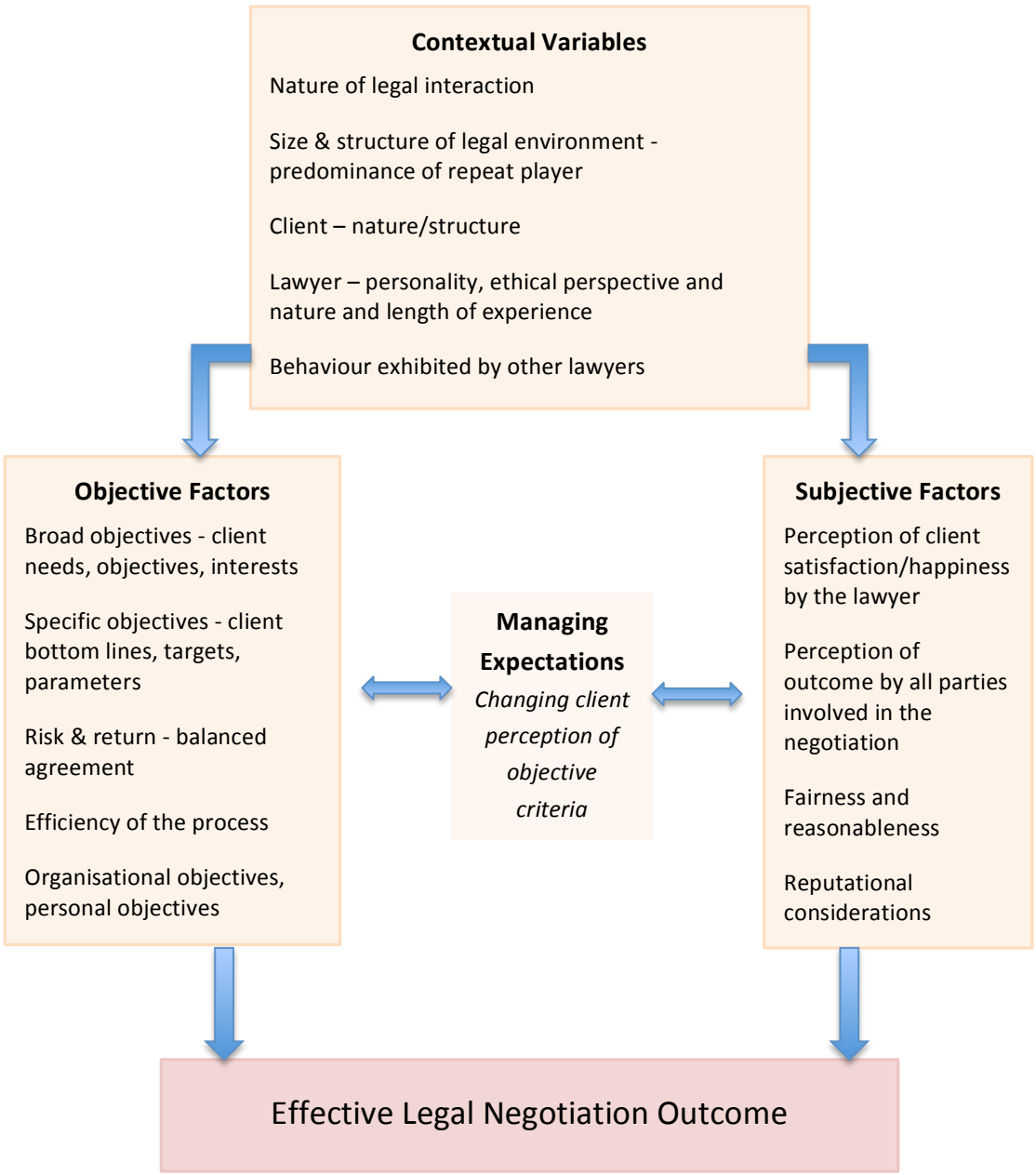
Finally, it is evident that the interviewees personality and ethical perspective, as well as the nature and length of their experience are contextual variable that are likely to have a direct influence on the perception of effectiveness.

Managing expectations

Lastly it is perhaps important to also observe that the lawyer appears to sometimes have an important role in influencing the client's subjective view of an objective outcome. This is expressed as 'managing expectations' and arguably amounts to a process of reframing in the mind of the client certain objective criteria previously considered by them as being ineffective to then being considered as being effective in terms of a negotiated outcome.

Figure 2 below is a representation of how the identified variables are linked to the subjective and objective factors that are elements of what might be perceived by the interviewees as an effective outcome in a legal negotiation.

Figure 2 – Elements that influence an effective legal negotiation outcome from the interviewee's perspective



5.5.2 Analysis summary - effective legal negotiation behaviour

The results have highlighted that the interviewees perceive a range of behaviours that are considered capable of being effective in legal negotiations, and identify a number of components that they consider directly influence the behaviours used.

The components of effective negotiation behaviour

Interviewees in the study group perceive there to be a number of components that are associated with effective negotiation behaviours.

The three main groups of components have been identified as 'personal factors', 'legal environment' and 'other parties'. All three component groups influence the nature of the negotiation behaviour that will be effective.

'Personal factors' are component factors that relate specifically to the individual interviewee concerned. The interview data identifies that the length and nature of the interviewee's experience as well as their personality and ethical perspective as being constituent parts of this component. In addition, the role of reputation is also an important constituent of this component with the desire to develop or protect a reputation identified as a very important personal driver of legal negotiation behaviour. However, a interviewee's reputational considerations don't only influence the type of legal negotiation behaviour, but the negotiation behaviour utilised also directly influences the reputation the negotiator is developing or safeguarding. This creates a type of feedback loop between behaviour and reputation.

The second component of behaviour is labelled 'legal environment' which relates to the legal context in which the negotiation takes place. The first constituent part of this component concerns the nature of the legal interaction defined in terms of relationships and in particular whether it can be characterised as creating or maintaining relationships, ending relationship or is transactional in nature. The presence and nature of any enduring relationship between either the respective

legal negotiators, or the clients involved in the negotiation appear to be a significant driver of effective behaviour. The second constituent part of 'legal environment' is concerned with the size and structure of the legal market. The perception of the Scottish legal market as relatively small and as dominated by small numbers of repeat players in certain practice areas appears to have a direct effect on what kind of behaviour might be deemed effective in a negotiation, particularly in terms of the effect that both reputations and the effect that the relationships between the lawyers involved in the negotiation has on negotiation behaviour

The third component of behaviour has been labelled 'other parties' which is concerned with the other individuals that are involved in the negotiation. The type and organisational structure of the client has emerged as a factor that influences negotiation behaviour, as is the type of behaviour exhibited by the other legal negotiator in the negotiation with the interview data suggesting that interviewees will alter their own negotiation behaviour in response to the other lawyer's negotiation behaviour.

These three main components ultimately influence the use of the four characterisations of potential effective legal negotiation behaviour identified from the results and outlines below.

Four distinct characterisations of legal negotiation behaviours

After analysis of the nature of all of the behaviours that have emerged from the interview data, four distinct characterisations or types of behaviours have been identified. These have been labelled as: *reasonable, firm but fair, hard* and *aggressive*.

A. 'Reasonable' Negotiation Behaviour

A characterisation of negotiation behaviour as being reasonable is most strongly associated by the sample group with the concept of effectiveness. This behaviour is associated with the adoption of realistic positions, the use of sensible arguments

and assumption of realistic expectations, all delivered using a reasonable tone of communication.

Reasonable behaviour appears to be closely linked to a willingness to make concessions as well as to an overall concept of fairness. Dealing with someone who has a reputation for being reasonable is considered to be helpful in achieving effective overall outcomes.

B. 'Firm but fair' Negotiation Behaviour

Firm but fair negotiation behaviour appears to share many of the features associated with reasonable negotiation behaviour but with the addition of components associated with a harder type of behaviour. This component was often expressed as a desire to be strong where necessary, to be able to stand ones ground and to argue points effectively.

Many of the sample group desired a personal reputation for being 'firm but fair' rather than simply 'reasonable', which appears to stem from a desire not to be perceived as being 'soft' or easy to 'push around'.

C. 'Hard' Negotiation Behaviour

The content of hard negotiation behaviour can be characterised as the adopting of more extreme positions and a reluctance to compromise or to make concessions, but delivered using a tone that is either neutral or indeed polite and respectful.

The majority of the sample group did not associate themselves with this type of behaviour but many considered that it could be effective in certain circumstances.

There was a suggestion within the interview data that a reputation for being a hard negotiator could be potentially helpful to a negotiator.

D. 'Aggressive' Negotiation Behaviour

Aggressive behaviour appears to be fundamentally characterised as using a tone of communication that include raised voices, displays of anger and physical aggression as well as a bullying and hectoring manner. It appears that this is often combined with content that shares some similarities with hard behaviour and includes the taking of extreme positions and a refusal to compromise, but it may also include more aggressive behaviour such as the issuing threats and ultimatums.

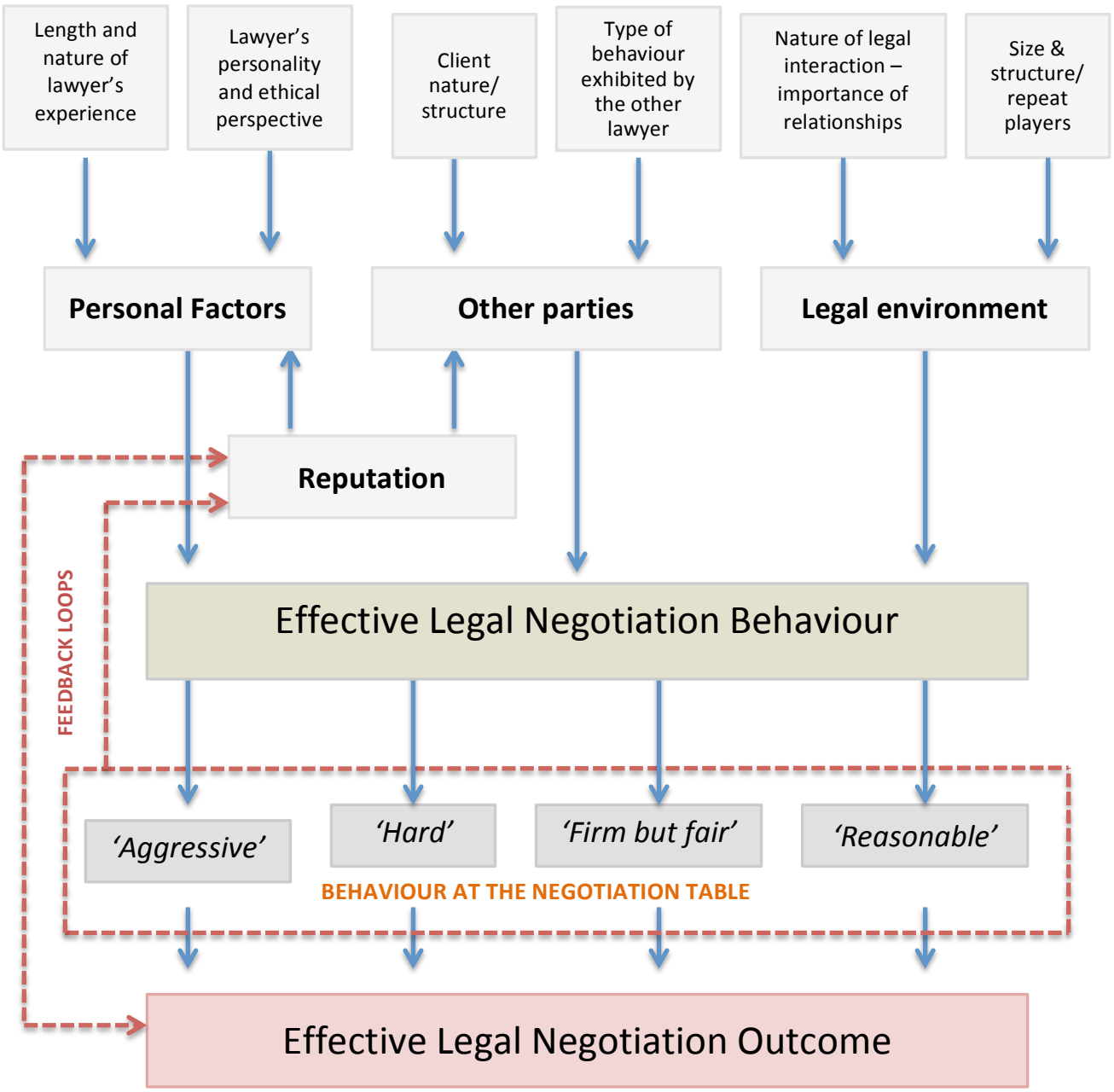
Although interviewees almost universally associate this type of behaviour with being highly ineffective, a significant number of the sample also considered that such behaviour could be effective in the right context.

The relationship between the three components and the four behaviours

The analysis of the interview data suggests that there is a direct relationship between the three component factors and the four types of behaviour that has been identified. The suggestion is that the component factors influence both the type of behaviour that will be used by a interviewee and whether it will be perceived as effective.

Figure 3 below represents diagrammatically the proposed relationship between the identified types of potentially effective negotiation behaviour and the components that influence both their use and their potential effectiveness.

Figure 3 – Effective Legal Negotiation Behaviour



5.6. Effectiveness - linking behaviour and outcome

It appears from the analysis of the results described in this chapter that there is a relationship between perceptions of effective negotiation behaviour and perceptions of effective outcomes.

The variables that have been identified as being relevant in relation to the perception of an effective negotiation outcome correspond to those that have been identified as influencing what constitutes effective negotiation behaviours.

Personal factors such as the length and nature of a interviewees experience, as well as their personality and ethical perspective, are identified as factors that influence the type of behaviour considered effective by interviewees as well as appearing as contextual variables relevant to what might be considered to be an effective outcome. In addition, the behaviour exhibited by the other lawyer as well as the nature and structure of the client are both factors relevant to what might constitute effective behaviour as well as also being a contextual variable in relation to what might be considered an effective outcomes. Finally, the nature of the legal interaction and in particular the importance of relationships in that context, as well as the perceived size and structure of the legal environment, particularly in relation to the predominance of repeat players, are both factors that appear to influence both what interviewees consider to be effective behaviour and how they perceive an effective outcome.

Reputation emerges as a factor that appears to strongly influence what interviewees perceive to be effective behaviour. The nature of interviewee's reputation in terms of how they conduct themselves in a legal negotiation emerges as being very important to interviewees and plays a key role in determining and sustaining an overall reputation for being an effective legal negotiator.

However, not only does personal reputation appear to be a product of the nature of the behaviour interviewees engage in during negotiations, it also appears to be a

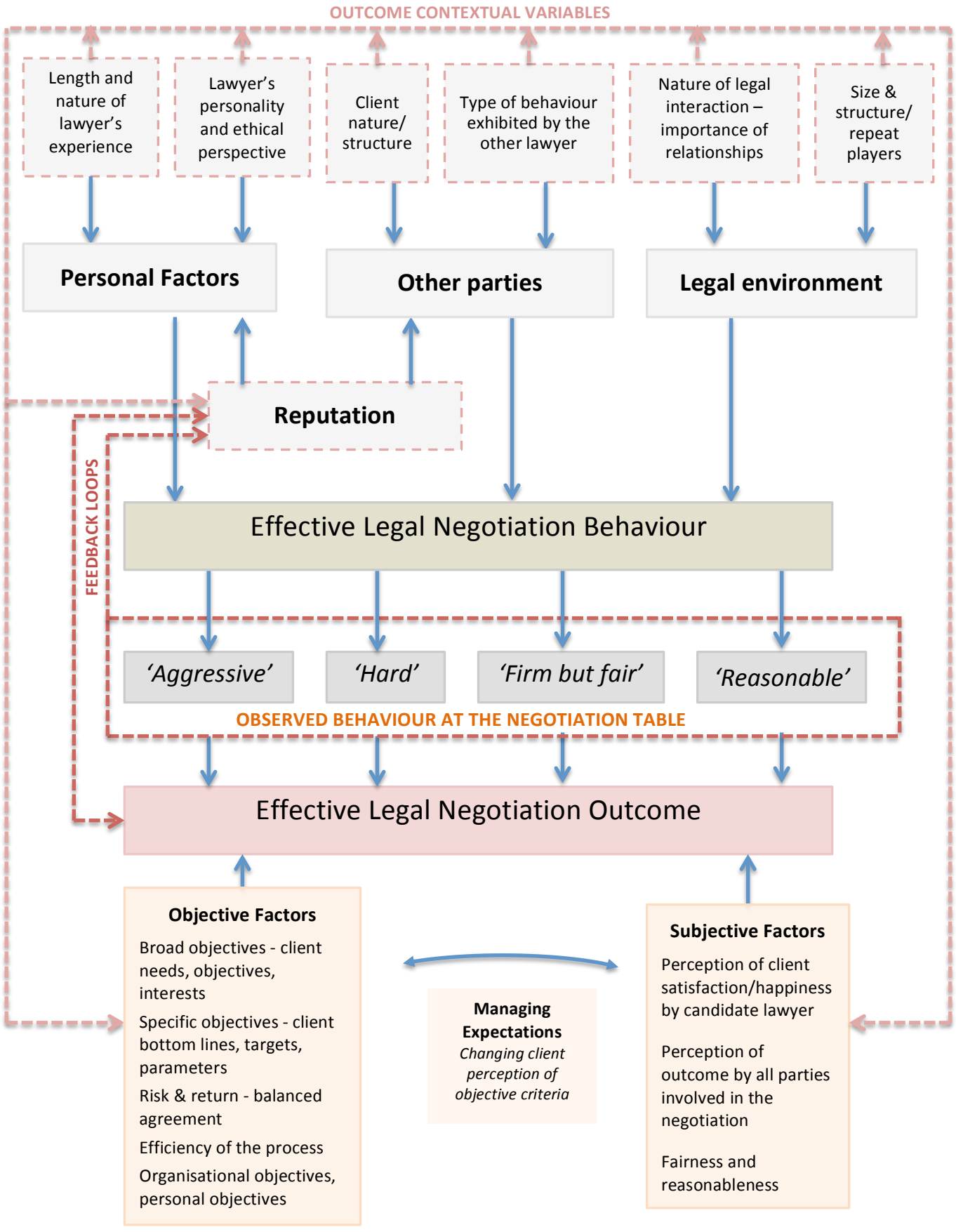
product of the nature of the outcomes they achieve. Reputation is clearly perceived as being important to the interviewees primarily because many consider that having a favourable reputation helps them to attain more effective outcomes. This in turn helps them to reinforce their reputation, which potentially helps to secure yet further effective outcomes in a feedback loop.

It can also be arguable that the subjective view of the outcome of a negotiation held by each of the parties involved is likely to be at least partially influenced by their view of how the negotiation was conducted, particularly in relation to concepts of fairness, reasonableness and efficiency of process, all of which are directly linked to negotiation behaviour. This effectively links many of the subjective factors that the interviewees report to be linked to their perception of effective outcome directly to factors that are also relevant to their perception of effective behaviour.

In summary, although the factors that influence effective outcome (what you are trying to achieve) and effective behaviours (how you intend to achieve it) in legal negotiations are instinctively assumed to be directly related to each other, the current research study provides some empirical evidence to support such an instinctive understanding and provides some insight into the relationship between the two concepts.

Figure 4 below represents diagrammatically the constituent elements identified in relation to effectiveness in legal negotiations and how they are interlinked.

Figure 4 – Effectiveness in legal negotiations – linking outcome and behaviour



5.7 Key findings relating to effectiveness

This chapter of the results sets out to answer the first research question: '*How do lawyers characterise what they understand by 'effectiveness' in the context of a legal negotiation?*'

In analysing the interview data in the context of this question, a number of findings have been identified that are discussed in the concluding two chapters of this thesis.

1. Although effective 'behaviours' might have been considered primarily a mechanism to achieve effective 'outcome*s',* the results suggest that the perception of overall legal negotiation effectiveness by the interviewees is based on a combination of both a perception of how the negotiation is conducted in combination with a perception of the outcome achieved.

2. Interviewees' perception of effectiveness in the context of legal negotiations appears to be predominantly subjective in nature rather than primarily being based on an objective assessment of the outcome or process.

3. Of the various factors that emerge as influencing lawyers perceptions of effectiveness in legal negotiations, the role that a interviewee's reputation plays appears to be of particular importance, with the extent of the influence appearing to be linked to the perceived size and nature of a particular legal market.

4. The nature of relationships within the negotiation plays an important role in characterising the nature of the legal interaction, and is of particular significance in influencing perceptions of effectiveness, with the extent of the influence appearing to be linked to the perceived size and nature of a particular legal market.

5. In the context of effectiveness, the results support a distinction between the tone of delivery of particular negotiation behaviour, and the overall substance or content of that behaviour.

6. There is a strong association in the minds of the interviewees between the personality type of a legal negotiator, and what might constitute effectiveness in legal negotiations for that individual. This relates both to the type of negotiation behaviour that might be generally effective for a particular legal negotiator, but also to the type of behaviour that might prove to be effective when used in conjunction with another legal negotiator with a particular personality type.

7. The analysis of the interview data identifies and characterises four types of behaviour described as ‘reasonable’, ‘firm but fair’, ‘hard’ and ‘aggressive’ that are all perceived as capable of being as effective. Of these types of behaviours, ‘aggressive’ behaviour is perceived as the least likely to be effective and ‘reasonable’ is perceived as being most associated with effectiveness.

Chapter 6 – Perception of personal effectiveness and negotiation behavioural style

6.1 Overview

Research Question 2 – *How do lawyers perceive their own effectiveness as negotiators and characterise their personal negotiation behavioural style?*

This chapter presents the data in relation to the second research question and therefore focuses on interview data that provides insight into how the interviewees perceive their own effectiveness as well as how they characterise themselves as negotiators in terms of their overall negotiation behavioural style. The secondary data gathered from the Thomas Kilmann Conflict Mode Instrument (TKI) survey negotiation style questionnaire[613] are also considered in this context and provide additional insight into the interviewees' perception of the characterisation of their own negotiation behavioural style.

Section 6.2 firstly looks to establish the interviewees' own perception of their effectiveness as legal negotiators along with the evidence interviewees draw upon to support their assertions.

Section 6.3 then goes on to identify and categorise the interview data in relation to how the interviewees perceive their own particular negotiation behavioural style using both their own language and then with reference to an introduced framework which they were asked to reflect upon.

Section 6.4 then considers the interviewees own perceived negotiation behavioural style in the context of their individual TKI scores.

Finally, Section 6.5 presents a summary of the results presented in this chapter.

[613] Kilmann, R. H., & Thomas, K. W., (1977) 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument,' *Educational and Psychological Measurement*, 37, 309-325.

As with the presentation of the results in Chapter 5, interview data extracts have been included from the transcripts at various points throughout this chapter. These have been printed in a smaller typeface and are preceded by an interviewee transcript reference. These are intended to be representative examples of the interview data drawn upon and do not represent the totality of the interview data analysed.

6.2 Perceptions of effectiveness and negotiation behavioural style

6.2.1 Perception of effectiveness

Towards the end of each interview the interviewees were asked specifically if they consider themselves to be effective legal negotiator and also to detail the evidence they used to support any such assertion. It is perhaps not surprising that all the interviewees reported themselves to be broadly effective negotiators and indeed one of the interviewees explicitly recognised that they were unlikely to report otherwise.

IC 018: I don't know what style I've got but my gut feeling is it's probably reasonably effective. But then again I would say that, wouldn't I?

However, it is worth noting that although essentially all the interviewees in the study consider themselves to be effective negotiators, only eight of the interviewees stated this unequivocally, expressing little or no doubt regarding their effectiveness as negotiators.

IC 003: I do consider myself to be an effective negotiator.

IC 007: Am I an effective legal negotiator? Yeah, I think I am an effective legal negotiator.

IC 022: I think I am effective.

The majority of the remaining interviewees in the study include some term to indicate that there was at least some doubt in their mind and use terms such as

'probably' or 'on balance', with some of the interviewees appearing to be unsure how effective they actually are.

IC 013: I think overall I would put myself in the bracket of being an effective negotiator… Could we be better, or could I be better? I'm quite sure I could.

IC 016: Well, I think on balance I'm probably more effective than not.

IC 025: Well, if I had to plump one way or the other I would probably say I consider myself effective.

A number of the interviewees indicate that they consider that their ability to negotiate has become better over time and either explicitly state or imply that they are continuing to improve their effectiveness.

IC 001: I've obviously got more effective the more experience I've had of them. I suppose they're still…I've still got stuff to learn.

IC 009: I think my negotiating style has definitely got better.

Some of the interviewees also either explicitly or implicitly indicate that on some occasions, or under certain circumstances they perform more effectively that on other occasions.

IC 017: I think more often than not I am. If I'm honest, there are the odd occasion where I don't feel I have been, or feel I could have got a better deal if I look back on it in the cold light of day.

IC 021: I would love to think that I'm an effective negotiator. I would have to be honest enough to say that I'm probably not all the time because I'm human.

IC 027: Some days I think yes I'm effective and then I get other days where I think "why is this going so wrong? Is it something that I've done?" What lessons can we learn from this?

Finally, some of the interviewees recognise that although they consider themselves to be effective negotiators, they find it hard to objectively measure or confirm this.

IC 015: I'd like to think I'm effective… But it's never been peer-tested, so I don't know.

6.2.2 Evidence of personal effectiveness

The interviewees were also asked to indicate what evidence they drew upon to come to their conclusion about their effectiveness as negotiators.

Evidence of being able to get the negotiation concluded appears to be an important factor in determining that they have been effective. Interviewees from contentious backgrounds appear to point to evidence that they have avoided court or tribunal as evidence of effectiveness. For non-contentious lawyers the evidence is focused on having completed the transaction or finalised the deal. However, both arguably amount to the same thing with both contentious and non-contentious interviewees drawing at least partially on evidence that they have been able to reach a negotiated agreement as evidence of their effectiveness.

IC 002: Because I get the deal done.

IC 011: Most of my cases do resolve outwith court. There's only really a handful that go to court. So yeah, I'd like to think that I am… I think most of my clients are reasonably pleased at the end of their cases.

IC 013: But overall, generally effective, based on a series of successfully completed transactions with happy clients.

IC 027: To me, the purpose of the negotiation is only to get you to the end point. So the quicker that is and the more straight forward that is, surely the more effective it is.

IC 029: So I think the evidence of my effectiveness is the fact that very few cases have gone to court but I think I've still achieved good results for the clients, whether they're organisations or individuals.

Many of the interviewees also cite evidence that their clients have reported satisfaction with their performance as being a key indicator of their effectiveness. Some frame this in the negative and draw on evidence of clients not telling them the outcome has been bad.

IC 004: I can't think of any situations where a client has said to me, I'm not happy with the way you did that, or I'm not happy with the way it ended up.

IC 018: I really can't remember any situations where a client's come back to me afterwards and been unhappy with the way things have panned out six months or a year after transaction.

IC 020: And I suppose my evidence for that would be all the previous cases that I've managed to negotiate to a conclusion and the number of clients that I've had thank me as a result.

IC 024: What evidence do I draw? I tend to get relatively good feedback from clients.

IC 030: The evidence, I suppose, is… by the time we conclude each contract, I would say in the vast majority of cases, clients are quite happy with where they've got to.

Many interviewees also appear to place great importance on their ability to retain their clients and secure repeat business as evidence of their effectiveness as negotiators.

IC 007: I think I'm seen as effective because clients are happy and they instruct me again.

IC 016: And what grounds would I have for saying that? Well, I've got clients that have been clients for years and years and years. And some of the clients have so much confidence in me they've invited me to join their board of directors.

IC 019: Repeat instructions, client feedback, management feedback internally.

IC 028: Sometimes it's a bit better for the other side. But the clients are always happy enough, come back to me with work and listen to the advice I give them.

Two interviewees specifically cite evidence of preserving relationships during negotiations as evidence of their effectiveness.

IC 006: And I'm also still on speaking terms with virtually everyone that I've negotiated with in the past so that, to me, is effective as well.

IC 014: I think on occasions where relationships need to be maintained I'm quite good at that, we get to the end without people having fallen out.

Finally, only a relatively small number of interviewees attempt to base their opinion on what might be considered more objective criteria and cite evidence of their ability to achieve outcomes that are close to what the client wants as evidence of their effectiveness.

IC 001: I achieve my objectives, or seem to achieve the clients' objectives in the negotiation.

IC 015: So I'd like to think that I generally get the clients something that is or is very close to what they were looking for.

6.3 Perception of personal negotiation style

6.3.1 Specific questioning - how the interview data was gathered

The second part of the research question focuses on understanding interviewees' perception of their own overall negotiation style. Towards the end of each interview interviewees were therefore asked to consider and describe a characterisation of their overall negotiation behavioural style.

They were firstly asked to characterise their own perception of their personal negotiation behavioural style without being given any particular points of reference, suggested terminology or reference to any framework.

Towards the end of the interview the interviewees were then introduced to a suggested theoretical framework that encompassed a spectrum of behaviour with cooperative behaviour at one end of the scale and competitive behaviour at the other end[614]. It was suggested to the interviewees that certain theorists have proposed that an individual's particular negotiation behavioural style could be placed somewhere on such a spectrum between what might be characterised as cooperative negotiation behaviour and what might be considered more competitive behaviour.

The interviewees were invited to consider, firstly, whether they considered such a framework to be in any way valid, and then to comment on their own approach to negotiation in the context of such a framework, if considered applicable.

[614] Based primarily on the terms used in the Williams study (Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West) to distinguish negotiation styles, a distinction that has been broadly maintained in substance as the literature has developed as described in Chapters 2 & 3 of this thesis.

6.3.2 Presentation of the interview data

The results obtained for each interviewee are shown in Table 8 below.

The first column of the table shows a list of the interviewees identified by their individual interviewee reference numbers. Where the reference number is written in italics, this indicates that the interviewees have classified themselves as engaged in contentious legal work, while no italics indicates the interviewees consider themselves to be engaged in non-contentious legal work.

The second column shows an abbreviated summary of the interview data taken from the transcripts for that particular interviewee relating to how each interviewee initially perceived their own negotiation behavioural style.

The third column contains the most relevant extracts from the interview data relating to how the interviewees perceive themselves in relation to the suggested competitive/cooperative framework.

Table 8 – Perceived Negotiation Style

Interview	Initial perception of own negotiation behavioural style	Self evaluation of negotiation behavioural style based on a suggested cooperative/competitive spectrum
IC 001	Reasonable but firm.	'Much closer to competitive'
IC 002		'Probably closer to cooperative'
IC 003	Reasonable, sensible, commercially aware.	'The aggressive negotiator would be there and the cooperative negotiator would be my reasonable sensible person, so I would say I fit there in the cooperative negotiator'.
IC 004	Doesn't think has a fixed style but thinks definitely not aggressive.	'I think it definitely applies. I'd definitely be towards the co-operative. If it was, like, 1 being co-operative and 10 being competitive, I'm probably, like, maybe 4 or something on the scale I think. It depends on the situation, but that would probably be the average. But you do see number 10 sometimes'
IC 005	Softer person. Not a confrontational person. Like to avoid conflict.	'I think I do recognise that validity… There is that more kind of competitive style… I think I'm at the other end of the spectrum, I think I'm more at the cooperative end… in terms of I am a natural person who likes to avoid conflict... So I therefore work to see immediately whether this conflict can be avoided, so I start from the cooperative side of things, and perhaps, I'm right towards that end I think, rather than competitive.'
IC 006	Friendly negotiator who likes to build rapport and relationships.	'I'd probably put myself slightly towards the cooperative end of it. But I think it also depends on who you're negotiating with'.
IC 007	Open style, non-aggressive, firm but flexible.	
IC 008	Does have a style – straightforward, reasonable, impersonal approach.	'Yes, I think it does say something,… I can think of people in this firm I could fit in that spectrum... And personally I would tend to put myself towards the cooperative end of the scale, quite far down, I would say, towards the cooperative end'.
IC 009	Like to think that comes across as a firm but sensible negotiator.	'I would tend to go with aggressive against cooperative, rather than competitive. It's kind of an insistence on a particular number without much justification for it, when you compare with the cooperative which doesn't necessarily mean weak, it just means you're at least willing to listen to that the other side has to say and factor it in to what your response it... And again, I think cooperative should be more successful'.
IC 010	Open approach to things, up front, not hiding anything.	'I'm sure there are different ways in which you could categorise it. I would possibly put myself on the more cooperative-type of spectrum'.
IC 011	Doesn't think has a style - thinks has a practical approach.	'I think it does have validity… I'd like to think I was more cooperative to begin with but I suppose there's times where you might move up and down the scale depending on what's happening'.

Interview	Initial perception of own negotiation behavioural style	Self evaluation of negotiation behavioural style based on a suggested cooperative/competitive spectrum
IC 012	Knows the line and how to hold it. Prepared – know your enemy.	'Yes I think I would recognise that. I would say I would probably be more at the cooperative end of the spectrum'.
IC 013	Robust but fair. Get straight to the point but keep it balanced. Adapts to different circumstances.	'You can't place yourself on that spectrum at one particular spot because you're being competitive or cooperative depending upon the point in question, depending upon the needs of the client, depending upon the bigger picture of the transaction as a whole. So there's no one space on that spectrum, you would probably go through that spectrum several times over the course of any transaction'.
IC 014	Open, accessible, reasonable style that is stable.	'Yeah, I think to characterise it in that way is probably right and I'm definitely towards the cooperative end'.
IC 015	Stable, non-aggressive, consensual and reasonable.	'I'd be on the cooperative end of it… I think there's got to be elements of it all in there… I think it is important that you don't negotiate in isolation. So you're always, in part, moved to meet what the other side is doing. It's always fluid'.
IC 016	A little bit chameleon-like, depending on client and the other party.	'I think it does have something to say. I think people who are at either end of the spectrum will be perceived as less effective negotiators… I think what you've got to do is be flexible… if you say that ten is the most extreme and one is the most cooperative, I think you probably work most effectively between three and eight and you've got to be able to work within that range. I'll tend to start around about the six or seven and as the deal gets easier, as the main points get dealt with, all of a sudden you find "actually, yeah, let's crack on and get this sorted."
IC 017	Not rigid – reasonable, measured, not aggressive, honest.	'I think it does to an extent. I don't think I would wholly agree because I think you do change slightly depending on the transaction and your client's position… On that spectrum I think I would see myself certainly much more towards the cooperative side. I think I'd be that end of the scale. It would change slightly depending my client's position but I don't think a huge amount… I will be bullish and if someone's aggressive to me and I feel that the only way to communicate with them is to be aggressive back I would do that. But I'd see myself certainly more towards the cooperative side'.
IC 018	Firm but fair and reasonably consensual.	'So I would have said I'm cooperative and competitive. I want to get a good result. I don't want to get just any result. I want to get the best result I feel I can get for my client within the bounds of what's appropriate and fair and allowing me to sleep at night feeling as if we've got a fair result for both parties. I think what I'd have at the other end of the scale is some aggressive, unpleasant behaviour. I don't think being cooperative is incompatible with being competitive'.

Interview	Initial perception of own negotiation behavioural style	Self evaluation of negotiation behavioural style based on a suggested cooperative/competitive spectrum
IC 019	Consensual and cooperative. It does change if I am up against someone who is aggressive.	'I wouldn't say it's wrong, but I shouldn't necessarily see those as polar opposites. I certainly associate my personal style with being highly cooperative. Having said that, everything I do involves an element of competition… So I think it would be very unlikely for me to run a deal which didn't have a competitive background, but I would certainly associate my role with the highly cooperative end of what you're describing'.
IC 020	Flexible. Depends on client, nature of case and the other lawyer. Not aggressive - bullish.	
IC 021	Someone who looks out of the box to find solutions.	'I would like to think, and I aim to be cooperative. Because I think the benefit of being cooperative is when you're dogmatic there's a good reason for it, and people do comment "you're a bit hard there." '
IC 022	Very, very friendly, very open and approachable. 'Collaborative'.	
IC 023	Try to find a compromise. Doesn't like conflict. Communicative and cooperative.	'Yeah, I'd say I'm definitely at the cooperative end which I think is partly, chiefly to do with my personality and the area of law I work in and my style of working'
IC 024	Fairly informal and personable.	'Where do I put myself on that? Everyone is going to say they're cooperative, aren't they? I'd like to think I am… I try to, when I can, subjugate that any sort of ego… to better the negotiation'.
IC 025	Depends on other side. Commercial, pragmatic, gets the deal done. Reasonable.	
IC 026	Not straight forward, pragmatic and commercial.	'My starting point would probably be nearer the cooperative end of it but I could easily go up to start competing. But I think it would just be a reaction to various things going on'.
IC 027	Start in a collaborative manner but flexible since not everyone will do the same.	'I would definitely tend towards the more cooperative end of the scale. No so cooperative that you just roll over on everything and don't get what your client wants'.
IC 028	Reasonable and measured – not hardball and unpleasant.	'Yeah, I think it is a valid way to describe it. That's right. I'm more towards cooperative than competitive… There always is that competitive instinct. You want to get a good result. But I suppose my competitive is perhaps different to competitive. I'm not that interested in grinding the other guy into the dirt. An honourable victory'.

Interview	Initial perception of own negotiation behavioural style	Self evaluation of negotiation behavioural style based on a suggested cooperative/competitive spectrum
IC 029	Measured, respectful of other side, objective, interests or needs based approach.	'I think that is a fair analysis of the way that things are… but I don't think they're necessarily exclusive. I think I would place myself on the cooperative label, I suppose. Is that any different from being competitive? Well, I think that I can equally deal with people who are competitive by using the same approach. I think there's more to be gained by having a cooperative approach than a competitive approach. I can be competitive, but I would always do that from a cooperative perspective, if that makes sense'.
IC 030	Firm but fair. Be clear about what you want and why you want it and do it in a pleasant manner.	'I'm competitive in the terms of you want to get the best and I don't mind using your elbows to get it. So in that sense I would put myself at the competitive end of the spectrum. But I just do it politely… it's competitive but consensual, maybe'.

6.3.3 Description of results

6.3.3.1 Initial perception of negotiation behavioural style

The first observation that is evident from the interview data is arguably the relatively limited vocabulary and lack of conceptual framework available to most of the interviewees. It was clear during the interviews that many of the interviewees had difficulty describing their behavioural style in any detailed way and a number of the interviewees expressed frustration about this.

The single term used by the most interviewees was *reasonable,* although it was only used explicitly in answer to specific questions about how an interviewee would describe their own negotiation style in a relatively small number of interviews (six). However, a significant majority of the interviewees had used the concept of reasonableness in the context of a description of effective behaviour and had very often framed that conversation in terms of behaviour that they would use themselves. For that reason, although reasonable was not explicitly used by many interviewees to describe their own overall negotiation style, it was clear from the interviews that a majority of the interviewees associated their overall approach to negotiation with the concept of reasonableness.

