

THE MYTH OF THE GLADIATOR AND LAW STUDENTS' NEGOTIATION STYLES

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INTRODUCTION

“Shark.” “Hired gun.” The popular view is that lawyers are, by and large, cut-throat competitors who take the ethical obligation of zealous advocacy on behalf of their clients to the extreme, heedless of the cost to others or to society as a whole. The adversarial system (with its winners and losers), law school teaching, and the portrayal of lawyers in popular media, all feed this stereotype. The focus on litigation promotes misperceptions about what most lawyers actually do. Lawyers make deals and resolve virtually all litigated matters short of trial, often through negotiation.² Studies of lawyers' behavior in negotiation over the last twenty-eight years have consistently shown that, contrary to popular stereotypes, the majority of practicing lawyers are not competitive negotiators. These studies also show that “cooperative,” or “problem-solving,” negotiators are considered to be effective more often than competitive negotiators.³

Will the current generation of law students continue this pattern? Raised on “Ally McBeal,” “L.A. Law,” and Court TV, will law students instead conform to popular stereotypes more than

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² See generally Marc S. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459 (2004); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUDIES 705 (2004).

³ GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983) (Williams, who did his research before the vocabulary of “integrative” or “problem-solving” bargaining was in widespread use, employed the terms “competitive” and “cooperative” to distinguish negotiation styles); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 152 (2002) (Schneider substitutes “adversarial” for “competitive,” without intending a real change in meaning; but she uses “problem-solving” rather than “cooperative” not only to avoid the “doormat” connotations of cooperation in negotiation, but also to provide a more “persuasive” alternative to competition as a negotiation style.).

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their predecessors do? Or has the spread of conflict resolution programs in schools taught them a “softer” approach to resolving disputes than lawyers in earlier decades learned? In an effort to explore how the next generation of lawyers will approach negotiating, I present in this article the results of a multi-year study of law students’ negotiating styles, based on their responses to the Thomas-Kilmann Conflict Mode Instrument (TKI), a widely-used psychological test.⁴

DEFINING NEGOTIATION STYLES USING THE TKI

As a teacher of negotiation and civil procedure for the last twenty years, I know how firm a grip the litigation model has on law students’ imaginations. This continues despite the rise of alternative (or “appropriate,” as many now prefer to call it) dispute resolution in its myriad voluntary and mandatory forms and despite the vanishingly small number of cases that are actually tried to verdict. In the world of the casebook, almost everything that matters is decided through the adversarial presentation of evidence and legal reasoning. In the real world, lawyers need many skills, other than advocacy and argument, to advance the interests of their clients. One of the most important skills is the ability to negotiate with a variety of people in a variety of situations. The disconnect between the realities of practicing law and the popular image of the fierce adversarial lawyer – all too often reinforced by a competitive atmosphere in law school – creates unnecessary tension for law students preparing to enter the profession.⁵ They often feel impaired if they lack competitive zeal and their training seldom addresses the skills needed to bring parties together through negotiation.⁶ Such abilities include intensive work on the listening (rather than speaking/arguing) skills that are essential to competent interviewing, counseling, and negotiation.

⁴ Consulting Psychologists Press, Inc. (www.cpp-db.com) is the current owner of the TKI and licenses its use.

⁵ Professor Schneider found that only nine percent of the “adversarial” negotiators were considered effective, compared to fifty-four percent of the “problem-solving” negotiators. See Schneider, *supra* note 3, at 167. When Schneider refined her analysis to differentiate “true problem solving” from “cautious problem solving” and “adversarial,” she found that seventy-five percent of the true problem solvers were considered to be effective negotiators, compared to only nine percent of those still in the adversarial category. *Id.* at 175.

⁶ See generally Mark N. Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1 (2002).

One challenge in teaching negotiation skills to law students is disarming the myth of the gladiator and helping students put into perspective the pros and cons of competitive behavior in negotiations. In addition, students need to learn other effective approaches to negotiation and how to choose among them. Unlike a first year course such as civil procedure or torts, students do not come to a negotiation class without any knowledge of the subject. They have been negotiating – interacting with others in a conflict situation in an effort to reach a mutually acceptable outcome – all their lives, first with parents and later with friends, teachers, and employers. By the time they arrive in law school, students have developed a characteristic way of approaching situations in which their desires conflict with someone else's, or in which they need assistance to reach their goals. These characteristic modes of handling negotiations are a product of temperament and experience dealing with people and situations that require negotiation; they are relatively unchanging over time.

In teaching negotiation, it is useful to describe the different negotiation approaches and to examine their respective strengths and weaknesses. One psychological instrument used in many professional arenas to define negotiation style is the TKI. The TKI is a pencil and paper test consisting of 30 forced choice pairs of statements, each describing a different possible method of dealing with conflict, e.g., “I propose a middle ground” versus “I press to get my points made.” Participants' responses are then tallied and organized into five categories – competing, collaborating, compromising, avoiding, and accommodating – based on the degree of assertiveness (concern for self) or cooperation (concern for others) they involve.⁷ The authors describe the different categories as follows: “competing is assertive and uncooperative, collaborating is assertive and cooperative, avoiding is unassertive and uncooperative, accommodating is unassertive and cooperative, and compromising is intermediate in both cooperativeness and assertiveness.”⁸

⁷ Ralph H. Kilmann & Kenneth W. Thomas, *Developing a Forced-Choice Measure of Conflict-Handling Behavior: The 'MODE' Instrument*, 37 *EDUC. AND PSYCHOL. MEASUREMENT* 309, 310 (1977).

⁸ *Id.* Since both Williams and Schneider use a bipolar style scale (Williams: cooperative versus competitive; Schneider: problem-solving versus adversarial), it is difficult to compare their categories directly to the TKI categories. See Schneider & Williams, *supra* note 3. While the TKI's “competing” style is similar to their “competitive/adversarial” styles, their “cooperative/problem-solving” styles overlap to some degree with three of the TKI's categories: “collaborating,” “compromising,” and “accommodating.”