Reasonableness was followed by the terms *measured*, *straightforward*, *pragmatic*, *flexible*, *fair, consensual* and *commercial*. A number of interviewees chose instead to identify a style of behaviour that they did not associate themselves with, in particular not being *aggressive* occurred often and to a lesser extent not being *confrontational* and avoiding or not liking *conflict*. In this particular context one interviewee used the word *collaborative* and another introduced the more technical language of using an *interests or needs based* approach to negotiation. The latter was one of only five in the sample group who had received any significant negotiation education or training.

However, it is also evident that around the most common characterisation of '*reasonable'* there were some interviewees who emphasised that they identified themselves with what might be characterised as firmer or more robust orientated approach, along with others choosing to emphasising a more consensual or non-confrontational orientated approach.

6.3.3.2 Negotiation behavioural style based on a suggested framework

When the interviewees were then presented with the suggested framework outlined earlier in the section and asked to indicate whether they thought it had anything valid to say about negotiation behavioural style and behaviour, almost all the interviewees explicitly indicated that they did consider it to have some validity in describing negotiation behavioural style and behaviour.

An analysis of the relevant interview data (summarised in Table 8) suggests that each of the twenty-seven interviewees that provided relevant interview data fell broadly into one of four categories.

Focused location on the spectrum

The first group are those who identify themselves as belonging to one part or area of the spectrum. Many of this group expressed it in terms of being 'closer', 'towards', 'at', 'quite far down', 'more at' or being on a particular 'side of things'. Fourteen of the twenty-seven interviewees fell into this category, thirteen of them

identified in some way with the cooperative side and only one identifying with the competitive side of the spectrum.

Variable locations on the spectrum

The second group are those interviewees who accepted the analysis, but considered their negotiation behavioural style to be to some extent flexible and to move across the spectrum depending on the circumstances. Of the eight interviewees that fell into this category, six of them indicated that they identified themselves as being cooperative but considered that they would also engage in more competitive types of behaviour under certain circumstances. The description of these circumstances ranged from vague 'certain situations' or 'depending what was happening' type of statements, to explicitly linking it either broadly to the person they were negotiating with or more specifically to the behaviour adopted by the other person. Of the remaining two interviewees in this group, one of them indicated their default position was to begin more competitively and then to move to be more cooperative as the negotiation proceeded. The second interviewee indicated no default position but that his behaviour would move across the spectrum multiple times during the course of a negotiation depending on the particular point in question, the needs of the client and the nature of transaction as whole.

Redefine some aspects of the spectrum

The third group are those interviewees who in some way needed to redefine the parameters of the framework before being able to identify with it. Of the three interviewees that belonged to this group, all three sought to redefine the 'competitive' end of the spectrum as more accurately being behaviour they would characterise as 'aggressive' and broadly unpleasant. Two of them essentially saw themselves as being at the other end of this redefined spectrum, which appeared to still be characterised as being cooperative. The other interviewee saw the other end of the spectrum from 'aggressive' not as being cooperative but rather as a hybrid

type of behaviour characterised as both competitive and cooperative, which were not seen as being incompatible with each other. This was described as still striving to get a good result for the client but doing so using behaviour that was characterised as appropriate and fair.

Doubts about the validity of the spectrum

The final group of interviewees are arguably those who had most trouble with the framework suggested. The two interviewees[615] that belong to this group did start by stating either that they thought the analysis was fair (IC 029) or that they wouldn't say it was wrong (IC 019), but then went on to suggest or imply that the two types of behaviour were not distinct. Although interviewee IC 019 still associates himself as being highly cooperative, he suggested that all his negotiations contain an element of competitive behaviour and that his transactions very often have a highly competitive background. Interviewee IC 029 questions whether cooperative and competitive behaviour are exclusive and, although he also describes himself as cooperative, he then questions whether is any different than being competitive and introduces the concept of being competitive from a cooperative perspective.

6.4 Negotiation behavioural style & the Thomas Kilmann Instrument

6.4.1 Introduction

In order to provide an element of objectivity[616] to the data as well as a measure of data triangulation, this section considers the results obtained in the last section in the context of the data obtained from the completed Thomas Kilmann Instrument

[615] Great care must be taken when attempting to make generalisations from such small numbers, however, it is submitted that the qualitative methodology at least allows it to be recognised that such opinions exist within the group of lawyers that formed the sample group.

[616] Although it is recognised that the TKI assessment is a self-reported tool and therefore is not strictly objective.

scores (TKI scores) that each interviewee was asked to complete following their interview.

The TKI assessment seeks to measure a person's predisposition to certain behaviours in conflict situations along the two dimensions of 'assertiveness' (the extent to which a person attempts to satisfy their own concerns), and 'cooperativeness' (the extent to which a person attempts to satisfy the other person's concerns)[617]. These two dimensions are similar in character to the dimensions of 'competitiveness' and 'cooperativeness' used by Williams[618] in his study. Indeed, Schneider substituted the term 'adversarial' for 'competitive' in her later study[619], arguably a term that is even closer to the dimension of 'assertiveness' used in the TKI. The use of the interviewees TKI scores should therefore provide further insight into the negotiation behavioural style of the interviewees.

6.4.2 Thomas Kilmann Instrument

6.4.2.1 Understanding the TKI

The Thomas Kilmann Instrument, first discussed in the context of the broader literature Chapter 2, is a psychological assessment consisting of 30 pairs of forced choice statements, each narrating a distinctive way of dealing with conflict (e.g. '*I am firm in pursuing my goals'* against '*I try to find a compromise solution'*). After completing the assessment the results are then arranged into five separate categories [620] according to the two dimensions of assertiveness and cooperativeness, characterised by Thomas & Kilmann as[621]:

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[617] http://www.kilmanndiagnostics.com/overview-thomas-kilmann-conflict-mode-instrument-tki - (last visited 5/6/2015)

[618] Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West

[619] Schneider, A. K., (2002)

[620] Originally developed as part of the Dual Concern Model by Blake and Moulton. See: Blake, R. R., & Mouton. J. S., (1964) 'The Managerial Grid', Houston: Gulf Publications

[621] Kilmann, R. H., & Thomas, K. W., (1977) 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument,' *Educational and Psychological Measurement*, 37, 309-325 at pp309 & 310.

Competing – assertive and uncooperative

Collaborating – assertive and cooperative

Avoiding – unassertive and uncooperative

Accommodating – unassertive and cooperative

Compromising – intermediate in both cooperativeness and assertiveness

In a study that considers the negotiation behavioural styles of student lawyers, Melissa Nelken provides a fuller description of the five TKI styles, compiled from conversations with the law students who participated in her study[622]. The descriptions in her study are helpful in the context of legal negotiators and can be usefully summarised as follows[623]:

Competing: tends to see negotiations as a competition or game to 'win', focus on beating the other party, works well when no continuing relationships exist between the parties. 'Fixed pie' mentality so focuses on claiming value rather than creating more value to be shared. Can be hard on going relationships, values short-term gain over longer term potential[624].

Collaborating: combines a strong focus both on your own interests as well as a strong focus on the other side's interests. The focus is on spending time and resources exploring options and alternatives to create a solution that seeks to optimise the outcome for all parties involved. This can be characterised as value creating behaviour and can be good for commercial relationships. The time and effort required by this approach however can exacerbate a problem if time and resources are short[625].

[622]Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at pp. 4 to 6

[623] The below summary has been amended directly from Nelken's study between pp4 to 6.

[624] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p4 & p5

[625] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p5

Compromising: fair, reasonable, easy to deal with and prepared to give and take, values efficiency and timesaving. There is a danger that a focus on being fair and reasonable might lead to the making of concessions on things of importance and hence they get less for their clients than they might[626].

Avoiding: tend to believe problems will go away if left alone, don't like long negotiations over detail. Although often seen as negative, can be powerful if you have high negotiating power causing the other side to make unilateral concessions. If you lack power then may have to make big concessions to bring matters to a close.[627]

Accommodating: more focused on the other side's needs than their own. Tend to be good at building and maintaining relationships and uncovering the hidden interests and concerns of the other parties. Can be open to exploitation when the behaviour is not reciprocated, they often expect legal negotiators to engage in competitive behaviours which they can find uncomfortable[628].

6.4.2.2 Interpreting the TKI

Individuals who complete the TKI receive a score between 0 and 12 for each of the five separate categories. The scores were originally plotted against a norm group of 400 mid-level managers based in the US from data gathered in the 1970's but has more recently been updated using a norm group of 8,000 full time employees from the US representing over 450 occupation titles and aged between 20 and 70 with an average age of 40.4 years[629].

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[626] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p5 & p6

[627] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p.6

[628] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p6

[629] Schaubhut, N. A., (2007) 'Technical Brief for the Thomas-Kilmann Conflict Mode Instrument', at p2. Available at: http://www.kilmanndiagnostics.com/sites/default/files/TKI_Technical_Brief.pdf (Last visited 26.5.2015)

An individual's score indicates the frequency of the conflict handling modes they tend to use relative to the others, as well as offering a percentile score comparison with the norm group. This allows individuals to relate how frequently they use a particular conflict handling behaviour with how frequently members of the norm group use that same behaviour. The scores for each category of conflict handling mode are grouped into 'high' (top 25% of the norm group), 'middle' (norm group between 25% and 75%), and 'low' (25% and below in the norm group)[630].

In order to offer a second point of reference for the interviewees in this study, each interviewee's TKI scores are also compared to a norm group of 754 law school negotiation students compiled by Nelken in the study referred to above[631]. The two sets of norm group percentile scores have been reproduced in Table 9 below, divided into high, middle and low. The percentile bands are very similar for both the norm groups in the collaborative category, but have some differences in all the other four categories.

[630] Schaubhut, N. A., (2007) 'Technical Brief for the Thomas-Kilmann Conflict Mode Instrument', at p1. Available at: http://www.kilmanndiagnostics.com/sites/default/files/TKI_Technical_Brief.pdf (Last visited 26.5.2015)

[631] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1

Table 9 – TKI norm group percentile comparators

		TKI Standard Norm Group[632]					Law School Negotiation Student Norm Group[633]				
		Compete	**Collaborate**	**Compromise**	**Avoid**	**Accommodate**	**Compete**	**Collaborate**	**Compromise**	**Avoid**	**Accommodate**
High 25%	100%	12 11 10 9	12 11 10	 12 11	12 11 10	11, 12 10 9	12 11 10 9	12 11 10 9	 12 11 10	12 11 10 9	12 11 10 9 8
	90%	8	9	10	9	8					
	80%	7			8	7					
Middle 50%			8	9			8	8		8	
	70%	6			7	6	7	7	9	7	7
	60%	5	7	8			6		8		6
	50%	4	6	7	6	5	5	6		6	
	40%	3			5	4	4	5	7	5	5
	30%		5	6							
Low 25%		2			4			4	6	4	4
	20%	1	4	5	3	3	3 2	3	5	3	3
	10%	0	3 2 1 0	4 3 2 1, 0	2 1 0	2 1 0	1 0	2 1, 0	4 3, 2 1, 0	2 1 0	2 1, 0

[632] Taken from the Thomas Kilmann Conflict Mode Instrument booklet that accompanies the assessment

[633] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p19

6.4.3 Presentation of the TKI data

The results obtained for each interviewee are summarised in Table 10 below.

The first column is a list of the interviewees identified by their individual reference numbers. As with Table 8, when the reference number is in italics the interviewees classify themselves as engaged in contentious legal work, while no italics indicate the interviewees consider themselves to be engaged in non-contentious legal work.

The second column is a combined abbreviated summary of the interviewees overall perception of their negotiation style and behaviour. This is essentially a condensed synopsis of the information contained in Table 8 for each interviewee.

Columns three to seven contain the individual interviewees TKI scores for each of the five conflict handling categories identified within the TKI assessment. Below each number is the percentile category for the TKI standard norm group. Where a second percentile category is indicated in brackets, this indicates that the percentile group is different when compared to the law student norm group identified by Nelken[634].

[634] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p19

Table 10 – Negotiation behavioural style and TKI scores

Interview	Combined summary of interviewee's perceived negotiation behavioural style	TKI				
		Collaborate	Compromise	Accommodate	Compete	Avoid
IC 001	Reasonable but firm. Much closer to competitive.	3 LOW	11 HIGH	3 LOW	7 HIGH (MIDDLE)*	6 MIDDLE
IC 002	Probably closer to cooperative.	4 LOW	10 HIGH	5 MIDDLE	6 MIDDLE	5 MIDDLE
IC 003	Reasonable, sensible, commercially aware. Where competitive equates aggressive behaviour then cooperative.	5 MIDDLE	10 HIGH	5 MIDDLE	5 MIDDLE	5 MIDDLE
IC 004	No fixed style - not aggressive. Depends on situation but towards cooperative.	6 MIDDLE	5 LOW	5 MIDDLE	9 HIGH	5 MIDDLE
IC 005	Softer, non confrontational – likes to avoid conflict. Cooperative – see this as someone who avoids conflict.	3 LOW	10 HIGH	9 HIGH	1 LOW	7 MIDDLE
IC 006	Friendly, builds rapport and relationships. Slightly towards cooperative but depends on other side.	9 HIGH	10 HIGH	2 LOW	3 MIDDLE (LOW)	6 MIDDLE
IC 007	Open style, non-aggressive, firm but flexible.	8 MIDDLE	6 MIDDLE (LOW)	5 MIDDLE	6 MIDDLE	5 MIDDLE
IC 008	Straightforward, reasonable, impersonal. Towards the cooperative end.	2 LOW	8 MIDDLE	8 HIGH	5 MIDDLE	7 MIDDLE
IC 009	Firm but sensible negotiator. Thinks aggressive more apt on the scale than competitive – feels cooperative is more effective.	2 LOW	5 LOW	5 MIDDLE	7 HIGH (MIDDLE)	11 HIGH
IC 010	Open, up front, not hiding anything. More on the cooperative side.	8 MIDDLE	8 MID	6 MIDDLE	1 LOW	7 MIDDLE

* Any entry in brackets indicates the result for the Law Student Norm Group where the percentile group is different from the TKI Standard Norm Group. Shaded cell/cells indicates a interviewee's highest score.

Interview	Combined summary of interviewee's perceived negotiation behavioural style	TKI				
		Collaborate	Compromise	Accommodate	Compete	Avoid
IC 011	No style - a practical approach. More cooperative but moves depending on circumstances.	3 LOW	10 HIGH	7 HIGH (MIDDLE)*	4 MIDDLE	6 MIDDLE
IC 012	Knows the line and how to hold it. At the more cooperative end.	5 MIDDLE	7 MIDDLE	3 LOW	7 HIGH (MID)	8 HIGH (MID)
IC 013	Robust but fair. Straight to the point, balanced, adaptable. Both cooperative and competitive throughout any given negotiation.	8 MIDDLE	6 MIDDLE (LOW)*	4 MIDDLE (LOW)	6 MIDDLE	6 MIDDLE
IC 014	Stable, open, accessible and reasonable. Towards cooperative end.	8 MIDDLE	7 MIDDLE	4 MIDDLE (LOW)	6 MIDDLE	5 MIDDLE
IC 015	Stable, non-aggressive, consensual and reasonable. Fluid, elements of both, influenced by other side, generally cooperative.	2 LOW	9 LOW (HIGH)	2 LOW	8 HIGH (MID)	9 HIGH
IC 016	A little chameleon-like, depending on parties. Not extreme but starts competitive and often gets more cooperative.	9 HIGH	8 MIDDLE	2 LOW	5 MIDDLE	6 MIDDLE
IC 017	Not rigid – reasonable, measured, not aggressive, honest. More cooperative by nature – can be bullish if others are aggressive.	5 MIDDLE	10 HIGH	6 MIDDLE	4 MIDDLE	5 MIDDLE
IC 018	Firm but fair and reasonably consensual. Cooperative and competitive – not incompatible. Other end of scale should be aggressive.	5 MIDDLE	9 LOW (HIGH)	3 LOW	4 MIDDLE	9 HIGH
IC 019	Consensual and cooperative. Changes if meet aggressive. Naturally highly cooperative but also competitive – not polar opposite behaviours	3 LOW	10 HIGH	5 MIDDLE	5 MIDDLE	7 MIDDLE
IC 020	Flexible. Depends on client, nature of case and the other lawyer. Not aggressive - bullish.	7 MID	6 MIDDLE (LOW)	7 HIGH (MID)	3 MIDDLE (LOW)	7 MIDDLE

Interview	Combined summary of interviewee's perceived negotiation behavioural style	TKI Score				
		Collaborate	Compromise	Accommodate	Compete	Avoid
IC 021	Someone who looks out of the box to find solutions. Aim to be cooperative but can be 'a bit hard' at times.	4 LOW	7 MID	2 LOW	9 HIGH	8 HIGH (MIDDLE)*
IC 022	Very, very friendly, very open and approachable. 'Collaborative'.	10 HIGH	7 MIDDLE	1 LOW	4 MIDDLE	8 HIGH (MIDDLE)
IC 023	Compromises. Doesn't like conflict. Communicative and cooperative. At cooperative end of scale.	7 MID	12 HIGH	3 LOW	3 MIDDLE (LOW)	5 MIDDLE
IC 024	Fairly informal and personable. Cooperative.	6 MIDDLE	4 LOW	6 MIDDLE	3 MIDDLE (LOW)	10 HIGH
IC 025	Depends on the other side. Commercial, pragmatic, gets the deal done. Reasonable.	3 LOW	10 HIGH	6 MIDDLE	4 MIDDLE	7 MIDDLE
IC 026	Not straight forward, pragmatic and commercial. Starts nearer cooperative – can change depending on circumstances.	7 MIDDLE	5 LOW	2 LOW	8 HIGH (MIDDLE)	8 HIGH (MIDDLE)
IC 027	Collaborative but flexible depending on others. Towards the cooperative end of scale.	2 LOW	11 HIGH	4 MIDDLE (LOW)	8 HIGH (MIDDLE)	5 MIDDLE
IC 028	Reasonable and measured. Towards cooperative but recognises competitive instinct.	2 LOW	7 MIDDLE	6 MIDDLE	7 HIGH (MIDDLE)	8 HIGH (MIDDLE)
IC 029	Measured, respectful of other side, objective, interest or needs based approach. Cooperative but can be competitive from a cooperative perspective.	6 MIDDLE	4 LOW	7 HIGH (MIDDLE)	6 MIDDLE	7 MIDDLE
IC 030	Firm but fair. Be clear about what you want and why you want it and do it in a pleasant manner. Competitive but does it politely.	4 LOW	11 HIGH	5 MIDDLE	7 HIGH (MIDDLE)	3 LOW

6.4.4 Analysis of the TKI results

6.4.4.1 Overview of the sample as a group

The data allows a comparison to be made between interviewees' perception of their negotiation behavioural style and a more objective assessment[635] of their related predisposition to certain conflict handling behaviours. To begin the analysis it is helpful to first consider an overview of the whole sample group TKI data.

Table 11 presents an overview of the TKI data indicating the number of interviewees who places each category as their top score, or joint top score, as well as the mean scores for each category for the whole sample group, as well as for the contentious and non-contentious interviewee groups.

Table 11 – TKI data overview

TKI Conflict handling categories	Number of interviewees with category as top or joint top score	Mean scores for whole sample group	Means scores for contentious interviewees	Mean scores for non-contentious interviewees
Compromising	16 Interviewees (7C +9NC)	8.10	7.71	8.44
Avoiding	9 Interviewees (6C + 3NC)	6.70	6.93	6.50
Competing	3 Interviewees (1C + 2NC)	5.37	5.36	5.37
Collaborating	7 Interviewees (3C + 4NC)	5.20	4.5	5.81
Accommodating	3 Interviewees (3C + 0NC)	4.60	5.5	3.81

The most apparent observation from the whole group TKI data is that more than half of the interviewees from the sample are most likely to use compromise

[635] As previously stated, it is recognised that the TKI assessment is a self-reported tool and therefore is not strictly objective.

behaviour than to use any other form of negotiation behavioural style (sixteen interviewees with a total sample mean score of 8.10). This accords with the results obtained for the law students in the Nelken study (where the mean score for compromising was the highest at 7.5 in a sample group of 754)[636] and is identical to results obtained for the much smaller sample group of experienced lawyers the Nelken study also considered (where the mean score for compromising was also the highest at 8.1 in a sample group of 64[637]). The mean score of 8.1 places the sample group in the middle 50% for this type of behaviour when compared with both the non-lawyer TKI Standard Norm Group and the Law Student Norm Group.

The Nelken study found that in the sample scores for the remaining four categories were all fairly evenly matched around scores of between 5.0 and 5.8 for both the larger student sample group and for the smaller sample of experienced lawyers. This placed all four categories within the middle 25th to 75th percentile range in relation to both the non-lawyer TKI Standard Norm Group and the Law Student Norm Group.

For the interviewee sample looked at for this research study the pattern is similar. The next most common style after compromising is avoiding which, although it has a higher mean score of 6.7 than both the Nelken groups, it still places the sample interviewee group in the middle 25th to 75th percentile range for this type of behaviour in relation to both the non-lawyer TKI Standard Norm Group and the Law Student Norm Group.

The accommodating mean score for this research study sample group at 4.6 is lower than found in both groups within the Nelken study but again is still in the middle 25th to 75th percentile range for this type of behaviour in relation to both the non-lawyer TKI Standard Norm Group and the Law Student Norm Group.

[636] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p18

[637] It should be noted that Nelken highlights that the experienced lawyer sample size is too small to be a representative sample and therefore does not draw any statistically generalisable conclusions from that data. The same is true for the even smaller sample size used in this study.

On the basis of the result presented above, the overview of the mean TKI scores for the interviewee sample group used in this research would appear to be comparable to both the larger sample group of law students and the smaller sample group of experienced lawyers used by Nelken.

6.4.4.2 Contentious and Non-contentious differences within the sample group

For the purpose of this research study it was decided to also look at the mean TKI scores for the group of interviewees engaged in contentious legal work and compare them with the group that are engaged in non-contentious legal work.

For the two groups of contentious and non-contentious legal work, only the mean scores for the accommodating category were statistically different from each other at the 5% (0.05) confidence level (mean values of 5.5 and 3.81 with p-value=0.019[638]). For the other four categories, although there were differences, these were not statistically significant (avoiding category – mean values of 6.93 and 6.5 with p-value=0.51: competing category – mean values of 5.36 and 5.37 with p-value=0.98: compromising category – mean values of 7.71 and 8.44 with p-value=0.40: collaborating category – mean values of 4.5 and 5.81 with p-value=0.15).

What the data therefore suggest is that in terms of the TKI analysis, the only significant difference between the five behavioural classifications when the data is organised into groups of contentious and non-contentious interviewees is that the contentious interviewees tend to use accommodating behaviour more than non-contentious interviewees, something that is discussed further in Chapter 8.

[638] P-values used refer to an unpaired two-tailed t-test.

6.4.4.3 TKI scores and interviewees' perception of negotiation behavioural style

As has been outlined earlier in this chapter, the interview data show that a large majority of the interviewees in this study broadly associate themselves with what they characterise as being closer to a cooperative type of behaviour than a type of competitive behaviour. In the context of the five TKI behavioural categories, strongly cooperative behaviour would be most closely associated with the accommodating category of behavioural style characterised as being where the individual is concerned primarily with the other side's needs rather than their own and can be said to be both unassertive and cooperative according to the two dimensions of assertiveness and cooperativeness described by Thomas & Kilmann outlined above[639].

Accommodating

However, the TKI scores obtained in this study shows the mean TKI score for accommodating behaviour for the whole sample group to be the lowest mean score for all five dispute handling categories with only three of the thirty interviewees have it as their highest score. Of these three interviewees, none has a score higher than 8 and all three interviewees have it as a joint highest score with either one or two other categories.

This would suggest that although many of the interviewees associate themselves with a broadly more cooperative style of negotiation behaviour, the majority of them are unlikely to be what might be considered true cooperatives since the TKI assessment does not in fact identify any interviewee that exhibits strong or indeed what might be considered truly cooperative behaviour.

[639] Kilmann, R. H., & Thomas, K. W., (1977) 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument,' *Educational and Psychological Measurement*, 37, 309-325 at pp309 & 310.

Compromising

Instead, the TKI results shows that compromising is the most prevalent type of behaviour identified by the interviewees in the sample group. This type of behaviour is characterised by Thomas & Kilmann as being intermediate in both cooperativeness and assertiveness. Students interviewed in the Nelken study describe compromisers as '*as fair, reasonable, easy to deal with, and prepared to give and take in the course of negotiating*'[640]. With specific reference to the TKI categories, Shell describes strong compromisers as individuals who are relationship friendly, and as reasonable people who like to employ fair standards in their negotiations[641].

This characterisation of a compromising style of behaviour appears to fit with the finding earlier in this chapter that suggests many of the interviewees in this study strongly associate their personal negotiation behavioural style with concepts of reasonableness and fairness as well as considering themselves to be measured, straightforward, pragmatic, flexible, consensual and commercial.

The only two interviewees to describe themselves as predominantly competitive (as opposed to interviewees who described themselves as being both cooperative and competitive) both scored as very high compromisers (both scored 11 - above the 90th percentile). However, both interviewees also score relative to the rest of the sample group as very highly for competing behaviour with scores of 7, a score classified as high and above the 75th percentile in relation to the TKI Standard Norm Group (although it is only medium, just above the 65th percentile, in relation to the Nelken Law Student Norm Group). Only one other interviewee also has both a very high compromising score and a high competing score (11 and 8 respectively), but in her case the interviewee does not perceive herself to be competitive but rather as '*Collaborative but flexible depending on others. Towards the cooperative end of*

[640] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p5

[641] Shell, G. R. (2001) 'Bargaining styles and negotiation: The Thomas–Kilmann Conflict Mode Instrument in negotiation training'. *Negotiation Journal*, 17, 155–174 at p167

scale'[642]*.* Despite specifically identifying herself as collaborative, this interviewee scores very low for collaborative behaviour with a score of 2.

Competing

Only three interviewees have competing behaviour as their TKI highest score. Of these, interviewee IC 004 scores very low for compromising behaviour (below the 20th percentile) and medium for the others styles. This interviewee describes herself as *'no fixed style - not aggressive. Depends on situation but towards cooperative'*[643]*.* Interviewee IC 021 has a high score of 9 for competing but combines this with a high score of 8 for avoiding (around the 75th percentile in both the TKI Standard Norm Group and the Nelken Law Student Norm Group). The third interviewee to have competing as her highest score does so jointly with her avoiding score (IC 026 – both scores were 8). Both the latter interviewees consider themselves to have a cooperative predisposition but with either an ability to be '*a bit hard at times'*[644] or the ability to '*change depending on the circumstances'*[645]*.*

Any suggested potential connection[646] between high competing scores and high avoiding scores perhaps becomes more explicable when the characterisation of avoiding behaviour is considered more fully. Arguably refusing to engage constructively in a negotiation process can be similar in appearance and effect to some types of highly competitive approaches to negotiation that encompass a refusal to modify one's position, discuss options or to make any sort of compromises. Nelken suggests that avoiders can be powerful when they have negotiating power or leverage in a negotiation often meaning that the other party

[642] See Table 10 – Interviewee IC 027

[643] See Table 10 – Interviewee IC 004

[644] See Table 10 – Interviewee IC 021

[645] See Table 10 – Interviewee IC 026

[646] As stated earlier, great care must be taken when attempting to make generalisations from such small numbers, however, it is submitted that the qualitative methodology at least allows it to be recognised that such opinions exist within the group of lawyers that formed the sample group.

has to make unilateral concessions to get the avoider to engage in the negotiation[647].

Avoiding

The avoiding category itself is much more prevalent than the competing style amongst the interviewees with the second highest mean score for the whole sample of 6.7 and with nine of the interviewees having it as their top or joint top score. However, of those only two interviewees score as strong avoiders having high avoiding scores in combination with relatively low scores in the other categories. One of these interviewees also has a very low competitive score of 3 and describes his negotiation behavioural style as '*Fairly informal and personable. Cooperative*'[648]. The second strong avoiding interviewee has a much higher competing score of 7 and describes himself as a *'firm but sensible negotiator'* who *'feels cooperative is more effective'*[649]. This latter interviewee may therefore present as what might be perceived as someone who looks at times to be engaging in competitive negotiating behaviour when in fact the interviewee's behaviour is actually a manifestation of their avoiding style[650]. Kilmann makes the observation that highly competitive behaviour used for the purpose of forcing an opponent to withdraw can in certain circumstances be viewed as an avoiding behaviour[651].

The other seven avoiding interviewees generally have avoiding scores at or below 9 and are more likely that any of the other highest category groups to have avoiding as a joint highest score with one or two other categories. In addition, generally

[647] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p6

[648] See Table 10 above – Interviewee IC 024

[649] See Table 10 above – Interviewee IC 009

[650] As stated earlier, great care must be taken when attempting to make generalisations from such small numbers, however, it is submitted that the qualitative methodology at least allows it to be recognised that such opinions exist within the group of lawyers that formed the sample group.

[651] Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 6. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf (last visited 26.5.2015) [Kilmann, R. H., (2011)]

these interviewees are characterised by having relatively closely matched scores for many or all of their style categories across a relatively narrow range. This suggests that although nine interviewees had avoiding as their highest score, often these interviewees were evenly matched across all their scores and were therefore arguably unlikely to exhibit any strongly identifiable characteristics. This perhaps also accords with Shells view '*when a TKI trait falls within the middle band of percentile rankings (roughly between the 25th and 75th percentiles), it usually means the mode is a more-or-less available resource, which may be called upon as the situation and personality of the other party dictates*'[652].

Many of the interviewees who have avoiding as their highest scores appear to generally associate themselves with a cooperative style of behaviour but very often specifically recognise an ability to be competitive or bullish under certain circumstances, but at the same time make it very clear that they are never aggressive. The interview data also show that none of the interviewees who have avoiding as their highest score indicate explicitly that they like to avoid conflict (the only two interviewees that do so both have high or very high compromising scores). This group arguably makes the strongest distinction between the use of what they deem to be acceptable competitive behaviour under certain circumstances, and the unacceptability of the use of aggressive behaviour under any circumstances.

Collaborating

Arguably collaborating and compromising are the most difficult types of behaviour to accurately distinguish between in the TKI[653]. According to the authors' characterisation they are essentially a more extreme variant of each other with compromising behaviour being characterised as intermediate assertive and

[652] Shell, G. R., (2001) 'Bargaining styles and negotiation: The Thomas–Kilmann Conflict Mode Instrument in negotiation training'. *Negotiation Journal*, 17, 155–174 at p166

[653] Kilmann describes collaborating as '*the most complex and least understood mode*' - Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 5. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf (last visited 26.5.2015)

cooperative, and collaborating being characterised as purely assertive and cooperative[654]. Kilmann offers further insight in a more recent article where he writes '*the key distinction, once again, concerns whose needs get met, and to what extent, as a result of using a particular conflict mode. Compromising means that each person gets partially satisfied but not completely satisfied… however, collaborating means that both persons get all their needs met*'[655]. Nelken offers further clarification by describing a TKI collaborating style as one that '*combines a strong sense of one's own interests with a concern for the other party's interests. Collaborators want to get the best possible deal for everyone involved*'[656]. Shell introduces the idea that collaborators take pleasure from solving tough negotiation problems in an interactive way and that '*they are instinctively good at using negotiations to probe beneath the surface of conflicts to discover basic interests and perceptions. They enjoy the continuous flow of the negotiation process and encourage everyone to be involved*'[657].

Seven interviewees score collaborating as their highest score with a mean sample group score of 5.2, the second lowest for all the TKI categories. Of these interviewees, only two have high scores above the 75th percentile. Of these, IC 022 is one of only two interviewees in the whole study that specifically identifies himself as being 'collaborative' in the interview data[658]. The interviewee perceives himself to be '*very, very friendly, very open and approachable*'[659]. This would potentially

[654] Kilmann, R. H., & Thomas, K. W., (1977), 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument,' *Educational and Psychological Measurement*, 37, 309-325 at pp309 & 310.

[655] Kilmann, R. H., (2011) Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 7. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf (last visited 26.5.2015)

[656] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p5

[657] Shell, G. R., (2001) 'Bargaining styles and negotiation: The Thomas–Kilmann Conflict Mode Instrument in negotiation training'. *Negotiation Journal*, 17, 155–174 at ppP168 & 169.

[658] Although it is of note that the other interviewee to do so has a TKI score of only 2 for collaborating

[659] See Table 10 – Interviewee IC 022

suggest a interviewee that might be good at building relationship and would be good at facilitating information exchange and communication. The other interviewee to have a high collaborating score perceives himself to be '*a little chameleon-like, depending on parties. Not extreme but starts competitive and often gets more cooperative*'[660] which is perhaps harder to immediately reconcile with a high collaborating score. There is only one interviewee in the sample group who has a high collaborating score without it actually being their highest score (which is compromising) who describes herself as '*friendly, builds rapport and relationships. Slightly towards cooperative but depends on other side*'[661]. This would again potentially suggest a interviewee that might be good at building relationship, information exchange and communication.

All seven interviewees who score collaborating as their highest style also have a middle compromising score between the 25th and 75th percentile. In five of the seven interviewees their compromising score is their next highest score. This would suggest that there is a potential association shown in the data between an interviewee's high collaborating score and the interviewee also having a relatively high compromising score. However, this relationship does not appear to hold in the other direction. Of the sixteen interviewees who have compromising as their highest score, only four have collaborating as their next highest score. This would tend to support an idea that collaborators find it easier to become 'less' assertive and cooperative as required (i.e. intermediate assertive and cooperative) than perhaps compromisers find it to become 'more' assertive and cooperative (i.e. to move from intermediate assertive and cooperative to purely assertive and cooperative). This would broadly support an argument that the ability to collaborate requires more skill than the ability to compromise.

[660] See Table 10 – Interviewee IC 016

[661] See Table 10 – Interviewee IC 006

6.5 Summary of results

6.5.1 Perception of effectiveness

The first part of the second research question recognises that it is important in the context of this research to establish from the interviewees how they actually perceive their own effectiveness as legal negotiators[662]. As has been acknowledged in the methodology outlined in Chapter 4, *interviewee bias* is likely to have been present given that the interviewer is also a member of the legal profession and therefore interviewees may have been reluctant to admit to anything that could be perceived as undermining their professional standing or status. This is likely to have been particularly relevant when answering a direct question regarding a interviewee's personal effectiveness as a negotiator. Steps were taken to reduce this potential effect by choosing interviewees who had no professional contact with the interviewer but the effect is still likely to have been present to some degree.

However, despite this, although all the interviewees considered themselves to be broadly effective, it is also clear that many of the interviewees did acknowledge some doubt in their own minds about their abilities or acknowledged that their performance varied even if ultimately everyone in the sample group broadly considered himself/herself to be an effective negotiator. This may have reflected genuine doubt about their own effectiveness but it may also be that some of the interviewees were more diffident, self-effacing, or modest that others and that they may have understated what they actually thought about their own effectiveness as a legal negotiator.

It is also evident from the results that there are links between the results reported in Chapter 5 in relation to the components associated with an effective outcome, and the evidence that the sample group reports to draw upon to determine their own effectiveness. Mirroring the results in Chapter 5, many interviewees point to a history of their ability to simply reach concluded agreements, either in the context

[662] Distinct from any objective measure of their own effectiveness

of out of court settlements or the conclusion of a transaction or a deal, as evidence of their own effectiveness regardless of the terms of such agreements.

The subjective perception of the client emerged as a key component of an effective outcome identified in Chapter 5 and indeed interviewees cite evidence of their own client satisfaction or happiness as evidence of their own effectiveness, along with evidence of having a personal history of client retention and securing repeat business, which also appears to have been taken by interviewees as good evidence of client happiness and therefore effectiveness on their part as a negotiator.

However, although the meeting of objective criteria emerged in Chapter 5 as another key component of what might be an effective outcome, it is arguably significant to note that only a small number of interviewees actually cite any evidence of their own ability to meet more objectively set client goals as evidence of their own effectiveness. Indeed a number of interviewees specifically concede that they are not able to offer any objective test or measure of their performance to support their feeling or assertion of their own effectiveness.

6.5.2 Perception of personal negotiation behavioural style

The interview data suggests that the initial framework that the majority of interviewees use to characterise their own negotiation behavioural style is often broadly centred around a concept of reasonableness. Based on the initial perception of the interviewees, the predominant characterisation of their own negotiation behavioural style might be broadly summarised as:

Reasonable, measured, straightforward and pragmatic and commercial whilst maintaining a degree of flexibility.

It also identified that a number of interviewees specifically perceive themselves as *not* being aggressive or confrontational, as well as interviewees who perceive themselves to be either on the firmer side of reasonable and those who consider themselves to be on the more consensual side of reasonable.

Once introduced to the suggested competitive/cooperative framework, it is evident that all the interviewees feel able to identify themselves to at least some extent with it and place themselves within this spectrum. The large majority of interviewees consider themselves to be, to a greater or lesser extent, cooperative in style with most considering this style to be broadly stable. However, a significant proportion of the interviewees consider that although cooperative, they have a more flexible approach and will adopt what they consider to be a more competitive approach to negotiation as and when required, depending on circumstances.

A small number of interviewees broadly agree with the suggested framework but sought to redefine the competitive end of the spectrum to be more accurately described as aggressive type of behaviour. These interviewees still appear to define their own negotiation behavioural style as cooperative.

Finally two interviewees consider that cooperative and competitive behaviour to some extent are not mutually exclusive and suggest they engage in what might be characterised as a hybrid style encompassing elements of both.

Given that almost the whole sample group perceives themselves to some extent to be cooperative, the results in this section suggest that it is important to look for evidence within the TKI data that might help provide more insight into what the interviewees might have meant by this perception.

6.5.3 TKI analysis and perceived negotiation behavioural style

It is clear from the results that the analysis of the TKI data is able to provide some further insight into the interviewees perceived negotiation behavioural style.

In particular, it highlights the difference in what might be characterised as true cooperative behaviour (categorised in the TKI as accommodating behaviour) and that of compromise behaviour. It would suggest that the majority of the interviewees are perhaps closer to a type of behaviour that is a mixture of cooperating and competing than an initial reading of the interview data might have suggested. It also sheds some light on the interface between avoiding behaviour

and competing behaviour and how, in some interviewees, the former might appear as the latter. This might suggest that when some of the interviewees consider themselves capable under certain circumstances of engaging in what they perceive to be competitive behaviour, this might actually be a manifestation of an avoiding behavioural predisposition.

Kilmann provides additional insight into the TKI by further interpreting the conflict handling modes of competing, accommodating and compromising as 'distributive' modes, associated with zero-sum[663] value claiming behaviour. The author identifies this behaviour as being potentially detrimental to performance particularly when an individual has two or three of these modes as their top styles[664]. On this analysis it is arguably clearly relevant to note that the large majority of interviewees in the study did have at least one of the distributive modes as their top TKI style which suggests that the TKI analysis provides evidence of a clear disposition by the sample group towards a zero-sum distributive negotiation style rather than one that is more integrative and potentially value creating.

However, it goes to the essence of this research study when Kilmann makes the very pertinent point that:

'In essence, I am distinguishing between—and prioritizing—such concepts as intention, behaviour, and outcome, and suggesting that each of these "perspectives" can lead to a slightly different interpretation of which conflict mode is being used and for what purpose. Intention is often elusive in the mind of the actor (whether conscious or not). Indeed, sometimes the intention is justified or

[663] The strict definition of a zero-sum is where the total gains for one side minus the total losses for the other side equal zero. See: Cooter, R., Marks, S., & Mnookin, R., (1982), 'Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour', 2 *Journal of Legal Studies*. 225 -251 at p 227

[664] Kilmann, R. H., (2011) Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 6. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf (last visited 26.5.2015)

rationalized only after the encounter has taken place. Sometimes, in fact, people don't know their intention until they've had time to think about their motives'[665].

Essentially he is identifying in the context of the TKI the concept of a link between the need to understand intentions and motivation and the ability to understand the true nature of the behaviour being used. Chapter 7 will therefore consider the motivations of the interviewees in the context of the TKI assessment and their perceived negotiation behavioural style.

[665] Kilmann, R. H., (2011) Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 6. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf (last visited 26.5.2015)

Chapter 7 – Motivations

7.1 Overview

The third research question identified in Chapter 1 directly relates to the literature explored in Chapter 3 that identifies underlying motives as being a variable of interest in this research study. As previously discussed in Chapter 1, authors such as Craver[666] argue that many people who appear to be cooperative negotiators are in fact indiscernibly motivated by hidden highly competitive objectives[667] something that is supported by studies carried out by authors such as Allred[668] and Genn[669]. Understanding the motivations of lawyers in legal negotiations is therefore likely to be of significance when attempting to understand how legal negotiators understand effectiveness and how they characterise the nature of behaviour that might be associated with effective legal negotiation.

Having presented the interview data specifically relating to effectiveness both in terms of negotiation outcomes and negotiation behaviour, and then having considered perceived personal negotiation effectiveness and behavioural style, this chapter first identifies and considers the interview data that relates to the underlying motivations, and then explores any relationship their motivations may have to the interviewees' perceived behavioural style in the context of the third research question.

[666] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337 at p 346

[667] See Allred, K.G. (2000). *Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value*. Negotiation Journal, Vol 16, Issue 4 at p394-396.

[668] Allred, K.G. (2000) 'Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value'. *Negotiation Journal*, Vol 16, Issue 4, 387-397

[669] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press.

Research Question 3 - *What are the underlying motivations of lawyers when they are engaged in legal negotiation and are they related to perceptions of effectiveness or to a particular negotiation behavioural style?*

Specifically, Section 7.2 of this chapter considers the interview data from a broader perspective, with Section 7.3 making some observations about the overall nature of motivations and how they may be interlinked with each other and to the broader process of legal negotiation.

Section 7.4 then goes on to analyses the data in more detail and explores the data for any evident link between particular motivations and particular behavioural negotiation styles.

Section 7.5 then presents a summary of the results and finding for the whole chapter.

7.2 An initial consideration of the interview data

7.2.1 Presentation of the interview data - personal, organisational and the client

It became evident during the pilot interviews that many interviewees had difficulty in distinguishing between their underlying motivations and their overall objectives or goals. It is perhaps therefore important at this stage to consider the definition of the terms *objective* and *motivation*:

Objective - A thing aimed at or sought; a goal.

Motivation - A reason or reasons for acting or behaving in a particular way[670]

Clearly objectives and motivations are related concepts but it is necessary for the purpose of this research study to specifically attempt to understand motivations and as such *why* each interviewee wishes to achieve their objectives and goals, a

[670] Definitions from http://www.oxforddictionaries.com/

concept that some of the interviewees report not to have thought specifically about in any great depth before.

IC 007: I don't really know why... I've never really thought about it.

In order to facilitate the interview data gathering process, building on the experience gained in the pilot interviews, the finalised interview schedule therefore prompted the interviewees to think about motivations in terms of their orientation and in particular in terms of whether they were personally orientated, directed towards their organisation or focused towards their client. This approach appeared to assist many of the interviewees to more easily recognise the concept under discussion and to better conceptualise, identify and then describe their underlying motivations, as well as assisting the overall presentation and analysis of the interview data.

It should also be noted that not all the interview data relating to motivations was revealed through direct questioning, some of the data that emerged was embedded in other passages in the interview transcripts that were ostensibly dealing with other topics of discussion.

7.2.2 Client orientated motivations

When first asked about motivations, almost all the interviewees initially express their answer in terms of wanting to do a good job for the client, getting a good result for the client, wanting to reach a resolution for the client, or simply wanting the client to be happy. As noted above, it appears that many of the interviewees were communicating what they wanted to achieve for the client rather than the underlying reasons why they wanted to achieve it.

IC 004: So going in, I want to do well for my client. I want them to be happy… I want to get to a point where I think I've protected their interest and done the best job I can for them.

IC 014: I suppose client first, motivated by getting them to where they want to be.

Other interviewees initially express their motivations towards the client in terms of the feelings they want the client to have towards them as their lawyer. This often includes a desire that the client feels that the interviewee or the interviewee's legal firm has done a good job, has added value or has represented them well.

IC 003: I want them to feel like they've got value for money.

IC 013: I suppose the biggest thing I'd want the client to feel at the end of any process is that you actually added value to their position.

IC 023: We want clients to say "this firm did a really good job."

It is evident from the interview data that there is a great deal of overlap between motivations directed towards the client, and with both what might be considered personal and organisational motivations. Many interviewees who frame a particular motivation as directed towards the client, on further evaluation appear in reality to be identifying a personal or organisational motive, or sometime both. These often combine concepts associated with client satisfaction leading to repeat business from a returning satisfied client or indeed to new business through enhanced reputation.

IC 010: I think you're always wanting the client to end up being satisfied with what you've done for them because at the end of the day, from a business point of view, the best way of getting business is word of mouth and for people to say "go to so-and-so because they're quite good".

It is also evident that some interviewees feel that personal motivations and motivations focused on the client's interests are sometimes difficult to differentiate or are very closely linked, although arguably the interviewees are again often in reality focusing more on the objectives of achieving success or a good outcome rather than the actual underlying motivations behind these desires.

IC 019: I think I'm talking about it from a personal perspective but I think it's probably quite difficult to differentiate the personal success here and the client success.

IC 020: And I think that the best lawyers will have a mix of those client's goals and personal goals, because it's no good achieving your personal goals if you've not achieved your client's.

Finally, it is evident that many of the interviewees feel they are motivated by ethical or professional considerations towards the client, although again it is often difficult to discern whether these are motivations that are in reality directed towards the client, or are actually personal, organisational or indeed a mixture of both. It is often not clear whether interviewees act professionally or behave ethically for the good of the client or because it accords with the interviewees' own value system or that it avoids reputational damage.

IC 016: I think, again, you've got to behave in a way that you'd like to be treated yourself. And again, I think that enhances your reputation both with the client and your fellow professionals and their client as well. I think there's got to be a degree of integrity in relation to your behaviour.

IC 021: Good faith is actually almost a way of life.

There is some evidence found in the interview data to suggest that where there is a conflict between interviewees' professional or ethical values and their client's values, the interviewee's values are likely to prevail[671].

IC 009: But certainly there's no place for it, and professionally I would not want to be in a position if a client was putting pressure on me to deliberately deceive or mislead the other side then that's not something that I would be willing to do.

IC 019: We are all very conscious and constantly reminded of the importance of professional ethics because, really, as you know yourself, your first duty is always to the court and your second duty is probably towards your professional peers in terms of certain well-established duties.

7.2.3 Personal orientated motivations

Professional and ethical motivations appear from the interview data to be most often closely linked to personal values, reputational issues and professional pride and satisfaction. Interviewees report strong feelings for the need to act

[671] Any detailed consideration of ethics and professional obligations is beyond the scope of this study and no further testing was attempted to establish if the answer accorded with what the individual would actually do in practice. For a discussion of legal negotiation ethics and professional obligation in a US context see: Craver, C. B., (2010) 'Negotiation Ethics for Real World Interactions', 25 *Ohio State Journal on Dispute Resolution.* 299.

professionally and not to undermine a legal system that is perceived to depend on such behaviour to function effectively.

IC 003: I suppose it's one of my core values – is that even the way to describe it – but I feel really strongly that as lawyers we should act professionally, that we've got a job to do, but it should never be to the detriment of your professional standing with other lawyers, so that sort of behaviour would upset me greatly, really would.

IC 013: Well, I think as lawyers we have to be absolutely ethical. Otherwise you undermine the whole process of what the legal system is meant to achieve.

Personal reputation has already emerged from the interview data as a very important concept linked to both effective outcome and effective behaviour considered in Chapter 5. It is evident that reputation is also very important in terms of personal motivations. The interview data shows that interviewees are strongly motivated to protect and enhance their reputation both externally amongst their professional peers, clients and potential clients, as well as internally amongst their colleagues within their organisation. The personal element of this appears to be for reasons of professional pride and respect, as well as career advancement and the potential for increased personal remuneration and financial enrichment. As has also been considered in Chapter 5, interviewees also consider that reputational factors can enhance their ability to negotiate effectively and achieve effective outcomes.

IC 003: I want my colleagues to think that my clients think that I'm good at what I do, I want my colleagues to want…particularly junior colleagues, if they've got a negotiation, I want them to think, well, [interviewees name] dealt with these before, what strategy would she adopt here, so it's really important to me – probably sometimes more important than it should be – about what my junior colleagues think about me.

IC 019: Also, as a junior, it feeds back to how likely you are to get a good instruction next, how likely you are to be given complex work. In my case I'm very actively trying to carve myself out a private equity niche. And part of that is developing a reputation amongst a fairly large group of partners that when that sort of work comes in I'll be the man for the job.

IC 029: I suppose it's almost an innate moral sense that I wouldn't want to do that but I think there's also the fact that we work in a very small environment and the way you conduct negotiations will

have a bearing on how you conduct the next negotiations and how you're perceived as a negotiator in a fairly small community

Other personal motivations that emerge from the interview data include job satisfaction, enjoyment of the 'buzz' of negotiation and the 'cut and thrust of the deal', ego massaging, being appreciated, enjoyment of working life, career development, doing the best for family, personal security, being liked by others, fairness, and not being shown to have a lack of knowledge.

IC 003: I suppose I'm the sort of person who does find it important to be liked by people sometimes, so that's just a part of my own personality, my own style.

IC 019: And obviously good market reputation leads to further business which leads to personal security in a position. And at the end of the day we're all working to earn money and do the best that we can for our families, so it all leads down to that, career progression and security.

IC 021: I wouldn't still be doing it if I didn't get a buzz. It's what gets me up in the morning. And occasionally I'm really happy when a position you've taken turns out to be correct.

IC 025: You obviously don't want to look foolish in front of your client or in front of other solicitors.

In Chapter 5 some consideration was given to the interviewees' views about winning and beating the other side in the context of negotiation outcome. This interview data can also be considered in the context of the motivations of the interviewees. The interview data suggests that a limited number of the interviewees do appear to be at least in some way motivated to beat the other party or to 'win' negotiations, although such interviewees appear to be in the minority. There is a suggestion that these types of desires and motivations can be generated in response to encountering hard or aggressive behaviour exhibited by the other party. This is appears to be directly linked to a type of reciprocal behaviour response identified in Chapter 5 in the context of effective behaviour.

IC 014: Probably not beating the other side, no. I think reaching a reasonable position, so no, not beating them.

IC 018: I mean, yes if I feel that the person on the other side is taking a position which is just not appropriate or which is unfair or which is untenable. And yes you want to win because you want to get to what you think is an appropriate outcome. Do I ever feel as if I want to win just for the sake of it? I guess probably occasionally.

IC 020: Absolutely. I wouldn't be very good at contentious litigation if it didn't. You have to have a desire to win, to get the best possible result. Whether that's result in terms of personal objectives or your client's objectives, you have to want to achieve them.

Finally, it is acknowledged that this type of self reporting has its limitations and it is relevant to note that following an initial suggestion or insinuation by some interviewees that their motivations were solely focused on the client, when they were questioned carefully using the interview schedule framework described above developed from the pilot studies, they almost always then went on to identify a range of additional personal and organisational underlying motivations. This arguably highlights that many of the sample group initially did not appear to be explicitly aware of the nature of their motivations, or perhaps had not previously considered them in any depth. Although the design of the interview schedule arguably helped the interviewees significantly with the process of self-reflection and to mitigate the limitations of this type of self reporting, it is acknowledged that it remains a limitation of the methodology of the current research study.

7.2.4 Organisational orientated motivations

It is evident from the interview data that organisational motivations and personal motivations appear to also be closely linked. The interview data suggests that most of the sample group feel that many of their motivations that are orientated towards the organisation are also personally beneficial and vice versa. Indeed some interviewees go as far as to express the view that personal and organisational interests are largely aligned.

IC 007: if I get it right for myself then presumably I've got it right for the firm that employs me.

IC 009: To be honest, I think the firm's interest in that kind of thing and my own personal interest are pretty much aligned.

This view appears to be focused on a view that anything that benefits the business of the organisation is also likely to be good for the interviewee's standing within that organisation. It is also often framed broadly in terms of reputation, with anything that is good for the interviewee's reputation being considered also likely to be good for the organisation's reputation.

IC 004: You've done a good job. It's rewarding, clients are happy, you're happy. Hopefully they'll come back if they need to use a solicitor again.

IC 013: That enhances personal reputation and helps bring in new business.

IC 018: And therefore my organisational objective is the same as my personal objective which is to be a firm which gets good results for clients, which is sensible to deal with, easy to deal with, which is clear in its dealings with clients and clear in its dealings with other solicitors

IC 023: Well, they're more likely to pay the bill without complaining. They're more likely to come back and give you more work in the future and they're more likely to tell other people that you did a good job. And all of these are things that you want both from a personal professional point of view and from the point of view of the firm as a whole.

Specific organisational motivations identified include protecting the reputation of the organisation and other colleagues, not letting other workload suffer which might impact on fees from other clients, winning new clients and future business, sticking to agreed fee quotes and therefore not letting negotiations become protracted driving up costs for the client and making them unhappy, generating referral business through word of mouth communication and retaining existing client by keeping them satisfied.

IC 004: You want to do a good job, but at the same time you are trying to do a lot of other pieces of work as well. And trying to complete matters, so you can fee them and get money in for the firm, which is how we all get paid.

IC 013: It comes back to ensuring that you have a good outcome for the client because a good outcome for the client means a good outcome for the firm. Which is an awful lot easier to get paid and negotiate decent fee levels if the client is happy with your service.

IC 026: As an organisation, that's the main drivers, to win new clients and also to retain the ones that we have. And keeping them happy is the main motivation of the whole firm.

A number of interviewees report that they are motivated to secure not just repeat business from their own client, but also potentially new business from the client of the other lawyer involved in the negotiation. Arguably this may introduce a potential conflict of interest if behaviour is modified to specifically attract business from the client on the other side of a negotiation. However, it might also be argued that behaviour that demonstrates the interviewees' ability to negotiation effectively can be both in the best interest of their own client and at the same time attract new business from those on the receiving end of such behaviour.

IC 006: As I said earlier, a lot of our work comes through referrals, not necessarily even from our own clients, from people on the other side of transactions. So there are organisational motivations there. Again, don't get me wrong, the firm is first and foremost there to represent the clients and do the best job that we can for our clients, but we can't be blind to the wider imperative of generating new business as well.

IC 016: And I think if you're being at all commercial about it you recognise that you're displaying these behaviours not just in front of your own client but in front of other clients who in the future you may wish to represent, and therefore if you behave that way in their presence, they're less likely to give you work in the future.

7.3 Analysis – motivation in legal negotiations

7.3.1 Initial analysis

The initial analysis of the motivational interview data suggests that legal negotiators have a bundle of motivations that often overlap and are ultimately closely interlinked. Although in order to assist the interview process the interview data was initially considered in terms of motivational orientation, it is clear from the analysis that the focus of many motivational factors are interlinked and cannot easily be

placed into any one distinct group based on their orientation. Indeed a number of the interviewees specifically recognised this.

IC 013: And obviously good market reputation leads to further business which leads to personal security in a position. And at the end of the day we're all working to earn money and do the best that we can for our families, so it all leads down to that, career progression and security.

IC 020: Because that's what we're here to do. If you're doing your job well then your colleagues can respect you, your bosses value you and your peer group can respect you as well. And it can win more business if you get a reputation as being someone who is an effective negotiator and can get a good deal for his clients, then that's going to get you more clients, hopefully.

Client focused motivations

The interview data does however appear to suggest a strong initial feeling expressed by many interviewees that their primary goals in legal negotiations are directed almost entirely towards the interests of the client, usually expressed broadly in terms of keeping them happy. Generally when interviewees then think more deeply about the nature of these client focused goals it became evident that for the majority of the sample group they actually have their origins in either deeper organisational or personal motivations.

In that respect many of the interviewees report that a broadly satisfied client will be more likely to be retained, will pay their fees on time, and will refer new business helping the organisation to meet its own financial and business objectives. It is also recognised by some interviewees that where the organisation keeps fees down or strives not to breach fee cap agreements this is beneficial not just to the client but also ultimately for the organisation.

Protecting and enhancing the reputation of the organisation is also clearly an important motive, argued by some interviewees to ultimately lead to better client service and an overall more consistent client experience. However, although in such cases the client may benefit, it is more likely that the primary motive is in such

examples ultimately directed toward meeting organisation or personal interests rather than those of the client.

However, it is of note that although it is well documented within the literature that not all personal and organisational motivations are necessarily aligned to clients' interests[672], none of the interviewees within the sample group specifically appear to acknowledge that any of organisational or personal motivations might ultimately be detrimental to the client.

Interlinked organisational and personal motivations

The interview data identifies a strong link between organisational motivations and personal motivations. The achievement of most organisational business and financial objectives appears to be perceived by interviewees as very often having a direct beneficial effect to them. Whether it was through enhanced remuneration, improved career prospects, job security, internal reputational factors leading to increased job satisfaction and prestige, many personal motivations appear to be directly aligned with those of the organisation.

However, clearly not all personal motivations identified in the interview data are always aligned with those of the organisation. Motivating factors identified such as fairness, enjoyment of the 'buzz' of negotiation, enjoyment of the 'cut and thrust of the deal', ego massaging, being appreciated, enjoyment of their working life, doing the best for their family and being liked by others may not necessarily always align with those of the organisation, although arguably perhaps a content and satisfied employee is likely to work longer and harder for the organisation.

Personal motivations as potentially beneficial to the client

Personal reputation was cited by many of the interviewees in the sample group as an important personal motivation. Arguably, anything that genuinely protects and

[672] See: Bebchuk, L. A., & Guzman, A, T., (1996) 'How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms', *Harvard Negotiation Law Review.* 1*:* 53-63. 4.

enhances an individual lawyer's reputation as an effective negotiator is likely to also be beneficial to the client. Personal motivations identified in the interview data are also linked to ethical and professional behaviour as well to concepts of fairness, again also potentially of benefit to the client.

Being motivated to win or to beat the other party in a negotiation is arguably predominantly a personal motivation. The interview data, however, suggests that although legal negotiators do possess such motivations they appear to be in the minority and are often as a response to the use of either aggressive or hard negotiation behaviour by the other party.

7.3.2 Developing a motivation cycle

The interview data supports an argument that the motivations of legal negotiators, and their perception of effectiveness in legal negotiations are linked.

In this context, the current study has already identified that the concept of reputation is potentially important both in relation to the perception of effectiveness (discussed in Chapter 5) and also as both a personal and organisational motive. Reputation therefore appears to be a key factor in determining effectiveness, as well as being and a key motivation for legal negotiators. This would therefore appear to demonstrate a link between what motivates lawyers in legal negotiations and how they perceive effectiveness.

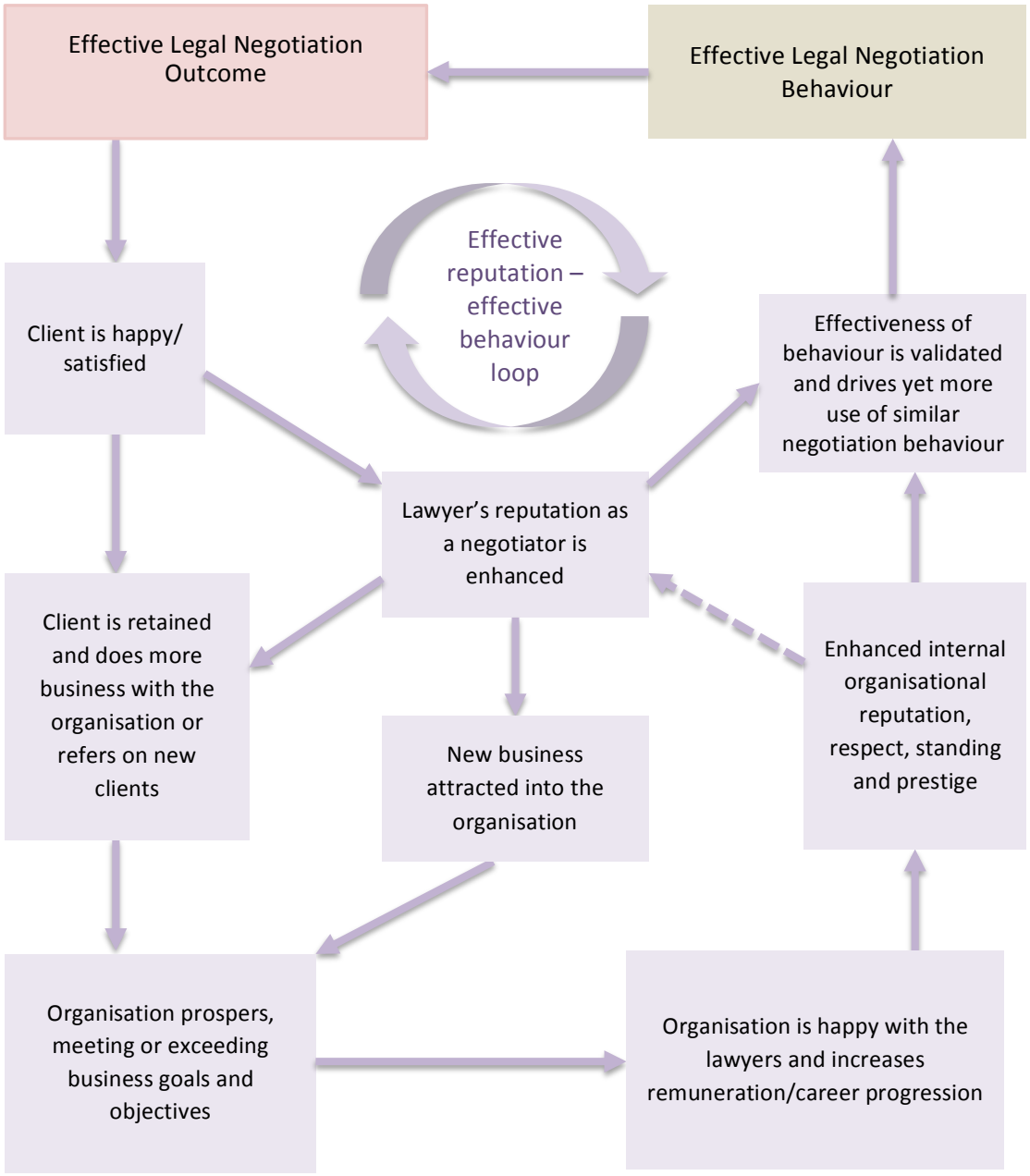
The motivation of legal negotiators identified around a theme of client retention, securing new clients and future business also appears to be closely linked to the perception of the effectiveness of the negotiation process by clients, something that has been identified as being an important element of effectiveness in legal negotiations. The perception of the interviewees appears to be that clients are retained and recommend new clients to the organisation when they perceive the negotiation performance of the legal negotiator to have been effective. This would

therefore appear to suggest another link between what motivates lawyers in legal negotiations and how they perceive effectiveness.

This potential link between effectiveness and motivations is represented in Figure 5 below which depicts a motivation cycle developed from the analysis of the interview data. It shows that when an effective outcome is achieved, it generally leads to a happy or satisfied client. It is the perception of the interviewee that this potentially leads to the client being retained or doing more business with the organisation or providing referrals. This in turn means that the organisation prospers and is therefore satisfied with the individual lawyer's performance, leading to increased remuneration and career progression. This then leads to increased reputation, respect, prestige and standing internally and potentially externally for the individual interviewee, which are key underlying motivations that validates and drives more of the effective behaviour that resulted to the effective outcome in the first place. The cycle then starts again.

Within the main motivation cycle described above is what has been labelled the 'effective reputation/effective behaviour loop'. This recognises that the enhanced reputation of the lawyer in itself has the direct effect of potentially leading to more effective negotiation behaviour, leading to more effective outcomes, more satisfied clients and thus a more enhanced reputation. In addition, the enhanced personal reputation of the lawyer may also bring new business into the organisation, feeding back into the main cycle in respect of the effect that this has on the organisation.

Figure 5 – Motive cycle in legal negotiation



7.3.3 Linking motivations to perceived effective outcomes and behaviours.

When the results presented in this chapter are considered in the context of the results presented in Chapter 5, it is apparent that the analysis suggests a cyclical relationship between the motivations of a interviewee and their perception of effectiveness, not only in terms of outcomes but necessarily therefore also in terms of perceived behaviours.

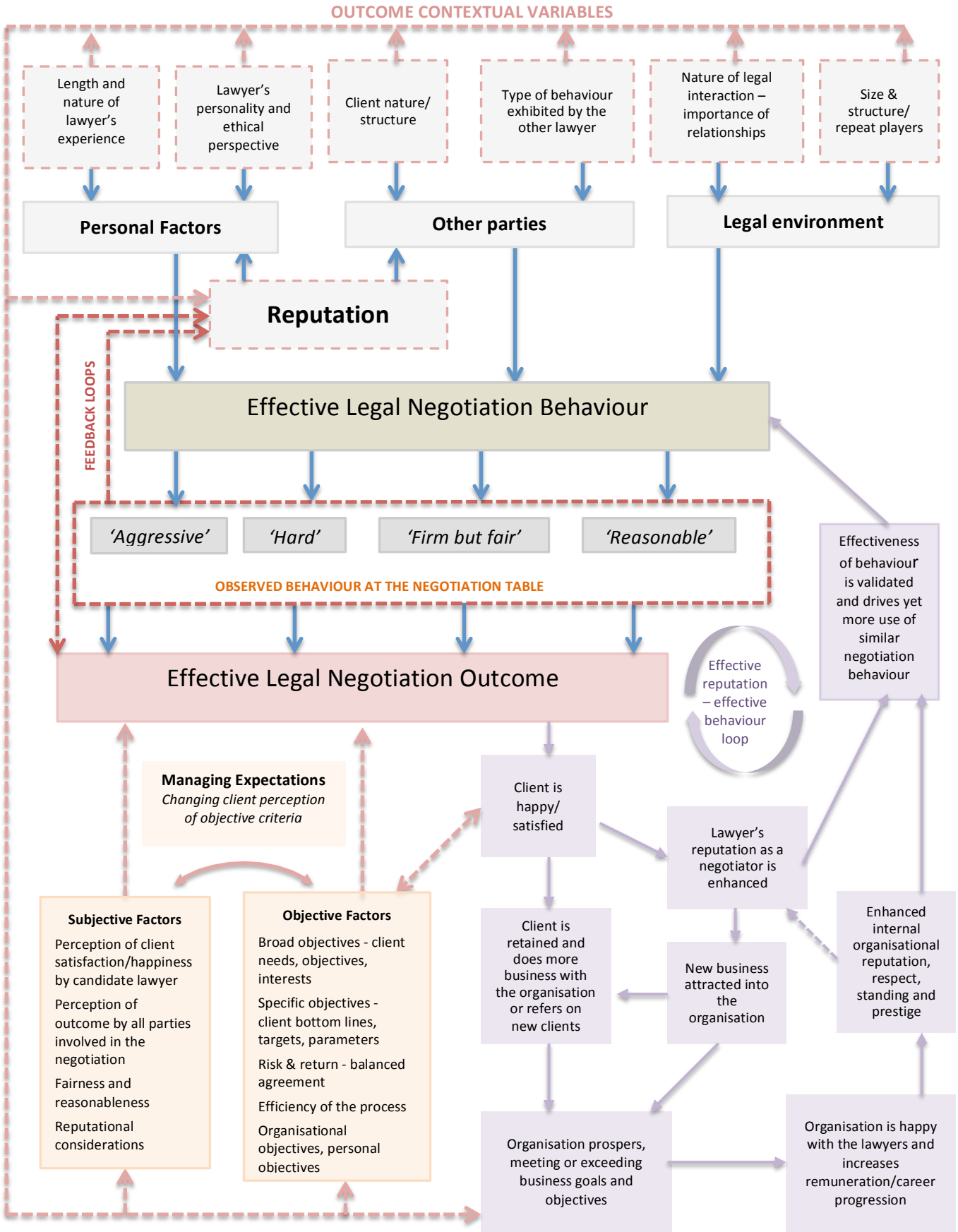
Figure 5 has already suggested that effective legal negotiation outcome occupies a key place in the motivation cycle. This cycle suggests that securing what a interviewee perceives to be an effective outcome is inextricably linked to their underlying motivations, be they personal, organisational or client focused or indeed a closely interlinked mixture of all three.

Given the relationship between effective outcomes and effective behaviour, arguably this relationship then acts to link motivations directly to effective legal negotiation behaviour.

Figure 6 below represents this relationship diagrammatically by bringing Figures 4 from Chapter 5 and Figures 5 above together illustrating the proposed relationship between the motivational cycle and the perception of effectiveness in legal negotiations.

It suggests that whatever a legal negotiator's motivations might be, if the behaviour used and perceived outcome achieved are then perceived as ultimately serving these motivations, then this will reinforce the use of such behaviours in a cyclical manner.

Figure 6 – The relationship between motivations, outcome & behaviour



7.4 Motivations and negotiation behavioural style

7.4.1 Uncovering motivations to understand negotiation behaviour

Having shown in the previous section that the interview data suggests a link between an individuals motivations and their perception of effective behaviour, this section will specifically consider the data in respect of whether there is a link between a particular motivation and a specific negotiation behavioural style.

The results presented in this Chapter 6 suggest that the majority of the interviewees in the study group perceive themselves as being somewhere between cooperative and competitive in their behavioural style, although predominantly described as being closer to what might be characterised as a more cooperative type of behavioural negotiation style.

The mean TKI data suggests that on average for the sample group this characterisation is likely to equate to a predisposition closer to a compromising type of behaviour than the other four types of behaviour and as such is likely to be a mixture of both cooperative and more competitive types of behaviours.

However, as previously discussed, when attempting to understand the nature of an individual's negotiation behavioural style the literature suggests that an individual's motivations are likely to be of significance. In order to understand this in more depth, the remainder of this chapter will therefore considers the data in relation to each interviewee's individual motivations in the context of their perceived negotiation behavioural style.

7.4.2 A more detailed analysis of the data

For the purpose of the analysis in this section, it is necessary to look in more detail at the motivations expressed by individual interviewees, particularly in the context of the results relating to their perceived negotiation behavioural style, in an

attempt to offer further insight into the nature of the type of behaviour being described.

Table 12 presents a summary of the interview data extracted from the transcripts relating to each interviewee's stated motivations, presented alongside their perceived negotiation behavioural style.

The first column is a list of the individual interviewee reference numbers. Where the reference number is in italics the interviewees classify themselves as engaged in contentious legal work, and where there are no italics the interviewees consider themselves as engaged in non-contentious work.

The second column shows a combined summary of overall interviewee perception of their personal negotiation behavioural style. This information comprises of a condensed summary of the information in Table 10 of the previous chapter for each interviewee followed by the interviewee's highest TKI score .

The third column contains a condensed summary of the motivation data extracted from the interviews for each interviewee.

Table 12 – Motivations & negotiation behavioural style[673]

Interview	Combined summary of overall interviewee perception of negotiation behavioural style	Summary of stated motivations
IC 001	Reasonable but firm. Much closer to competitive. *Highest TKI - Compromise 11*	Personal reputation, professional pride, sense of accomplishment. Recognition by others, want to get a good result for client, because want client to do well internally.
IC 002	Probably closer to cooperative. *Highest TKI - Compromise 10*	Personal career, bottom line of firm, reputation of firm, personal finances, personal satisfaction, pride in work, client satisfaction, to be efficient as possible.
IC 003	Reasonable, sensible, commercially aware. Where competitive equates aggressive behaviour then cooperative. *Highest TKI - Compromise 10*	Personal reputation, being seen to add value, being seen as the person who gets the client a good deal, achieving a fair result, ego, good result for client, client retention, job satisfaction, reputation within firm and with colleagues, setting a good example for junior colleagues, being liked by others.
IC 004	No fixed style - not aggressive. Depends on situation but towards cooperative. *Highest TKI - Compete 9*	Personal satisfaction, client retention and repeat business, client satisfaction, doing best for client, professional reputation amongst peers, being seen as good to deal with by peers.
IC 005	Softer, non confrontational. Cooperative – see this as someone who avoids conflict. *Highest TKI - Compromise 10*	Avoid going to tribunal because don't like the adversarial process, reputation for being reasonable amongst peers. Client satisfaction.
IC 006	Friendly, builds rapport and relationships. Slightly towards cooperative but depends on other side. *Highest TKI - Compromise 10*	Personal and professional satisfaction when client is happy with performance, feeling you have 'won' something, client retention, having an easier and more enjoyable working life by building good relationships with all those involved in the negotiation, satisfaction in acting in a professional manner. Reputation amongst peers and client. Workable deal that all are happy with.
IC 007	Open style, non-aggressive, firm but flexible. *Highest TKI - Collaborate 8*	Professional pride in doing a good job, reputation, enjoyment of 'cut and thrust' of negotiation, client retention and bringing in new clients, desire to win, getting a good result, client satisfaction, reputation for doing a good job amongst peers and clients of peers, fitting career in with domestic circumstances.
IC 008	Straightforward, reasonable, impersonal. Towards the cooperative end. *Highest TKI - Compromise 8, Accommodate 8*	Personal satisfaction – result not important but must feel that you have done a good job, doing the best job you can for the client and to be the best lawyer you can be.
IC 009	Firm but sensible negotiator. Thinks aggressive more apt on the scale than competitive – feels cooperative is more effective. *Highest TKI - Avoid 11*	Not being shown to be lacking in skill and expertise in front of peers but being shown to be credible, on top of facts and legal issues. Not looking bad, Professional pride, standing and reputation amongst peers. Satisfaction of client – wanting them to feel you performed better than counterpart. Personal interests seen as aligned with firm's interests.
IC 010	Open, up front, not hiding anything. More on the cooperative side. *Highest TKI Collaborate 8, Compromise 8*	To get on with your peers because you are dealing with them on a day-to-day basis on various cases. To be on the successful side of an outcome. To meet the client's needs.

[673] The terms 'colleague' is used throughout this table to denote someone who works in the same organisation as the interviewee, the term 'peer' is used to denote other lawyers within the profession but not within the same organization.

Interview	Combined summary of overall interviewee perception of negotiation behavioural style	Summary of stated motivations
IC 011	No style - a practical approach. More cooperative but moves depending on circumstances. *Highest TKI - Compromise 10*	Client feeling they have had good service, that was value for money, being approachable to client, reputation from satisfied clients. Not interested in generating more fees by taking things unnecessarily to court. Satisfied client. Doing the best for them.
IC 012	Knows the line and how to hold it. At the more cooperative end. *Highest TKI - Avoid 8*	Resolve disputes for clients in the most effective way possible for them, be a trusted advisor and be somebody that people like working with. Client feels they have got a good deal.
IC 013	Robust but fair. Straight to the point, balanced, adaptable. Both cooperative and competitive throughout any given negotiation. *Highest TKI - Collaborate 8*	Personal and professional pride, reputation for ability to get the deal done amongst clients and peers, getting an agreement that satisfies both parties, create favourable impression with other side, enhance professional reputation to bring in new business, personal security, remuneration and career progression, not to upset people if you can avoid it. Protecting client's position.
IC 014	Stable, open, accessible and reasonable. Towards cooperative end. *Highest TKI - Collaborate 8*	Personal satisfaction in doing the job well, get the clients what they want, maintain a relationship with counterparty in the negotiation, build and maintain a good relationship with peers that will be useful in future dealings, reputation amongst peers for being fair, reasonable, good at job and will not try and get one over them.
IC 015	Stable, non-aggressive, consensual and reasonable. Fluid, elements of both, influenced by other side, generally cooperative. *Highest TKI - Compromise 9, Avoid 9*	Personal job satisfaction, being happy did a good job. Achieving a commercial outcome at the minimum the client is wanting, reputation amongst peers and in the marketplace for being sensible and not unnecessarily hard nosed. For the other side not to think I'm being unduly difficult. Personal satisfaction of winning the argument.
IC 016	A little chameleon-like, depending on parties. Not extreme but starts competitive and often gets more cooperative. *Highest TKI - Collaborate 9*	Reputation and impression created in front of both side of the negotiation to win future business from either side. Both sides feeling they have a decent deal, both parties being able to work together, professional reputation – not being seen as difficult to help retain clients. Integrity – enhances reputation amongst both sets of clients and peers. Adhere to personal ethics and integrity.
IC 017	Not rigid – reasonable, measured, not aggressive, honest. More cooperative by nature – can be bullish if others are aggressive. *Highest TKI - Compromise 10*	Reputation amongst peers and within the broader profession for being a fair negotiator who is truthful and does not use underhand tactics or is aggressive. Client retention through client satisfaction with the service and outcome, personal satisfaction, get deal that if possible meets bot parties desires.
IC 018	Firm but fair and reasonably consensual. Cooperative and competitive – not incompatible. Other end of scale should be aggressive. *Highest TKI Compromise 9, Avoid 9*	Retaining personal relationship with clients as friends and doing good job for them. Organisational objective same as personal objective - to be a firm which gets good results for clients, which is sensible to deal with, easy to deal with, and clear in its dealings, both sides equally satisfied with outcome if possible.
IC 019	Consensual and cooperative. Changes if meet aggressive. Naturally highly cooperative but also competitive – not polar opposite behaviours. *Highest TKI - Compromise 10*	Reputation for success with client and amongst peers, to meet objective criteria as a matrix of success within firm, to meet client's objective measures, reputation amongst colleagues and partners within the firm, client retention leading to career development, personal satisfaction of performing well, securing reputation for ability to perform within firm so am allocated more work.