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The highest possible score in any TKI category is 12 (indicating that the person chose, for example, an “avoiding” response over any of the others every time it was presented); a score of 6 indicates that the person chose that category half the time it was offered; and the lowest is 0 (indicating that the person never chose, e.g., an “avoiding” response). These five negotiation styles, described in more detail below, can serve as a basis for discussion and comparison in different negotiation situations. They give students a language for describing their experience in negotiations. This helps them to both identify the strengths and weaknesses of their own preferred style and to recognize others’ styles. With this understanding, students can experiment by expanding their range of available styles to suit the requirements of a particular negotiation.

CHARACTERISTICS OF THE DIFFERENT STYLES

The negotiation styles included in the TKI, as discussed above, involve differing mixes of assertive and cooperative behavior. Although the test booklet contains a brief description of each style’s features, an active conversation among the students in each group about the pros and cons of their style is more beneficial to students. It results not only in a more nuanced discussion of how different styles work in different situations, but also a greater appreciation for the value of each style.⁹

Competing: In many ways, students who are strong in competing fit the stereotype of lawyers generally. They are assertive, self-centered, focused, and determined to “win.” The war and sports metaphors frequently used to describe legal negotiations fit competitors well because they tend to think of negotiations as a battle of wits or a game, and they are not afraid of rough play. These characteristics serve them well in situations in which the relationship between the parties is of little importance, such as a personal injury suit be-

⁹ To foster this conversation, I have the students meet in their predominant style groups to brainstorm the pros and cons of that style. I then ask them to winnow their lists to the top three pros and cons and to present those to the whole class. In addition, I ask them to come up with adjectives to describe what they want and what they get when they negotiate with someone from each of the groups, including their own. When the different groups’ lists are posted side by side, students see where their perceptions of their own style do and do not overlap with others’ perceptions of their style. They also see how much the strengths of any style mirror its weaknesses (e.g., being “focused” is a commonly mentioned pro of a competing style – but that very orientation often surfaces under cons as “rigid”).

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tween strangers. As with the other categories though, the problems created by a competing style are often the mirror-image of its strengths: competitors may be so focused on the bottom line and so intent on “beating” the other party that they miss opportunities for joint gain. They tend to have a “fixed pie” mentality, seeking to claim the largest share of the pie rather than trying to enlarge the pie for everyone. When an ongoing relationship is important to the parties, a competing stance can lead to hard feelings and the sacrifice of long-term potential for short-term gain. Competitors may also be so goal-oriented that they miss some of the subtle, nonverbal signals that can provide valuable information to a negotiator.

Collaborating: A collaborating style 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. They are prepared to spend time and energy getting everyone’s interests on the table and exploring different solutions to see which combination of options works best. They are creative, open to new ideas, and not wedded to their own agenda. In many situations, a collaborative style focused on creating value can lead to novel solutions that leave both parties better off than they would otherwise be, such as settling costly and protracted contract litigation by renegotiating the terms of the parties’ business relationship and starting over. In some situations, though, the search for the optimal result may entail more time and effort than the dispute or the relationship between the parties requires. Where time is truly of the essence, a collaborative style is more likely to exacerbate a problem than to resolve it since collaborators are seldom satisfied until they have examined a wide array of options.

Compromising: A compromising style, like a collaborative one, combines both assertiveness and cooperation. Compromisers see themselves as fair, reasonable, easy to deal with, and prepared to give and take in the course of negotiating. They are the classic “split the difference” closers in a negotiation, valuing efficiency and timesaving over detailed bargaining about every issue and every dollar at stake. The risk for the compromiser (and her clients) is that the emphasis on being, and being perceived as, fair and reasonable may lead to concessions on issues that are important or that could have been resolved more favorably if the negotiator had been less quick to compromise. Thus, the most common negative

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cited by students who are strong compromisers is that they get less for their clients than they could have.

Avoiding: Answers such as “I feel that differences are not always worth worrying about” on the TKI characterize an avoiding style. Avoiders are unlikely to fan the flames of a dispute and generally believe that many problems will go away if left alone. They “don’t sweat the small stuff” and prefer not to get involved in protracted negotiations over details. Law students often react negatively to being categorized as conflict avoiders, perhaps because they believe that you have to love conflict to be a good lawyer. In fact, an avoiding style can be powerful, at least when you have some leverage in a negotiation. The other party has to figure out a way to engage the avoider, and this often takes the form of unilateral concessions to get the negotiation moving. However, when a negotiator lacks leverage, there is always the risk that the problem will only get worse the longer she ignores it; and avoiders sometimes end up making concessions simply in order to bring a negotiation to a close.

Accommodating: An accommodator is more focused on others’ needs than on her own needs. Accommodators are good at building and maintaining relationships, and they are willing to do much of the work necessary to keep relationships going. Accommodators are skilled at reading inconspicuous signals that reveal other parties’ interests and concerns. In a negotiation where the relationship between the parties is important, a lawyer with an accommodating style will be sensitive to the nuances of the other party’s situation and will make sure that its needs are taken into account in developing proposals for resolving the conflict. Where the parties’ needs are not overlapping, however, the accommodator’s focus on what the other side wants may leave her client open to exploitation, especially at the hands of a negotiator who is focused only on her own client’s goals. Over time, accommodators can become resentful when their concern for the other party is not reciprocated. Students with an accommodating style often expect to find the world of legal negotiation a rough place and they approach it with trepidation.

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IS THERE A “BEST” LEGAL NEGOTIATION STYLE?