Interview	Combined summary of overall interviewee perception of negotiation behavioural style	Summary of stated motivations
IC 020	Flexible. Depends on client, nature of case and the other lawyer. Not aggressive - bullish. *Highest TKI - Collaborate 7, Accommodate 7, Avoid 9*	Reputation amongst peers – especially repeat player counterparties, client satisfaction, respect from boss, colleagues and peers. Reputation for effectiveness in negotiation leading to client retention and winning more business. A desire to 'win' both in terms of client objectives and personal objectives. Recognition from peers and colleagues.
IC 021	Someone who looks out of the box to find solutions. Aim to be cooperative but can be 'a bit hard' at times. *Highest TKI - Compromise 7*	Getting a buzz from the job, satisfaction from being right, personal and professional reputation. Getting the best result for your client, client being pleased.
IC 022	Very, very friendly, very open and approachable. 'Collaborative'. *Highest TKI - Compromise 7*	Personally motivated to be sociable with other lawyers, personal satisfaction when get the deal done – nice feeling, job satisfaction of taking worry away from clients, motivation to be seen to be consistent in my approach which is open and easy to deal with. Getting what client wants relatively quickly.
IC 023	Compromises. Doesn't like conflict. Communicative and cooperative. At cooperative end of scale. *Highest TKI - Compromise 12*	To get deal done quickly, amicably without conflict. Not having a reputation within the profession for being difficult. Client satisfaction so they don't complain – pay the bill, retain client, generate new business, personal and firm reputation. Personal job satisfaction.
IC 024	Fairly informal and personable. Cooperative. *Highest TKI - Compromise 4*	Personal satisfaction in resolving problems, client satisfaction leading to client retention. Both clients feeling like they got what they want. Building good relationship with both parties to generate business including from other lawyers
IC 025	Depends on the other side. Commercial, pragmatic, gets the deal done. Reasonable. *Highest TKI - Compromise 10*	Personal reputation – not looking a fool in front of client or peers. Client retention but also personal satisfaction – feels good personally to do a good job. Looking after clients interests what every they are.
IC 026	Not straight forward, pragmatic and commercial. Starts nearer cooperative – can change depending on circumstances. *Highest TKI - Compete 8, Avoid 8*	Client retention and personal reputation. Client satisfaction with result, achieving what they want to achieve.
IC 027	Collaborative but flexible depending on others. Towards the cooperative end of scale. *Highest TKI- Compromise 11*	Maintain harmonious working environment, avoid conflict where possible. Maintain good working relationships including with other side. Achieve your client's goal
IC 028	Reasonable and measured. Towards cooperative but recognises competitive instinct. *Highest TKI - Avoid 8*	Satisfied client, client retention, personal moral code leading to personal satisfaction from doing a good job, recognition from peers, and colleagues within the organisation. Not to be badly though of.
IC 029	Measured, respectful of other side, objective, interest or needs based approach. Cooperative but can be competitive from a cooperative perspective. *Highest TKI - Accommodate 7, Avoid 8*	Personal satisfaction when client is happy with result. Getting best result for client, Not doing damage to personal reputation.
IC 030	Firm but fair. Be clear about what you want and why you want it and do it in a pleasant manner. Competitive but does it politely. *Highest TKI - Compromise 11*	Client satisfaction leading to enhanced reputation, client retention and recommendation leading to new business. Career growth and personal development, personal pride and satisfaction in career and professional standing.

7.4.3 Linking motivations to individual personal negotiation behavioural style

7.4.3.1 Separating broad objectives from motivations

As has already been highlighted, a large majority of interviewees initially framed their expressions of motivations in terms of their objectives, generally expressed as the maximisation of their own client's outcomes and levels of satisfaction. However, when the data presented in Table 12 are considered in more detail, there are some specific observations that are worthy of comment.

Good outcomes for both sides

Two interviewees appear to be specifically motivated toward achieving stated outcomes for *both* sides of the negotiation, and not just for their own client. Interviewee IC013 expresses this in terms of both parties being satisfied, and IC016 expresses it in terms of both sides having achieved a 'decent' deal. Both these interviewees have their highest TKI score for collaborating behaviour and both perceive themselves to use both cooperative and competitive types of behaviour. Although IC013 also indicates that he is motivated not to upset people if it can be avoided and wishes to create a favourable impression with the other side, this appears to have been at least partially motivated by a desire to enhance his personal reputation in order to bring in new business leading to career advancement and increased remuneration. Similarly interviewee IC016 states a motivation to adhere to personal ethics and integrity, but also directly links this to a reputational motivation to be seen as not difficult in order to retaining clients and potentially win business from those on both sides of the negotiation.

One other interviewee indicates that they are motivated to get outcomes that satisfy both sides of the negotiation but only 'if possible'[674]. The primary motivation for this interviewee is stated as being to keep clients as friends and doing a good job for them, as well as securing a personal and organisational reputation for getting

[674] See Table 12 – Interviewee IC018

good results and being easy to deal with. This interviewee has his joint highest scores in compromising and avoiding in the TKI and describes himself as 'firm but fair', and considers that cooperative and competitive behaviour are not incompatible[675].

Winning

Only three of the interviewees indicate that they are to some degree specifically motivated by any concept of *winning*[676] although two other interviewees appear to be motivated by arguably the related concepts of the 'cut and thrust'[677] or the 'buzz'[678] of negotiation. These five interviewees appear to have their highest TKI scores spread across four of the five styles, with the exception of competing which is arguably the one style that the interviewees expressing these motivations might have been instinctively expected to score highly in.

Avoiding conflict

The only two interviewees that specifically mention that they are motivated to avoid conflict both have very high TKI compromise scores and describe themselves as being at or towards the cooperative end of the scale[679]. Of these interviewees, IC023 identifies client satisfaction as a motivation but then links it directly to arguably what is perhaps her true motivations of avoiding complaints and ensuring clients pay their bill, as well as to client retention and generating new business. Reputation for not being difficult is also highlighted as a motivation, as is job satisfaction. In contrast, although interviewee IC027 identifies achieving client goals as a motivation, her true motivations appear focused on maintaining a good working relationship with all parties and maintaining harmonious working

[675] As stated earlier, great care must be taken when attempting to make generalisations from such small numbers, however, it is submitted that the qualitative methodology at least allows it to be recognised that such opinions exist within the group of lawyers that formed the sample group.

[676] See Table 12 – Interviewees IC006, IC015 & IC020

[677] See Table 12 – Interviewee IC 007

[678] See Table 12 – Interviewee IC 021

[679] See Table 12 – Interviewees IC 023 and IC 027

relationships. The underlying motivation here appears to be to achieve a comfortable working environment and job satisfaction in a interviewee who feels uncomfortable with conflict.

Fairness

Finally, only one interviewee states that she is specifically motivated by the fairness of the outcome, which the interviewee links to achieving a good result for the client. Interviewee IC003 combines this with a strong personal reputational motivation that appears to be orientated towards the organisation, particularly setting an example to junior colleagues, but also wanting to be liked by others. This interviewee score highest for compromising in the TKI and characterises herself as reasonable, sensible, commercially aware and cooperative.

Nature of the data

What a more detailed examination of the data suggest is that given the multiple and varied nature of each individual interviewee's motivations and the apparent interconnected nature of the motivations, it is difficult to find evidence that there is any direct association between any distinct motivation and a particular negotiation behaviour or indeed overall negotiation behavioural style.

However, although it is evident that each of the interviewees has a number of different motivations, there does appear to be similarities in the nature of some of these motivations that will allow a categorisation of the interviewees into groupings based on the overall characterisation of the nature of all their motivations.

The next section will therefore concentrate on an analysis of the nature of the characterisation of the collection of motivations expressed by each interviewee.

7.4.3.2 Grouping interviewees according to the nature and characterisation of their motivations

This section of the analysis establishes interviewee groupings determined by the overall nature and character of their motivations.

This involved firstly taking statements from each interviewee identified as relating to a motivation and then distilling the meaning of each statement into a more concise phrase. As phrases were developed, they were used to represent other similar statements from different interviewees when a new statement relating to motivations was assessed as having a similar meaning to an existing phrase. The character and nature of the phrases was then reflected upon leading to the phrases being sorted into three groupings of a similar character.

Each interviewee from the sample group was then allocated to one of theses three groupings following an assessment of the predominant nature and character of the motivations they expressed.

It should be noted that it is possible for interviewees in the different groupings to share a number of similar motivations since the classification is based on an evaluation of the overall predominant character of each interviewee's motivations. Some interviewees were harder to place in a particular group than others, sometimes exhibiting features of more than one grouping. In these circumstances an assessment of the dominant character of the motivations of the interviewee ultimately determined to which grouping he or she was allocated.

The three separate groupings identified have been labelled *ethically motivated*, *relationship motivated* and *status motivated.*

Ethically motivated

The first group are those interviewees whose predominant motivations might be characterised as being principally for reasons of personal satisfaction, professional pride or ethical reasons. This includes those interviewees who derive particular satisfaction from simply doing their job well, as well as those who value being seen as truthful and as someone who acts fairly. Their motivations are driven primarily by feelings of personal satisfaction and a sense of duty or professional pride.

Arguably the motivations of 'ethically motivated' legal negotiators are more likely to aligned with meeting the interests of their client than the other two groups

identified, albeit as long as this does not conflict with the negotiators own personal, professional or ethical view of the negotiation process or their values.

Relationship motivated

The second group of interviewees are those who are predominantly motivated by how others perceive them. They have a desire to be seen as being easy to deal with and as not being perceived as being difficult or unreasonable. This is often, but not exclusively, directed towards their peers who are likely to be on the other side of repeat negotiations. It appears that a strong motivation for this group is at least partly aimed at avoiding confrontational or 'difficult' situations as well as increasing personal job satisfaction, an overall desire to be liked by people and the formation of rewarding professional relationships.

'Relationship motivated' legal negotiators are therefore motivated primarily towards shaping their working environment and by a desire to create a negotiating setting that they feel comfortable with, primarily through creating comfortable non-threatening working relationships that they derive satisfaction from, arguably perhaps sometimes to the detriment of the interests of the client.

Status motivated

The third group are those interviewees who are primarily motivation by personal career advancement leading to higher remuneration and increased status and social standing within the organisation as well as within the broader profession and society in general. The focus is often to achieve this through good client retention and the securing of new business and the meeting of organisational targets and financial goals.

The motivations of 'status motivated' interviewees are therefore primarily focused on themselves and achieving their own status orientated goals. The emphasis is on doing things for the client in a way that will directly advance their personal career and status objectives. Although often these interests are aligned and what is good

for the client is also good for the legal negotiator, the interests of the legal negotiator are likely be the stronger influence.

Table 13 shows the phrases distilled from the interview data most associated with each of the three motivation groupings identified. Table 14 shows the placement of each of the interviewees within each of the three motivational groupings. Interviewees are identified by their reference number together with a combined summary of their overall perception of negotiation behavioural style taken from Table 12.

Table 13 – Phrases most associated with each of the three motivational categories

Ethically motivated	Relationship motivated	Status motivated
- Professional pride. - Satisfaction in acting in a professional manner. - Personal satisfaction when client is happy with result. - Personal job satisfaction – being happy did a good job. - Getting a buzz from the job, satisfaction from being right. - Sense of accomplishment. - Result not important but must feel that you have done a good job, - To be the best lawyer you can be. - Offer value for money service. - Want the client to do well internally. - Being approachable to client, - Not interested in generating more fees by taking things unnecessarily to court. - Resolve disputes for clients in the most effective way possible for them, - To be a trusted advisor. - Reputation for being a fair negotiator who is truthful and does not use underhand tactics or is aggressive. - Personal moral code leading to personal satisfaction from doing a good job. - Not to be badly though of. - Not being shown to be lacking in skill and expertise in front of peers but being shown to be credible, on top of facts and legal issues.	- Job satisfaction. - Being liked by others. - Avoid going to tribunal because don't like the adversarial process. - To avoid conflict where possible. - To get deals done quickly, amicably without conflict. - Having an easier and more enjoyable working life by building good relationships with all those involved in the negotiation. - Maintain harmonious working environment. - Getting on with your peers because you are dealing with them on a day-to-day basis on various cases. - Maintain a relationship with counterparty in the negotiation, - Build and maintain a good relationship with peers that will be useful in future dealings. - Maintain good working relationships including with other side. - Personally motivated to be sociable with other lawyers. - Reputation for being reasonable amongst peers. - Reputation amongst peers and in the marketplace for being sensible and not unnecessarily hard nosed. - To be seen to be consistent in approach which is open and easy to deal with. - For the other side not to think I'm being unduly difficult. - Not having a reputation within the profession for being difficult. - Reaching workable deal that all are happy with. - Fitting career in with domestic circumstances. - Both sides equally satisfied with outcome if possible.	- Personal career. - Personal finances. - Personal security, remuneration and career progression. - Career growth and personal development. - Bottom line of the firm. - To meet objective criteria as a matrix of success within firm. - Securing reputation for ability to perform within firm so is allocated more work. - Recognition from peers and colleagues. - Respect from boss, colleagues and peers. - Reputation amongst colleagues and partners within the firm. - Enhance professional reputation to bring in new business. - Reputation and impression created in front of both side of the negotiation to win future business from either side. - Reputation for success with client and amongst peers. - Reputation for effectiveness in negotiation leading to client retention and winning more business. - Building good relationship with both parties to generate business including from other lawyers. - Client retention leading to career development. - Client satisfaction leading to client retention. - Not being seen as difficult to help retain clients. - A desire to 'win' both in terms of - client objectives and personal objectives. - Client satisfaction leading to enhanced reputation, client retention and recommendation leading to new business. - Personal pride and satisfaction in career and professional standing.

Table 14 – Interviewees placed in each of the three motivational groupings identified

Ethically Motivated	Relationship Motivated	Status Motivated
IC 001: Reasonable but firm. Much closer to competitive. *Highest TKI - Compromise 11*	IC 003: Reasonable, sensible, commercially aware. Where competitive = aggressive behaviour then cooperative. *Highest TKI - Compromise 10*	IC 002: Probably closer to cooperative. *Highest TKI - Compromise 10*
IC 008; Straightforward, reasonable, impersonal. Towards the cooperative end. *Highest TKI - Compromise 8, Accommodate 8*	IC 005: Softer, non confrontational. Cooperative – see this as someone who avoids conflict. *Highest TKI - Compromise 10*	IC 004: No fixed style - not aggressive. Depends on situation but towards cooperative. *Highest TKI - Compete 9*
IC 009: Firm but sensible negotiator. Thinks aggressive more apt on the scale than competitive – feels cooperative is more effective. *Highest TKI - Avoid 11*	IC 006: Friendly, builds rapport and relationships. Slightly towards cooperative but depends on other side. *Highest TKI - Compromise 10*	IC 013: Robust but fair. Straight to the point, balanced, adaptable. Both cooperative and competitive throughout any given negotiation. *Highest TKI - Collaborate 8*
IC 011: No style - a practical approach. More cooperative but moves depending on circumstances. *Highest TKI - Compromise 10*	IC 007: Open style, non-aggressive, firm but flexible. *Highest TKI - Collaborate 8*	IC 016: A little chameleon-like, depending on parties. Not extreme but starts competitive and often gets more cooperative. *Highest TKI - Collaborate 9*
IC 012: Knows the line and how to hold it. At the more cooperative end. *Highest TKI - Avoid 8*	IC 010: Open, up front, not hiding anything. More on the cooperative side. *Highest TKI Collaborate 8, Compromise 8*	IC 019: Consensual and cooperative. Changes if meet aggressive. Naturally highly cooperative but also competitive – not polar opposite behaviours. *Highest TKI - Compromise 10*
IC 017: Not rigid – reasonable, measured, not aggressive, honest. More cooperative by nature – can be bullish if others are aggressive. *Highest TKI - Compromise 10*	IC 014: Stable, open, accessible and reasonable. Towards cooperative end. *Highest TKI - Collaborate 8*	IC 020: Flexible. Depends on client, nature of case and the other lawyer. Not aggressive - bullish. *Highest TKI - Avoid 9*
IC 021: Someone who looks out of the box to find solutions. Aim to be cooperative but can be 'a bit hard' at times. *Highest TKI - Compromise 7*	IC 015: Stable, non-aggressive, consensual and reasonable. Fluid, elements of both, influenced by other side, generally cooperative. *Highest TKI - Compromise 9, Avoid 9*	IC 024: Fairly informal and personable. Cooperative. *Highest TKI - Compromise 4*
IC 025: Depends on the other side. Commercial, pragmatic, gets the deal done. Reasonable. *Highest TKI - Compromise 10*	IC 018: Firm but fair and reasonably consensual. Cooperative and competitive – not incompatible. Other end of scale should be aggressive. *Highest TKI Compromise 9, Avoid 9*	IC 030: Firm but fair. Be clear about what you want and why you want it and do it in a pleasant manner. Competitive but does it politely. *Highest TKI - Compromise 11*
IC 026: Not straight forward, pragmatic and commercial. Starts nearer cooperative – can change depending on circumstances. *Highest TKI - Compete 8, Avoid 8*	IC 022: Very, very friendly, very open and approachable. 'Collaborative'. *Highest TKI - Compromise 7*	
IC 028: Reasonable and measured. Towards cooperative but recognises competitive instinct. *Highest TKI - Avoid 8*	IC 23: Compromises. Don't like conflict. Communicative and cooperative. At cooperative end of scale. *Highest TKI - Compromise 12*	
IC 029: Measured, respectful of other side, objective, interest or needs based approach. Cooperative but can be competitive from a cooperative perspective. *Highest TKI - Accommodate 7, Avoid 8*	IC 027: Collaborative but flexible depending on others. Towards the cooperative end of scale. *Highest TKI - Compromise 11*	

7.4.4 Interpreting the analysis of the motivational grouping results

7.4.4.1 Summary of the motivation grouping analysis

It is perhaps helpful to firstly outline the more obvious observations from the results. It appears that broadly the interviewees are relatively evenly dispersed across all three motivational groups in terms of numbers of interviewees in each group, although the 'status motivated' group does contain the least number of interviewees with eight against eleven interviewees in the other two groups. It is also evident that the most common TKI highest category of *'compromise'* identified in Chapter 6 is represented fairly evenly across each of the three motivational groupings.

Although the 'status motivated' group does contain the least number of interviewees, it includes interviewees with highest scores in all five of the TKI styles. The 'relationship motivated' group has the narrowest representation of highest TKI styles, with a high proportion of compromisers as well as a small number of avoiders and collaborators. There is no competing or accommodating styles represented in this group.

Finally the 'ethically motivated' group appears to have high numbers of compromisers and avoiders and has no highest scoring collaborative negotiators represented.

When looking at statements from the interview data used by the interviewee to describe their negotiation behavioural style, in the 'relationship motivated' group four interviewees use the term 'open', two use the term 'friendly' and two also use the terms 'non confrontational' and 'doesn't like conflict'. None of these terms appear in either of the other two motivation groups. The 'relationship motivated' group is also the only motivation group where interviewees specifically describe themselves as being 'collaborative'.

The term 'reasonable' is used by a number of interviewees across the 'ethically motivated' and 'relationship motivated' groups but does not appear in the 'status motivated' group. A number of interviewees present in all three motivation groups consider themselves to be 'not aggressive'.

Finally, there is an association with some degree of cooperative type of behaviour expressed by interviewees that appear in all three groups. Although there is also reference to at least some ability to engage in competitive behaviour across all the motivation groups, both 'status motivated' and ''ethically motivated' interviewees are arguably more likely to associate themselves generally with a more flexible approach to negotiation and the ability to use both cooperative and competitive behaviours than is expressed by the interviewees in the 'relationship motivated' group.

7.4.4.2 Interpretation of motivation grouping analysis

The results from Chapter 6 found that the most commonly perceived negotiation behavioural style possessed by a majority of the interviewees can be characterised as one that is *reasonable, measured, straightforward, pragmatic, flexible, fair, consensual and commercial.* The interviewees are also likely to perceive themselves to be closer to cooperative that competitive in nature, with the TKI suggesting an overall predisposition towards compromise behaviour the assessment characterises as being intermediate in assertive and in cooperative behaviour.

7.4.4.3 No suggested link between motivations and behavioural style

Although arguably the findings in this chapter suggest that there may be some discernible variations relating to some aspects of perceived behavioural style that might be relate to the overall nature of a interviewees motivations, the overriding evidence is that, firstly, interviewees with many features of the most commonly perceived negotiation behavioural style are found across all three of the motivational groupings developed from the interview data, and secondly, that there

is no evidence to suggest any discernible link between any given behavioural style and a particular motivation or motivation grouping.

7.5 Summary - motivations

This chapter presents the results that set out to answer the third research question, namely*:*

What are the underlying motivations of lawyers when they are engaged in legal negotiation and are they related to perceptions of effectiveness or personal negotiation behavioural style?

In analysing the data relating to this question a number of findings have been made and themes identified that are presented below.

1. Interviewees initially had difficulty in conceptualising their motivations and tended to frame their discussions in terms of objectives rather than motivations.

2. Interviewees have a bundle of motivations that often overlap and are ultimately closely interlinked and cannot easily be placed into any one distinct group based on their orientation.

3. The interview data supports an argument that the motivations of legal negotiators and their perception of effectiveness in legal negotiations are linked in a cyclical relationship with reputational factors emerging as a key factor.

4. Although interviewees are subject to a range of motivations, they can be broadly categorised as belonging to one of three arguably distinct motivational groupings based on the identification of overall motivational characterisations labelled as ‘status motivated’, ‘relationship motivated’ and ‘ethically motivated’.

5. The data supports the conclusion that interviewees that have very similar perceptions of their overall negotiation behavioural style and indeed have similar TKI scores, are likely to be motivated to negotiate the way they do for a variety of different underlying reasons.

6. No evidence was found to suggest that specific motivations are linked to a particular negotiation style.

PART FIVE - DISCUSSIONS AND CONCLUSIONS

Chapter 8 – Findings and discussion

8.1 Overview

The following chapter discuses the results and the main findings of this research study drawn from Chapter 5, Chapter 6 and Chapter 7 in the context of the current literature.

Section 8.2 discusses the findings on the overall concept of effectiveness, Section 8.3 discusses the findings in relation to perceived personal effectiveness and behavioural style, and finally Section 8.4 discusses the findings on motivations.

8.2 Effectiveness in legal negotiation

8.2.1 Introduction

As has been outlined in the opening chapter of this study, arguably one of the key failings of a significant part of the available empirical research in the field of legal negotiation has been the inability to adequately define or fully understand a key component of what many studies purport to in some way study, namely effectiveness. Without the ability to understand what lawyers actually understand themselves by the concept of effectiveness, there is limited value in attempting to understand what types of behaviours or outcomes might be associated with such a concept.

8.2.2 How is effectiveness perceived – outcome, behaviour or both?

The first research question therefore seeks to provide empirical insight into what might appear an obvious question to ask, namely what do lawyers actually mean themselves by effectiveness in the context of legal negotiation? Much of the

relevant literature that has been identified in this research study has focused on theorising about what an effective outcome perhaps ideally should be, or ought to look like, or conversely attempting to describe behaviours that have led to either a pre-assigned definition of what might be considered to be effective or indeed situations where no definition is offered at all. This study, however, attempts to ascertain from practising lawyers what they actually perceive themselves to constitute effectiveness in legal negotiations, something it is submitted that must be of relevance since it must be directly relevant to what lawyers are actually striving to achieve when they negotiate.

The analysis of the interview data relating to this question discloses a number of interrelated factors that appear to be relevant to determining how legal negotiators define effectiveness, discussed in more detail below in the context of the relevant literature.

One of the first findings revealed goes directly to the heart of what is being considered in this study. It became clear at the outset of the interview data collection phase that effectiveness as a concept was difficult for the interviewees to conceptualise. Once the interviewees were encouraged to talk about both effective outcomes and effective behaviours it became apparent from the perceptions that emerged that rather than effective negotiation behaviour being seen primarily as a mechanism for achieving an effective outcome, the overall concept of effectiveness in the minds of the interviewees incorporated interconnected elements from both the behaviour used and the outcome achieved. In essence, effectiveness in legal negotiation has been shown in the current study to be likely to be understood by lawyers as a concept that incorporates both an assessment of the behaviour used during the negotiation process, as well as being related to the outcome or result achieved.

This finding is arguably consistent with the approach taken by Menkel-Meadows when she specifically indicates that her criteria for evaluation include an assessment of how the negotiation process itself either promotes or detracts from

the final '*solution*'[680]. Arguably the use of the term '*solution*' encapsulates more than a simple assessment of the end point or the result of a negotiation, and appears to include the concept of value also being associated with how that outcome is achieved. Indeed the author indicates that her criteria are based on '*the quality of the solution produced*'[681], a concept she indicates that is prevalent amongst '*game theorists, decision scientists and economists'*, and which she contrasts with the more rational economic concept of outcomes that was favoured by negotiation theorists at the time of her research[682]. Indeed, within the criteria suggested she does identify some elements that appear to be concerned with the way the negotiation is conducted as well as with the outcome achieved.

Macfarlane's criteria are arguably strongly focused on how the negotiation process is conducted and the results of this research study lend some support to her use of the reduction of expense and the speed of results as assessment criteria[683]. This is arguably related to the concept of efficiency of process that emerges as one of the objective criteria that is identified in the current study as being a relevant factor in determining an effective outcome, as well as being identified as being linked to perceived effective behaviours such as making reasonable concessions, not being obstructive and adhering to professional and ethical rules of conduct.

Thompson considered ways of measuring negotiation behaviour and in that context proposed that negotiation outcomes could be looked at as being either economic or social psychological[684]. The economic outcomes refer to what might be considered

[680] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p760

[681] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p760

[682] Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at p760 and at Note 12.

[683] Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' at p23 & 24. Available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015).

[684] Thompson, L., (1990) 'Negotiation behavior and outcomes: Empirical evidence and theoretical issues'. *Psychological Bulletin*, 108, 515–532

more objective measurements of outcome such as how much value has been created, claimed and allocated, whereas the social psychological elements concern perceptions of the bargaining process, perceptions of the other party and perception of themselves[685]. Essentially, Thompson's framework looked to separate process from outcome and measure them independently. However, it was the later work by Curhan *et al*[686] that made an arguably significant modification to Thompson's framework and proposed that an important source of subjective value is derived from the way that the negotiator feels about the negotiation process rather than simply an objective assessment of the process itself[687].

The identification by Curhan *et al* of the importance of subjectivity in the context of the assessment of negotiation behaviours and outcomes, and indeed that positive subjective feelings can be carried over into subsequent negotiations[688], is particularly relevant to the second finding of the current research study discussed next.

8.2.3 The subjective nature of effectiveness

The second key finding of this research study supports the view that, not only was the perceived characterisation of effectiveness shown to be a combination of behaviour and outcome, it was evident that any element of objective rational assessment of effectiveness appears to be less important that the perceived subjective view of negotiation effectiveness and therefore it seems to suggests that

[685] Thompson, L., (1990) 'Negotiation behavior and outcomes: Empirical evidence and theoretical issues'. *Psychological Bulletin*, 108, 515–532 at pp517-519

[686] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512

[687] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512at p294

[688] Curhan, J. R., Elfenbein, H. A., & Eisenkraft. N., (2010) 'The objective value of subjective value: A multi-round negotiation study', *Journal of Applied Social Psychology* 40(3): 690–709

the overall perception of effectiveness in legal negotiations may be significantly subjective in nature.

What the current study clearly suggests is that the subjective perception by interviewees of how satisfied and happy their clients are with the negotiation is one of the most important components identified as being relevant to the interviewees' own perception of effectiveness. Indeed, the interviewees also appear to be concerned, albeit to a lesser extent, with the subjective perception of the negotiation held by the other lawyers and their client.

The finding that subjective perceptions appear to be important relate directly to a body of literature that supports the assertion that measuring the satisfaction of the parties in a general negotiation context is not simply about objectively assessing their respective outcomes[689], but needs to recognise that there are other relevant subjective factors involved[690].

Indeed, there are a number of implications of this second finding that need to be considered particularly in the context of the relevant literature on the subjective evaluation of outcomes in negotiations.

One of the findings of the current research study is that interviewees have a role in managing the expectations of their clients by effectively modifying their beliefs about what a good outcome is likely to be. As far back as in 1967 Blumberg

[689] It is relevant to note that clients have been shown to be poor at assessing factors such as the quality of outcome, the appropriateness of the cost, and the appropriateness of the time taken in negotiations. See: Moorhead, R., Sherr, A., Webley, L., Rogers, S., Sherr, L., Paterson, A., & Domberger, S., (2001) 'Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot'. Norwich, England: Stationery Office; Sherr, A., & Paterson, A., (2007) 'Professional Competence Peer Review and Quality Assurance in England and Wales and in Scotland', 45 Alta. L. Rev. 151 – 168; Sherr, A., Moorhead, R., & Paterson, A., (1994) 'Lawyers, The Quality Agenda: Assessing and Developing Competence in Legal Aid', London: Her Majesty's Stationery Office.

[690] See: Messick, D. M., & Sentis, K. P., (1985) 'Estimating social and non-social utility functions from ordinal data'. *European Journal of Social Psychology,* IS, 389-399, and Loewenstein, G. F., Thompson, L., & Bazerman, M. H., (1989) 'Social utility and decision making in interpersonal contexts'. *Journal of Personality and Social Psychology,* 57, 426–441

recognised that *'In varying degrees, as a consequence, all law practice involves a manipulation of the client and a stage management of the lawyer-client relationship so that at least an appearance of help and service will be forthcoming'*[691]. Later Sarat and Felstiner in a study that involved tape recording 115 lawyer-client meetings in California and Massachusetts recognised the role of the lawyer in divorce cases in managing client expectations and concluded '*to some extent, it is the job of lawyers to bring these expectations and images of law and legal justice closer to the reality that they have experienced'*[692]. Genn, in her English based study, concluded that the personal injury clients in her study '*were almost invariably ignorant of what sums the legal system of damages might produce, and that their expectations came (in all but a few cases) from advice given by their lawyers'*[693]. It is therefore also clear that as well as the subjective perception of the client being important to a lawyer's perception of effectiveness, the lawyer themselves have a key role in influencing that subjective perception.

There is also support found in the broader literature for the general view that the degree to which expected outcomes differ from actual outcomes is better at predicting satisfaction than an objective assessment of the outcomes that are actually achieved[694]. Managing expectations by the lawyer would then appear to act to reduce the potential for divergence between actual and expected outcomes, which according to Oliver *et al* is likely to raise the satisfaction of the client leading to a higher subjective assessment of the negotiation which will in turn arguably then lead the lawyer to subjectively perceive the negotiation to have been more effective.

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[691] Blumberg, A. S., (1967) 'The Practice of Law as Confidence Game: Organizational Cooptation of a Profession', Law & Society Review, Vol.1(2), pp.15-39 at p26

[692] Sarat, A., & Felstiner, W. L. F., (1986) 'Law and Strategy in the Divorce Lawyer's Office', Law & Society Review, Vol. 20, No. 1 (1986), pp. 93-134 at p126

[693] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press at p7

[694] Oliver, R. L., Balakrishnan, P. V., & Barry, B., (1994) 'Outcome satisfaction in negotiation: A test of expectancy disconfirmation'. *Organizational Behavior & Human Decision Processes*, 60 at pp269-270.

This literature would appear therefore to offer further support for a conclusion that there is a benefit to managing the expectations of the client, as it is likely to ultimately influence their subjective perception of satisfaction, which in turn arguably appears to be a key component of effectiveness. This suggests that there is potential value in lawyers using a strategy to reduce the likely divergence between actual outcome and expected outcome in order to increase the perception of effectiveness for both clients and therefore ultimately for the legal negotiator involved.

In a related study, Galinsky[695] *et al* found a disconnect between how negotiators perceive what they achieve in a negotiation and what they objectively actually get. The authors found that negotiators who focused on high targets obtained objectively more from the negotiation, but also felt subjectively more disappointed with the outcome when compared to those negotiators who focused on simply bettering their low reserve points. The latter were shown to feel subjectively better and more content with what were objectively worse outcomes[696].

An implication of the study by Galinsky *et al* is that it might suggest that lawyers who objectively achieve more using highly competitive strategies are likely to be subjectively less satisfied with the result than a less competitively focused lawyer who achieves objectively less, with the same also being true for the client. Given that findings in the current research study suggest a significantly subjective element to the characterisation of effectiveness, this might suggest that less competitive types of negotiators are more inclined to be more satisfied and therefore are more likely to view negotiation solutions as more effective when compared to competitive negotiators who, although strive for more, in terms of the Galinsky *et al* findings are arguably more likely to be dissatisfied with what they achieve.

[695] Galinsky, A. D., Mussweiler, T., & Medvec, V. H., (2002) 'Disconnecting outcomes and evaluations: The role of negotiator focus'. *Journal of Personality and Social Psychology*, 83, 1131–1140

[696] Galinsky, A. D., Mussweiler, T., & Medvec, V. H., (2002) 'Disconnecting outcomes and evaluations: The role of negotiator focus'. *Journal of Personality and Social Psychology*, 83, 1131–1140 at p1131

Curhan *et al*[697] argue that subjective value derived from negotiations is important for three reasons. Firstly, the authors essentially propose that if a negotiation results in an individual feeling good even for intangible reasons, then by definition this must be recognised as a significant source of value[698]. Secondly, that '*subjective feelings of success*[699]' are very often the only available measure of performance since the negotiator will rarely know objectively how good an outcome is without access to the other party's reserve point or by comparing the result with another negotiator in the same position[700]. Finally, that subjective value in a current negotiation might lay the foundation for future objective value. Essentially, where an individual or counterparty feels good about one negotiation, they may feel motivate to engage in future interactions that yield more objective value[701].

In that empirical study, Curhan *et al* conclude *'researchers may dramatically underrate subjective outcomes in negotiation given their real-world importance*[702]', something that is supported by the finding of the current research in so far as it suggests that subjective perception of effectiveness is arguably of more importance that objective measures.

[697] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512

[698] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512 at pp494-495

[699] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512 at p494

[700] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512 at p495

[701] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512 at p495

[702] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512 at p507

Curhan *et al* also found that *'participants reporting high subjective value were more likely weeks later to choose their counterpart for a future cooperative interaction that had real stakes, and they were also more likely to report plans to maintain a professional relationship*[703]*'.* Again, this finding appears to be directly relevant to the findings in the current study in two ways. Firstly, the current study links the subjective perception by the interviewee of the lawyer on the other side of the negotiation (their negotiation counterparty) with a desire to interact with them again in future legal negotiations. This is explored in more detail below when the effect of reputation and relationships are considered. Secondly, the results of the current study suggest that the desire to achieve subjectively satisfied or happy clients is linked to a motivation to induce future interactions with these clients in the form of repeat business.

The results of the current study therefore lends empirical support to the findings of Curhan *et al* and indeed suggest their findings may be specifically relevant in the field of legal negotiation research and beyond the more general population of students, community member and negotiation practitioners from the US they studied. It also provides further evidence to support a link between the social psychological literature on negotiation and the literature on legal negotiation focused on more objective economic outcomes, potentially developing the framework initially proposed by Thompson[704].

Finally, the findings relating to perception and subjectivity are arguably also related to the concept of process satisfaction and whether individuals have perceived themselves to have been treated in a reasonable and fair manner. There is empirical evidence within the procedural justice literature that concludes that individuals who perceive themselves to have been treated more respectfully during

[703] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512 at p507

[704] Thompson, L., (1990) 'Negotiation behavior and outcomes: Empirical evidence and theoretical issues'. *Psychological Bulletin*, 108, 515–532

the negotiation process are subjectively more satisfied with objectively less than those who have received more but have been treated with less respect[705]. Hollander-Blumoff writes '*Although procedural justice research has typically focused on the importance of fairness of process to participants who receive a decision from a third party on a matter that is meaningful to them, newer empirical research has suggested that procedural justice effects may also be present in bilateral negotiation. This research suggests factors that lead to assessments of fair treatment in negotiation and indicates that the fairness of the negotiation process may have significant effects on parties' acceptance of and adherence to their negotiated agreements*[706]*'.*

8.2.4 The role of reputation

The third finding in relation to effectiveness involves reputation, a concept that can perhaps helpfully be defined as '*socially constructed labels that extends the consequences of a party's actions across time, situations, and other actions*[707]*'* and which '*give information about a counterpart that is based on either prior social interaction or credible information from the negotiator's social network*'[708].

A finding of the current research suggests that the role reputation plays is significant both in terms of what constitutes a favourable outcome and also as one of the drivers of effective behaviour. Williams hypothesised the existence of such a link between what constitutes effectiveness and maintaining a favourable reputation amongst legal peers although his research did not make any findings or draw any conclusions in this area[709].

[705] See: Hollander-Blumoff, R., (2010) 'Just Negotiation', 88 *Washington University Law Review*. 381

[706] Hollander-Blumoff, R., (2010) 'Just Negotiation', 88 *Washington University Law Review* 381 at p384

[707] Tinsley, C., O'Connor, K., & Sullivan, B., (2002) 'Tough guys finish last: the perils of a distributive reputation'. *Organizational Behavior and Human Decision Process* 88: 621-642 at p622

[708] Tinsley, C., O'Connor, K.,Sullivan, B., (2002) 'Tough guys finish last: the perils of a distributive reputation'. *Organizational Behavior and Human Decision Process* 88: 621-642 at p622

[709] Williams, G. R., (1983) 'Legal Negotiation and Settlement' St. Paul, MN: Thomson West at p44

Tinsley *et al*[710] showed in a laboratory based study looking at buyer/seller exchanges that reputation is of significance and, in negotiations with integrative value creating potential, having a reputation as a more competitive value claimer is likely to harm the interests of the negotiator[711]. Earlier, Gibson & Mnookin offered a theory of reputational markets for lawyers suggesting that reputation in legal negotiations could be good for the client in that the selection of a lawyer with what might be considered as a more cooperative and constructive reputation would send a positive communication to their negotiation counterparties that might ultimately help to facilitate a more constructive negotiating environment[712]. Gibson & Mnookin's theory also proposes that the size of the market is relevant and that it is easier to create and retain a reputation for more cooperative types of behaviours in a smaller market than in a larger one, arguably important in the context of the relatively small legal jurisdiction that is the subject of the current research.

Tinsely and her colleagues in a later work[713] carried out supplementary analysis on the data from the Schneider study[714] (discussed at length a various points throughout the current study) and concluded that it did offer empirical support to a theory that value creating problem solving reputations are more valuable in smaller markets than in larger markets, concluding that '*we would also expect that smaller*

[710] Tinsley, C., O'Connor, K., & Sullivan, B., (2002) 'Tough guys finish last: the perils of a distributive reputation'. *Organizational Behavior and Human Decision Process* 88: 621-642

[711] Tinsley, C., O'Connor, K.,Sullivan, B., (2002) 'Tough guys finish last: the perils of a distributive reputation'. *Organizational Behavior and Human Decision Process* 88: 621-642 at p637

[712] Gilson, R. J., & Mnookin R. H., (1995) 'Disputing through agents: Cooperation and conflict between lawyers in litigation'. *Columbia Law Review* 94(2): 509–566.

[713] Tinsley, C. H., Cambria, J., & Schneider, A. K., (2008) 'Reputations in Negotiation', *Marquette University Law School Legal Studies Research Paper Series,* Research Paper No. 08-08, July, 202-214

[714] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143

practice areas would lead to a greater ability to create and benefit from an integrative reputation'[715].

The findings of the current research study add some support to this finding by suggesting that the perception of the size and structure of the legal environment may be linked to the interviewees' perception of the importance of reputation in legal negotiations, which in turn appears to be related to overall effectiveness. The current study found that in a majority of lawyers from the sample group appeared to directly link a heightened importance of their reputation with their perception of the size and structure of their legal environment and as being important to their overall effectiveness as negotiators.

Overall the interview data in the current study suggests that reputation is one of the components of negotiation behaviour and that the type of reputation identified that was perceived as being desirable was generally associated with being seen as reasonable, easy to deal with, not untrustworthy, and not being difficult or obstructive. These are features that are arguably at least partly similar in character (rather than necessarily in substance) to the value creating, integrative reputations characterised by both Tinsley *et al* and Gibson & Mnookin reported as being beneficial. However, the current study would suggest that conclusions from earlier findings might be extended to recognise that *any* reputational factors that the participants in a particular legal market perceive to be equated with effectiveness might be beneficial, and not simply cooperative or integrative reputations.

The findings in the current research concerning the role that repeat player lawyers play in relation to understanding effectiveness can arguably also be related to research carried out in the context of business negotiations which focused on whether the previous experience of negotiators at the negotiating table with the

[715] Tinsley, C. H., Cambria, J., & Schneider, A. K., (2008) 'Reputations in Negotiation', *Marquette University Law School Legal Studies Research Paper Series,* Research Paper No. 08-08, July, 202-214 at p209

same counterparties affected negotiation performance[716]. Whereas the Tinsley study[717] was concerned with reputation (arguably in the nature of how the overall characterisation of an individual's negotiation capability and behaviour is perceived within the market he or she operates in), O'Conner *et al* attempted to look at how the actual negotiation experience that has occurred between individuals in the past influences future outcomes[718]. The study highlighted the lack of research in this area and ultimately found that in some circumstances it would be more applicable for researchers to view negotiations as connected incidents rather than discrete independent events, as well as underlining '*the role of bargaining histories as significant predictors of negotiation behavior'*[719].

Although the O'Connor study involved undergraduate students negotiating simulated business disputes, the results of the current study would at least suggest that the behaviour and perception of effectiveness of legal negotiators are to some extent influenced by their experience of past interactions with particular lawyers. It is perhaps also relevant to a suggestion that certain types of legal negotiations should be more accurately conceptualised as on-going interrelated events between repeat player lawyers, even when the clients and indeed the subject matter of the negotiations are completely unrelated. Arguably the existence of a limited number of repeat player lawyers suggests that even if a particular legal negotiation has the features of a one-off discrete occurrence involving a single interaction between clients following which they will have no further probable contact with each other in the future, the existence of repeat player lawyers in what is perceived to be a small legal jurisdiction may well lead to reputational effects (and indeed relational

[716] O'Connor, K. M., Arnold, J. A., Burris, E. R., (2005) 'Negotiators' bargaining histories and their effects on future negotiation performance', *Journal of Applied Psychology* 90(2):350–62

[717] Tinsley, C., O'Connor, K., & Sullivan, B., (2002) 'Tough guys finish last: the perils of a distributive reputation'. *Organizational Behavior and Human Decision Process* 88: 621-642

[718] O'Connor, K. M., Arnold, J. A., Burris, E. R., (2005) 'Negotiators' bargaining histories and their effects on future negotiation performance', *Journal of Applied Psychology* 90(2):350–62 at p358

[719] O'Connor, K. M., Arnold, J. A., Burris, E. R., (2005) 'Negotiators' bargaining histories and their effects on future negotiation performance', *Journal of Applied Psychology* 90(2):350–62 at p350

effects discussed further below) that have the potential to unlock value for the negotiator over a series of negotiations. The results of the current study therefore appear to suggests that the effect of potential future interactions applies as much to the lawyers involved as to the clients and that the area of legal practice is perhaps less important to reputational factors than the predominance of repeat player lawyers in any given practice area.

It is perhaps relevant that although a study by Anderson & Shirako[720] found that the link between past behaviour and reputation in a simulated negotiation study involving MBA students was generally mild, it was found to be much stronger '*for individuals who were more well-known and received more social attention in the community*'[721]. Their findings suggest that in order for a reputation based on past behaviour to be relevant in a negotiation context, the past behaviour has to be disseminated effectively throughout the relevant negotiation community. This is arguably relevant to findings in the current research in that dissemination is likely to be more effective in the sample group populated by single practice area lawyers and dominated by repeat players that characterises the sample of lawyers used in the current study.

In a recent paper by Welsh, the author concludes that '*available research strongly suggests that lawyers with positive reputations as legal negotiators tend to be those perceived by their peers as skilled lawyers who maximize results for their clients and are sufficiently trustworthy*'[722]. The results from the current research suggest that although trust emerges as an important aspect of reputation, the interview data does not perhaps give it the overall prominence that Welsh suggests. In the current study it is the absence of a reputation for being untrustworthy that appears to be

[720] Anderson, C., & Shirako, A., (2008) 'Are Individuals' Reputations Related to Their History of Behavior?' *Journal of Personality and Social Psychology*, Vol. 94, No. 2, 320–333

[721] Anderson, C., & Shirako, A., (2008) 'Are Individuals' Reputations Related to Their History of Behavior?' *Journal of Personality and Social Psychology*, Vol. 94, No. 2, 320–333 at p320

[722] Welsh, N. A., (2012) 'The Reputational Advantages of Demonstrating Trustworthiness' *Negotiation Journal* Volume 28, Issue 1, 117–145 at p139

more important, perhaps suggesting that trust is considered to be the accepted default position in the jurisdiction the current research study group is drawn from perhaps in contrast to those in the broader US jurisdiction considered in the Welsh study. Also in contrast to the conclusions by Welsh, the current research found that the reputational factors that the study interviewees were most concerned about involved ease of dealing with and reasonableness rather than being seen as someone who necessarily maximises the results for their client.

Ultimately however, Welsh's conclusion that '*perhaps paradoxically, the negotiators who are most likely to have a reputation for effectiveness are those who acknowledge that legal negotiation is just as much about the other people who are involved and abiding by relevant professional norms as it is about the task of competing for a favorable share of apparently scarce resources*[723]*'* is supported by the findings of the current study and is particularly relevant in the context of the role of subjective perception of effectiveness considered earlier.

8.2.5 Relationships

The fourth finding that emerges from the results relates to the role that relationships play in the conceptualisation of effectiveness. Relationships emerge as being relevant to effectiveness both indirectly in terms of the relational purpose of a particular legal negotiation interaction, arguably something that can be broadly defined in terms of whether it creates or maintains relationships, terminates relationships or is purely transactional in effect, but also directly in terms of the nature of the relationships between the participants in the negotiation.

Arguably the most important finding of the current study relating to relationships is the suggestion that the relationship between the lawyers themselves may be of key significance to both influencing the type of negotiation behaviour they might engage in and to the overall way they might characterise effectiveness.

[723] Welsh, N. A., (2012) The Reputational Advantages of Demonstrating Trustworthiness' *Negotiation Journal* Volume 28, Issue 1, 117–145 at p139 at p120

The concept of relationships in negotiations looks to be closely related to that of reputation and indeed appears to be influenced by similar factors. In this context it has already been suggested that the existence of repeat players in single practice area legal environments may be significant in terms of the reputational effect of legal negotiators. Within the related literature, Blumberg recognised the role that key areas of social structure played in a US based criminal context referring to the role that the relationships lawyers had with the court organisation as well as the characterisation of the lawyer-client relationship[724]. Genn recognises specifically that plaintiff solicitors in personal injury cases may modify their behaviour in a manner that is at least party motivated by a desire to maintain or create a particular reputation amongst defendant lawyers. Genn writes '*Thus although the solicitor's decisions as to whether to settle or litigate are clearly dependant on the individual facts of the case before him, they may also have to be viewed within a more general context related to the creation and maintenance of the negotiator's own reputation vis-à-vis defendants* [725] *'*. Sarat and Felstiner found lawyer reputation to be emphasised repeatedly in the context of lawyer-client meetings in a divorce context[726].

The findings of the current study suggest that in the context of effectiveness, both the nature of the behaviour engaged in and the type of outcomes sought are influenced directly by the nature of relationship the interviewees have with the lawyer on the other side of the negotiation[727]. This appears to be related to the likelihood of repeat future interactions between the individual lawyers themselves,

[724] Blumberg, A. S., (1967) 'The Practice of Law as Confidence Game: Organizational Cooptation of a Profession', Law & Society Review, Vol.1(2), pp.15-39 at p38

[725] Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press at 48

[726] Sarat, A., & Felstiner, W. L. F., (1986) 'Law and Strategy in the Divorce Lawyer's Office', Law & Society Review, Vol. 20, No. 1 (1986), pp. 93-134 at p102

[727] This is supported by earlier literature that recognises that the nature of the relationship between the respective negotiators in contract negotiations has an influence on how they implement and rely on contractual practices as well as on non-legal norms. See: Macaulay, S., (1963) 'Non – Contractual Relations in Business', *American Sociological Review, Vol 28, No 1 p*55-67

something which is arguably more likely between single practice area lawyers operating in smaller legal jurisdictions.

When considered in the context of the effect that the size and structure of a legal market may have on the type of behaviour utilised by lawyers, there is evidence from a simulated study by Patton & Balakrishnan involving MBA students that in situations where there is more likelihood of future dealings, negotiators are more likely to act in a friendly way and use cooperative problem-solving behaviours compared to one-off negotiators, as well as being more likely to produce greater equality in the satisfaction levels experienced by each of the parties[728]. Given that there is some evidence from the findings in the current study that a number of the interviewee lawyers had social contact and indeed what amount to friendships with the legal negotiators that they have repeat contact with as part of their legal work, the findings of Patton & Balakrishnan suggest that such friendships, arguably more likely to occur in a small legal market dominated by repeat players, may have an effect on the type of behaviour adopted by legal negotiators and the satisfaction of the parties.

A study by Greenhalgh and Chapman[729] using MBA negotiation students provides some empirical support for the related finding that the relationships between negotiators influences negotiation behaviour in particular in relation to information sharing and the use of what might be characterised as highly competitive or aggressive behaviour[730]. The study also makes a link between the use of such highly competitive or aggressive behaviour and a negative effect on the future

[728] Patton, C., & Balakrishnan, P., (2010) 'The impact of expectation of future negotiation interaction on bargaining processes and outcomes'. *Journal of Business Research* 63(8): 809–816 at p809

[729] Greenhalgh, L., & Chapman, D. I., (1998) 'Negotiator relationships: Construct measurement, and demonstration of their impact on the process and outcomes of negotiation'. *Group Decision and Negotiation* 7(6): 465–489

[730] Greenhalgh, L., & Chapman, D. I., (1998) 'Negotiator relationships: Construct measurement, and demonstration of their impact on the process and outcomes of negotiation'. *Group Decision and Negotiation* 7(6): 465–489 at p482

relationships between the negotiators[731], leading Fleck *et al* to draw the conclusion following their own later research that '*In terms of practitioners, making personal connections with a counterpart and his or her network of friends and associates can change the dynamics of a negotiation; individuals often negotiate more favorably with friends than with strangers[732]'*. A study by Curhan *et al*[733] provided some additional empirical support for Fleck *et al* when they concluded that negotiators may fail to capitalise on their ability to claim value in order to protect, maintain or enhance relationships[734]. Finally, there is some evidence to suggest that repeat negotiations involving the same lawyers may lead to the achievement of better settlement rates achieved more quickly[735].

The above noted literature is also relevant to the finding in the current research study that the relational purpose of a legal negotiation interaction, when defined in terms of its core function regarding the relationships between the respective clients, might be directly relevant to negotiation effectiveness. Although the current study wasn't able to show whether legal practice areas themselves have any discernible influence on negotiation behaviour and perceptions of effectiveness, it does suggest that what might be important is in reality the purpose of a particular legal interaction defined in terms of the key relationships within the negotiation rather than the legal practice area itself.

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[731] Greenhalgh, L., & Chapman.,D. I., (1998) 'Negotiator relationships: Construct measurement, and demonstration of their impact on the process and outcomes of negotiation'. *Group Decision and Negotiation* 7(6): 465–489 at p482

[732] Fleck, D., Volkema, R., Pereira, S., Levy, B., & Vaccari, L., (2014) 'Neutralizing Unethical Negotiating Tactics: An Empirical Investigation of Approach Selection and Effectiveness', *Negotiation Journal* January 23-48 at p44

[733] Curhan, J. R., Neale, M. A., Ross, L., & Rosencranz-Engelmann, J., (2008) 'Relational accommodation in negotiation: Effects of egalitarianism and gender on economic efficiency and relational capital', *Organizational Behavior and Human Decision Processes* 107: 192–205

[734] Curhan, J. R., Neale, M. A., Ross, L., & Rosencranz-Engelmann, J., (2008) 'Relational accommodation in negotiation: Effects of egalitarianism and gender on economic efficiency and relational capital', *Organizational Behavior and Human Decision Processes* 107: 192–205 at p202

[735] Johnston, J. S., & Waldfogel, J., '(2002) 'Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation', 31 *Journal Of Legal Studies* 39 at p39

However, it appears that any such analysis based on the relational purpose of an interaction must also take into consideration the on-going relationships between the lawyers involved. As previously discussed, this perhaps means that certain types of litigation interactions traditionally characterised in terms of a process that terminates the relationships between the respective clients, should perhaps also be seen as a process between repeat player lawyers who anticipate future dealings with each other and are therefore invested in their relationship. This might help to explain why, on the face of it, litigation or indeed contentious interviewees in the study don't appear to perceive themselves as engaging in significantly different behaviour relative to other types of lawyers. Indeed, in smaller jurisdictions arguably there is almost always likely to be a significant element of influence due to relationship and reputational factors that perhaps might not be present in a larger jurisdiction.

Any consideration of relationships between the parties needs also to acknowledge the role that agency plays in the context of legal negotiation. A study by Lee & Thompson[736], having acknowledged that the central question of whether agents both understand and then pursue their principals' best interests remains a difficult area for researchers[737], looked instead at how the relationship between agents and principals affected negotiation outcomes and in particular impasses in simulated business negotiations conducted by MBA students. Their research concluded that agents that had a closer and more supportive relationship with their principals were more likely to focus on the interest of their principal rather than their own[738]. This

[736] Lee, S., & Thompson, L., (2011) 'Do agents negotiate for the best (or worst) interest of principals? Secure, anxious and avoidant principal–agent attachment', *Journal of Experimental Social Psychology* 47 681–684

[737] Lee, S., & Thompson, L., (2011) 'Do agents negotiate for the best (or worst) interest of principals? Secure, anxious and avoidant principal–agent attachment', *Journal of Experimental Social Psychology* 47 681–684 at p681

[738] Lee, S., & Thompson, L., (2011) 'Do agents negotiate for the best (or worst) interest of principals? Secure, anxious and avoidant principal–agent attachment', *Journal of Experimental Social Psychology* 47 681–684 at p683. Reference is also made to work by Rosenthal who proposed a participatory model as a paradigm for a professional-client relationships increasing the prospects for client

has potential implications relating to the concept of effectiveness if the research findings by Lee & Thompson are applicable in the context of legal negotiation. From a relationship perspective, it would suggest that a closer and more supportive relationship between lawyer and client might lead to better outcomes for the client. Although the current research study was not able to specifically analyse the difference in the type of relationships that existed between interviewees and their clients, it is possible that the quality of relationship between client and lawyer may be another factor of relevance in the overall context of effectiveness and arguably negotiation behaviour, an area that would benefit from further research.

It is also worth placing the findings of the current research in the context of very recent work exploring a theory of '*Relational Negotiation*'[739]. This theory explores the role of negotiations as between individuals fundamentally '*embedded in relationships*'[740]. Rather than viewing the roles of relationships instrumentally as a means to an end, a relational view of negotiation sees them as '*an inherently valuable part of our human experience*'[741]. The authors who have formulated this theory essentially appear to be suggesting that the creating and maintaining of relationships within negotiations has intrinsic value in itself and suggest that this understanding might '*encourage negotiators to work harder and be more creative in crafting mutually beneficial solutions*'[742], something that the authors contend can happily sit alongside a more traditional self-interest based analysis of the process.

A move in the literature away from theories that view relationships in negotiations purely in self-interested instrumental terms is arguably supported by the findings in

satisfaction in two main areas: increased control and reduced stress and anxiety, See: Rosenthal, D., (1974) 'Lawyer and Client: Who's in Charge?', Russell Sage Foundation, at p168

[739] Ingerson, M., DeTienne, K. B., & Liljenquist, K, A., (2015) 'Beyond Instrumentalism: A Relational Approach to Negotiation', *Negotiation Journal* January, 31-46

[740] Ingerson, M., DeTienne, K. B., & Liljenquist, K, A., *(*2015) 'Beyond Instrumentalism: A Relational Approach to Negotiation', *Negotiation Journal* January, 31-46 at p37

[741] Ingerson, M., DeTienne, K. B., & Liljenquist, K, A., (2015) 'Beyond Instrumentalism: A Relational Approach to Negotiation', *Negotiation Journal* January, 31-46 at p39

[742] Ingerson, M., DeTienne, K. B., & Liljenquist, K, A., (2015) 'Beyond Instrumentalism: A Relational Approach to Negotiation', *Negotiation Journal* January, 31-46 at p42

the current study insofar as it appears to suggest that some interviewees may derive satisfaction from not only engaging in rewarding personal relationships in the context of the negotiation itself, but that they may also perceive some intrinsic value in ensuring the parties enhanced or maintained relationships as a result of the process. However, it is very difficult to distinguish the true reason behind such feelings and clearly more research would need to be done in this area to lend support to any evolving theory of '*Relational Negotiation*' in a legal negotiation context.

Finally, clearly there are important ethical implications to the findings relating to relationships, in particular in relation to the duty of a lawyer to act in the best interest of their client. Such a consideration goes beyond the scope of the current research study and is a matter that might helpfully be the subject of future research.

8.2.6 Tone and substance

The fifth finding in the current research relates to a distinction between the tone of delivery of particular negotiation behaviour and the substance of that behaviour. A number of the interviewees in the study group make a distinction between the tone of the communication and what might be considered the substance of the behaviour used, something that was particularly relevant in differentiating between types of behaviour that were characterised as either being 'hard' or alternatively 'aggressive'.

Almost all the interviewees in the study associated or indeed strongly associated angry or aggressive types of behaviour in negotiations with ineffectiveness. The findings tend to suggest that it was the tone of the behaviour that was the major contributor to the perceived ineffectiveness rather than its substance. However there appears also to be a recognition from many interviewees that angry behaviour can be effective, although almost no one acknowledged using such behaviour themselves other than as a response to aggression initiated by the other

party. In this context it is perhaps interesting to note that a study by Diekmann *et al*[743] suggests that negotiators who say they will respond to expected aggressive behaviour in a negotiation with similarly aggressive behaviour actually become less competitive, with the authors stating that '*when expecting an opponent to be competitive, negotiators may think they will fight fire with fire, think they will be lions that roar, but in the end they are merely mice that whimper*[744]'.

Recognition in the current study of the at least perceived potential effectiveness of aggressive behaviour is arguably consistent with aspects of research in the general negotiation literature that has found that individuals are more likely to make more concessions to angry negotiators than to happy negotiators[745]. Individuals are also more likely to lower their demands when dealing with a negotiator who has expressed anger to them in previous negotiations[746]. However, later studies have found that the position is more complex, showing that the effect was reduced where the display of anger was understood by the other negotiator to be inauthentic strategic anger[747], and that the behavioural effects of angry behaviour are strongly dependent on the consequences of rejection and the opportunity for deception by the recipient of the angry behaviour[748]. It has also been shown that

[743] Diekman, K. A., Tenbrunsel, A. E., & Galinsky, A. D., (2003) 'From Self-Prediction to Self-Defeat: Behavioral Forecasting, Self-Fulfilling Prophecies and the Effect of Competitive Expectations', 85 *Journal of Personality & Social Psychology*. 672, 672-83

[744] Diekman, K. A., Tenbrunsel, A. E., & Galinsky, A. D., (2003) 'From Self-Prediction to Self-Defeat: Behavioral Forecasting, Self-Fulfilling Prophecies and the Effect of Competitive Expectations', 85 *Journal of Personality & Social Psychology*. 672, 672-83 at p673

[745] See: Van Kleef, G. A., De Dreu, C. K. W., & Manstead, A. S. R., (2004) 'The interpersonal effects of anger and happiness in negotiations' *Journal of Personality and Social Psychology* 86(1): 57–76; and Sinaceur, M., & Tiedens, L., (2006) 'Get mad and get more than even: When and why anger expression is effective in negotiations'. *Journal of Experimental Social Psychology*, 42, 314–322

[746] Van Kleef, G. A., De Dreu, C. K. W., (2010) 'Longer-term consequences of anger expression in negotiation: Retaliation or spillover?' *Journal of Experimental Social Psychology* 46 753–760 at p758

[747] Han-Ying Tng & Al K. C. Au, (2014) 'Strategic Display of Anger and Happiness in Negotiation: The Moderating Role of Perceived Authenticity', *Negotiation Journal* July 301-327

[748] Van Dijk, E., Van Kleef, G. A., Steinel, W., Van Beest, I., (2008) 'A social functional approach to emotions in bargaining: When communicating anger pays and when it backfires'. *Journal of Personality and Social Psychology 94*(4): 600–614 at p611; and Han-Ying Tng & Al K. C. Au, (2014)

expressions of anger can induce '*covert retaliation'* and therefore that '*the value-claiming advantages of expressed anger need to be weighed against the costs of eliciting (covert) retaliation*[749]*'.*

It is relevant to note that these research studies were generally conducted on students in a non-legal context and primarily focused on an objective assessment of outcomes rather than the subjective assessment that previously discussed research, including the current study, suggests is an important element of legal negotiation effectiveness. On that basis it is arguable that although there is some evidence that aggressive negotiators might in certain circumstances be able to secure objectively better outcomes, it is likely that any overall assessment of the negotiation might be less favourable if it fully recognises the subjective perception of those involved.

Gifford differentiates between negotiation style and negotiation tactics and suggests that the negative effects of using highly competitive tactics '*can be mitigated if the style of the negotiator is friendly*[750]*'.* This appears consistent to at least some extent with the findings of the current study which found that around half of the interviewees reported that they considered that a non-aggressive type of 'hard' negotiation behaviour could be effective, with a small number of interviewees specifically reporting that being forceful or even playing hardball *can* be associated with effectiveness when such behaviour is delivered politely and respectfully. Gifford argues that the original Williams study fails to differentiate descriptions of what he considers to be style from what he considers to be more in the nature of tactics, and that negotiators require to make decisions about the use

'Strategic Display of Anger and Happiness in Negotiation: The Moderating Role of Perceived Authenticity', *Negotiation Journal* July 301-327 at pp302-302

[749] Wang, L., Northcraft, G. B., Van Kleef, G. A., (2012) 'Beyond negotiated outcomes: The hidden costs of anger expression in dyadic negotiation', *Organizational Behavior and Human Decision Processes* 119 54–63 at p55

[750] Gifford, D. G., (2007) 'Legal negotiation: Theory and practice', 2nd Edn. St. Paul, Minnesota: Thomson West at p21

of both[751]. Indeed later Craver and Williams[752] support their argument for the existence of a hybrid type of negotiator they label as a competitive/problem-solver by identifying negotiators with what they consider to be competitive/adversarial goals but which they advance in a courteous and professional manner[753]. Craver describes such negotiators as '*seemingly cooperative'* and who '*appear to seek results beneficial to both sides*'[754]. He suggests that by essentially adopting a '*pleasant and professional'* style of negotiation, the competitive/problem-solver can mask more competitive/adversarial intentions and indeed tactics to achieve bigger concessions and better results[755].

In supporting a distinction between the style or tone of behaviour and the substance of the behaviour, the current study provides some evidence to support the existence of an overall characterisation of negotiation behaviour amongst legal negotiators at least in some respects akin to a hybrid type of behaviour described in the literature in that it acknowledges a distinction between the substance of particular negotiation behaviour and the manner in which it is delivered.

As has been described in Chapter 5, the current study identifies a type of behaviour that has been characterised as 'hard' which encapsulate elements of substantive behaviour such as the ability to stand one's ground, argue points effectively and not be pushed around, as well as the adopting of more extreme positions accompanied by reluctance to compromise, all behaviours often associated with a more competitive value claiming type of negotiation behaviour. However, in the current study this type of behaviour is differentiated from the 'aggressive' behaviour also identified, in that the tone of 'hard' behaviour is much more moderate and is characterised as neutral, reasonable or even polite when contrasted with aggressive

[751] Gifford, D. G., (2007) 'Legal negotiation: Theory and practice', 2nd Edn. St. Paul, Minnesota: Thomson West at p31

[752] Williams, G. R., & Craver C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West

[753] Williams, G. R., & Craver C. B., (2007) 'Legal negotiating' St. Paul, MN: Thomson West at p53

[754] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337 at p348

[755] Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337 at p348

type of behaviour. Indeed Condlin's description of the '*adversarial*' bargainer, described as '*substantially aggressive, not socially aggressive*[756]', arguably has much in common with the 'hard' bargaining behaviour identified in the current study. Condlin goes on to make the point that the skilful adversarial negotiator '*does not offend, antagonize, or insult as much as it pressures, influences, and deceive*s'[757].

Another important element in understanding the nature of both the style and substance of negotiation behaviour is motivations, something that is considered later in this chapter.

8.2.7 Personality as a determinant of effective negotiation behaviour

The sixth finding relating to effectiveness is the strong association identified in the minds of the interviewees between 'personality type' or the 'character' of a legal negotiator and the type of negotiation behaviour that might be effective for that particular individual. The suggestion is that legal negotiators can only be effective if they use behaviour that suits their own personality type, with the important implication that effectiveness cannot necessarily be assessed in isolation from the personality of the lawyer who adopts it or indeed is subject to it.

Such a finding is at odds with early negotiation research into this subject, which led Thompson to conclude that *'personality and individual differences appear to play a minimal role in determining bargaining behaviour*[758]*'.* However, later studies have suggested otherwise, with Barry & Friedman concluding that '*distributive bargaining, which is governed in large part by gamesmanship, nerve, and aggressiveness, is affected by personality factors that influence social interaction*

[756] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231 at p285

[757] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231 at p285

[758] Thompson, L., (1990) 'Negotiation behavior and outcomes: Empirical evidence and theoretical issues', *Psychological Bulletin*, 108, 515–532 at p515

but not by problem-solving ability and planfulness. In contrast, integrative bargaining, which is governed primarily by problem solving, is affected by enhanced understanding, creativity, and care but not by differences in approach to social interaction[759]*'*. Another study involving 149 masters-level negotiation students based in the US concluded that as much as 46% of objectively measured performance and 19% of subjectively perceived performance in mixed motive negotiation simulations was explained by individual and personality related differences[760]. A feature of this study was that it recognised that the differences in performance observed were not simply about the personality of the negotiator but were also due to the specific interaction with the particular personality of the counterparty since '*personality is not only about our own behavior but also about the behavior that we tend to elicit in others*[761]*'.*

The finding of the current study would tend to suggest that there is a perception that such observations may well be applicable in a legal negotiation setting, with a number of interviewees expressing the opinion that not only is personality type strongly related to the type of behaviour legal negotiators use and perceive as being effective, but also that the type of behaviour they use and its effectiveness is influenced by the personality of their negotiating counterparty.

In a recent study involving 126 undergraduate students in the US, Dimotakis *et al*[762] looked at how a personality trait they characterise as 'agreeableness' interacts with both integrative and distributive contexts to influence the way the negotiation is

[759] Barry, B., & Friedman, R. A., (1998) 'Bargainer characteristics in distributive and integrative negotiation', *Journal of Personality and Social Psychology*, 74, 345–359 at pp356-357

[760] Elfenbein, H. A., Curhan, J. R., Eisenkraft, N., Shirako, A., & Baccaro, L., (2008) 'Are some negotiators better than others? Individual differences in bargaining outcomes', *Journal of Research in Personality* 42 1463–1475 at p1463

[761] Elfenbein, H. A., Curhan, J. R., Eisenkraft, N., Shirako, A., & Baccaro, L., (2008) 'Are some negotiators better than others? Individual differences in bargaining outcomes', *Journal of Research in Personality* 42 1463–1475 at p1464

[762] Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193

conducted[763]. The authors take their definition of agreeableness from earlier work by Costa & McCrae who describe it as '*fundamentally altruistic, sympathetic to others, eager to help and be helped in return. By contrast, the disagreeable person is egocentric, skeptical of others' intentions, and competitive rather than cooperative*[764]*'.* The authors go on to argue that '*whether agreeableness is an asset or a liability depends on the fit between the demands of the negotiation and the negotiator's disposition. We argue that this experience of fit (or match) with situational characteristics should affect individuals' experiential reactions, and ultimately their negotiation performance. Specifically, the integrative potential of the negotiation affects whether the behavioral responses that come naturally to individuals will be those that are best suited to the demands of the context*'[765].

The authors examined '*negotiator fit*' by assessing '*defeat reactions*' and '*defense reactions*' through the measurement of cardiovascular response[766] and found that '*agreeableness can differentially predict how individuals experience and behave in a negotiation, depending on the features of the context*'[767]. Ultimately they found that '*negotiators high in agreeableness were best suited to integrative negotiations and that negotiators low in agreeableness were best suited to distributive negotiations*'

[763] Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193 at p183

[764] Taken from Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193 at p183 who directly quote: Costa, P. T., Jr., & McCrae, R. R. (1992) 'NEO PI-R professional manual', Odessa, FL: Psychological Assessment Resources at p15.

[765] Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193 at p184

[766] Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193 at p184

[767] Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193 at p190

and also that the '*person-situation fit'* was ultimately related to the economic outcome attained by the study participants[768].

A further study[769] has looked at the effect of one of the component facets of agreeableness, labelled as '*straightforwardness*' and described as '*one's tendency to behave in ways that are frank, sincere, and ingenuous*'[770], had on concession behaviour in simulated negotiations involving students in the US. The study concluded that a higher disposition towards straightforwardness led to greater concern for the other parties' interests which led to greater concession making, but that this was qualified by the value creating possibility and relative power distribution within the negotiation[771]. The authors recognise that their study was only concerned with economic orientated concessions and that following on from the work by Curhan *et al*[772] they considered that the importance of intangible outcomes needed to be considered in this context[773].

Amanatullah *et al*[774] had looked at a personality concept taken from the field of health psychology labelled *'unmitigated communion'* (UC) described by the authors as '*an orientation involving high concern for and anxiety about one's relationships*

[768] Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193 at p183

[769] DeRue, D, Conlon, D, Moon, H, & Willaby, H., (2009) 'When is straightforwardness a liability in negotiations? The role of integrative potential and structural power', *Journal Of Applied Psychology*, 94, 4, 1032-1047

[770] DeRue, D, Conlon, D, Moon, H, & Willaby, H., (2009) 'When is straightforwardness a liability in negotiations? The role of integrative potential and structural power', *Journal Of Applied Psychology*, 94, 4, 1032-1047 at p1033

[771] DeRue, D, Conlon, D, Moon, H, & Willaby, H., (2009) 'When is straightforwardness a liability in negotiations? The role of integrative potential and structural power', *Journal Of Applied Psychology*, 94, 4, 1032-1047 at p1033

[772] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512

[773] DeRue, D., et al (2009) at p1044

[774] Amanatullah, E. T., Michael W. Morris, M. W. & Curha, J. R., (2008) 'Negotiators Who Give Too Much: Unmitigated Communion, Relational Anxieties, and Economic Costs in Distributive and Integrative Bargaining' *Journal of Personality and Social Psychology*, Vol. 95, No. 3, 723–738

coupled with low self-concern[775]*'.* The study, using a sample of 357 MBA students from the US[776], found that high UC individuals engaged in accommodating behaviour in both distributive and integrative simulated business negotiations leading to lower outcomes in both types of scenarios. In distributive negotiations, worry about the potential damage to relationships caused the negotiators to reduce high initial demands, and in integrative negotiations accommodating behaviour aimed at protecting relationships resulted in lower economic joint gains but '*increased subjective satisfaction with the relationship*'[777].

In the context of the current research study, Dimotakis *et al* importantly make the observation that '*the present research demonstrates that personality variables can provide an important addition to negotiation research*'[778]*.* Arguably the findings of the current study lend some empirical support to these views specifically in the context of legal negotiation by suggesting that there is a strong perception by legal negotiators that both their choice of negotiation behaviour and perception of effectiveness is strongly influenced by both the personality of the negotiator and arguably how this interacts with the context of the negotiation. There is also some evidence in the current study that suggests that some legal negotiators may specifically modify negotiation behaviour to protect relationships, which evidence from the literature suggests may at least in part be personality driven with a suggestion that it may lead to lower economic gains.

[775] Amanatullah, E. T., Michael W. Morris, M. W. & Curha, J. R., (2008) 'Negotiators Who Give Too Much: Unmitigated Communion, Relational Anxieties, and Economic Costs in Distributive and Integrative Bargaining' *Journal of Personality and Social Psychology*, Vol. 95, No. 3, 723–738 at p723

[776] Amanatullah, E. T., Michael W. Morris, M. W. & Curha, J. R., (2008) 'Negotiators Who Give Too Much: Unmitigated Communion, Relational Anxieties, and Economic Costs in Distributive and Integrative Bargaining' *Journal of Personality and Social Psychology*, Vol. 95, No. 3, 723–738 at p726

[777] Amanatullah, E. T., Michael W. Morris, M. W. & Curha, J. R., (2008) 'Negotiators Who Give Too Much: Unmitigated Communion, Relational Anxieties, and Economic Costs in Distributive and Integrative Bargaining' *Journal of Personality and Social Psychology*, Vol. 95, No. 3, 723–738 at p723

[778] Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193 at p191

8.2.8 Four types of behaviour

The final finding relating to effectiveness brings together a number of the concepts already considered in this context and in particular the distinction between tone and substance of behaviour highlighted above. The finding categorises four types of negotiation behaviour that emerges from the study, all of which appear to be capable of contributing to what might be characterised as an effective legal negotiation. The types of behaviour identified are categorised in the results as being 'reasonable', 'firm but fair', 'hard' and 'aggressive'. The finding that all the identified categories of negotiation behaviour are capable of being effective reflects the finding in the Williams study which concluded that no single pattern of behaviour was either perceived as effective or ineffective and ultimately all the styles he identified were capable of both[779].

'Reasonable' behaviour emerges in the current study as having the highest association with effectiveness. This type of behaviour on a first analysis appears to have much in common with the cooperative/problem-solvers identified in the literature, considered by both Williams and Schneider to be most likely to be effective as legal negotiators when compared to more competitive styles of behaviour.

However, once the negotiation behaviours of the interviewees in the current study is looked at in the context of the motivation and TKI data, it is perhaps evident that the 'reasonable' behaviour identified in this study appears to have at least some features that are competitive in nature.

The characterisation of 'firm but fair' behaviour is arguably revealing. It recognises that many of the interviewees instinctively may have felt that being too 'reasonable' potentially left them open to exploitation and thus they desired to be seen as not being 'soft' nor being capable of being pushed around. It is also

[779] Williams, G. R., (1983) 'Legal Negotiation and Settlement' St. Paul, MN: Thomson West at p41

interesting to note that although many interviewees desired a reputation for being 'firm but fair', they wanted the person they were negotiating with to be 'reasonable'. This might suggest that they viewed the characteristics of the former behaviour to be more desirable and arguably more effective than the latter.

As has already been discussed above, 'aggressive' behaviour is perceived as the least likely to contribute to effectiveness. However, 'hard' negotiation behaviour appears to share much of the substance of aggressive behaviour but arguably none of its tone. It could be characterised as a highly competitive, value claiming type of behaviour but delivered in a polite and reasonable tone. Conversely, aggressive behaviour is primarily defined by its tone of delivery, which was associated in the current study with raised voices, displays of anger and physical aggression as well as a bullying and hectoring manner. These differences in the behaviours identified arguably support the earlier findings already identified that identify a distinction between the tone of delivery and the substance of the behaviour itself as being relevant to the characterisation of effectiveness.

It is perhaps relevant to note that although Williams concluded that 59% of those perceived as cooperative were described as effective but only 25% of those perceived as aggressive were considered effective, he did note that it was the extremes of both types of behaviour that tended to be ineffective, with negotiations either being overly cooperative or too aggressive[780]. Arguably the category of 'firm but fair' behaviour could be viewed as a less extreme version of the 'reasonable' behaviour that emerges from this study. It could also be argued that 'hard' negotiation behaviour is a less extreme version of 'aggressive' behaviour and as such is more effective.

Finally in this context it should also be noted that the criticism of previous studies that lawyers might simply be reporting as effective behaviour that they themselves feel comfortable with and indeed use themselves still applies to the finding of the

[780] Williams, G. R., (1983) 'Legal Negotiation and Settlement' St. Paul, MN: Thomson West at p33-34

current study[781]. However, it can be argued that when viewed in the context of the findings that supports a predominantly subjective view of effectiveness by legal negotiators, it is perhaps entirely valid that they would identify behaviour that they themselves feel comfortable with.

8.3 Self perception - effectiveness and behavioural style

This section discusses the results from Chapter 6 that relate to the interviewees' self perception of firstly their own personal effectiveness, and then of their own personal behavioural style, including a discussion of the TKI assessment.

8.3.1 Perceptions of personal effectiveness

Following on from the finding on how the lawyers in the sample group perceived effectiveness, they were also asked specifically about how they perceived their own effectiveness as legal negotiators.

As has been outlined in Chapter 6, the key finding in relation to the interviewees perception of their own effectiveness was arguably not that they all considered themselves to be broadly effective, something that might have been predicted although it is of note that a number of the interviewees did express at least some doubt over their own effectiveness as negotiators, but rather that the interviewees reported little direct evidence to base their opinion on and relied primarily on indirect evidence which included the subjective assessment of their clients, a track record of concluding agreements or an ability to retain or attract clients.

From the literature there is evidence that individuals are not good at predicting their own future performance in negotiations when faced with different negotiation behaviour from their counterparty [782]. Individuals are also arguably not good at

[781] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231 at p288

[782] See: Diekman, K. A., Tenbrunsel, A. E., & Galinsky, A. D., (2003) 'From Self-Prediction to Self-Defeat: Behavioral Forecasting, Self-Fulfilling Prophecies and the Effect of Competitive Expectations', 85 *Journal of Personality & Social Psychology*. 672, 672-83

assessing their own performance in real world negotiations and indeed egocentric biases have been well documented in the social psychology literature that suggest most negotiators view themselves as more honest and truthful than their negotiation counterparty[783]. However, there is some evidence that suggests, at least in the narrow context of plea bargaining in the US, that lawyers might be capable of being more rational than their client and serve to reduce the effect of bias when assessing the options available[784]. However, this was generally not supported when Wistrich & Rachlinski, in their study following a review of the relevant literature, concluded that '*A substantial body of research indicates that in a wide range of decisions involving a variety of potential sources of cognitive errors, people with legal training and litigation-related experience do not consistently make better judgments than lay people*[785]'.

Indeed Condlin labels a '*communitarian preoccupation with perception over substance*[786]' and highlights the dangers of confusing perceptions of effectiveness with more objective measures of effectiveness. However, for the purpose of the current research and in the context of understanding what legal negotiators themselves understand by the concept of effectiveness, it is argued that it is necessary to understand firstly what the interviewees themselves think of their own effectiveness, and secondly what evidence they used to support their perception.