Obviously, none of the above styles is appropriate for all negotiations; there is no one best style. A competing style can turn a potential long-term business relationship into nothing more than a short-term deal that will never be renewed. An accommodating style, especially in a one-shot negotiation like a personal injury suit, might lead to an unfavorable settlement for the accommodating lawyer's client. A collaborative approach, when a quick resolution is important, may waste precious time, energy, and money. A skillful negotiator, then, always has to consider the subject matter of the negotiation, the situation of the parties, and the styles of the other negotiators in deciding what negotiation style is most likely to further her client's goals in a particular instance. Flexibility is the key to success in a variety of negotiations, and the TKI results can help beginning and experienced negotiators pinpoint the characteristics that they need to hone and develop in order to become more effective.

Fortunately, most people who take the TKI are not pure types: even those who score particularly high (ninetieth percentile and above) in one category have some traits that fall in the other styles. Many people tend to be evenly spread among the categories, with a high score (seventy-fifth percentile and above) in one or another style, and some have similar scores in all five categories. The usefulness of the TKI, and of the categories it defines, is not so much to pigeonhole people as to make them aware that they have *multiple* ways of approaching conflict situations, and that they can choose among them. A person's style is not uniform. It can and should be varied to adapt to the subject matter, the context, and the other parties in different negotiations.

Some people do have a well-defined preference for one style, as measured by a high score in one TKI category. They may find it difficult to shift gears and adopt another style. For such people, the TKI highlights a default style that is likely to control unless they devote considerable thought and planning to using other approaches. Even when they do so, a strong default style is likely to reassert itself if the going gets tough and the negotiator starts to feel insecure or thwarted in achieving her goals. When the default style is strongly competitive, accommodating or avoiding (the unmixed TKI styles), it can be particularly difficult to incorporate mitigating characteristics of the other styles in a stressful situation. Since negotiating skill requires comfort and facility in employing

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the full range of styles described by the TKI, one challenge in teaching negotiation is to help students explore the possibilities of their underdeveloped styles.

WHAT STYLES DO LAW STUDENTS USE?

The TKI was originally graphed in relation to the scores of a group of mid-level managers in the 1970s, and the chart in the published test booklet reflects the scores of that group. Since that time, the TKI has been widely used and its categories are the basis for the discussion of negotiation styles in a recent book by Professor G. Richard Shell of the Wharton School at the University of Pennsylvania.¹⁰ Professor Shell has also published his own TKI chart, based on the scores of 1682 participants in executive education programs.¹¹ Both sources look at bargaining styles of business executives, rather than those of lawyers or law students. It has not been clear how relevant their results are for negotiators in another field.

Do different professions draw people with markedly different negotiation styles? Are law students, for example, more competitive on average than business people? Do male and female students have different styles? Does the experience in law school affect students' negotiation styles? Without a body of data that allows comparisons, it has not been possible to know how, if at all, law students differ from the other groups studied. To answer these and other questions, I have been collecting data from negotiation and mediation classes at Hastings for several years, and systematically over the last two academic years from Hastings, Boalt, and Stanford law schools. The resulting chart, based on a sample of 754 students, is shown in Figure 1. Using this chart, a law student can compare her individual scores on the TKI to see where she falls in relation to the group as a whole in the various categories. It is only in relation to this chart that a student can assess whether she is, for example, more or less competitive, or compromising, than other law students. The raw numbers do not give you this information.

¹⁰ G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE* (1999).

¹¹ G. Richard Shell, *Bargaining Styles and Negotiation: The Thomas-Kilmann Conflict Mode Instrument in Negotiation Training*, 17 *NEGOT. J.* 155, 163 (2001). The sample used for purposes of illustration included 1682 participants in Wharton executive education programs. Professor Shell has continued to collect TKI data since the time his *Negotiation Journal* article was submitted for publication, and he has kindly made the cumulative data available to me for purposes of comparison with my sample (see below, Figure 5).

For example, a score of “7” puts you in the sixty-fifth percentile on competing, while the same score puts you only in the thirty-sixth percentile on compromising.

There are some caveats about the data. While they do give an accurate picture of the negotiation styles of law students who have enrolled in negotiation or mediation classes, the students are a self-selected group taking an elective course, most often in the third year. However, their styles do not appear to differ markedly from the styles of other third-year students. In addition, women are over-represented in negotiation classes (61.4%) compared to their representation in the law school as a whole, which is closer to fifty percent.

The chart in Figure 1 is useful for measuring individual variations in percentile scores on the TKI, and a student can get a clear picture of where her styles fall in comparison to others by connecting the dots between her scores in the different categories. To look at characteristics of law school negotiation students as a group, it is easier to read a simple chart that shows the mean score in each category (Figure 2). The most salient finding here is that the negotiation students in the law school sample, like lawyers in the earlier Williams and Schneider studies, are more likely to seek compromise (the mean score is 7.5) than to use any other negotiating style (the remaining four categories are clustered around a score of +/- 5.5). Law students actually use a competing style marginally *less* frequently than any of the others.¹²

Since the sample for this study was predominantly from one law school (Hastings n=588; Boalt n=58; Stanford n=108), it would be interesting to replicate it in other schools to see to what extent the findings are similar in different law school environments. There were noticeable differences in TKI mean scores in several categories across the three schools (see Appendix, Table 1), but the Boalt and Stanford samples are so small that the differences may not be meaningful in light of standard errors on the estimates of the means. A larger sample from these or other law schools would make it possible to compare the Hastings data with another representative sample of law students.

I also administered the TKI to third-year students in two large lecture classes at Hastings to test whether self-selection skewed the results for negotiation students. Thirty percent of the students in

¹² Both Williams and Schneider found that the majority of lawyer negotiators fell into the cooperative/problem-solving category, rather than the competitive/adversarial category. See Schneider, *supra* note 3; Williams, *supra* note 3.

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the third-year sample had taken or were taking a negotiation course. The mean scores for the third-year group were almost identical to those of the negotiation students, with slight differences showing up only in the compromising and avoiding categories (Figure 3).¹³ This result suggests that the students who take negotiation are generally representative of their peers, although they are somewhat less likely to avoid conflict than the average third-year student in the sample.