As has already been highlighted, the findings of the current study tend to support an argument that effectiveness has a significant subjective content which would suggest that perception is perhaps more important that perhaps authors such as

[783] Thompson L., (2015) 'The mind and the heart of the negotiator', Prentice Hall, Upper Saddle River, New Jersey, Sixth Edition at p357

[784] Bibas, S., (2004) 'Plea Bargaining Outside the Shadow of Trial', *Harvard Negotiation Law Review* 117: 2463 at p2527

[785] Wistrich, A. J., & Rachlinski, J. J., (2013) 'How Lawyers' Intuitions Prolong Litigation' 86 *Southern California Law Review* 571 – 636 at p579

[786] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231 at p283 Note 210

Condlin might have us believe. Legal negotiators arguably must repeatedly take a view about their effectiveness as legal negotiators so understanding how that assessment is made must be relevant to understanding what they do and why they do it. The finding that this assessment of effectiveness appears to be significantly reliant on factors directly related to the subjective assessment of both lawyer and client is arguably therefore a finding worthy of note.

8.3.2 Characterisation of negotiation behavioural style

8.3.2.1 Introduction

Having considered how the interviewees perceived their own effectiveness and acknowledging that they essentially all considered themselves to be broadly effective negotiators, the study then goes on to attempt to understand how they characterise their own negotiation behavioural style, a characterisation that by implication can therefore also be assumed to be perceived to be effective by the interviewees.

No precise definition of negotiation behavioural style was offered to the interviewees although most appeared to assume that it amounted to an overall characterisation of their particular approach to negotiation. Shell's definition of negotiation behavioural style that encompasses notions of a negotiation style being both '*stable*' and '*personality-driven'* when he defines it as a *'relatively stable, personality-driven clusters of behaviors and reactions that arise in negotiating encounters*[787]*'* is arguably helpful and broadly appears to have been supported by the results of the current study.

The data used in the current research study to help determine a characterisation of each interviewee's perceived negotiation behavioural style consisted of three elements. Firstly, a description was obtained from the interviewee of their own negotiation behavioural style using their own vocabulary, terminology and points of

[787] Shell, G. R., (2001) 'Bargaining styles and negotiation: The Thomas–Kilmann Conflict Mode Instrument in negotiation training'. *Negotiation Journal*, 17, 155–174 at p156

reference. Secondly, the interviewees were invited to make an assessment of their own negotiation behavioural style with reference to an introduced negotiation framework consisting of a continuum of behaviour ranging from cooperative behaviour to competitive behaviour. Third, the interviewees were asked to complete a TKI psychological assessment[788] of their predisposition to use certain types of behaviours in conflict situations measured along the two dimensions of 'assertiveness' and 'cooperativeness'.

8.3.2.2 Using their own words

The study found that when using their own words, the majority of the interviewees initially most often associated their negotiation style generally with a concept of reasonableness. This is broadly consistent with the findings discussed earlier that suggested reasonableness was also the term that was often associated with both the reputation that was most desired by the interviewees and the type of behaviour that they considered to be most effective.

Arguably of more significance in this context is the finding that the interviewees often generally lacked both the vocabulary and a conceptual framework to describe their perceived negotiation style. This could arguably be related to the sample group on average having received limited exposure to negotiation education or training with only five of the group reporting to have received any significant negotiation training or education at any point during their career.

This raises broader questions relating to negotiation education and training in the legal profession. Agndal[789] refers to seven studies that addressed issues of negotiation training and feedback on negotiation behaviour, which the author

[788] Kilmann, R. H., & Thomas, K. W., (1977), 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument*', Educational and Psychological Measurement*, 37, 309-325.

[789] Agndal, H., (2007) 'Current trends in business negotiation research: An overview of articles published 1996-2005', SSE/EFI Working Paper Series in Business Administration, No 2007:003 February available at: http://swoba.hhs.se/hastba/papers/hastba2007_003.pdf (last visited 26.5.2015)

states provides evidence that negotiation training impacts behaviour and skills[790]. Other studies have shown that purely experiential learning of negotiation skills in the absence of feedback is largely ineffective at improving negotiation effectiveness[791]. Although any in-depth consideration of legal negotiation education and training is beyond the scope of the current study, it is apparent from the findings that the average exposure to negotiation education and training within the sample group was generally low, something that may not only have impacted on their ability to express themselves within the interviews, but as the literature suggests may arguably have also impacted upon their ability to improve their performance as effective legal negotiators.

8.3.2.3 Identifying with a framework and cooperative perceptions

Another finding relating to negotiation behavioural style was that the majority of the interviewees were in some way able to identify with the negotiation framework that was suggested to them. In the context of that framework, most considered their style to be relatively stable and associated more with a specific point on a continuum of behaviour, although a significant number of interviewees viewed their behavioural style as encompassing a more flexibility behavioural approach by either suggesting they use different behaviours at different times during any single negotiation or that they adopt a particular approach depending on the specifics of a particular negotiation. Only a small number of interviewees sought to either redefine or modify some aspect of the framework, or alternatively substantially disagreed with it.

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[790] Agndal, H., (2007) 'Current trends in business negotiation research: An overview of articles published 1996-2005', SSE/EFI Working Paper Series in Business Administration, No 2007:003 February available at: http://swoba.hhs.se/hastba/papers/hastba2007_003.pdf (last visited 26.5.2015) at p23

[791] Thompson, L., (1990) 'The influence of experience on negotiation performance', *Journal of Experimental Social Psychology*, Volume 26, Issue 6, 528-544; Thompson, L., & DeHarpport, T., (1994) 'Social Judgement, feedback, and interpersonal learning in negotiation'. *Organizational Behaviour and Human Decision Processes,* 58(3), 327-345

The fact that many interviewees were able to identify with a framework based upon a dichotomy of two extremes of negotiation behaviours lends some support to its enduring relevance. However, what does appear to have emerged is that rather than the framework being perceived as incorporating two distinct and mutually exclusive negotiation styles, interviewees tended to conceptualise a range of behaviours often describing themselves as 'more towards' one style than the other. Although the framework offered to the interviewees incorporated a continuum of behavioural styles with an implied middle ground rather than simply two distinct and discrete styles and that this may have influenced their perception, it does appear to have struck an instinctive accord with the majority of the interviewees who appeared to be comfortable and indeed on occasions relieved to be able to use this frame of reference to describe their perception of their own behavioural style.

In the context of that framework, the large majority of interviewees perceived themselves to be, to a greater or lesser extent, more towards the cooperative end of a continuum when describing their negotiation style, with most considering their style to be broadly stable.

Arguably the first broad observation relating to this finding is that it suggests the perception of the negotiation style of the majority of the sample group appears to be at least broadly similar to the majority findings in both the Williams and the Schneider studies that found approximately two-thirds of lawyers were described by their negotiation counterparties to be essentially cooperative/problem solvers[792]. Indeed this appears to also be broadly in line with MBA students, with one study finding 78% describing their negotiation style as 'cooperative'[793].

Interviewees in the current study tended to view the concept of competing as less desirable than behaviour associated with the concept of cooperating and indeed

[792]Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West; and Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143

[793] Lewicki, R. J., & Robinson, R. J. (1998) 'Ethical and unethical bargaining tactics: An empirical study' *Journal of Business Ethics* 17(6). 665-682

often appeared to associate competing with aggressive or at the very least disruptive behaviour. In contrast, the notion of cooperativeness appeared often to be perceived as constructive and broadly as positive.

Although such a general characterisation does not in itself shed any light on what the interviewees actually meant by these two types of behavioural styles, it does suggest that negative associations with competitive types of behaviour do appear to exist in the minds of legal negotiators and are not just in the minds of the legal negotiation '*cooperative supremacists*'[794] theorists that arguably have dominated the negotiation debate in this field for many years.

When thinking about negotiation behaviour in terms of a stylistic framework, the new challenge that has been recognised by authors such as Craver, and conceptualised by Schneider as looking behind negotiation 'labels'[795], is to look more deeply into the true nature of the behaviours that have conventionally being associated with stylistic characterisations. In order to say any more about the nature of these perceived styles in the context of this research study it is necessary to consider both the TKI analysis and the motivation results discussed below.

8.3.2.4 TKI Analysis

The purpose of using the TKI analysis in this research study was to add another dimension[796] to the exploration of the interviewees' negotiation behavioural style by introducing an assessment of their individual predisposition to use certain behaviours associated with negotiation in conflict situations.

Although the TKI has been around for over 40 years and has been widely used and accepted it is not without its critics. Schneider argues amongst other things that it is

[794] See Chapter 1 Note 9 - a phrase adapted from one used by Korobkin, R., (2008) Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323 at p1337 & p1338

[795] See: Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337; Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13

[796] As well as offering a separate data source that is arguably at least partially quantitative in nature, the TKI offers an element of triangulation that is described in detail in Chapter 4.

only capable of capturing the '*static self*'[797] and essentially does not allow for the fact that style is capable of changing during the conduct of any given negotiation[798]. The current research study does suggests that most interviewees perceive their negotiation style to be stable, despite some interviewees describing that their behaviour might change multiple times during any given negotiation depending on the situation. Arguably Schneider's concerns can be addressed by clarifying the distinction between what is an overall negotiation style and what are specific negotiation behaviours used in a particular circumstance or context. On this analysis the data in the current study would support the ability of a interviewee to identify with a stable overall style or predisposition to negotiation that involves the predominant use of certain negotiation behaviours but also encompasses the use of less typical types of behaviour as circumstances dictate. This analysis is arguably supported by Shell's description of negotiation style as a relatively stable cluster of behaviours[799] referred to earlier.

The essence of what the results of the current study show is that although the majority of the interviewees associate themselves with what they considered to be a more cooperative type of negotiation behaviour, the TKI results suggest that their behavioural style may be better characterised as what Kilmann describes as '*intermediate assertive and cooperative*[800]*'.* This behavioural style essentially

[797] Schneider, A. K., & Brown, J. G., (2013) 'Negation Barometry: A Dynamic Measure of Conflict Management Style', 28 *Ohio State Journal on Dispute Resolution* 557-580 at p557 where she attributes the phrase to Peter Gabrielli, a Yale law student, coined this phrase during a debrief of the TKI in a Negotiation class taught in the Fall of 2012.

[798] Schneider, A. K., & Brown, J. G. (2013) 'Negation Barometry: A Dynamic Measure of Conflict Management Style', 28 *Ohio State Journal on Dispute Resolution* 557-580 at p 557

[799] Shell, G. R., (2001) 'Bargaining styles and negotiation: The Thomas–Kilmann Conflict Mode Instrument in negotiation training'. *Negotiation Journal*, 17, 155–174 at p156.

[800] Kilmann, R. H., & Thomas, K. W., (1977), 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument,' *Educational and Psychological Measurement*, 37, 309-325 at pp309 & 310.

[800] Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 7. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf

involves a mixture of both cooperative and competitive types of behaviours and is labelled by Kilmann as '*compromising'*. Kilmann describes compromising as each person getting partially satisfied, as opposed to collaborating where each party get potentially all their interests met[801]. When defined in terms of the *Dual Concern Model,* which describes TKI outcomes in terms of concern for your own outcome (self) measured against concern for the interests of the other party (other)[802], the results of the current study suggest that the majority of the interviewees have a balanced but moderate concern for both.

It is particularly important to highlight that fundamentally Kilmann sees compromising behaviour as zero-sum [803] distributive behaviour, distinct from collaborating that involves integrative value creating[804]. As such, the TKI data and its analysis would suggest that although the behaviour of the majority of the interviewees may be perceived as reasonable, incorporating elements of both cooperative and some more competitive traits, it is still likely to be fundamentally zero-sum compromise behaviour rather than the value creating, problem solving collaborative behaviour that is often associated in the literature with effectiveness in negotiation.

If this interpretation of the TKI analysis is indeed correct, then it suggests that the majority of the interviewees actually display behaviour that much of the literature arguably considers to be suboptimal since it doesn't actually indicate that the

[801] Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 7. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf

[802] First described by: Blake, R. R., & Mouton. J. S., (1964) 'The Managerial Grid', Houston: Gulf Publications

[803] The strict definition of zero-sum is where the total gains for one side minus the total losses for the other side equal zero (See: Cooter, R., Marks, S., & Mnookin, R., (1982), 'Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour', 2 *Journal of Legal Studies*. 225 -251). For a helpful explanation of the zero-sum paradigm see: Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving' 31 *UCLA Law Review* 754 at pp783 - p789.

[804] Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 7. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf

interviewees are predisposed to use cooperative/problem-solving behaviour to create mutually beneficial agreements through the use of a 'win-win' type of interest based value creating behaviour[805].

Another aspect of the TKI analysis that is worthy of discussion is the predominance of avoiding behaviour seen amongst the interviewees. With the second highest number of interviewees having it as their highest score, and with the second highest mean score across all the behavioural styles, it is clearly of some significance. Although, as has already been described in Chapter 6, there are perhaps some moderating circumstances relevant to this particular result, it remains clear that the TKI scores suggest that many of the interviewees have a predisposition towards avoiding behaviour when dealing with conflict.

In many respects avoiding is perceived as the least helpful or least constructive mode of behaviour described by the TKI and indeed Nelken indicates that law students dislike being categorised as such[806]. Kilmann classifies it as *'neither attempting to satisfy your own needs nor attempting to satisfy the other person's needs[807]'* but does go on to distinguish '*good avoiding'* from '*bad avoiding'* as where '*you purposely leave a conflict situation in order to collect more information, wait for tempers to calm down, or conclude that what you first thought was a vital issue isn't that important after all. Bad avoiding, however, is when the topic is very important to both you and the other people involved in the conflict (and to the organization) but you aren't comfortable with confronting them. Instead, you're inclined to sacrifice your needs and their needs which undermines your self-esteem,*

[805] See: Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West at p41; Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p189

[806] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p6 [Nelken, M. L., (2005)]

[807] Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 4. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf

leaves you perpetually dissatisfied, and prevents you from helping the others.'[808] Schneider also suggests a positive aspect to an overall negative assessment of avoiding in that it might allow negotiators to *'pick their battles' or 'conserving their resources'*[809].

As previously discussed, Nelken has suggested that the overall effect of avoiding behaviour also depends on the leverage of the parties engaged in the negotiation. Her analysis suggests that avoiding behaviour can result in greater concessions being achieved when leverage is high[810]. Although the literature has long supported the assertion that negotiators with more power than their counterparty are able to claim a greater share of value[811], the literature also suggests that in asymmetric-power dyads overuse of leverage by the more powerful party can trigger behaviours that limit value creation[812] and as such there are arguably clearly dangers associated with such an avoiding behavioural predisposition. It is also relevant to note that the failure to offer concessions, sometimes associates with avoiding behaviour, is likely to be perceived as negative and aggressive[813]. Not only is such behaviour ultimately zero-sum and unlikely to result in what might be characterised as value creating integrative behaviour, the literature suggests it is also arguably

[808] Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights at p 4. Available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf

[809] Schneider, A. K., and Brown, J. G., (2013) 'Negation Barometry: A Dynamic Measure of Conflict Management Style', 28 *Ohio State Journal on Dispute Resolution* 557-580 at p568

[810] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p6

[811] See: Mannix, E., Thompson, L., & Bazerman, M., (1989) 'Negotiation in small groups' *Journal of Applied Psychology*, 74, 508–517

[812] Wolfe, R. J., & McGinn, K. (2005) 'Perceived relative power and its influence on negotiations'. *Group Decision and Negotiation*, 14, 3–20 at p3

[813] Chi, S. S., Friedman, R. A., & Shih, H., (2013) 'Beyond Offers and Counteroffers: The Impact of Interaction Time and Negotiator Job Satisfaction on Subjective Outcomes in Negotiation', *Negotiation Journal* January 39-60 at p43

likely to result in more impasses since individuals with high power have been shown to be more likely to act in a risk-seeking way[814].

What perhaps can be concluded from this research study specifically in relation to avoiding behaviour is that the TKI results suggest a predisposition to such behaviour seen amongst a potentially significant number of the interviewees, something that is arguably not only surprising in a sample group of practising lawyers but may also have implications relating to how they perform in different leverage contexts.

This leads to the consideration of a further finding in the current research study that relates to the nature of the legal work that the interviewees are engaged in, defined in terms of contentiousness. Lawyers within the legal profession in the UK often define the type of work they do in terms of whether it is contentious or non-contentious. Contentious lawyers generally engage in work that is related to some form of dispute resolution process where negotiations are likely to be conducted against a backdrop of a court, tribunal or arbitration type of process. Non-contentious lawyers, as the term suggests, tend to be involved in anything that does not involve disputes and is often (but not exclusively) more advice driven or transactional in nature.

Although the results across the rest of the research study did not appear to find any discernable difference between both groups of lawyers, the TKI analysis does appear to suggest a difference between the two groups in that the contentious interviewees appear to tend to use accommodating behaviour more than non-contentious interviewees. This is perhaps difficult to explain given that one would have expected, if anything, contentious lawyers to use less accommodating behaviour and perhaps to use more competitive types of behaviour than their non-contentious colleagues. This is based on an argument that contentious contexts are more likely to involve adversarial settlement type of negotiation scenarios with no continuing relationships that are arguably more likely to benefit from competitive

[814] Anderson, C., & Galinsky, A. D., (2006) 'Power, optimism, and risk-taking', *European Journal of Social Psychology* 36, 511–536 at p529-530

types of distributive negotiation behaviour than non-contentious contexts[815]. Indeed, this perception is perhaps reinforced by the interview data in the current study that shows that some of the non-contentious interviewees appear to also make an assumption that their contentious colleagues would be more likely to engage in competitive or indeed aggressive negotiation behaviour than they would.

However, what can perhaps be concluded from all the TKI results in the current study is that they are arguably in line with what Nelken found in her 2005 study that looked at TKI results for US law students and practising lawyers. She concludes that '*the competitive/adversarial lawyer stereotype of popular culture is not borne out by studies of either lawyers or law students. The data discussed above on negotiation styles of law students demonstrate that they are most likely to use a compromising style in dealing with conflict.*[816]'

However, Nelken then appears to go on to equate the TKI compromising style that Kilmann himself defines as being fundamentally zero-sum directly with the value creating and problem solving characterisation of the cooperative/problem-solving behaviour described in the earlier Schneider and Williams study, a conclusion that would appear to be difficult to substantiate[817].

Finally, when the TKI results are considered in conjunction with the interview data, they arguably highlight that that the interviewees in the current study are perhaps not actually as cooperative in their approach to negotiation as they may instinctively perceive themselves to be. This may suggest that lawyers have a different perception of what it means to be cooperative when compared to non-lawyers. Perhaps, given that the interviewees operate in what is considered to be a highly adversarial context, even as cooperative legal negotiators the group may

[815] For a general discussion on distributive negotiation see; Thompson L., (2015) 'The mind and the heart of the negotiator', Prentice Hall, Upper Saddle River, New Jersey, Sixth Edition, Chapter 3

[816] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p16 & p17

[817] Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1 at p17

actually be far more competitively orientated than they perceive themselves to be when measured against negotiators from non-legal contexts.

8.4 Motivations in legal negotiations

The TKI analysis is linked directly to the concept of motivations in negotiations through the Dual Concern Model which is primarily concerned with what has been described as the 'social motivations' that are a balance between the concern for a negotiators own outcome against a concern for the others outcome[818]. This section now focuses on a broader discussion of the results specifically related to what the current study says about the motivations of legal negotiators and how they might be related to effectiveness and behavioural style in legal negotiations.

8.4.1 Are motivations linked to a concept of effectiveness?

Although the literature acknowledges that in legal negotiations there are differences in the interests and underlying motivations of lawyer and client that potentially conflict[819], there is also a view that '*most of the time in bargaining, client interests and lawyer interests are intertwined, and a lawyer does better for the client when he does better for himself*[820]'.

What the results from the current study suggests is a view that legal negotiators themselves are subject to a number of different motivations simultaneously that are interlinked, with an apparently cyclical relationship between the motivational factors identified in the study that also incorporates the concepts of both effective behaviour and effective outcome. This is represented diagrammatically in Figure 5 in Chapter 7.

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[818] See: Elfenbein, H. A., (2013) 'Individual Differences in Negotiation' Chapter 2 at p30. In Olekalns, M., & Adair, W. L., (Eds) *Handbook of Research on Negotiation,* London: Edward Elgar.

[819] See: Bebchuk, L. A., & Guzman, A, T., (1996) 'How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms', *Harvard Negotiation Law Review.* 1*:* 53-63. 4

[820] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution* 231 at p284.

What this motivational cycle suggests is that not only are motivations that appear to be focused on the client, the organisation or are personal in nature all interrelated in a cyclical relationship, but that the concept of effectiveness is an integral part of that cycle of motivational relationships. It supports the arguably instinctively assumed view that legal negotiators are motivated through the use of what they perceive to be effective negotiation behaviour to obtain what they perceive to be effective outcomes. The motivation cycle then goes on to suggest that the effective outcomes obtained then influence the motivation process, shaping broader motivational relationships that in turn leads back to influencing what might be perceived as effective behaviour and then outcomes again.

However, what is perhaps most significant from these findings is that when combined with a recognition of the importance of the subjective nature of a negotiators overall perception of effectiveness in legal negotiations, this cycle highlights that the nature of the motivations themselves appear to have a direct role in influencing how a legal negotiator actually perceives both effective outcomes and behaviours. In short, it suggests that what constitutes effectiveness for legal negotiators is ultimately directly linked to their motivations that in turn influences behaviour and then outcome, which in turn influence motivations in what amounts to a self-reinforcing cycle.

8.4.2 The nature of motivations

Proself versus prosocial

In terms of the nature of motivations themselves, a number of studies in the social psychological literature have distinguished motivations in negotiations broadly in terms of either proself or prosocial motivations. '*Proself motivation comprises both competitive and purely individualistic goals, and prosocial motivation comprises both cooperative and purely altruistic goals. Individuals with a proself motivation desire to maximize their own outcomes, and they have no (or negative) regard for the outcomes obtained by their opposing negotiator. Individuals with a prosocial*

motive desire a fair distribution that maximizes both own and other's outcomes, and they have a positive regard for the outcomes obtained by their opposing negotiator[821]*'.* Ingerson *et al* go on to argue that what appears to be a 'proself' default assumption has become established within the literature on negotiation and that negotiation behaviour is often considered to be '*best predicted and explained by selfish motives',* an approach referred to as '*instrumental rationality*[822]*'.* The authors dispute this view as essentially being overly simplistic whilst proposing their '*relational negotiation'* perspective, discussed earlier in this chapter[823].

The results in the current study did not reveal evidence that would necessarily support a move away from an instrumental rationality and disclosed no real evidence of any prevailing altruistic motivational imperative by legal negotiators. Although the concepts of fairness and reasonableness did emerge in the current study as factors that many interviewees thought were associated with effectiveness, very few interviewees indicated that they were specifically motivated by fairness of outcome or a concern about the result achieved by the other party. When these types of altruistic appearing factors did arise, they tended to be in the context of their ability to maximise other areas of perceived pro-self value such as maintaining the working relationship between the parties for reasons of being ultimately beneficial to their own client, and ultimately themselves, rather than for altruistic reasons.

However, the findings in the current research would arguably go some way to supporting the development of a more relationship orientated motivational model. Although many of the interviewees appeared to have client focused objectives, the motivations behind these objectives were revealed as being complex and indeed

[821] De Dreu C. K. W., Beersma B., Euwema M. C. & Stroebe K., (2006) 'Motivated Information Processing, Strategic Choice, and the Quality of Negotiated Agreement', *Journal of Personality and Social Psychology*, Vol. 90, No. 6, 927–943 at p928

[822] Ingerson, M., DeTienne, K. B., and Liljenquist, K, A., (2015) 'Beyond Instrumentalism: A Relational Approach to Negotiation', *Negotiation Journal* January, 31-46 at p32

[823] Ingerson, M., DeTienne, K. B., and Liljenquist, K, A., (2015) 'Beyond Instrumentalism: A Relational Approach to Negotiation', *Negotiation Journal* January, 31-46 at p37

interlinked with other motivations. On the face of it the key underlying interests of interviewees appear to most often have included personal and organisational factors based around reputational considerations, and securing repeat and new business. However, it is also clear that relationships were very often cited or alluded to as being an important factor, either in the context of protecting the relationship between the respective clients for on-going commercial reasons, or in the context of the personal relationship between the lawyer and client, or finally in the context of the relationship between repeat player lawyers in what they perceive to be small legal environment. However, where Ingerson *et al* might associate a 'relational negotiation' perspective with a less instrumental rationality, it is argued from the results of this study that the motivations behind such relationships can still be viewed from a proself perspective and a desire to maximize their own outcomes, albeit that the specific nature of the outcome desired is likely to be predominantly subjective and dependent on the individual legal negotiators particular motivations.

Motivations and reputations

The role of reputations appears not only to be important in the context of effectiveness discussed above, but also looks to be an important link between motivations and effectiveness. The argument advanced earlier in this chapter that the current study supports a view that reputations appear to have a more pronounced influence on perceived effectiveness in legal environment consisting of repeat player lawyers, arguably also applies to motivations. It is arguable that better dissemination of information discussed earlier in the chapter in the context of reputations might also accentuate the effect of the '*effective reputation – effective behaviour*' loop identified within the motivation cycle discussed above. This loop within the motivation cycle specifically recognises that having a reputation for effectiveness as a legal negotiator can promote further effective behaviour that in turn increases the reputation for effectiveness.

In the context of reputations, is worth noting that previous research that has found that having a reputation for value claiming distributive types of competitive

behaviour leads to objectively measured lower joint gains[824] arguably may be missing an important point. If the measure of effectiveness is ultimately predominantly subjective in nature, as is supported by the current research study, then objective measurements of joint gains are not arguably what legal negotiators or indeed their clients are ultimately predominantly pursuing. What the motivation cycle does is arguably show that legal negotiators are motivated to secure any reputation that they perceive to be associated with what they perceive to be effective outcomes. The fact that their perception of effectiveness appears to be significantly influenced by their client's subjective view leads to a conclusion that maximising objective joint gains may ultimately have little relevance. Even the more in-depth consideration of reputation by Welsh discussed earlier in this chapter which relates positive reputation with the perception of peers specifically in relation to skill, trust and maximisation of results[825], still arguably neglects the importance of the subjective filter of the legal negotiator himself or herself and any link to specific motivations.

Other motivational factors

Other relevant motivational factors came into focus in the analysis of the interview data. The categories of motivations identified suggest that factors such as social status and job satisfaction may also be relevant in determining how legal negotiators are motivated and indeed can be differentiated. In this context the literature raised the possibility that negotiators that have higher job satisfaction may influence the perception of outcome felt by their client – irrespectively of objective outcome. Research carried out by Chi *et al*[826] has recently found that *'customer satisfaction does not require negotiated price concessions, but rather*

[824] Tinsley, C., O'Connor, K., & Sullivan, B., (2002) 'Tough guys finish last: the perils of a distributive reputation'. *Organizational Behavior and Human Decision Process* 88: 621-642

[825] Welsh, N. A., (2012) 'The Reputational Advantages of Demonstrating Trustworthiness' *Negotiation Journal* Volume 28, Issue 1, 117–145 at p139

[826] Chi, S. S., Friedman, R. A., & Shih, H., (2013) 'Beyond Offers and Counteroffers: The Impact of Interaction Time and Negotiator Job Satisfaction on Subjective Outcomes in Negotiation', *Negotiation Journal* January 39-60

depends on extensive interaction with salespeople who are happy in their work. This is the first study to show that negotiator job satisfaction can affect important negotiation outcomes[827]*'.* Although there is no direct link in the research to any legal negotiation context, given the finding in the current research study which indicates that subjective perceptions are an important factor in perceived effectiveness in legal negotiations, it does at least open the possibility that legal negotiators who are motivated by job satisfaction might influence negotiation effectiveness.

The current study also suggests that personal motivations based around what might be broadly characterised as prestige, rank and social hierarchy appeared to be important to some of the interviewees. Hierarchy differences are considered to be present in all social groups and may be explained as the *'rank order of individuals or groups on a valued social dimension*[828]*'.* However, although some studies have considered links between concepts such as dominance, prestige and influence[829], the methodology of current study was only able to recognise that such personal motivations were likely to exist amongst the sample group and that it appeared to be often associated with career advancement through the organisation. Any more detailed consideration of this observation is beyond the scope of this study.

Finally, very few of the interviewees report being motivated by wanting to win or to beat the other party, an observation that would appear to be consistent with the finding that the predominant behavioural style was found to be more towards what the interviewees perceived to be cooperative. However, this perhaps needs to be

[827] Chi, S. S., Friedman, R. A., & Shih, H., (2013) 'Beyond Offers and Counteroffers: The Impact of Interaction Time and Negotiator Job Satisfaction on Subjective Outcomes in Negotiation', *Negotiation Journal* January 39-60 at p37

[828] Magee, J. C., & Galinsky, A. D. (2008) 'Social hierarchy: The self-reinforcing nature of power and status'. *Academy of Management Annals,* 2, 351–398 at p354

[829] See for example: Cheng, J. T., Tracy, J. L., Foulsham, T., Kingstone, A., & Henrich, J., (2013), 'Two Ways to the Top: Evidence That Dominance and Prestige Are Distinct Yet Viable Avenues to Social Rank and Influence', *Journal of Personality and Social Psychology* Vol. 104, No. 1, 103–125

considered more fully in the context of how motivations might be linked to behavioural style that is considered next.

8.4.3 Motivations and behavioural style

Although the current study suggests a link between legal negotiators' motivations and their perceptions of effectiveness, the analysis of the results did not appear to identify any relationship between distinct types of motivations and a particular negotiation behavioural style.

The analysis of the interview data identified three arguably distinct motivational groupings based on the identification of common motivational characteristics and then allocated each interviewee to one of the groups. It was evident that there were interviewees with the most common type of negotiation behavioural style (measured in terms of both self perception and TKI score) in all of the three of the identified motivational groupings. Although there are potentially some variations between the three groups relating to certain words that interviewees use to describe themselves, the overall analysis suggests no link between a particular negotiation behavioural style and the nature of a interviewees underlying motivations, suggesting that lawyers are therefore likely to be motivated to engage a particular negotiation behavioural style for a number of different underlying reasons.

However, the nature of the characterisation of the three groups of motivations identified by the analysis does give some grounds for further comment and discussion. The group that has been labelled 'status motivated', broadly motivated by career advancement, personal development and peer recognition, when considered from a Dual Concern Model [830] perspective could arguably be characterised as being mostly concerned with their own outcome. The group that has been labelled 'relationship motivated', broadly motivated by being liked by others, enjoying their working environment, building relationships and avoiding

[830] See: Blake, R. R., & Mouton. J. S., (1964) 'The Managerial Grid', Houston: Gulf Publications

uncomfortable situations, when considered from a Dual Concern Model perspective could arguably be characterised as being mostly concerned with others at the expense of themselves. Finally, the 'ethically motivated' group is broadly motivated to maintain professional standards of behaviour, ethics and trust, and takes pride and satisfaction from their skill and knowledge. When considered from a Dual Concern Model perspective these interviewees are arguably either intermediate in their concern for self and the other or perhaps may more accurately be described as concerned with the 'process', which is neither a concern for self nor the other party although ultimately may benefit both.

Although the three motivational groups that have been developed from the interview data therefore appear to relate to some extent to the two dimensions that underpin the TKI assessment, the TKI scores themselves and indeed the interview data within the study does not suggest any apparent relationship between motivations and negotiation behavioural style. It remains evident that the 'status motivated' group includes interviewees with highest scores from all five separate TKI categories, and indeed interviewees who are highest in the most common TKI category of compromising can be found across all three motivational groupings. It is also true that there are interviewees within the 'status motivated' group that perceive themselves to be cooperative and consensual, and interviewees within the 'relationship motivated' group that consider themselves to be firm negotiators.

In the context of these findings it is of note that authors such as Williams and Schneider have associated particular types of negotiation behavioural style with particular motivations and goals. Schneider makes an assumption that aiming to secure as large a settlement as possible is essentially motivated by the self-interest of the lawyer over and above the client[831] and that '*maximising settlement*',

[831] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p166-167

'*profitable fees'*, and '*improving firm reputation*' are in some way indicative of adversarial goals and indeed behaviour[832].

In that respect the results from the current study clearly suggest that past studies in the negotiation literature that fundamentally characterise a particular type of approach or negotiation style in terms of particular underlying motivations, and indeed fails to differentiate between the substance of negotiation behaviour and the tone or manner in which it is delivered, are therefore arguably likely to be based on a false premise.

As has been discussed earlier in this study, more recent work by authors such as Craver in particular has essentially suggested a decoupling between motivations and behaviour in relation to certain behavioural styles and essentially argue that individuals can negotiate using apparently cooperatively behaviour but for highly competitive or adversarial goals and thus presumably underlying motives. Craver writes: '*When Professor Williams and I combined his previous study with one conducted years later by Professor Schneider, we concluded that many highly skilled negotiators are neither Cooperative/Problem-Solvers nor Competitive/Adversarials - they are a hybrid. They combine the best traits from both categories by seeking highly beneficial results for their own sides, but they endeavor to accomplish this objective in a respectful and seemingly cooperative manner[833]'.*

As has been discussed above, the findings of the current research study would also support a distinction between the tone of delivery of particular negotiation behaviour and the substance of that behaviour, which is another feature that is consistent with this hybrid type of approach.

[832] Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p175

[833] Craver C. B., (2014) 'How to Conduct Effective Transnational Negotiations between Nations, Nongovernmental Organizations, and Business Firms', 45 *Washington* University Journal of Law & Policy 69 at p86

However, in order to test the existence of this type of hybrid negotiation approach further, it is perhaps appropriate to consider the results of the current study in terms of some of the elements that Craver attributes to the group he describes as '*effective competitive/problem-solvers'*. The following elements have therefore been extracted from Cravers work and then commented upon:

> 1. *'They work to maximize their client's returns, but they endeavour to accomplish this objective in a courteous and seemingly cooperative manner'*[834].

The current study supports a notion of maximisation of client returns but arguably in terms of subjective perception of satisfaction rather than of any notion of objectively measured client returns. The current study clearly suggests that many of the interviewees seek to maximise client satisfaction in what might be considered a reasonable and cooperative manner.

> 2. *'They also recognize the importance of expanding the overall pie divided between the bargaining parties'*.[835]

The concept of expanding the pie is more problematic and is harder to assess. The results in the current study would tend to suggest that the majority of the interviewees are more likely to engage in compromising behaviour, which as has been described above is ultimately zero-sum, rather than the collaborative behaviour associated with true value creating behaviour.

> 3. *Although they strive to claim more of the distributive items desired by both sides, they look for integrative terms valued more by one side than by*

[834] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35 *American Journal of Trial Advocacy* 1 at p10 & p11

[835] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35 *American Journal of Trial Advocacy* 1 at p11

> *the other in recognition of the fact that if these terms are resolved efficiently, both sides will achieve better results'*.[836]

There is some evidence from the current study that interviewees balance the desire to obtain more for their clients with a concept of efficiency of the process, and an understanding that both parties to the negotiation must be allowed to achieve what they fundamentally need.

> 4. *'Although they may manipulate opponent perceptions with respect to the degree to which they value particular terms, they do not employ truly deceitful tactics. They realise a loss of credibility would seriously undermine their capacity to obtain beneficial accords'*.[837]

There was clear evidence in the current study that many of the interviewees consider the manipulation of their negotiation counterparty to be fundamentally part of the negotiation process. However, interviewees also almost universally distinguished this behaviour from deceitful behaviour, something that all the interviewees reported as behaviour they would not use. Acting professionally and being trustworthy also emerged as something that would assist the overall negotiation process.

> 5. *'They understand that the imposition of poor terms on their adversaries does not necessarily benefit their own clients. All other factors being equal, they wish to maximize opponent satisfaction, as long as this does not require significant concessions with respect to terms valued by their own side'*.[838]

There was a general recognition amongst many of the interviewees in the current study that the other party to a negotiation needed to get something out of a

[836] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35 *American Journal of Trial Advocacy* 1 at p11

[837] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35 *American Journal of Trial Advocacy* 1 at p12

[838] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35 *American Journal of Trial Advocacy* 1 at p12

negotiated agreement. Very few of the interviewees were motivated by wanting to win or beat their opponent and appeared to have not instinct to impose poorer than necessary terms on a negotiation counterparty.

> 6. *'At the conclusion of bargaining encounters, they do not compare the results they have achieved with those obtained by their adversaries. They instead ask themselves whether their clients like what they received'.*[839]

The current study provides clear evidence that a large majority of the interviewees measure the effectiveness in legal negotiations primarily in terms of the subjective perception of their client and not generally with reference to any comparison with the outcome achieved by their negotiation counterparty.

> 7. '*Competitive problem-solvers appreciate the importance of negotiation process. They understand that persons who believe the bargaining process has been fair and they have been treated respectfully are more satisfied with objectively less beneficial final terms than those with objectively more beneficial terms achieved through a process considered less fair and less respectful. This explains why proficient competitive problem-solvers always treat their adversaries with respect and act professionally. They are also careful at the conclusion of interactions to leave opponents with the feeling those persons obtained "fair" results'.*[840]

The current research study revealed that many interviewees think in terms of creating balanced commercial agreements that match risk and reward. This was associated with a conceptualisation of the negotiation process as a fair process, along with a desire to act professionally and ethically.

> 8. *They do not work to maximize opponent returns for purely altruistic reasons. They appreciate the fact that such behaviour most effectively*

[839] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35 *American Journal of Trial Advocacy* 1 at p12

[840] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35 *American Journal of Trial Advocacy* 1 at p12 & p13

> *enhances their ability to advance their own interests. They understand that they must offer their opponents sufficiently generous terms to induce those persons to accept the agreements they are proposing. They also want to be certain that adversaries will honour the terms agreed upon*.[841]

The current study found no evidence that interviewees are motivated by altruism but that they instead strive for various client focused objectives that are often motivated by deeper personal or organisational goals. However, it also did not find evidence that interviewees sought to actually maximise their opponents return, rather they tended to report an understanding that concessions often needed to be made in order to secure agreement.

> 9. '*…attorneys often interact with the same opponents in the future. If those individuals feel that their current encounters have been pleasant and beneficial, they will look forward to future interactions with those persons*'.[842]

There was clear evidence in the current study that indicated interviewees are very aware of the repeat interactions they have with other lawyers in legal negotiations and that they understand that taking a reasonable approach is likely to be beneficial for future interactions.

Comparison of the current results against the Craver competitive/problem-solver criteria arguably highlights an important observation. Although there is a great deal of alignment there is also a key difference. Craver assumes that the competitive/problem-solvers that he considers make up a significant percentage of effective legal negotiators will engage at least to some extent in true interest based value creating behaviour. However, as has been discussed above, the evidence suggests that the interviewees in the current study, although reasonable and

[841] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35 *American Journal of Trial Advocacy* 1 at p13

[842] Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35 *American Journal of Trial Advocacy* 1 at p13

cooperative, fundamentally appear to engage in what might properly be considered zero-sum compromising behaviour.

In many respects arguably what reference to the Craver criteria has highlighted is encapsulated in the criticism by Lande of the ARCO (Appropriate-Result, Consensus-Orientated) behaviour described by Kritzer[843], where Lande effectively suggests that although such lawyers may perceive themselves as being cooperative, they are not in reality engaging in true interest-based negotiation behaviour that he argues is at the heart of value creating behaviour[844]. Indeed, it can be argued that the overall characterisation of the behaviour displayed by the majority of the interviewees in the current study is likely to be closer in nature to the Ordinary Legal Negotiation (OLN) approach discussed earlier in this research described by Lande[845] than to the hybrid competitive/problem-solver described by Craver.

On this basis, it is arguable that what the current study suggests is that the most common style of effective negotiator derived from the perception of the lawyers in the sample group may be more likely to be in the nature of a 'reasonable/compromiser' rather than the competitive/problem-solver[846] theorised by Craver.

The perceptions of the lawyers themselves are arguably relevant to the development of the legal negotiation behavioural literature in two key ways. Firstly, since the existing Williams empirical study that has been instrumental in the

[843] Kritzer, H. M., (1991) 'Let's Make A Deal: Understanding the Negotiation Process in Ordinary Litigation', Madison: University of Wisconsin Press at p118-127, referred to in Chapter 3 of this Thesis

[844] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p117

[845] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144, see notes 20, 354 and 356 above.

[846] It is acknowledged that the relative power and bargaining strength of a negotiators may have ultimately influenced the choice of the negotiation behaviour used by the lawyers in the sample group in any given situation although there was no direct indication of this evident from the analysis of the interview data and no suggestion that such factors would have changed the nature of the characterisation of the various negotiation behaviour described in this study.

development of the legal negotiation behavioural literature was fundamentally based on the perception of the lawyers involved, and indeed the more recent Craver characterisation of legal negotiation behaviour is itself based on a reinterpretation of that original Williams data, then the results of the current research study which are also based on perception must be relevant to informing the development of the negotiation behavioural theory that has emerged from that earlier research. Secondly, the current research study is fundamentally concerned with how legal negotiators themselves perceive effectiveness within legal negotiations. As has been outlined earlier in this thesis, it is difficult to interpret earlier research that seeks to in some way measure effectiveness without first understanding what legal negotiators themselves understand by the concept and thus what they actually perceive themselves to be working to achieve, something that the current research seeks to inform. The current study provides some evidence of what that perception might be.

8.4.4 Final assessment

Having presented the results in Chapters 5, 6 and 7, it is clear from the findings discussed in detail in this chapter that there are a number of conclusions that can properly be drawn from this research study together with implications for future research. This follows in Chapter 9 which presents the final conclusions of this PhD thesis.

Chapter 9 – Conclusions and implications

9.1 Overview

The inspiration behind this PhD research study was the recognition highlighted in the first Chapter 1 that although negotiation is a key function carried out by lawyers, it continues to be a challenge to develop a research driven legal negotiation framework that accurately reflects what happens in practice. Within that context, a lack of understanding of the concept of effectiveness and what legal negotiators actually understand by this concept has been identified as a clear deficiency identified within the available literature. Indeed, arguably very little progress has been made in this particular area since Heumann and Hyman specifically identified a need to design a future study that could help develop understanding about what lawyers actually mean by effectiveness in a negotiation[847].

In attempting to address this fundamental deficiency within the literature, this research study has made a number of findings and related findings that have been discussed in some detail in the previous chapter. The purpose of this final chapter is to draw together these findings and identify conclusions that can be reasonably drawn that have theoretical and empirical implications and make a contribution to the literature.

9.2 Conclusions

The predominantly qualitative methodology allows a number of empirically supported conclusions to be drawn from the findings discussed in Chapter 8 that, it is submitted, make a small but significant contribution to the legal negotiation

[847] Heumann, M. & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310 at p279 at Note 24

literature. Each conclusion is presented in the context of the research questions it addresses.

Research Question 1 – *How do lawyers characterise what they understand by 'effectiveness' in the context of legal negotiation?*

Conclusion 1. Lawyers from within the study sample group generally appear to perceive effectiveness to relate to both the negotiation process as well as to the outcome. The perception of effectiveness by lawyers from within the sample group is most likely to be based on criteria which can be characterised as 'subjective'[848] **and which reflect the lawyers perception of client satisfaction rather than being principally based on objective negotiation outcome related criteria.**

The first conclusion focused on the concept of effectiveness suggests that lawyers may perceive the assessment of effectiveness in the context of legal negotiations to be related to both the process of negotiation and to the negotiation outcome, and significantly, that such assessment may be primarily subjective in nature and related to their perception of client satisfaction. This conclusion is arguably significant in that it suggests that research in the legal negotiation field that looks to relate effectiveness primarily to an objective assessment of outcome may be failing to understand what lawyers are in reality attempting to achieve. The current study lends some empirical support to research on subjective value in negotiations such as the study by Curhan *et al* who propose that an important source of subjective value in negotiations is the way that the negotiators feel about the negotiation

[848] See Section 5.5.1 above for a more detailed explanation of how the term 'subjective' is defined and used within this research study. In this study the term is used in direct contrast to what is classified in the current study as 'objective' assessments criteria, which are in the nature of economic outcomes '*which are the explicit terms or products of a negotiation'* and which might include specific monetary, strategic or contractual objectives that are clearly defined and measurable.

process rather than simply an objective assessment of the process itself[849]. The current study more broadly lends support to a move identified in the literature that suggests using purely rational economic models to understand legal negotiation may not be helpful in producing a relevant framework.

Conclusion 2. The perception of effectiveness held by lawyers from within the sample group, insofar as it applies specifically to the negotiation process, looks to relate generally to both the tone of delivery of particular negotiation behaviour, as well as to the substance of that behaviour.

Although this study suggests that perceptions of effectiveness may relate to both the perception of the process of legal negotiation and the perception of outcome, in the context of the negotiation process and the perception of the negotiation behaviour used during the negotiation process this study lends some empirical support to the developing literature that seeks to make a distinction between the substance (content/tactics) of that negotiation behaviour and the manner (style/tone) in which it is delivered. This finding has particular significance in relation to the characterisation and indeed definition of specific negotiation behaviours and lends empirical support to the conclusions reached by Gifford in his criticism of the Williams study in that it failed to recognise that negotiators require to make decisions about the use of both style and tactics[850], and ultimately supports the authors and researchers who propose that any useful framework for legal negotiation must incorporate recognition of this distinction[851].

[849] Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512 – p294

[850] Gifford, D. G., (2007) 'Legal negotiation: Theory and practice', 2nd Edn. St. Paul, Minnesota: Thomson West at p31

[851] See: Gifford, D. G., (2007) 'Legal negotiation: Theory and practice', 2nd Edn. St. Paul, Minnesota: Thomson West; Craver, C. B., (2011) "The impact of Negotiator Styles on Bargaining Interactions', 35. *American Journal of Trial Advocacy* 1; Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13

3. Lawyers form within the sample group generally perceive their reputation to be closely linked to their effectiveness, with reputational effects perceived to be more significant in what they perceive to be a small legal market dominated by repeat player lawyers.

This conclusion acknowledges the frequently expressed perceived relationship within the sample group between reputation and effectiveness, and its link to the nature and perceived size of the legal market that legal negotiators operate in. Previous studies have linked smaller legal markets to an increase in reputational effect[852]. The current research arguably adds to the literature by suggesting that some lawyers who perceive themselves to operate in a small market perceive increased reputational effect to be linked to the existence of single practice area lawyers who interact with each other often in repeat transactions.

Such a conclusion arguably builds on the research by Anderson & Shirako[853] who suggest that in order for reputational effects based on past behaviour to be relevant the reputations must be disseminated effectively throughout the relevant negotiation community.

4. Lawyers from within the sample group generally consider that the nature of the relationship between the legal negotiators on either side of a legal negotiation influences their perception of effectiveness in relation to legal negotiations, and that this effect is perceived to be more significant in what they perceive to be smaller legal markets in practice areas dominated by repeat players.

[852] Gilson, R. J., & Mnookin R. H., (1995) 'Disputing through agents: Cooperation and conflict between lawyers in litigation'. *Columbia Law Review* 94(2): 509–566; Tinsley, C. H., Cambria, J., & Schneider, A. K., (2008) 'Reputations in Negotiation', *Marquette University Law School Legal Studies Research Paper Series,* Research Paper No. 08-08, July, 202-214

[853] Anderson, C., & Shirako, A., (2008) 'Are Individuals' Reputations Related to Their History of Behavior?' *Journal of Personality and Social Psychology*, Vol. 94, No. 2, 320–333

This conclusion lends some empirical support to research by Fleck *et al*[854] and also by Curhan *et al*[855] suggests that such an influence on behaviour might result in legal negotiators negotiating more favourably with other lawyers because they are friends, and that they might fail to capitalise on their ability to claim value in order to protect, maintain or enhance relationships. Indeed other implications related to this conclusion are suggested by the research from Patton & Balakrishnan[856] who found that in situations where there is more likelihood of future dealings, negotiators are more likely to act in a friendly way and use cooperative problem-solving behaviours compared to one-off negotiators, as well as being more likely to produce greater equality in the satisfaction levels experienced by each of the parties.

The conclusion also goes on to suggests that the effect of the relationship between the lawyers involved on either side of the negotiation may be more significant in legal practice areas that are perceived to be dominated by repeat player lawyers in legal markets that are perceived to be small.

5. There is a perceived link by a majority of lawyers from within the sample group between the personality of a lawyer and the nature of the legal negotiation behaviour that they might find effective.

The final conclusion that relates specifically to effectiveness lends some empirical support to findings in the general negotiation literature that suggest a link between the personality of a negotiator and their negotiation behaviour and performance. In

[854] Fleck, D., Volkema, R., Pereira, S., Levy, B., & Vaccari, L., (2014) 'Neutralizing Unethical Negotiating Tactics: An Empirical Investigation of Approach Selection and Effectiveness', *Negotiation Journal* January 23-48

[855] Curhan, J. R., Neale, M. A., Ross, L., & Rosencranz-Engelmann, J., (2008) 'Relational accommodation in negotiation: Effects of egalitarianism and gender on economic efficiency and relational capital', *Organizational Behavior and Human Decision Processes* 107: 192–205

[856] Patton, C., & Balakrishnan, P., (2010) 'The impact of expectation of future negotiation interaction on bargaining processes and outcomes'. *Journal of Business Research* 63(8): 809–816 at p809

particular, this conclusion lends some supports the research by Dimotakis *et al*[857] who found that personalities are an important variable in negotiations, and indeed suggests that their findings may be specifically applicable in a legal negotiation environment.

Research Question 2 – *How do lawyers perceive their own effectiveness as negotiators and characterise their personal negotiation behavioural style?*

Although this study found that essentially the entire sample group perceived themselves to be broadly characterised as effective negotiators, this was not arguably a significant conclusion for reasons discussed earlier. However, the finding that the evidence that they relied upon to make this assertion was predominantly based on what has been characterises as 'subjective'[858] based assessment and was generally not based on any objective assessment of outcomes was valuable in that it helped to inform the first conclusion of this research study.

6. Lawyers from within the sample group predominantly consider themselves to have a negotiation behavioural style perceived to be 'reasonable' and more 'cooperative' in nature than 'competitive', with the true nature of that style likely to be in the nature of a 'reasonable/compromiser' rather than a 'competitive/problem-solver'.

Although the current study offers some support for the existence of a hybrid type of characterisation of effective legal negotiation that encompasses a mixture of both cooperative and competitive types of behaviour, this study does not support a conclusion that such hybrid effective behaviour can be characterised in terms of the competitive/problem-solving behaviour proposed by Craver. This is on the basis that no evidence was found to suggest that the majority of legal negotiators in the

[857] Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193

[858] See note 848 above.

study sample group appeared to display the interest based, value-creating aspect to their behaviour that is a key feature of Craver's characterisation.

What the current study did suggest was that although the type of behavioural style adopted by the majority of legal negotiators in the study group does appear to include some elements of both the cooperative and competitive types of behaviour that Craver describes, their behavioural style is likely to be fundamentally more in the nature of zero-sum compromise behaviour rather than value-creating interest based behaviour of the type that Craver suggests.

What the conclusions of this study does suggest is that the characterisation of the effective type of hybrid behaviour potentially associated with effective legal negotiators might be more accurately be characterised as 'reasonable/compromise' behaviour. In many respects it can be argued that the overall characterisation of this behaviour is likely to be closer in nature to the Ordinary Legal Negotiation (OLN) approach described by Lande[859] and discussed earlier in this research.

Research Question 3 – *What are the underlying motivations of lawyers when they are engaged in legal negotiation and are they related to perceptions of effectiveness or to a particular negotiation behavioural style?*

7. Lawyers from within the sample group are generally subject to a range of motivations but can be broadly categorised as belonging to one of three arguably distinct motivational groupings based on the identification of overall motivational characterisations labelled as 'status motivated', 'relationship motivated' and 'ethically motivated'.

This conclusion recognises that although the individual lawyers from within the sample group appear to generally be subject to a number of different motivations, for each lawyer these motivations can be categorised as belonging to one of three

[859] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144

groupings based on the overall nature or characterisations of their group of motivations. The three groupings appear to have at least some relationship to the Dual Concern Model[860] of analysis, which is able to broadly describe each of the groups in the context of concern for yourself against concern for the other party.

8. Although the motivations of lawyers within the sample group appear to be linked to perceptions of effectiveness, no evidence was found to suggest that specific motivations are linked to a particular negotiation style.

This conclusion has particular implications relating to the on-going debate as to the nature of effective negotiation behavioural style. The earlier conclusion that supports a distinction between the tone and substance of negotiation behaviour, together with this conclusion that suggests there is no evidence of a link between a specific motivation and a particular negotiation behavioural style, arguably provides further evidence of the unreliability of the original conclusions reached by both Williams and later Schneider in their characterisation of the effective cooperative/problem-solver as someone defined by specific motivations and who fails to distinguish between how behaviour is delivered and the substance of that behaviour.

This conclusion is arguably significant as it provides some empirical support for the still contentious decoupling of the direct association between specific motivations and particular legal negotiation behavioural styles, an association that appears to remain a feature of a section of the legal negotiation literature.

9.3 Contribution and why does it matter?

Specific contributions

In Chapter 1 of this study it was recognised that the development of a new and more accurate legal negotiation framework should address what Lande describes as

[860] See: Blake, R. R., & Mouton. J. S., (1964) 'The Managerial Grid', Houston: Gulf Publications.

'*negotiation romanticism*'[861]. In many respects the key contributions of the current research study adds to the body of knowledge in this field in a way that echoes Lande's assertion that existing frameworks essentially present an over simplification of the legal negotiation process. Ultimately, the purpose of the current research study was to advance our understanding of the legal negotiation process in a way that will contribute to the development of a more relevant legal negotiation framework.

Subjective perception

The current study provides evidence that existing theories of legal negotiation that are fundamentally constructed around a concept of economic rationality and the maximisation of objective outcome criteria ultimately fail to understand the role that the subjective perception of both lawyer and client plays in the overall assessment of what constitutes effectiveness in legal negotiation. This has significant implications for how the value being created and distributed during any given legal negotiation should be assessed. It suggests that in existing models that rely on the identification and measurement of value within a legal negotiation[862], the concept of what constitutes value must be extended to include subjective sources of value, something that is arguably extremely hard and perhaps even impossible to accurately assess. As well as assisting the development of more relevant legal negotiation frameworks that focus on a better understanding of how to deal more effectively with notions of subjective value, this research also raises some important questions about the ethics of potentially manipulating the subjective feelings of clients during the negotiation process using techniques identified such as the management of expectations.

Context matters

[861] Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* 109-144 at p113

[862] Directly relevant to the notion of a Pareto-Efficient Frontier. See: Raiffa, H. (1982). 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University at p190

The current study also contributes to the current literature by finding that effectiveness within a legal negotiation cannot be assessed in isolation from key contextual factors. Both the perceived size and structure of the particular legal market and the personalities of the lawyers who deliver it or indeed are subject to it have been specifically identified as being important contextual factors. This study therefore implies that any existing framework that does not recognise that there is a relationship between key contextual variables and both how effectiveness in legal negotiations is perceived by lawyers and the behaviour that they ultimately use is likely to be of limited value. The closely related findings concerning the role that the relationships between the lawyers themselves involved in any given legal negotiation may have on both behaviour and outcomes also has significant implications. It suggests that in certain circumstances lawyers may act in a way designed to protect a continuing relationship with another lawyer rather than necessarily acting directly in the best interests of a particular client. This clearly has professional and ethical implications for legal practice although whether this effect ultimately leads to poorer outcomes for any given client might be very difficult to establish.

The nature of legal negotiation behaviour

Finally, the current study provides evidence that contributes to the literature by challenging our current understanding regarding the nature and characterisation of the type of effective legal negotiation behaviour that is thought to be most prevalent amongst practising lawyers.

Firstly, the current study suggests that the most prevalent negotiation behaviour described by previous research and characterised as problem solving (whether cooperative/problem-solving or indeed competitive/problem-solving) is not in reality in the nature of integrative, interest based value creating behaviour as has previously been assumed. Rather the results of the current study suggest it is likely to be more in the nature of zero-sum compromising behaviour. If correct, this fundamentally challenges our understanding of the nature of the most prevalent

type of legal negotiation behaviour undertaken by practising lawyers. This implies that legal negotiation behaviour might not be as broadly efficient (and arguably effective) as has originally been presumed in that zero-sum types of compromise behaviour are understood to be less efficient at maximising value than integrative value creating behaviour. However, it should also be noted that this assumption itself is in reality based on a rational economic model of what constitutes value in negotiations, something that is not supported by the findings of this study.

Secondly, the findings of the current study challenges the accuracy of previous studies that have effectively defined particular negotiation styles or behaviours as being fundamentally associated with specific underlying motivations. The current study found no evidence that the most prevalent characterisation of effective negotiation behaviour or style was associated with any specific underlying motivations and suggests that lawyers can engage in different negotiation behaviours for a range of underlying motivational reasons. This contributes to our understanding of negotiation behaviour in that it provides evidence for the decoupling of the previously assumed link between the nature and characterisation of negotiation behaviour and the underlying motivations of the lawyers involved. Instead the current study provides evidence that supports the existence of a fundamental distinction between the tone and the substance of negotiation behaviour and its place in the development of a more relevant legal negotiation framework. A focus away from motivations and towards a distinction between tone and substance is likely therefore to provide the basis for a more enduring and relevant legal negotiation framework.

Implications specific to Scotland

As has been highlighted, the conclusions of the current research indicate that the perceived size and structure of the legal market in Scotland by lawyers within the sample group is generally considered by them to be a significant contextual factor that influences legal negotiation behavioural and perceptions of effectiveness.

The conclusions at least suggest the possibility that there may be increased relationship and reputational effects found within the legal market in Scotland, or indeed within sections of that market, that might lead to different perceptions of effectiveness being present when compared to a larger market such as is found in England although further research would be needed to establish this. If such a finding could be shown to be applicable to the broader legal profession within Scotland or indeed applicable to identifiable groups within the Scottish legal profession, it may potentially lead to the development of more effective legal negotiation strategies by lawyers within the Scottish legal profession when engaged in negotiations with lawyers from larger jurisdictions.

9.5 Future research

The conclusions highlight areas for potential future research in a number of different areas.

1. The question of what lawyers perceive to be effective has been considered in this study with the findings clearly suggesting that the perception of the client may also be very important. Further research is therefore suggested that looks specifically at how the clients in legal negotiations perceive effectiveness.

2. Clearly the full nature and characterisation of effective legal negotiation behaviour still remains unclear. Although this study suggests that effective legal negotiation behaviour is less likely to be interest based and value creating than has previously been suggested, this needs to be researched further. It has proved extremely difficult to design and implement studies that isolate and measures actual legal negotiation behaviour rather than just simulations involving students. However, it might prove possible to design a study that analyses the final outcomes of legal negotiations (perhaps the terms of any publicly available contracts, transactions or settlements) to detect evidence of any value creating behaviour that may have taken place.

3. This study has suggested that there is no link between specific motivations and particular characterisations of negotiation behavioural styles. This needs to be tested further and in the context of whether it only applies to the predominant 'reasonable/compromise' behaviour identified in this study. It is possible that extreme types of behaviours such as highly competitive and aggressive behaviours, or indeed highly accommodating behaviours, both of which were poorly represented in the data obtained in the current research study, might show a specific relationship with certain motivations.

4. The questions raised in relation to the size and structure of legal markets require further investigation. In particular it needs to be established whether some smaller legal markets actually have a concentration of specialist lawyers who are repeat players as this study has suggested. Is this a feature of all smaller legal markets or is it related to other features of particular legal markets? Does it apply to the total legal market in a jurisdiction or can it apply to highly specialist areas of law within a much larger jurisdiction?

5. Further research into the nature of legal reputations and the mechanism for their dissemination in different sizes and structures of legal markets would be helpful. Research that specifically looks at precisely how individual lawyers receive information about reputation, and what form that information takes and over what time period would be helpful.

6. Finally, it would be helpful to conduct research that explores how the nature of relationships between lawyers is influenced by repeat contact, and the difference in levels of repeat contact that is present in different legal markets and in different specialisms within legal markets.

9.6 Limitations of the study

The limitations of this research study have been discussed in Section 4.10 of Chapter 4 which deals with methodological weaknesses in the context of the

development of the research study methodology. However, it is worth revisiting the subject to discuss some further insight gained following the analysis.

Previous studies into perceptions of effectiveness have been criticised on the basis that lawyers might simply be reporting as effective what they themselves feel comfortable with and indeed use themselves. Schneider's attempt at neutralising this by asking respondents to complete a self-assessment[863] may have gone some way to address this, but her methodology is still heavily criticised as being unreliable by Condlin[864].

However, given that this study specifically seeks the perception of the interviewees rather than an objective assessment, and indeed that the main elements that have emerged as being significant to that perception of effectiveness appear to be ultimately primarily subjective in nature, arguably this would appear to substantially obviate the effect of this potential bias.

The main problem within this study is arguably in the determination of the interviewees' perception of their own effectiveness. The problem here is not whether or not interviewees are capable of understanding whether they are or are not objectively effective since that is not what is being asked. The problem is that they may not accurately report what they actually think due to an element of interviewee bias, particularly given that the interviewer is also a member of the legal profession and they perhaps might not wish to admit to being ineffective at one of their key functions as lawyers. However, this limitation was recognised when analysing the results and the specific findings that are related to this part of the interview data have a limited effect on any of the main conclusions of the study.

[863]Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143 at p152

[864] Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231 at p288

In addition, the element of self-selecting bias identified earlier is perhaps worthy of further comment. There can be no doubt that participation in this study demanded a not insignificant input in terms of time and effort from each interviewee and it may be assumed that in order to do so they are likely to have had some interest in the subject that may ultimately have predisposed the interviewees to a particular way of thinking about negotiation. However, given the difficulty in securing the participation of thirty-five research interviewees from a population of busy practising lawyers it was not practical to take any further steps to eliminate the element of self-selecting bias in this study without severely compromising the ability to secure the necessary number of interviewees to take part in the study.

Finally, there is no doubt the TKI instrument provided very useful data that unlocked valuable insight that has proved very relevant to a number of the conclusions. However, despite it being a widely recognised assessment that has been used for over forty years, there are limitations to its effectiveness. Schneider raises concerns that it only provides a snapshot of behaviour that relates to what is in an individual's mind on a particular day, and that it does not recognise that individuals might deploy a mix of different behaviours in any given situation. She also considers that it is two-dimensional and ignores other types of behaviours that might be important or relevant in negotiation[865]. Whilst these limitations are accepted, it is submitted that the benefits of using such a well understood and respected assessment outweigh its limitations.

9.7 Summary statement

This research study was inspired by a desire to assist in the development of a research driven legal negotiation framework that more accurately reflects what happens in practice.

[865] Schneider, A. K., & Brown, J. G., (2013) 'Negation Barometry: A Dynamic Measure of Conflict Management Style', 28 *Ohio State Journal on Dispute Resolution* 557-580 *at* pp567-568

In that regard it is hoped that the conclusions reached in this study have provided some further understanding and insight around the important concept of effectiveness, particularly in relation to what legal negotiators actually understand by the concept, and some factors that may be directly relevant to it.

Bibliography

Adler, R. S., & Silverstein, E. M., (2000). 'When David meets Goliath: dealing with power differentials in negotiations.' *Harvard Negotiation Law Review*, 5: 1-112

Agapiou, A., & Clark, B., (2013) 'A follow-up empirical analysis of Scottish construction clients interaction with mediation', (2013) *Civil Justice Quarterly,* 32 *(*3*).* 349-368

Agapiou, A., & Clark, B., (2012) 'An empirical analysis of Scottish Construction Lawyers' interaction with mediation: a qualitative approach', *Civil Justice Quarterly*, 31(4), 494-513

Agapiou, A., & Clark, B., (2011) 'Scottish construction lawyers and mediation: an investigation into attitudes and experiences', *International Journal of Law in the Built Environment,* Vol. 3, No. 2; 159-181

Agndal, H., (2007) 'Current trends in business negotiation research: An overview of articles published 1996-2005', SSE/EFI Working Paper Series in Business Administration, No 2007:003 February available at: http://swoba.hhs.se/hastba/papers/hastba2007_003.pdf (last visited 26.5.2015)

Allred, K.G. (2000) 'Distinguishing Best and Strategic Practices: A Model of Prescriptive Advice for Managing the Dilemma between Claiming and Creating Value'. *Negotiation Journal*, Vol 16, Issue 4, 387-397

Amanatullah, E. T., Michael W. Morris, M. W. & Curha, J. R., (2008) 'Negotiators Who Give Too Much: Unmitigated Communion, Relational Anxieties, and Economic Costs in Distributive and Integrative Bargaining' *Journal of Personality and Social Psychology*, Vol. 95, No. 3, 723–738

Anderson, C., & Galinsky, A. D., (2006) 'Power, optimism, and risk-taking', *European Journal of Social Psychology* 36, 511–536

Anderson, C., & Shirako, A., (2008) 'Are Individuals' Reputations Related to Their History of Behavior?' *Journal of Personality and Social Psychology*, Vol. 94, No. 2, 320–333

Avruch, K., (2000) 'Culture and negotiation pedagogy'. *Negotiation Journal* 16(4): 339–346

Ayres, I., (2010) 'Never Say No: The Law, Economics, and Psychology of Counteroffers'. *25 Ohio State Journal on Dispute Resolution.* 603

Bailey, K. D., (1994), 'Methods of Social Research', (4th Edition) New York: The Free Press

Barry, B., & Friedman, R. A., (1998) 'Bargainer characteristics in distributive and integrative negotiation', *Journal of Personality and Social Psychology*, 74, 345–359

Basit, T. N., (2003) 'Manual or electronic? The role for coding in qualitative data analysis', *Education Research* 45(2) 143-153

Bazerman, M. H., & Neale, M. A., (1992) 'Negotiating rationally'. New York: Free Press

Bebchuk, L. A., & Guzman, A, T., (1996) 'How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms', *Harvard Negotiation Law Review.* 1*:* 53-63. 4

Benjamin, A., 'The Role of Law School in Producing Psychological Distress Revisited', Undated, available at: http://archive.law.fsu.edu/academic_programs/humanizing_lawschool/images/benjamin.pdf (last visited 26.5.2015)

Bibas, S., (2004) 'Plea Bargaining Outside the Shadow of Trial', *Harvard Negotiation Law Review* 117: 2463

Birke, R., & Fox, C. R., (1999) 'Psychological principles in negotiating civil settlements.' *Harvard Negotiation Law Review* 4: 1-57

Blake, R. R., & Mouton. J. S., (1964) 'The Managerial Grid', Houston: Gulf Publications

Blaxter, L., Hughes, C., & Tight, M., (1996) 'How to Research', Buckingham, Open University Press

Blumberg, A. S., (1967) 'The Practice of Law as Confidence Game: Organizational Cooptation of a Profession', Law & Society Review, Vol.1(2), pp.15-39

Bottom, W. P., & Paese, P. W., (1999) 'Judgment accuracy and the asymmetric cost of errors in distributive bargaining', *Group Decision & Negotiation* 8:349, 358-362

Box, G. E. P., & Draper, N. R., (1987) 'Empirical Model-Building and Response Surfaces', Wiley Series in Probability and Statistics

Brett, J. M., Shapiro, D. L., Lytle, A. L., (1998) 'Breaking the bonds of reciprocity in negotiations'. *Academy of Management Journal* 41, 4; p410-424

Brockopp, D. Y., & Hastings-Tolsma, M. T., (2002) 'Fundamentals of Nursing Research', (2002) Jones and Bartlett Publishers, Inc; 3rd Revised edition

Bruner, J., (1979) 'On Knowing: Essays For The Left Hand', (Second Edition) Belknap Press of Harvard University Press

Bucher, R., Fritz, C. E. & Quarantelli, E. L., (1956) 'Tape Recorded Interviews in Social Research', *American Sociological Review*, Vol. 21, No. 3 pp. 359-364

Buelens, M., Van De Woestyne, M., Mestdagh, S., & Bouckenooghe, D., (2008) 'Methodological Issues in Negotiation Research: A State-of-the-Art-Review', *Group Decision & Negotiation* 17:321–345

Burns, R (2000) 'Introduction to Research Methods', London, Sage

Camp, J., (2002) 'Start with No: The Negotiating Tools That the Pros Don't Want You to Know'. Crown Publications

Cheng, J. T., Tracy, J. L., Foulsham, T., Kingstone, A., & Henrich, J., (2013) 'Two Ways to the Top: Evidence That Dominance and Prestige Are Distinct Yet Viable Avenues to Social Rank and Influence', *Journal of Personality and Social Psychology* Vol. 104, No. 1, 103–125

Chi, S. S., Friedman, R. A., & Shih, H., (2013) 'Beyond Offers and Counteroffers: The Impact of Interaction Time and Negotiator Job Satisfaction on Subjective Outcomes in Negotiation', *Negotiation Journal* January 39-60

Cialdini, R. B., (1993) 'Influence: The Psychology of Persuasion', Collins; Revised Edition

Condlin R. J., (2008) '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', 9 *Cardozo Journal of Conflict Resolution*. 1

Condlin, R. J., (2012) 'Bargaining Without Law' 56 *New York Law School Law Review* 281

Condlin, R. J., (2008) 'Every day and in Every Way We Are All Becoming Meta and Meta' or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio State Journal on Dispute Resolution*. 231

Coope, S., & Morris, S., (2002) 'Personal Injury Litigation Negotiation and Settlement' HMSO, Edinburgh

Cooter, R., Marks, S., & Mnookin, R., (1982) 'Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour', 2 *Journal of Legal Studies*. 225 -251

Corbetta, P., (2003) 'Social Research Theory, Methods and Techniques'. London: SAGE Publications

Costa, P. T., Jr., & McCrae, R. R. (1992) 'NEO PI-R professional manual'. *Odessa, FL: Psychological Assessment Resources*

Craver, C. B., (2001) 'Effective legal negotiation and settlement'. Fourth Edition, LEXIS Pub

Craver C. B., (2003) 'The Negotiation Process', *27 American Journal of Trial Advocacy*. 271

Craver, C. B., (2010) 'What Makes A Great Legal Negotiator', 56 *Loyola Law Review* 337

Craver, C. B., (2010) 'Negotiation Ethics for Real World Interactions', 25 *Ohio State Journal on Dispute Resolution.* 299

Craver, C. B., (2011) 'The Inherent Tension Between Value Creation And Value Claiming During Bargaining Interactions', 12 *Cardozo Journal of Conflict Resolution* 1

Craver, C. B., (2011) 'The impact of Negotiator Styles on Bargaining Interactions', 35. *American Journal of Trial Advocacy* 1

Craver C. B., (2014) 'How to Conduct Effective Transnational Negotiations between Nations, Nongovernmental Organizations, and Business Firms', 45 *Washington* University Journal of Law & Policy 69

Curhan, J. R., Elfenbein, H. A., & Xu, H., (2006) 'What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation', *Journal of Personality and Social Psychology*, Vol. 91, No. 3, 493–512

Curhan, J. R., Elfenbein, H. A., & Eisenkraft. N., (2010) 'The objective value of subjective value: A multi-round negotiation study'. *Journal of Applied Social Psychology* 40(3): 690–709

Curhan, J. R., Neale, M. A., Ross, L., & Rosencranz-Engelmann, J., (2008) 'Relational accommodation in negotiation: Effects of egalitarianism and gender on economic efficiency and relational capital', *Organizational Behavior and Human Decision Processes* 107: 192–205

Curtis, S., Gesler, W., Smith, G., Washburn, S., (2000) 'Approaches to sampling and case selection in qualitative research: examples in the geography of health', *Social Science & Medicine* 50

Daicoff, S., (1997) 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attribute Bearing on Professionalism', 46 *American University Law Review* 1337

Davies, J., (2011) 'Formalizing legal reputation markets'. *Harvard Negotiation Law Review* 16(1): 367–382

Dawson, R., (2001) 'Secrets Of Power Negotiating'. Career Press 2nd Ed

De Dreu C. K. W., & Carnevale P. J., (2005) 'Disparate methods and common findings in the study of negotiation'. *International Negotiation* 10:193–203

De Dreu C. K. W., Beersma B., Euwema M. C. & Stroebe K., (2006) 'Motivated Information Processing, Strategic Choice, and the Quality of Negotiated Agreement', *Journal of Personality and Social Psychology*, Vol. 90, No. 6, 927–943

Deem, R., (2001) 'Globalisation, New Managerialism, Academic Capitalism and Entrepreneurialism in Universities: Is the Local Dimension Still Important?' *Comparative Education* 37(1), 7–20

De Girolamo, D., (2013) 'The Negotiation Process: Exploring Negotiator Moves Through a Processual Framework' 28(2) Ohio State Journal on Dispute Resolution 353.

Denise Fleck, D., Volkema, R., Pereira, S., Levy, B., and Vaccari, L., (2014) 'Neutralizing Unethical Negotiating Tactics: An Empirical Investigation of Approach Selection and Effectiveness', *Negotiation Journal* January 23-48

DeRue, D, Conlon, D, Moon, H, & Willaby, H., (2009) 'When is straightforwardness a liability in negotiations? The role of integrative potential and structural power', *Journal Of Applied Psychology*, 94, 4, pp. 1032-1047

Dicicco-Bloom, B. and Crabtree, B. F., (2006) 'The qualitative research interview'. *Medical Education*. 40: 314–21

Diefenbach, T., (2009) 'Are case studies more than sophisticated storytelling?: Methodological problems of qualitative empirical research mainly based on semi-structured interviews', *Quality & Quantity* 43:875–894

Diekman, K. A., Tenbrunsel, A. E., & Galinsky, A. D., (2003) 'From Self-Prediction to Self-Defeat: Behavioral Forecasting, Self-Fulfilling Prophecies and the Effect of Competitive Expectations', 85 *Journal of Personality & Social Psychology*. 672, 672-83

Dimotakis, N., Conlon, D. E., & Ilies, R., (2012) 'The Mind and Heart (Literally) of the Negotiator: Personality and Contextual Determinants of Experiential Reactions and Economic Outcomes in Negotiation', *Journal of Applied Psychology*, Vol. 97, No. 1, 183–193

Druckman, D., (1977) 'Boundary Role Conflict: Negotiation as Dual Responsiveness', 21 *Journal of Conflict Resolution*, 639

Druckman, D., (1986) 'Stages, turning points, and crises: Negotiating military base rights, Spain and the United States'. *Journal of Conflict Resolution*, 30, 327–360

Druckman, D., (2001) 'Turning points in international negotiation: A comparative analysis', *Journal of Conflict Resolution*, 45, 519–544

Druckman, D., (2004) 'Departures in negotiation: Extensions and new directions', *Negotiation Journal* 20, 185–204

Druckman, D., & Olekalns, M., (2011) 'Turning Points in Negotiation', *Negotiation and Conflict Management Research,* 4: 1–7

Easterby-Smith, M., Thorpe, R. and Lowe, A., (1991) 'Management Research: An Introduction', Sage Publications, London

Eisenberg, M. A., (1976) 'Private ordering through negotiation: dispute-settlement and rulemaking'. 89 *Harvard Law Review* 637-681

Eisenberg, T., Lanvers, C., (2009) 'What is the Settlement Rate and Why Should We Care?' *Journal of Empirical Legal Studies,* Volume 6, Issue 1, 111-146

Eisenhardt, K. M., (1989) 'Building theories from case study research'. *Academy of Management Review* 14(4): 532 – 550

Elfenbein, H. A., (2013) 'Individual Differences in Negotiation' Chapter 2. In Olekalns, M., & Adair, W. L., (Eds) *Handbook of Research on Negotiation* London: Edward Elgar

Elfenbein, H. A., Curhan, J. R., Eisenkraft, N., Shirako, A., & Baccaro, L., (2008) 'Are some negotiators better than others? Individual differences in bargaining outcomes', *Journal of Research in Personality* 42 1463–1475

Firestone, W. A., (1993) 'Alternative arguments for generalizing from data as applied to qualitative research', *Education Researcher,* 22(4), 16-23

Fisher, R. and Ury, W. (1981) 'Getting to Yes: negotiating agreement without giving in'. England: Penguin Books

Fleck, D., Volkema, R., Pereira, S., Levy, B., and Vaccari, L., (2014) 'Neutralizing Unethical Negotiating Tactics: An Empirical Investigation of Approach Selection and Effectiveness', *Negotiation Journal* January 23-48

Flick, U., (2002) 'An introduction to qualitative research', (2nd Edition). London: Sage p216

Fox, K. H., (2009) 'Negotiation as a Post-Modem Process', 31 *Hamline Journal of Public Law & Policy* 367

Freund, J., (1992) 'Smart Negotiating', London: Simon & Schuster

Galinsky, A. D., Mussweiler, T., & Medvec, V. H. (2002) 'Disconnecting outcomes and evaluations: The role of negotiator focus'. *Journal of Personality and Social Psychology*, 83, 1131–1140

Genn, H., (1987) 'Hard Bargaining; Out of Court Settlement in Personal Injury Actions', Oxford University Press

Geoffrey P. Miller, G, P., (1987) 'Some Agency Problems in Settlement', *Journal of Legal Studies* Vol. 16 189

Gibbert, M., Ruigrok, W., and Wicki, B., (2008) 'What passes as a rigorous case study?' *Strategic Management Journal* 29: 1465–1474

Gifford, D. G., (1985) 'A Context-Based Theory of Strategy Selection in Legal Negotiation', 46 *Ohio State Law Journal* 41

Gifford, D. G., (1987) 'Synthesis Of Legal Counseling And Negotiation Models: Preserving Client-Centered Advocacy In The Negotiation Context'. *UCLA Law Review*, 34: 811-862

Gifford, D. G., (1989) 'Legal Negotiation: Theory and Application'. St. Paul, Minnesota: West Publishing Co

Gifford, D. G. (2007) 'Legal negotiation: Theory and practice', 2nd Edn. St. Paul, Minnesota: Thomson West

Gilson, R. J., & Mnookin R. H., (1995) 'Disputing through agents: Cooperation and conflict between lawyers in litigation', *Columbia Law Review* 94(2): 509–566

Golafshani, N., (2003) 'Understanding Reliability and Validity in Qualitative Research', *The Qualitative Report*, Volume 8 Number 4, 597-607

Golden, J., Moy, H. A., & Lyons, A., (2008) 'The Negotiation Counsel Model: An Empathetic Model for Settling Catastrophic Personal Injury Cases'. 13 *Harvard Negotiation Law Rev*. 211

Graham, P., (ed) (2003) 'Mary Parker Follett - prophet of management: a celebration of writings from the 1920s'. District of Columbia: Beard Books

Greenhalgh, L., & Chapman, D. I., (1998) 'Negotiator relationships: Construct measurement, and demonstration of their impact on the process and outcomes of negotiation'. *Group Decision and Negotiation* 7(6): 465–489

Gulliver, P.H., (1979) 'Disputes and Negotiations: A cross cultural perspective', Academic Press

Han-Ying Tng & Al K. C. Au., (2014) 'Strategic Display of Anger and Happiness in Negotiation: The Moderating Role of Perceived Authenticity', *Negotiation Journal* July 301-327

Hardon, A., Hodgkin, C., Fresle, D., (2004) 'How to investigate the use of medicines by consumers', *World Health Organization and University of Amsterdam* available for download at http://apps.who.int/medicinedocs/en/d/Js6169e/7.html (last visited 26.5.2015)

Harris, D. R., Maclean, M., Genn, H., Lloyd-Bostock, S., Fenn, P., Corfield, P., & Brittan, Y., (1984) 'Compensation and Support for Illness and Injury', Oxford: Clarendon Press

Hay, B. L., (1996) 'Contingent Fees and Agency Costs', *Journal of Legal Studies* Vol. 25 503

Heaton, J., (2004) 'Reworking Qualitative Data', London: SAGE Publications

Heinz, J.P., Nelson, R.L., Sandefur, R.L., & Laumann, E.O., (2005) 'Urban Lawyers: The New Social Structure of the Bar', University of Chicago Press.