MALE-FEMALE DIFFERENCES IN NEGOTIATION STYLE

When the negotiation student sample is broken down by gender (Figure 4), the main differences are in the competing and accommodating categories. There, the results are consistent with the social stereotype that women focus more on building and maintaining relationships than men do. The female mean for competing (self-assertion) is lower than that for males (5.1 versus 5.8) and the female mean for accommodating (concern for others) is higher than the male mean (5.8 versus 5.1). These differences in means are statistically significant (the p-value for competing is .02 and the p-value for accommodating is .0001).¹⁴

Interestingly, the law student male-female differential in competing and accommodating was reversed in a group of experienced lawyers (mostly in practice more than 15 years) attending a recent continuing legal education conference on negotiation. Among the lawyers, the mean score in competing was *higher* for women than for men (5.7 versus 4.5), and the men scored higher in accommodating than the women (5.7 versus 5.2) (see Appendix, Table 1).¹⁵ The male-female differentials in the two groups are not simply a difference between students and practitioners. Perhaps it is more a generational difference between current women law students and

¹³ Unfortunately, the enrollment in both Remedies classes chosen was far larger than the actual attendance on the day the TKI was administered, so the third-year sample is smaller than I had hoped it would be (n=89). As it turned out, though, the group of third-year students present in the classes matched almost exactly the male/female split in the negotiation sample (38.6 percent men in the negotiation sample; 38.5 percent men in the third-year sample).

¹⁴ Here and throughout, p-values refer to an unpaired two-tailed test.

¹⁵ The lawyer sample (n=64, 34 women and 30 men) is much smaller than the negotiation student sample and the data were all gathered on a single occasion, so it is hard to know how representative the sample is of the San Francisco legal community. For this reason, I include the lawyer data only to suggest another fertile field for TKI research, rather than to draw any firm conclusions from it.

experienced women lawyers who attended law school when it was less common for women to do so. On the one hand, the women lawyers may have been more self-selected for competing, entering what was then a male-dominated profession widely considered to be highly competitive. On the other hand, the women lawyers may simply have adapted to the perceived norm of the profession, reinforcing the existing stereotype.

Craver's 1990 study of the impact of gender on negotiation outcomes concluded that there were no statistically significant differences in negotiation *performance* between male and female law students, despite pervasive stereotypes that women are socialized to be less competitive than men and are thus less likely to prevail in the world of legal negotiations.¹⁶ Putting his results together with my data suggests that on average, there may be some significant differences in *style* between men and women. However, overall, these style differences will not lead to significant differences in negotiation results. While the female mean for competing in Figure 4 is lower than the male mean, the female means for both collaborating and compromising, involving a *combination* of assertiveness and concern for others, are higher (5.9 versus 5.6 on collaborating and 7.6 versus 7.3 on compromising), though the differences in these means are not statistically significant. Although a competitive approach will sometimes lead to the greatest gain in a negotiation, in other circumstances a focus on both parties' needs will actually yield better results.¹⁷ The emphasis in negotiation teaching over the last twenty years on integrative/problem-solving bargaining and communication skills has shown that there is much more to successful negotiating than single-minded value claiming.¹⁸ As more and more lawyers enter practice with training in negotiation, and

¹⁶ Charles B. Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 OHIO ST. J. ON DISP. RESOL. 1 (1990). Craver's sample consisted of graded negotiations, in which teams of negotiators were ranked against others representing the same party and graded based on points accumulated according to each side's confidential scoring system. Since points could be earned only for predetermined outcomes, and grades depended on points earned, the negotiations may have privileged value claiming over value creating in individual encounters.

¹⁷ The results of Professor Schneider's study support this view: "[c]ontrary to the popular (student) view that problem-solving behavior is risky, it would seem instead that adversarial bargaining represents the greater risk." Schneider, *supra* note 3, at 167; *see also* Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, *The Tension Between Empathy and Assertiveness*, 12 NEG. J. 217 (1996) (discussing the importance of both assertiveness and concern for others in negotiation).

¹⁸ MELISSA NELKEN, *UNDERSTANDING NEGOTIATION* (2001); ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TULUMELLO, *BEYOND WINNING* (2000); SHELL, *supra* note 10; ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1981).

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the experience of attending law school with equal numbers of women and men, the stereotypes Professor Craver sought to dispel in his study may begin to wither away of their own accord.¹⁹

DIFFERENCES BETWEEN EXPERIENCED LAWYERS
AND NEGOTIATION STUDENTS

Comparison of the data for all negotiation students to the data for all lawyers shows that the groups are similar in the competing, collaborating, and accommodating categories. However, the lawyers are more likely to compromise and are somewhat less likely to avoid conflict than the law students (see Appendix, Table 1). The lawyers' results, like the law students', showed a substantial preference for compromising over all other negotiation styles (the lawyers' mean for compromising was 8.1; the next highest mean score was 5.7 for collaborating). The fact that the lawyers' scores in compromising are higher than their scores in any other category (and that the next highest score is for collaborating) fits with the findings of Williams and Schneider about lawyers' actual behavior as negotiators.²⁰

Willingness to compromise keeps the wheels of commerce turning and may be important to a lawyer's reputation among her peers as someone with whom negotiation is likely to be fruitful. Its dominance among negotiation styles is further evidence that the "gladiator" myth is just that. As others have pointed out, the reality of practice within a community of lawyers dictates that lawyers learn to get along as members of that community rather than fighting for the last dollar for every client.²¹ In practice, the ethical duty of zealous advocacy is often tempered by the pragmatic need for compromise.

Comparing male negotiation students with male lawyers, the biggest difference between the two groups is in competing. The stu-

¹⁹ Professor Craver noted that his data "would warrant rejection of the theory that men are more likely to behave in a 'win-lose' competitive manner while women are more likely to act in a 'win-win' cooperative fashion." Craver, *supra* note 16, at 16. For a comprehensive analysis of studies of gender and gender stereotypes in the negotiation literature, see Laura J. Kray & Leigh Thompson, *Gender Stereotypes and Negotiation Performance: An Examination of Theory and Research*, 26 RES. IN ORG. BEHAV. 105 (2005).

²⁰ See *supra* note 3.

²¹ See, e.g., Ronald Gilson & Robert Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); Gary Lowenthal, *A General Theory of Negotiation Process, Strategy and Behavior*, 31 U. KAN. L. REV. 69, 105-8 (1982).

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dents' mean is higher than the lawyers' (5.8 for male students versus 4.5 for male lawyers), and this difference in means is statistically significant, with a p-value of .02. Compromising is the highest mean score for both groups, but the male lawyers' mean is higher than the male students' mean (8.3 versus 7.3), perhaps reflecting the effect of practicing within a legal community on the adversarial norms of law school. The p-value of the difference between both groups in compromising is .06. The male lawyers' mean is also higher in accommodating (5.7 versus 5.1), but that difference is not statistically significant.

Among the women, both students and lawyers also score highest in compromising. The lawyers' mean is higher than the students' (8.2 versus 7.6), but the difference between the two is not as great as that between the male lawyers and male students noted above. The biggest differences between the female lawyers and female students are in the competing, avoiding, and accommodating categories (5.7 in competing for lawyers versus 5.1 for students; 5.0 in avoiding for lawyers and 5.6 for students; and 5.2 in accommodating for lawyers versus 5.8 for students); but only the differences in the avoiding and accommodating categories approach statistical significance, with p-values of .1. In fact, the female students' *lowest* mean score is in the competing category (5.1), while the female lawyers are lowest in avoiding (5.0) and accommodating (5.2).

Unfortunately, the small sample of lawyers makes it hard to know whether the differences in TKI mean scores indicate a generational difference in attitudes toward conflict, demonstrate the effects of actual negotiation experience in law practice, are merely an artifact of the particular group of lawyers tested, or have arisen solely by chance. Further research on the negotiation styles of lawyers using the TKI could give a more nuanced picture of the component parts of Schneider's adversarial/problem-solving negotiation style dichotomy and could also show whether there are meaningful generational differences in negotiation styles within the profession.

NEGOTIATION STUDENTS AND BUSINESS EXECUTIVES

We do have recent data available about the negotiation styles of business executives, as measured by the TKI. The recent data allows for some useful comparisons to the law school negotiation student sample. Figure 5 compares the law student means with the

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mean scores of 3528 participants in Wharton executive education programs.²² When p-values are calculated for the differences in means, they are all significant at .05 or better.²³

Compromise is the dominant style in business and law, as evidenced by the executives' mean score of 7.7 for compromising. The next highest mean score for Wharton participants is 6.5 for collaboration. The executives are substantially more likely to use a collaborative style, taking the time to look at multiple options and to seek opportunities for joint gain, than the students are (6.5 for business versus 5.8 for students).²⁴ Since both compromising and collaborating styles incorporate a mixture of assertiveness and cooperation, the differences in results may reflect anxiety among law students about the open communication that a collaborative approach requires, or simply a preference for quick solutions over optimal ones. In addition, an effective collaborative style may develop with experience from a compromising style, and the students generally do not yet have the business group's professional experience as negotiators.

The business group's lowest mean scores were in the avoiding and accommodating categories (5.1 and 5.0, respectively), the only categories in which the student means were higher than the business means (5.7 for avoiding and 5.5 for accommodating). The business group's higher mean scores in competing, collaborating, and compromising (the assertive categories) suggest that they are more capable of keeping their own needs in mind – without necessarily losing sight of others' needs – than are the students, whose mean scores are higher in both non-assertive categories (avoiding and accommodating).

WOMEN NEGOTIATION STUDENTS, EXECUTIVES, AND LAWYERS

The cumulative Shell data discussed above are not broken down by gender, but a smaller data set of female global business executives allows some comparisons with women students (Figure

²² Professor Shell provided me with the data on which these calculations are based in April 2004. I have not included data from the original TKI scales since those are 25 years old and may not accurately reflect the behavior of business people today.

²³ The p-values are: competing, .02; collaborating, .0001; compromising, .05; avoiding, .0001; accommodating, .0001.

²⁴ I have not included the means for the lawyer sample in Figure 5 due to the small sample size, but those figures are available in the Appendix, Table 1.

6) and women lawyers.²⁵ Here again, the business means were higher than the student means in all of the assertive categories (5.4 versus 5.1 for competing; 6.8 versus 5.9 for collaborating; 7.8 versus 7.6 for compromising) and lower in both non-assertive categories (5.1 versus 5.6 for avoiding; 4.9 versus 5.8 for accommodating). The data for women lawyers, though less reliable because of the small sample size, suggest that the observed differences in assertiveness between women students and women executives may be more attributable to negotiating experience than to professional style. The women lawyers were both more competitive and more compromising than the executives (5.7 versus 5.4 for competing and 8.2 versus 7.8 for compromising), and their mean scores on avoiding and accommodating were similar to those of the executives (5.0 versus 5.1 on avoiding and 5.2 versus 4.9 on accommodating).

The women executives' mean in collaborating is significantly higher than the other women's (6.8 for business versus 5.9 for students and 6.0 for lawyers). Interestingly, the women executives' mean of 6.8 is also higher than the mean for collaborating in the business group as a whole, which is 6.5 (see Figure 5), suggesting that a collaborative style may be particularly dominant among women in the business sample. In both other groups as well, the women's mean for collaborating, seeking to resolve conflict with assertiveness *and* concern for others, is higher than the men's (5.9 versus 5.6 for negotiation students and 6.0 versus 5.6 for lawyers).²⁶

EFFECTS OF LAW SCHOOL EXPERIENCE ON TKI SCORES

The TKI was designed to be context-neutral in order to reduce social desirability bias, or the tendency to give what is thought to be the "right" answer about how to handle a particular conflict situation. I am not aware of any studies that explore what contexts test takers actually imagined in responding to the TKI, or how their responses varied with the imagined context. I usually ask students to choose the response that they feel is most characteristic of them, without regard to a particular context, since that response is likely to be the default mode used in a moment of stress or uncertainty.

²⁵ The female business executive data set includes TKI scores for 431 participants.

²⁶ See *supra* notes 16 and 17 and accompanying text.

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What happens, though, to negotiation style when a person is immersed in a new culture, such as law school, where she is expected to adopt a new social role as a member of the legal profession? To examine the impact of law school on students' negotiation styles, I administered the TKI to a group of first-year students in the third week of the fall semester and also to a group of third-year students (30 percent of whom had taken a negotiation course) during the spring semester.²⁷

Based on these groups, it appears that the law school experience may change students' approaches to conflict, to some extent in ways that the stereotypes about lawyers would predict (Figure 7). First-year students were *less* competitive and *more* accommodating than third-year students (4.9 versus 5.4 for competing; 6.0 versus 5.4 for accommodating).²⁸ These differences may be attributable to a number of factors, including experiencing the case method of instruction, with its reliance on litigated cases; the importance of competitively-earned grades for job placement; and the power of role expectations regarding "lawyer-like" conduct as "hard" rather than "soft."

Interestingly, the first-year students were also *less* collaborative than the third-years (5.5 versus 5.8). Although the difference between the two groups on collaborating (.3) was smaller than on either competing (.5) or accommodating (.6), it may suggest that winning is not the *only* goal emphasized during law school training. Perhaps with more emphasis in various courses on group projects (rather than on individual achievement), as well as more widespread teaching of specific problem-solving skills, law schools might increase the degree to which they train future lawyers to be truly effective negotiators.

CONCLUSION

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

²⁷ The first-year sample was made up of students in two sections, for a total of 165 students. See *supra* note 13 and accompanying text for discussion of the third-year student sample.

²⁸ Although no single difference in means between the first and third-year students is significant at the conventional .05 p-value, the difference in accommodating has a p-value of .08. In addition, the consistency of the overall pattern lends strength beyond these individual tests to a tentative inference that law students become more competitive and less accommodating in the course of their training.

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demonstrate that they are most likely to use a compromising style in dealing with conflict. In this respect, they resemble the lawyers in earlier studies that showed the predominance of cooperative/problem-solving behavior in actual legal negotiations. Since the earlier studies also demonstrated that problem-solvers are far more likely than adversarial types to be perceived as effective negotiators, we have to wonder whether, in this age of ADR and the vanishing trial, we are successfully preparing our students for the real-life demands of law practice by maintaining our litigation-oriented curriculum.

One result of the law school experience appears to be an increase in students' competitive behavior and a decrease in their willingness to accommodate others in conflict situations. By focusing legal education almost exclusively on litigated cases, we succeed in teaching students the law, and how the common law develops; but these cases model only an adversarial approach to resolving disputes. Reliance on the case method risks failing to teach students a myriad of other skills, like communication, facilitation, and problem-solving skills, that are essential to the effective practice of law. Negotiation is at the heart of what lawyers do, whether they are transactional lawyers or litigators. Training effective negotiators and dispute resolvers requires building on the strengths our students bring in the arts of compromise, rather than continuing to exalt an adversary ideal that often fails to serve the interests of their future clients.

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APPENDIX

TABLE 1 – CALCULATED TKI MEANS FOR DIFFERENT GROUPS

Group	Compete	Collaborate	Compromise	Avoid	Accommodate
Hastings negotiation (n=588)	5.5	5.8	7.6	5.6	5.4
Stanford negotiation (n=108)	4.9	5.8	7.0	6.2	6.0
Boalt negotiation (n=58)	5.4	5.5	7.2	6.4	5.6
All negotiation (n=754)	5.4	5.8	7.5	5.7	5.5
All business (n=3528)	5.7	6.5	7.7	5.1	5.0
All lawyer (n=64)	5.0	5.7	8.1	5.3	5.4
M negotiation (n=291)	5.8	5.6	7.3	6.0	5.1
M lawyer (n=30)	4.5	5.6	8.3	5.8	5.7
F negotiation (n=463)	5.1	5.9	7.6	5.6	5.8
F business (n=431)	5.4	6.8	7.8	5.1	4.9
F lawyer (n=34)	5.7	6.0	8.2	5.0	5.2
1 L (n=165)	4.9	5.5	7.3	6.2	6.0
3 L (n=89)	5.4	5.8	7.5	5.8	5.4

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FIGURE 1. LAW SCHOOL NEGOTIATION STUDENTS' TKI SCORES
(N=754)

		Competitive	Collaborating	Compromising	Avoiding	Accommodating
Top 25%	100%	12	12 11		12 11	12 11
		11		12		
	90%	10	10	11	10	10
			9			9
	80%	9		10	9	8
<hr/>						
Middle 50%	70%	8	8		8	
		7		9		7
	60%		7		7	
		6		8		6
	50%	6	6		6	
		5		7		5
	40%	5				
	30%	4	5		5	
<hr/>						
Low 25%	20%		4	6	4	4
		3				
	10%	2	3	5	3	3
		1	2	4	2	2
	0%	0	0 1	2 0 3 1	1 0	0 1

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FIGURE 2. MEAN TKI SCORES OF LAW SCHOOL NEGOTIATION STUDENTS (N=754)

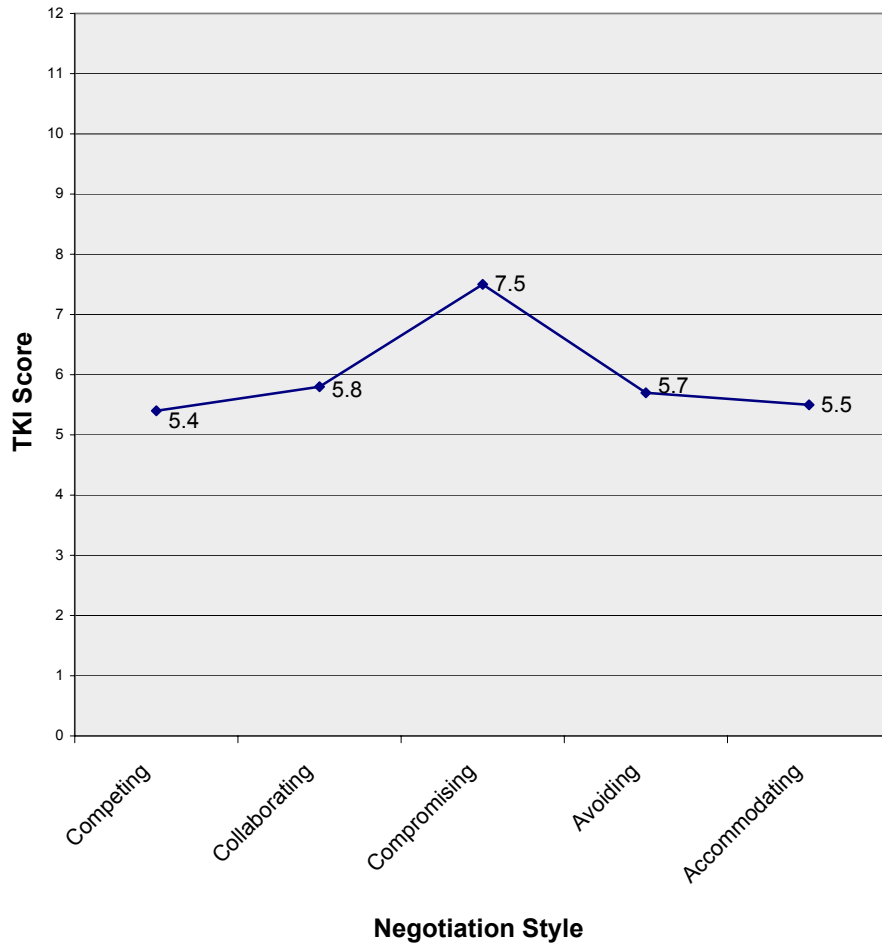
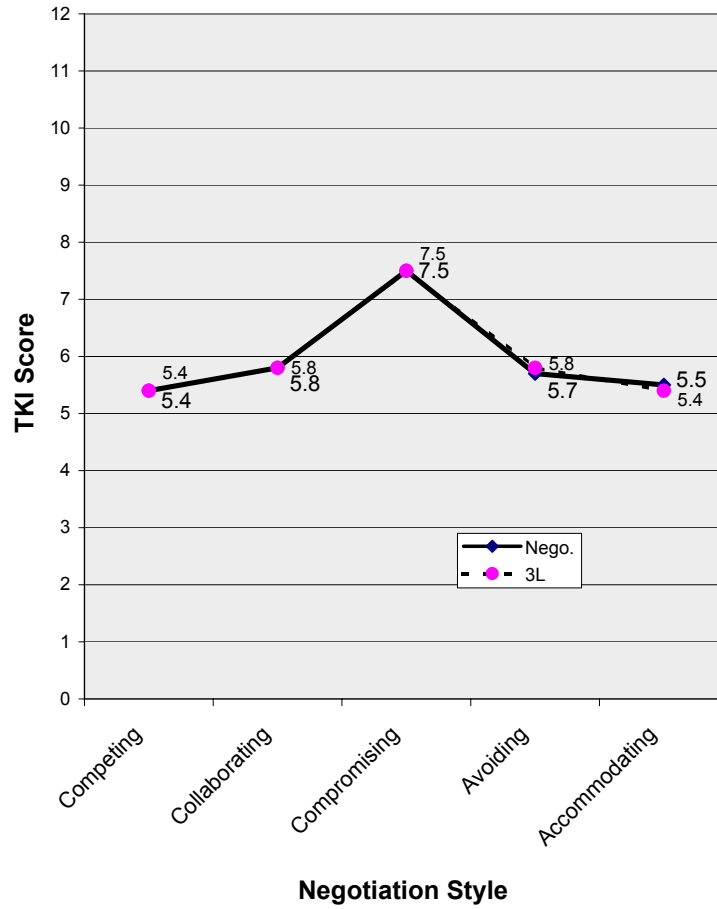


FIGURE 3. MEAN TKI SCORES OF LAW SCHOOL NEGOTIATION STUDENTS (N=754) AND THIRD YEAR STUDENTS (N=89)



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FIGURE 4. MEAN TKI SCORES OF MALE (N=291) AND FEMALE (N=463) LAW SCHOOL NEGOTIATION STUDENTS

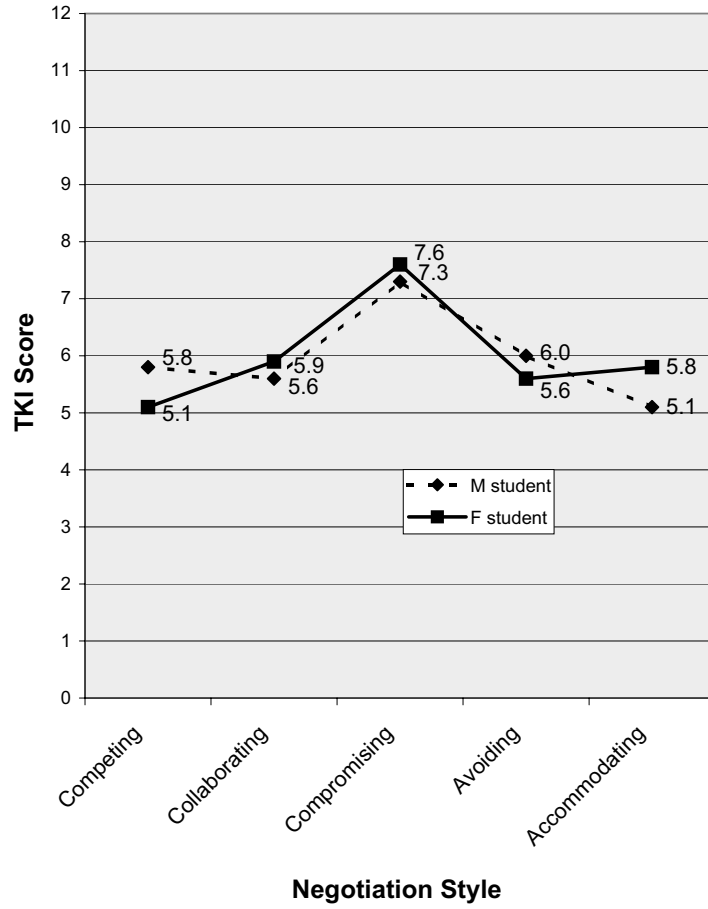


FIGURE 5. MEAN TKI SCORES OF LAW SCHOOL NEGOTIATION STUDENTS (N=754) AND BUSINESS EXECUTIVES (N=3528) (SHELL 2004)

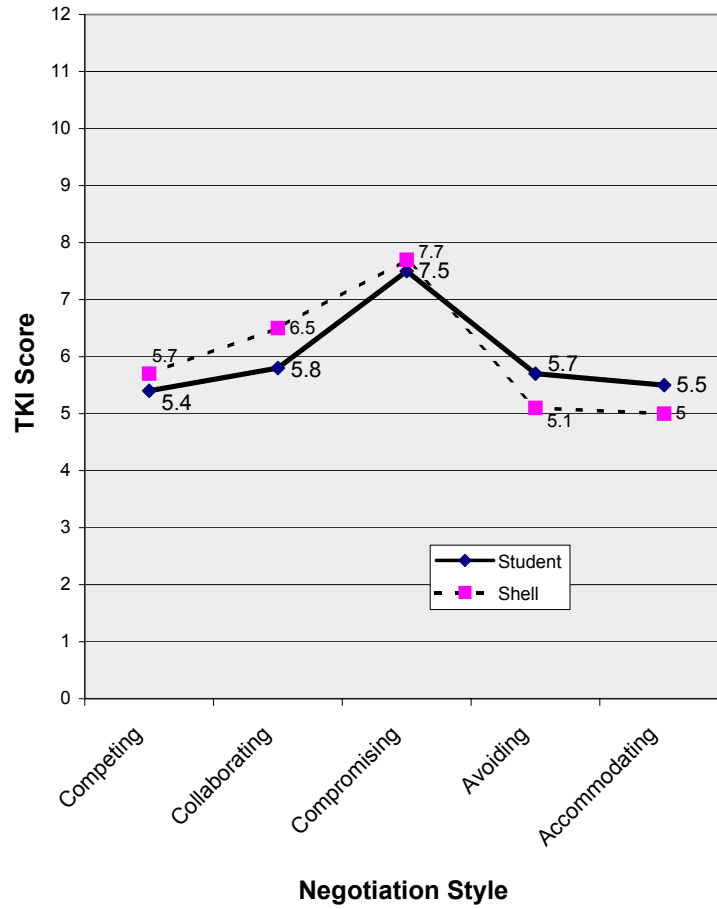


FIGURE 6. MEAN TKI SCORES OF FEMALE LAW SCHOOL NEGOTIATION STUDENTS (N=463) AND FEMALE BUSINESS EXECUTIVES (N=431) (SHELL 2004)

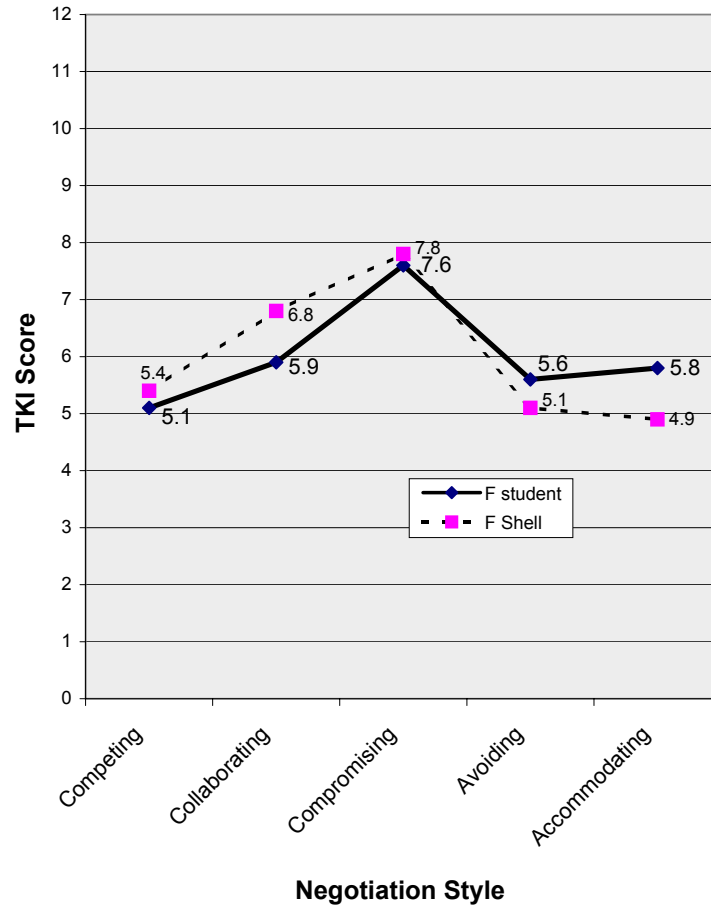


FIGURE 7. MEAN TKI SCORES OF FIRST YEAR (N=165) AND THIRD YEAR (N=89) LAW STUDENTS