Henham, R.J., (2000) 'Truth in Plea-bargaining': Anglo-American Approaches to the use of Guilty Plea Discounts at the Sentencing Stage', 29 Anglo-Am. L. Rev;

Heumann, M. & Hyman, J. M., (1996) 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What you Want"' *Ohio State Journal On Dispute Resolution,* 12**:** 253-310

Hollander-Blumoff, R., (2005) 'Legal Research on Negotiation', *International Negotiation* 10: 149-164

Hollander-Blumoff, R., (2010) 'Just Negotiation', 88 *Washington University Law Review*. 381

Hoppmann, P. T., (2000) 'Bargaining and Problem Solving: Two Perspectives on International Negotiation'. In Crocker, C. A., Hampson, F. O. & Aall, P. (Eds), *Turbulent Peace: The Challenges of Managing International Conflict.* Washington DC: USIP Press

Hutcheson, T. C., McKay, T., Farr, L., & Seddon, B., (1988) ' Evaluation of the stain Viablue for the rapid estimation of viable yeast cells', Journal of Applied Microbiology, Volume 6, Issue 4 85-88

Ingerson, M., DeTienne, K. B., & Liljenquist, K, A., (2015) 'Beyond Instrumentalism: A Relational Approach to Negotiation', *Negotiation Journal* January, 31-46

Johnston, J. S., & Waldfogel, J., '(2002) 'Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation', 31 *Journal Of Legal Studies* 39

Johnston, J. S., (2006) 'The Return Of Bargain: An Economic Theory Of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses And Consumers'. 104 *Michigan Law Review* 857

Kahn, R. L., & Cannell, C. F., (1957) 'The dynamics of Interviewing: Theory, Technique and Cases', New York: Wiley

Kahneman, D., (1991) 'Reference points, anchors, norms, and mixed feelings', *Organizational Behavior and Human Decision Processes*, 51, 296–312

Kates, S., (1998) 'A qualitative exploration into voters' ethical perceptions of political advertising: Discourse, disinformation and moral boundaries', *Journal of Business Ethics*, 17, 1871-1885

Kilmann, R. H., (2011) 'Celebrating 40 Years with the TKI Assessment- A summary of my favorite insights', CPP Author Insights available at: www.cpp.com/PDFs/Author_Insights_April_2011.pdf (last visited 26.5.2015)

Kilmann, R. H., & Thomas, K. W., (1977) 'Developing a Forced-Choice Measure of Conflict Behavior: The 'MODE' Instrument,' *Educational and Psychological Measurement*, 37, 309-325

Korobkin, R., (2000) 'A Positive Theory of Legal Negotiation', *Georgetown Law Journal,* 88: 1789-1831

Korobkin, R., (2008) 'Against Integrative Bargaining', 58 *Case Western Reserve Law Review* 1323

Korobkin, R., (2009) 'Negotiation Theory and Strategy', 2nd Edition, Aspen Publishers

Korobkin, R., & Guthrie, C., (1994) 'Opening offers and out-of-court settlement: A little moderation may not go a long way', 10 *Ohio State Journal on Dispute Resolution* 1

Krefting, L., (1991) 'Rigor in Qualitative Research: The Assessment of Trustworthiness', *The American Journal of Occupational Therapy*, 45*(3), 214-222.*

Kristensen, H., & Garling, T., (1997) 'The Effects of Anchor Points and Reference Points on Negotiation Process and Outcome', *Organizational Behavior and Human Decision Processes* Vol. 71, No. 1, July, 85–94

Kritzer, H. M., (1991) 'Let's Make A Deal: Understanding the Negotiation Process in Ordinary Litigation', Madison: University of Wisconsin Press

Kuttner, R., (2011) 'The Wave/Particle Tension in Negotiation', 16 *Harvard Negotiation Law Review*. 331-366

Kuzel, A., (1992) 'Sampling in qualitative inquiry'. In: Crabtree, B., Miller, W. (Eds.), *Doing Qualitative Research.* Sage, Newbury Park, CA

Kvale, S., (1994) 'Ten standard objections to qualitative research interviews', *Journal of Phenomenological Psychology*, 25, No 2, 147-173

Kvale, S., (1996) 'Interviews', London: SAGE Publications

Kwon, S. & Weingart, L., (2004) 'Unilateral concessions from the other party: concession behavior, attributions, and negotiation judgements'. *Journal of Applied Psychology*, 89(2):263-278

Lande, J., (2012) 'Teaching Students to Negotiate Like a Lawyer', 39 *Washington University Journal of Law & Policy* pp109-144

Lathlean, J., (2006) 'Qualitative analysis'. In Gerrish, K., Lacy, A. (eds*) The research process in nursing*. Oxford: Blackwell Science

Lax, D.A. & Sebenius, J.K. (1986) 'The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain', New York: Free Press

Lax, D. A. & Sebenius, J. K., (2006) '3D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals', Harvard Business School Press, Boston, MA

Leary, K., (2004) 'Critical moments in Negotiation', Negotiation Journal, 20 (2): 143-145

Lee, S., & Thompson, L., (2011) 'Do agents negotiate for the best (or worst) interest of principals? Secure, anxious and avoidant principal–agent attachment', *Journal of Experimental Social Psychology* 47 681–684

Lewicki, R. J., & Robinson, R. J., (1998) 'Ethical and unethical bargaining tactics: An empirical study', *Journal of Business Ethics.* 17(6). 665-682

Lewicki, R. J., Saunders, D. M., & Minton, J. W., (1997) 'Essentials of Negotiation'. Chicago: Irwin

Loewenstein, G. F., Thompson, L., & Bazerman, M. H., (1989) 'Social utility and decision making in interpersonal contexts', *Journal of Personality and Social Psychology,* 57, 426–441

Lord, C. G., Lepper, M. R., & Preston, E., (1984) 'Considering the Opposite: A corrective strategy for social judgement', 47 *Journal of Personality & Social Psychology* 1231

Lowenthal, G. T., (1982) 'General Theory Of Negotiation Process, Strategy, and Behaviour', 31 *University of Kansas Law Review* 69

Luce, R. D., & Raiffa, H., (1957) 'Games and Decisions: Introduction and Critical Survey'. New York: Wiley, Paperback reprint, New York; Dover

Lytle, A. L., Brett, J. M., Shapiro, D. L., (1999) 'The Strategic Use of Interests, Rights, and Power to Resolve Disputes', *Negotiation Journal* Jan; 15, 1

Macfarlane, J., (2005) 'The Emerging Phenomenon Of Collaborative Family Law (CFL): A Qualitative Study of CFL' available at: http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf (last visited 26.5.2015)

Mack, N., Woodsong, C., Macqueen, K. M., Guest, G., Namey, E., (2005) 'Qualitative Research Methods: A Data Collector's Field Guide', Research *Triangle Park, NC:* Family Health International

Magee, J. C., & Galinsky, A. D. (2008) 'Social hierarchy: The self-reinforcing nature of power and status', *Academy of Management Annals,* 2, 351–398

Main, B. G. M., and Park, A., (2000) 'The British and American Rules: an experimental examination of pre-trial bargaining in the shadow of the law'*, Scottish Journal of Political Economy*. 47, 1, 37-60

Main, B. G. M., and Park, A., (2002) 'The impact of defendant offers into court on negotiation in the shadow of the law: experimental evidence', *International Review of Law and Economics.* 22, 2, 177-192

Mannix, E., Thompson, L., & Bazerman, M., (1989) 'Negotiation in small groups', *Journal of Applied Psychology*, 74, 508–517

Marlow, C., (1993) 'Research methods', Pacific Grove, CA: Brooks/Cole

Marshall, C. & Rossman, G. B., (1999) 'Designing Qualitative Research' (3rd Edition), Thousand Oaks, CA, Sage

Menkel-Meadow, C., (1983) 'Legal negotiation: A study of strategies in search of a theory', *American Bar Foundation Research Journal:* 905-937

Menkel-Meadow, C., (1984) 'Toward Another View Of Legal Negotiation: The Structure Of Problem Solving', 31 *UCLA Law Review* 754

Menkel-Meadow, C., (2000) 'Teaching about gender and negotiation: Sex, truths and videotape', *Negotiation Journal* 16(4): 357–377

Menkel-Meadow, C., (2001) 'Negotiating with lawyers, men and things: The contextual approach still matters', *Negotiation Journal* 17(3): 257–93

Menkel-Meadow, C., (2004) 'Critical Moments in Negotiation: Implications for Research, Pedagogy and Practice', *Negotiation Journal* Apr 20, 2; 341-347

Menkel-Meadow, C., (2006) 'Why Hasn't the World Gotten to Yes? An Appreciation and Some Reflections', *Negotiation Journal*, Volume 22, Issue 4, 485–503

Menkel-Meadow, C., (2009) 'Chronicling the Complexification of Negotiation Theory and Practice', *Negotiation Journal*, October 25(4)

Messick, D. M., & Sentis, K. P., (1985) 'Estimating social and non-social utility functions from ordinal data', *European Journal of Social Psychology,* IS, 389-399

Moffitt, M., & Bordone, R., (eds) (2005) 'The Handbook of Dispute Resolution', San Francisco: Jossey-Bass

Moorhead, R., Sherr, A., Webley, L., Rogers, S., Sherr, L., Paterson, A., & Domberger, S., (2001) 'Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot'. Norwich, England: Stationery Office

Morrow. S. L., (2005) 'Quality and Trustworthiness in Qualitative Research in Counseling Psychology', Journal of Counseling Psychology, Vol. 52, No. 2, 250–260

Miller, G. P., (1987) 'Some Agency Problems in Settlement', 16 *Journal of Legal Studies* 189

Miles, M. B., & Huberman, A. M., (1994) 'Qualitative Data Analysis', 2nd Edition, Sage Publications

Mnookin, R. H., Peppet, S. R.,Tulumello, A. S., (1996) 'The Tension Between Empathy and Assertiveness', 12 *Negotiation Journal*. 217

Mnookin, R. H., Peppet, S. R.,Tulumello, A. S., (2000) 'Beyond Winning: Negotiating To Create Value In Deals And Disputes', By Cambridge, Ma: The Belknap Press of Harvard University.

Moorhead, R., Sherr, A., Webley, L., Rogers, S., Sherr, L., Paterson, A., & Domberger, S., (2001) 'Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot'. Norwich, England: Stationery Office

Morrow. S. L., (2005) 'Quality and Trustworthiness in Qualitative Research in Counseling Psychology', *Journal of Counseling Psychology*, Vol. 52, No. 2, 250–260

Morse, J. M., Barrett, M., Mayan, M., Olson, K., Spiers, J., (2002) 'Verification Strategies for Establishing Reliability and Validity in Qualitative Research', *International Journal of Qualitative Methods,* 1(2)

Neale, M. A., Huber, V. L., & Northcraft, G. B. (1987), 'The framing of negotiations: Contextual versus task frames', *Organizational Behavior and Human Decision Processes*, 39, 228–241

Nelken, M. L., (2005) 'The myth of the gladiator and law students' negotiation styles', 7 *Cardozo Journal Conflict Resolution* 1

Nelson, R. L., Trubek, D.M., & Solomon, R.L., (1992) 'Lawyers' ideals and lawyers' practices', Cornell University Press

Nelson, D. & Wheeler, M., (2004) 'Rocks and Hard Places: Managing Two Tensions in Negotiation', *Negotiation Journal*, Volume 20 Issue 1, 113 - 128

Neuman, W.L. (2000). 'Social Research Methods: Qualitative and Quantitative Approaches', 4th ed. Boston: Allyn & Bacon

Neuman, W. L., (2003) 'Research Methods: Qualitative and Quantitative Approaches', (5th ed.) New York: Pearson Education, Inc.

Neumann, R., & Krieger, S., (2003) 'Empirical inquiry twenty-five years after the lawyering process', *Clinical Law Review*, 10: 349-397.

O'Connor, K. M., Arnold, J. A., Burris, E. R., (2005) 'Negotiators' bargaining histories and their effects on future negotiation performance', *Journal of Applied Psychology* 90(2):350–62.

O'Leary, Z., (2004) 'The Essential Guide to Doing Research', London: SAGE Publications

O'Leary, Z., (2007) 'The Social Science Jargon Buster' at http://srmo.sagepub.com/view/the-social-science-jargon-buster/n114.xml (last visited 26/5/2015)

Olekalns, M., & Weingart, L. R., (2008), 'Emergent negotiations: Stability and shifts in negotiation dynamics', *Negotiation and Conflict Management Research,* 1, 135–160

Oliver, R. L., Balakrishnan, P. V., & Barry, B., (1994) 'Outcome satisfaction in negotiation: A test of expectancy disconfirmation', *Organizational Behavior & Human Decision Processes*, 60

Orr, D., & Guthrie, C., (2005) 'Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis', 21 *Ohio State Journal on Dispute Resolution* 597

Patton, C., & Balakrishnan, P., (2010) 'The impact of expectation of future negotiation interaction on bargaining processes and outcomes', *Journal of Business Research* 63(8): 809–816

Patton, M. Q., (2002) 'Qualitative evaluation and research methods' (3rd ed.) Thousand Oaks

CA: Sage Publications, Inc. Polit, D., & Hungler, B., (1991) 'Nursing research: Principles and methods', New York: J.B. Lippincott

Polit, D. F., & Beck, C. T., (2004) 'Nursing research: Principles and methods', (7th ed.). Philadelphia: Lippincott, Williams, & Wilkins

Pruitt, D. G., (1981) 'Negotiation Behaviour', New York: Academic Press

Pruitt, D. G. & Carnevale, P. J., (1993) 'Negotiation in social conflict', Buckingham: Open University Press

Pruitt, D.G., Carnevale, P.J., Ben-Yoav, O., Nochajski, T.H., & Van Slyck, M.R., (1983) 'Incentives for cooperation in integrative bargaining'. In Tietz, R., (Ed) *Aspiration levels in bargaining and economic decision making*, Berlin-Heidelberg New York: Springer-Verlag.

Punch, K., (1998) 'Introduction to Social Research: Quantitative and Qualitative Approaches', London: Sage

Putnam, L. L., & Jones, T. S., (1982) 'Reciprocity in negotiations: an analysis of bargaining interaction', *Communication Monographs* 49:171–191

Putnam, L. L., (1994) 'Challenging the Assumptions of Traditional Approaches to Negotiation', 10 *Negotiation Journal* 337

Putnam, L. L., (2004) 'Transformations and critical moments in negotiation', *Negotiation Journal* 20, 2; 275-295

Rackham, N., & Carlisle, J., (1978) 'The effective negotiator - Part 1: The behaviour of successful negotiators', *Journal of European Industrial Training*, Vol. 2 Issue 6: 6 - 11

Raiffa, H., (1982) 'The art and science of negotiation', Cambridge, Mass.: Belknap Press of Harvard University

Reinharz, S., (1993) 'Empty explanations for empty wombs: An illustration of a secondary analysis of qualitative data'. In Schratz, M., (Ed.) *Qualitative voices in education research*, London: Falmer

Richards, L., & Morse, J. M. (2007) 'Read me first for a user's guide to qualitative methods', (2nd Edition). Thousand Oaks, CA: Sage

Ringer, Robert J., (1978) 'Winning Through Intimidation', London: Circus/Futura

Riskin, L. L., (2002) 'The Contemplative Lawyer: On the Potential Contributions of Mindfulness Mediation to Law Students, Lawyers, and their Clients', 7 *Harvard Negotiation Law Rev*. 1, 16

Rogelberg, S. G., (2002) 'Handbook of research methods in industrial and organizational psychology', Blackwell Publishers

Rosenthal, D., (1974) 'Lawyer and Client: Who's in Charge?', Russell Sage Foundation

Rubin, A., & Babbie, E., (2010) 'Essential Research Methods for Social Work', United States: Brooks/Cole

Rubin, J. Z., Pruitt, D. G., & Kim, S. H., (1994) 'Social conflict: Escalation, stalemate and settlement', New York: McGraw-Hill

Saldana, J., (2009) 'The coding manual for qualitative researchers', Los Angeles, CA: SAGE

Sarat, A., & Felstiner, W. L. F., (1986) 'Law and Strategy in the Divorce Lawyer's Office', Law & Society Review, Vol. 20, No. 1 (1986), pp. 93-134

Saunders, M., Lewis, P., & Thornhill, A., (2000) 'Research Methods for Business Students', 2nd Edition, Pearsons

Schaubhut, N. A., (2007) 'Technical Brief for the Thomas-Kilmann Conflict Mode Instrument', Available at: http://www.kilmanndiagnostics.com/sites/default/files/TKI_Technical_Brief.pdf (Last visited 26.5.2015)

Schelling, T. C., (1956) 'An Essay on Bargaining', 46 *American Economic Review* 281

Schneider, A. K., (2002) 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harvard Negotiation Law Review* 143

Schneider, A. K., (2012) 'Teaching a New Negotiation Skills Paradigm', 39 *Washington* University Journal of Law & Policy 13

Schneider, A. K., & Brown, J. G., (2013) 'Negation Barometry: A Dynamic Measure of Conflict Management Style', 28 *Ohio State Journal on Dispute Resolution* 557-580

Schwab, W. H., (2004) 'Collaborative Lawyering: A closer look at an emerging practice', 4 *Pepperdine Dispute Resolution Law Journal*, 351

Sebenius, J. K., (1992) 'Negotiation Analysis: A Characterization and Review', *Management Science* 38(1), 18-38

Sebenius, J. K., (2009) 'Negotiation Analysis: From games to Inferences to Decisions to Deals', *Negotiation Journal* Volume 25, Issue 4

Shell, G. R., (2001) 'Bargaining styles and negotiation: The Thomas–Kilmann Conflict Mode Instrument in negotiation training', *Negotiation Journal*, 17, 155–174

Sherr, A., Moorhead, R., & Paterson, A., (1994) 'Lawyers, The Quality Agenda: Assessing and Developing Competence in Legal Aid', London: Her Majesty's Stationery Office.

Sherr, A., & Paterson, A., (2007) 'Professional Competence Peer Review and Quality Assurance in England and Wales and in Scotland', 45 Alta. L. Rev. 151 – 168

Siegel, S., & Fouraker, L., (1960) 'Bargaining and Group Decision Making', New York: McGraw-Hill

Silverman, D., (2006) 'Interpreting Qualitative Data', (3rd ed.) London: Sage

Sinaceur, M., & Neale, M., (2005) 'Not all threats are created equal: how implicitness and timing affect the effectiveness of threats in negotiations', *Group Decision and Negotiation*, 14:63-85

Sinaceur, M., & Tiedens, L., (2006) 'Get mad and get more than even: When and why anger expression is effective in negotiations', *Journal of Experimental Social Psychology*, 42, 314–322

Stone, D., Paton, B. & Heen, S., (1999) 'Difficult conversations: How to discuss what matters most'. New York: Penguin

Tam Tim-kui, P., (1993) 'The Role of Quantification in Qualitative Research in Education', Educational Research Journal, Vol. 8, pp.19-27

Thomas, K., (1976) 'Conflict and Conflict Management'. In Dunnette M. D., (Ed) *Handbook Of Industrial And Organizational Psychology.* Rand McNally College Pub. Co.

Thompson, L., (1990) 'Negotiation behavior and outcomes: Empirical evidence and theoretical issues', *Psychological Bulletin*, 108, 515–532

Thompson, L., (1990) 'The influence of experience on negotiation performance', *Journal of Experimental Social Psychology*, Volume 26, Issue 6, 528-544;

Thompson, L., (1991) 'Information exchange in negotiation'. *Journal of Experimental Psychology* 27, 161-179

Thompson L., (2005) 'The mind and the heart of the negotiator', Prentice Hall, Upper Saddle River, New Jersey, Third Edition

Thompson L., (2015) 'The mind and the heart of the negotiator', Prentice Hall, Upper Saddle River, New Jersey, Sixth Edition

Thompson, L., & DeHarpport, T., (1994) 'Social Judgement, feedback, and interpersonal learning in negotiation', *Organizational Behaviour and Human Decision Processes,* 58(3), 327-345

Tinsley, C. H., Cambria, J., & Schneider, A. K., (2008) 'Reputations in Negotiation', *Marquette University Law School Legal Studies Research Paper Series,* Research Paper No. 08-08, July, 202-214

Tinsley, C., O'Connor, K., & Sullivan, B., (2002) 'Tough guys finish last: the perils of a distributive reputation', *Organizational Behavior and Human Decision Process* 88: 621-642

Tsay, T.J. & Bazerman, M. H., (2009) 'A decision making perspective to negotiation: A review of the past and a look to the future', *Negotiation Journal* 25(4): 465-478

Tversky, A., & Kahneman, D., (1974) 'Judgement under uncertainty: Heuristics and Biases', 185 *Science* 1124-1131

Ury, W., (1991) 'Getting past No: Negotiating with difficult people' New York, Bantam Books

Ury, W. L., Brett, J. M., and Goldberg, S. B., (1993) 'Getting Disputes Resolved', 2nd Ed. San Francisco: Jossey-Bass Publishers

Van Dijk, E., Van Kleef, G. A., Steinel, W., Van Beest, I., (2008) 'A social functional approach to emotions in bargaining: When communicating anger pays and when it backfires', *Journal of Personality and Social Psychology 94*(4): 600–614

Van Kleef, G. A., De Dreu, C. K. W., & Manstead, A. S. R., (2004) 'The interpersonal effects of anger and happiness in negotiations', *Journal of Personality and Social Psychology* 86(1): 57–76

Van Kleef, G. A., De Dreu, C. K. W., (2010) 'Longer-term consequences of anger expression in negotiation: Retaliation or spillover?', *Journal of Experimental Social Psychology* 46 753–760

Vayrynen, R., (Ed) (1991) 'To settle or to transform? Perspectives on the resolution of national and international conflicts. New directions in conflict theory: Conflict resolution and conflict transformation'. London: Sage

Vrij, A., & S. Mann., (2004) 'Detecting deception: The benefit of looking at a combination of behavioral, auditory and speech content related cues in a systematic manner', *Group Decision and Negotiation* 13(1): 61–79

Walton, R. E., & McKersie, R. B., (1965) 'A behavioural theory of labor relations'. New York: McGraw-Hill

Walton, R.E., Cutcher-Gershenfeld, J.E., & McKersie, R. B., (1994) 'Strategic Negotiations: A Theory of Change in Labor-Management Relations', Boston: Harvard Business School Press

Wang, L., Northcraft, G. B., Van Kleef, G. A., (2012) 'Beyond negotiated outcomes: The hidden costs of anger expression in dyadic negotiation', *Organizational Behavior and Human Decision Processes* 119 54–63

Wells, P. (1994) 'Ethics in business and management research'. In Wass, V. J. and Wells, P. E. (eds), *Principles and practice in business and management research*, Aldershot: Dartmouth

Welsh, N. A., (2012) 'The Reputational Advantages of Demonstrating Trustworthiness', *Negotiation Journal* Volume 28, Issue 1, 117–145

Wetlaufer, G. B., (1990) 'The Ethics of Lying in Negotiations', 75 *Iowa Law Review* 1219

Wetlaufer, G. B., (1996) 'The Limits of Integrative Bargaining', 85 *Georgetown Law Journal* 369- 394

Wheeler, M., (1984) 'The Theory and Practice of Negotiation', 34 *Journal of Legal Education* 327

Wheeler, M., (2004), 'Anxious Moments: Openings in Negotiation', *Negotiation Journal*, 20: 153–169

White, J. J., (1967) 'The lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation', 19 *Journal of Legal Education*, 337

White, J., (1984) 'The pros and cons of "Getting to Yes"', *Journal of Legal Education* 34: 115–124

White, S. B., Valley, K. L., Bazerman, M. H., Neale, M. A., & Peck, S. R., (1994) 'Alternative models of price behavior in dyadic negotiations: Market prices,

reservation prices, and negotiator aspirations', *Organizational Behavior and Human Decision Processes*, 57 430–447

Wilkenfeld, J., (2004) 'Reflections on Simulation and Experimentation in the Study of Negotiation', *International Negotiation* 9: 429–199,

Williams, C., Bower, E. J., & Newton, J. T., (2004) 'Research in primary dental care. Part 6: Data analysis', *British Dental Journal* 197: 67-73

Williams, G. R., (1983) 'Legal Negotiation and Settlement', St. Paul, MN: Thomson West

Williams, G. R. & Craver C. B., (2007) 'Legal negotiating', St. Paul, MN: Thomson West

Wistrich, A. J., & Rachlinski, J. J., (2013) 'How Lawyers' Intuitions Prolong Litigation' 86 *Southern California Law Review* 571 - 636

Woolf, B., (1990) 'Friendly persuasion', New York: G.P. Putnam's Sons

Wolfe, R. J., & McGinn, K., (2005) 'Perceived relative power and its influence on negotiations', *Group Decision and Negotiation*, 14, 3–20

Yukle, G. A., (1974) 'Effects of the opponent's initial offer, concession magnitude and concession frequency on bargaining behaviour', *Journal of Personality and Social Psychology*, 30(3)

Zartman, I. W., Jensen, L., Pruitt, D. & Young, P., (1996) 'Negotiation as a Search for Justice', *International Negotiations: A Journal of Theory and Practice* 1(1)

Zohar, D., & Marshal, I., (1993) 'The Quantum Society: Mind, Physics, And A New Social Vision', New York: Bloomsbury Publishing.

Appendix I – Interview Schedule

PhD Research Interview Schedule

Preamble

1. Confidentiality and ethical code

3. Purpose of the research

4. Practical issues – consent and recording

Opening Questions

1. Brief professional history and area of law practiced.

2. How long qualified as a solicitor

3. Any history of negotiation training or exposure to negotiation theory (books etc).

Main question themes

1. I want to start off by asking how you would define the process of negotiation in a legal context – what is it and what is its purpose?

2. I next want to consider the concept of **'effectiveness'** in legal negotiations in relation to ***outcomes.***

- Outcomes – how would you characterise, describe or measure what constitutes an effective outcome in a legal negotiation?
- What kind of outcomes do you think 'effectiveness' in legal negotiation are associated with?
- How do you measure success in negotiations?

3. Next I want toy considering the concept of **'effectiveness'** in legal negotiations in relation to ***behaviours.***

- Behaviours – what kind of behaviours or conduct would you characterise as being **effective** in legal negotiations? Are there identifiable patterns to effective negotiating behaviour? Things that lawyers actually do? What strategies do you observe lawyers most commonly using?
- What kinds of negotiating behaviour or conduct do you observe being used or use yourself that you would characterise as being **ineffective**? Again, things that lawyers actually do? Things that lawyers actually do? What strategies do you observe lawyers most commonly using?
- Why do you think such conduct is ineffective?
- Is the tone of communication and interaction relevant? Modification of your own behavioural reply?
- (If not already mentioned it) - What is the role of 'fairness' in a legal negotiation? How about 'reasonableness'?
- What do you think about manipulative behaviour? How about 'deceitful' behaviour? What do you mean by 'deceitful'?
- Do you consider ethical behaviour to be effective behaviour? How about trust in negotiation?

4. I'm going to use different language here in terms of looking at what you think about in a negotiation. I want now to consider the kinds of things that you **think about and motivates** you when you negotiate on behalf of a client.

- What are your motivations? Is there any distinction between your personal motivations, your organisational motivations and those associated directly with your client?
- Does it matter to you how the other side 'feels' after a negotiation? How would you like them to feel?

- How do your own personal motivations and interests impact on how you negotiate on behalf of a client? Reputation? Remuneration? Beating another lawyer?

5. Finally, I want you to **think about yourself as a negotiator**.

- Do you consider yourself to have a particular negotiation 'style'? Does that style change in different circumstances? If so then how?
- If someone was to suggest a conceptualisation of negotiation behaviour in a framework that included cooperative negotiation behaviour, whatever that means to you, and competitive negotiation behaviour, do you agree with this conceptualisation? If you do then where would you see yourself within that framework, or does that framework not mean anything to you or apply to you.
- Do you think that 'cooperative' and 'competitive' behaviours are mutually exclusive in a negotiation?
- What informs your negotiation style, why do you think you negotiate in the way you do?
- Do you consider yourself to be an effective legal negotiator? If so why? If not then why not? What **evidence** do you use to support your assertion?

6. What is your attitude or perception regarding the usefulness of negotiation training?

7. Finish up

- 'Is there anything you would like to add?'
- 'Is there anything I've left out you think is important?'

Appendix II – Email to potential Interview Candidates

Dear ,

I hope you don't mind me contacting you - your name has been suggested to me as a potential research interview interviewee for my PhD research.

By way of introduction, I am a former solicitor who now does some teaching at the University of Dundee (Honorary Lecturer) and the University of Edinburgh (Associate Lecturer) as well as working as a consultant for various organisations, mainly in the Middle East.

I'm conducting PhD research under Prof Bryan Clark (Dean of the Faculty of Law at Strathclyde University) looking at the perception of effective negotiation behaviour amongst lawyers. The research methodology involves conducting a series of semi-structured interviews with around 30 practising lawyers across a number of legal disciplines within Scotland. The interviews are to be recorded and transcribed but would be strictly anonymised and would remain completely confidential and indeed the transcripts will not be submitted with my thesis. After analysis, the data will be destroyed once the research is complete.

Interviewees will be asked about their perception of effectiveness both in relation to outcomes and behaviour. They will not be asked about individual transactions or anything that could breach client confidentiality. The research is being carried out strictly in accordance with the University of Strathclyde's ethical code and has received approval by their research ethics committee.

Each interview would take approximately 60 minutes and would be conducted at a location and time that suits you. I am attempting to complete as many interviews as I can in March and April. [*Individualised suggestion as to when we could meet with proposed appointment times*]

In the meantime I enclose a copy of the 'Participant Information and Consent Form' for your information and I look forward to hearing if you would be able to participate in my research.

Many thanks.

Kind regards,

Tom

Appendix III – Email sending out Thomas-Kilmann Conflict Mode Instrument

Dear ,

It was very good to meet you today.

As I indicated during our meeting, I'm asking everyone to complete the enclose 'Thomas-Kilmann Conflict Mode Instrument' (TKI) which is used to triangulate my data.

The TKI has been used internationally for three decades to assess the attitude of individuals towards conflict and negotiation. It should take you 10 minutes or so to complete and simply requires you to choose 'A' or 'B' in relation to 30 pairs of statements - please read the instructions on the first page.

I have sent it as a 'word' document so please just highlight the statement you most agree with for each question and then return it to me by email. I will then send you back the interpretation booklet by email in case you are interested in finding out what your results mean for yourself. You may find it interesting.

Thanks again for all your help with this and I look forward to receiving the TKI back in due course.

Kind regards,

Tom

Appendix IV – List of Coding Nodes developed during the NVIVO analysis

- Adapting behaviour
- Attitude
- Being commercial
- Being prepared
- Candidates
- Common Ground
- Conceptual difficulties
- Contrasting
- Deceitful behaviour
- Driver of own negotiation style
- Drivers of behaviour
- Effectiveness
  - Effective outcome
  - Ineffective outcome
- Emotions
  - Candidate emotions
  - Candidate's client emotions
  - Other client's emotions
  - Other lawyers emotions
- Fairness
  - Fairness - client
  - Fairness - other client
  - Fairness - other lawyer
  - Fairness - personal
- Grandstanding
- Interests
  - Client interests
  - Lawyers interests
  - Other lawyers interests
  - Other side's client interests
- Manipulative behaviour
- Motivations
  - Client
  - Organisational
  - Personal
- Negotiation Context
- Negotiation behaviour
  - Effective behaviour
  - Effectiveness depends on context
  - Ineffective behaviour
- Own negotiation
  - Characterisation of own style
  - Evidence of effectiveness of own style
- Perception of negotiation training
- Process satisfaction
- Professional behaviour
- Professional v Personal
- Tone of communication
- Trust
- Vocabulary difficulty

Appendix V – Interview Candidate Information and Consent Sheet

Participant Information Sheet for Solicitors & Advocates

Name of department: School of Law
Title of the study: A Study Into How Lawyers Negotiate

Introduction

This research is being conducted out by Tom Hutcheson, a PhD student at the University of Strathclyde under the supervision of Professor Bryan Clark, Head of School of Law at the University of Strathclyde. Tom is a former solicitor who specialises in dispute resolution consultancy work as well as currently lecturing negotiation on the MBA programme at the University of Edinburgh School of Business as an Associate Lecturer and at the University of Dundee School of Law as an Honorary Lecturer.

What is the purpose of this investigation?

The purpose of this study is to add to the existing literature and research on legal negotiation by exploring in detail what motivates lawyers when they negotiate and to explore with them concepts of effectiveness in relation to both behaviour and outcomes.

The first objective of the study is therefore to describe and then categorise insight gained into the underlying objectives, expectations and motivations that lie behind the negotiation behaviour of lawyers when they negotiate and develop this into a descriptive framework.

The second objective of the study is to develop a description of what practicing lawyers understand by the concept of effectiveness in legal negotiation, highlighting areas of common understanding and areas of divergence of understanding.

Finally the third objective is to take the data derived from the study and use it to inform the development of a theory of effective legal negotiation.

Do you have to take part?
Participation in the study is purely voluntary. It is entirely up to the participant to decide whether to take part in the study. A participant may withdraw at any time prior to completion of the research study and this decision remains entirely under the individual control for the participant.

What will you do in the project?

If you agree to participate in the study you will be asked to take part in a semi-structured interview which will last between 45 minutes and 60 minutes to be arranged at a date, time and location convenient for the participant.

The interview will be audio recorded and then transcribed for analysis. The transcriptions will be anonymised and will contain no reference to the name of the participant, the name of the firm or the organisation the participant works for or the name of any client. Any information within the transcript that could also reasonably lead to the identification of the participant, the participant's organisation or clients will also be removed or further anonymised as appropriate.

Following the interview, the participant will be asked to complete a negotiation style multiple-choice assessment that will take about 10 minutes and can be completed in their own time.

The participants will not be asked to discuss or comment upon any specific transaction or client interactions or to divulge any information that would breach client confidentiality.

Why have you been invited to take part?

The study involves practicing solicitors and advocates who are at least 3 years qualified and who do not spend more than 50% of their time overseas.

What are the potential risks to you in taking part?

On the basis that: 1. The data will be strictly anonymised, 2. There is no intention to discuss anything that would breach client confidentiality 3. The transcripts, audio recording and style assessments will only bee seen or heard by the researcher, Tom Hutcheson, and 4. The data will be held securely and destroy five years after completion of the study, participation in the study involves very low risk to those involved.

What happens to the information in the project?

The anonymised interview transcripts, audio recordings and negotiation style assessments will be analysed by the researcher Tom Hutcheson and will not be made available to anyone else. The data will be stored in secure password protected files accessible only to Tom Hutcheson. Following completion of the study the data will be held securely for a period of five years and then destroyed. Any academic publications resulting from the research will contain only the analysis and conclusions of the research and will not include the primary data.

The University of Strathclyde is registered with the Information Commissioner's Office who implements the Data Protection Act 1998. All personal data on participants will be processed in accordance with the provisions of the Data Protection Act 1998.

Thank you for reading this information – please ask any questions if you are unsure about what is written here.

What happens next?

If you are happy to proceed as a participant you will be asked to sign a consent form to confirm this and will then be contacted to arrange a convenient time to meet. If you do not wish to be involved I would like to thank you for taking the time to give it your consideration.

If the results of the research are to be published you will be informed accordingly.

Researcher contact details:

Tom C Hutcheson,
PhD Candidate,
University of Strathclyde School of Law
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50 George Street
Glasgow
Email: tom@exfacieconsultants.com or tom.hutcheson@strath.ac.uk
Telephone: 07949571295

Chief Investigator details:

Professor Bryan Clark
Head of the Law School
University of Strathclyde
Room 717, Graham Hills Building
50 George Street
Glasgow
Tel. +44 141 5483400
Email: bryan.clark@strath.ac.uk

This investigation was granted ethical approval by the University of Strathclyde Ethics Committee.

If you have any questions/concerns, during or after the investigation, or wish to contact an independent person to whom any questions may be directed or further information may be sought from, please contact:

Secretary to the University Ethics Committee
Research & Knowledge Exchange Services
University of Strathclyde
Graham Hills Building
50 George Street
Glasgow
G1 1QE

Telephone: 0141 548 3707
Email: ethics@strath.ac.uk

Consent Form for Solicitors & Advocates

Name of department: School of Law
Title of the study: A Study Into How Lawyers Negotiate

- I confirm that I have read and understood the information sheet for the above project and the researcher has answered any queries to my satisfaction.
- I understand that my participation is voluntary and that I am free to withdraw from the project at any time, without having to give a reason and without any consequences.
- I understand that I can withdraw my data from the study at any time.
- I understand that any information recorded in the investigation will remain confidential and no information that identifies me will be made publicly available.
- I consent to being a participant in the project
- I consent to being audio recorded as part of the project

In agreeing to participate in this investigation I am aware that I may be entitled to compensation for accidental bodily injury, including death or disease, arising out of the investigation without the need to prove fault. However, such compensation is subject to acceptance of the Conditions of Compensation, a copy of which is available on request.

Yes/ No

(PRINT NAME)	
Signature of Participant:	Date: