Using *Creativity* when Negotiating Commercial Disputes – A Challenge for Lawyers?

"Negotiations which end in a resolution that satisfies *all* parties are rare"[1]. Why should we nevertheless strive for integrative win-win solutions rather than accepting that usually only one side can win? Especially a lawyer representing a client in a commercial dispute – where at least one party believes it has legal rights against the other that are enforceable in court – may argue that only the own client's benefits matter but not the opponent's interests[2].

For several reasons, integrative agreements are considered to be the most desirable outcome in negotiations[3]. Negotiations are unpredictable[4], neither side can be absolutely sure to prevail in a distributive negotiation and impose the own position on the other side. If, however, the negotiators use integrative bargaining they may be more likely to avoid litigation. Furthermore, if they manage to increase the size of the bargaining pie it is more likely that also the own share of the pie is bigger[5].

Reaching mutually beneficial resolutions can also create additional short- or long-term values. A win-win solution may be the basis for a future business relationship, or a remarkable settlement may enhance the reputation of a company in its business community and thereby facilitates other, unrelated negotiations[6]. Consequently, trying to reach a win-win solution and caring about the opponent's interests eventually is in the own client's interest.

I. Why can creativity challenge lawyers in particular?

Creativity is considered a "key ingredient in the creation of value, and in transforming fixed pie or even deadlocked situations into integrative, win-win agreements"[7]. At the same time, using creativity is challenging for negotiators[8], and maybe even more for lawyers.

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[1] Max H. Bazerman, Margaret A. Neale, *Negotiating Rationally*, New York et al., 1992, 16.
[2] Alan Scott Rau, Edward F. Sherman, Scott R. Peppet, *Negotiation*, New York, 2nd edition, 2002, 153 suggesting that many attorneys "fear that adopting a problem-solving strategy will sacrifice their clients' interests in the name of cooperation."
[3] Tetyana Sribna, *Creative Thinking in Negotiations. What is the challenge?*, 2005, 5, available at http://bora.nhh.no:8080/bitstream/2330/107/1/sribna%20tetyana%202005.pdf.
[4] Robert A. Wenke, *The Art of Negotiation for Lawyers*, Long Beach, 1985, 4.
[5] Max H. Bazerman, Margaret A. Neale, *supra*, note 1, 75.
[6] See Tetyana Sribna, *supra*, note 3, *id.*.
[7] Jacob Goldenberg, Dina Nir, Eyal Maoz, *Structuring creativity: Creative Templates in Negotiation*, in *Creativity and Innovation in Organizational Teams*, New York et al., 2nd edition, 2005, 2.
[8] *Id.*

When we think of creative professions we typically have designers, artists, architects, or perhaps even teachers in mind, but not lawyers. We may like it or not: The legal profession is, generally speaking, not notorious for its creativity. Generally speaking, lawyers are said "to exacerbate disputes by increasing the demands and conflicts and narrow disputes by translating into limited legal categories what might have been broader and more general"[9].

Already the legal education does not aim to develop creative skills at the first place: Rational thinking, analytic skills, sharp argumentation, and efficiency – not creativity – are necessary to pass exams[10]. In court, the judge will typically be more impressed by precedent rather than novel own ideas. The work product of lawyers frequently has to be in a certain format, perhaps even using forms, which does not leave much room for creativity either. Overall, the adversarial system often appears to dominate the "mental landscape" of lawyers[11].

Also other, more practical restrictions can prevent lawyers from developing creativity. Clients give narrow instructions. Furthermore, a lawyer has to protect the client's interests what typically raises the desire to control the negotiation process and the communication vis-à-vis the opponent[12]. Revealing information is often perceived as being dangerous and incompatible with the own strategy but, at the same time, a key of integrative bargaining[13].

Also an immense workload or small remuneration may limit the available options. Obviously, unlimited time and funds – two parameters seldom found – are likely to promote creative alternatives. However, if the lawyer's fees are based on an hourly rate the client may not want to "waste" time/money on creative open-ended brainstorming or rapport building social conversations prior to the core negotiation.

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[9] Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 97, in Alan Scott Rau, Edward F. Sherman, Scott R. Peppet, *supra*, note 2.
[10] *See* J. W. Getzels, P. W. Jackson, *Creativity and Intelligence: Explorations with Gifted Students*, New York, 1962, suggesting that "divergent thinking" is often not rewarded in schools and organizations and that most educational training favors logical thinking rather than creativity.
[11] Alan Scott Rau, Edward F. Sherman, Scott R. Peppet, *supra*, note 2, 50.
[12] Robert Mnookin, Scott Peppet, Andrew Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, 155, in Alan Scott Rau, Edward F. Sherman, Scott R. Peppet, *supra*, note 2, describing the dilemma of lawyers using a problem-solving negotiation style and protecting the clients' interests.
[13] Roy J. Lewicki, David M. Saunders, John W. Minton, *Essentials of Negotiation*, Chicago et al., 1997, 65.

At the same time, some areas of law appear to be more creative than others. Family law, for example, is associated with "creative solutions"[14] and known for using such alternative approaches as transformative mediation[15]. In contrast thereto, business, corporate and commercial law, where typically two corporations or businessmen interact with each other, do not have the reputation to be extremely creative using "alternative" or "novel" approaches. Particularly when negotiating commercial disputes – where litigation often will be the best alternative to a negotiated agreement – the atmosphere is competitive and the parties, driven by fixed-pie-perceptions, use positional bargaining. A competitive approach, however, typically blocks the imagination and creativity because it requires that the negotiator takes a firm position on a single issue and tries to persuade the other side[16]. In contrast thereto, being cooperative may be interpreted as a sign of weakness arguing that "people with strong cases do not make concessions"[17]. This raises the question: Is creativity when negotiating commercial disputes too challenging for lawyers? The answer is: "No". Creativity "is available to everyone and can be acquired as a skill through training"[18]. Thus, all lawyers can be creative and improve their creativity.

II. What is creativity and why is creativity beneficial when negotiating commercial disputes?

A. The attempt of defining creativity

Creativity can be defined in many, very different ways focusing on either a "novel" work product or the process of "restructuring ideas into a new form" or "unique self-expression"[19]. Now, lawyers may think that the law, in general, does not allow for "unique self-expression" and the format of the work product is set forth in statutes and/or unwritten rules. However, apart from certain basic legal and ethical ground rules, the negotiation

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[14] E. Wendy Trachte-Huber, *Negotiation: Strategies for Law & Business*, Dallas, 1995, 96.
[15] Joseph P. Folger, Robert A. Baruch Bush, *The Promise of Mediation*, San Francisco, 1994.
[16] See Tetyana Sribna, *supra*, note 3, 26.
[17] Gerald R. Williams, *Legal Negotiation and Settlement*, St. Paul, 1983, 54.
[18] Morris Isaac Stein, *Stimulating Creativity: Individual Procedures*, New York, 1974. There are basically four different schools of thought which view creativity as (i) a personal trait, (ii) a problem-solving process that can be taught, (iii) a product of a special environment or stimulating climate, and (iv) a product of behavior and thought. See C. Taylor, *Various Approaches to and Definitions of Creativity?*, in R. Sternberg, ed., *The Nature of Creativity*, Cambridge, 1988.
[19] Bertram I. Spector, *Creativity in Negotiation: Directions for Research*, Laxenburg, 199, 2, available at www.iiasa.ac.at/Publications/Documents. See also: Linda Naiman, *What is creativity*, available at www.creativityatwork.com/articlesContent/whatis.htm, suggesting that "creativity requires whole-brain-thinking; right-brain imagination, artistry and intuition, plus left-brain logic and planning".

process gives lawyers a great flexibility to tailor the process to the client's needs. This should be considered as an obligation to make use of this freedom.

Integrating the above-mentioned different approaches of defining "creativity" creativity can be described as "a process by which persons develop novel outcomes that are acceptable, useful, and satisfying to a given audience"[20]. "The outcome" of creativity is "a new way of perceiving things, a new possibility, or a new path or direction to explore"[21]. Isn't this exactly what we should look for when negotiations have come to an impasse? Nevertheless, "(t)he creative aspect of negotiations is too often ignored by negotiators, who fixate on the competitive aspect of negotiations" [22].

B. The benefits of creativity in commercial dispute negotiations

Negotiations of commercial disputes are, usually, complex and perceived as a rational, unemotional process in which a fixed pie has to be split between highly competitive parties. For example, in a breach of contract scenario, the discussion will primarily focus on the legal question whether there is a cause of action and what amount of damages has to be paid. The more money is at stake, the more aggressive is the negotiation style and the higher the willingness of the parties to litigate if no negotiated agreement can be reached. Overall, commercial disputes have the potential of causing a particularly tense atmosphere in which the negotiators usually chose a competitive bargaining style.

This reminds us that the parties to a negotiation always are in conflict and negotiation is a "conflict management process"[23]. Frequently, the communication between the disputing parties is or will become ineffective[24]. For instance, the negotiators focus on accusing and blaming each other rather than on creating value and generation options[25]. Additionally, it is likely that the negotiation style of one or all parties leads to a deadlock which the parties are not able to overcome because of the advanced level of their conflict[26]. Eventually, parties are not able to reach an agreement.

Even though negotiators of commercial disputes probably won't focus on creative solutions at first place, creativity can be a valuable means of deescalating, and managing the

[20] Morris Isaac Stein, *supra*, note 18.
[21] *Id*.
[22] Leigh L. Thompson, *The Mind and Heart of the Negotiator*, New Jersey, 3rd edition, 2005, 174.
[23] Roy J. Lewicki, David M. Saunders, John W. Minton, *supra*, note 13, 112.
[24] *Id.*
[25] *Id.*
[26] *Id.*

conflict. Primarily, creativity can be used to overcome the fixed-pie perception and transform deadlocked situations into integrative solutions[27]. Compromising and reaching settlements is obviously significantly easier "when the pie has been enlarged via creative and insightful problem-solving strategies"[28].

However, creativity can be used also in other regards, for instance in order to improve the communication and relationship between the parties. It is widely accepted that relationships among negotiators may affect the results of the negotiation[29]. Positive emotions and positive moods improve the relationship between the negotiators and help them to identify joint gains which further the understanding of the underlying interests of both parties[30]. Negotiators reach most creativity when they approach the negotiations in the mental model of problem-solving rather than other mental models such as haggling or game playing[31].

Overall, creativity can contribute in different ways to the outcome of negotiations in commercial disputes. Creativity may enable the parties to think out-of-the-box, expand the pie, and reach integrative win-win solutions. Also, creativity may be beneficial in particularly critical stages of the process in order to overcome impasse. Creative tools may be used to facilitate the communication between the parties which is of essence during all stages of the negotiation. Finally, creative techniques may contribute to a positive atmosphere and support the building of trust and rapport. However, creativity never means that the lawyer should not analyze carefully, "rationally identify all issues and each party's relative concerns for these issues and by rationally thinking about the bargaining zone"[32].

C. Possible facets of creativity in commercial dispute negotiations – "substantive" and "procedural" creativity

In the context of negotiations, creativity is often described as a tool producing "freshness" which may appear in a new offer, a new approach, or both[33]. Such new offers

[27] Jacob Goldenberg, Dina Nir, Eyal Maoz, *supra*, note 7, 2.
[28] Leigh L. Thompson, *supra*, note 22.
[29] Clark Freshman, Adele Hayes, Greg Feldman, *The Lawyer-negotiator as mood scientist: What we know and don't know about how mood relates to successful negotiation*, J. Disp. Resol. 1, 2002, 1, 21.
[30] Clark Freshman, Adele Hayes, Greg Feldman, *supra*, note 29, 15, 22.
[31] Leigh L. Thompson, *supra*, note 22, 178 et seq.
[32] E. Wendy Trachte-Huber, *supra*, note 14, 75.
[33] Bertram I. Spector, *supra*, note 19, 4.

must be perceived as “breaking new ground” and being beneficial to all sides[34]. For example, the parties may discover possible side deals which may increase the bargaining pie[35] and which at the beginning of the negotiation process did not appear to be possible. Section I. below addresses the issue of generating fresh offers introducing the term of “substantive creativity”.

However, often nobody actually wants the orange peel[36] and it is in fact not possible to generate an integrative win-win solution. Even in such situations, creativity still should be used to improve the communication between the parties, change their attitudes and perceptions in order to eventually lay the foundation for reaching a mutually acceptable settlement. This second kind of creativity which focuses more on a "fresh process" is described in Section II. below introducing the term of “procedural creativity”.

Consequently, there are different ways how creativity can improve the outcome of negotiations and which a lawyer should be aware of.

I. “Substantive Creativity”

Generating new options, increasing the bargaining pie, is definitely the most challenging task when negotiating a highly disputed matter. Some key elements to achieving creative agreements are increasing the size of the resources available for allocation, nonspecific compensation (i.e. making payoffs to the other side in some other currency that it finds beneficial), trading off one issue for another, minimizing the costs incurred by one party in accepting what the other side wants (so-called cost-cutting), and satisfying the true underlying interests of both sides by bridging[37].

Lawyers should exhaust all possible legal constructions which may facilitate creative agreements. Amongst others, contingency contracts which are capable of addressing future

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[34] *Id.*

[35] Leigh L. Thompson, *supra*, note 22, 71.

[36] Roger Fisher, William Ury, Bruce Patton, *Getting to Yes Negotiating Agreement Without Giving In*, Boston, 2nd edition, 1991, providing the classic example illustrating the differences between distributive and creative integrative bargaining. Two sisters argue over a single orange, each sister claiming that she need the entire orange. Under a distributive approach one sister prevails over the other and gets the entire orange. Rather than reaching a compromise in which each sister gets half of the orange, creative integrative bargaining focusing on the underlying interests reveals that one sister wants to eat the fruit while the other wants the orange peel to bake a cake.

[37] D. Pruitt, *Creative Approaches to Negotiation*, in D. Sandole and I. Sandole-Staroste, eds., *Conflict Management and Problem Solving: Interpersonal to International Applications*, London, 1987, providing a typology of five creative approaches. For a summarizing description of the four approaches see also Tetyana Sribna, *supra*, note 3, 21 et seq.

factual uncertainties can increase the probability of reaching a settlement[38]. Also option contracts, inventive payment plans or alternative forms of compensation (stocks options or profit sharing) can create new ideas and generate fresh offers. Since this relates to basic legal skills, lawyers should be familiar with the variety of creative solutions the law offers for inventive negotiation agreements.

Given the high number of creative approaches the benefit and feasibility of which, however, largely depend on the circumstances of the individual case, the attempt of listing all of them would be inappropriate. Therefore, only the brainstorming technique which is frequently recommended but at the same time particularly challenging for lawyers, will be described in further detail below.

Creativity requires the negotiator to consider differences between the disputants as not being the ending point. Differences need to be perceived as "opportunities rather than barriers"[39]. The negotiators have to try to find solutions which "lie outside the assumptions" which can be achieved when the conflict is redefined, underlying interests are identified, and brainstorming is used for creating a variety of potential solutions[40]. The aim is to generate as many options as possible without evaluating, criticizing or judging the ideas[41].

The way the human brain usually operates imposes an obstacle which prevents negotiators from creating new solutions because we tend to develop solutions for a current issue based on previous solutions to similar problems[42]. Thereby, we limit option generating because we neither invent new solutions nor consider previous solutions to problems which were not similar to the present issue[43]. Creativity, however, requires breaking out of this "patterned way of thinking".

Especially lawyers are likely to approach a new case by recurring to previous similar matters. Finding a precedent which supports the present case increases the probability of prevailing. A lawyer has to overcome this approach in order to avoid being limited to how

[38] Leigh L. Thompson, *supra*, note 22, 182, providing an analysis of benefits of, and examples for, contingent contracts.
[39] Max H. Bazerman, Margaret A. Neale, *supra*, note 1, 94.
[40] Max H. Bazerman, Margaret A. Neale, *supra*, note 1, 100.
[41] Bertram I. Spector, *supra*, note 19, 8, 9.
[42] Mind Tools, *Creativity Tools*, 1995-2008, available at www.mindtools.com/pages/articles/newCT_00.htm.
[43] *Id.*

similar disputes have been solved in the past. Ideally, options need to be generated without comparing the present case to previous similar cases[44].

Brainstorming is considered as a valuable technique which, however, may also be challenging for lawyers because of a perceived lack of control over its dynamics, or the risk of revealing too much information. Research has established that when looking for creative solutions "quantity equals quality"[45] which contradicts to the usual thinking of lawyers.

However, even if a lawyer perceives brainstorming with the other side or the client as inappropriate, brainstorming may still be used by the lawyer individually. In fact, so-called "individual brainstorming" is considered as being able to produce an even wider range of options because nobody has to worry about other people's opinion and thus people can be more freely creative[46]. The key is not to limit the available options because of assumptions which are either unnecessary or incorrect.

II. "Procedural Creativity"

Assumed a certain commercial dispute, in fact, is not capable of an integrative solution, the negotiator can nevertheless improve the success of the negotiation by using creativity. In such situations, creative ideas can still further the overall atmosphere and communication between the parties and thereby improve the final outcome significantly. The creative means may relate to small details the impact of which sometimes cannot be measured rationally. However, based on the knowledge of the factors which contribute to the success of a negotiation these minor details appear being worth considering during the stages of the negotiation[47].

For instance, the key problem in most conflicts consists in getting the participants to talk and listen to one another[48]. Today, it is well established that negotiators who manage to establish a trusting relationship increase the probability that a win-win settlement will be reached[49]. Thus, a lawyer should not feel being limited to "traditional" approaches with

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[44] So-called "creativity templates" have been developed which shall provide a systematic way of successfully using past negotiations for future negotiations. See Jacob Goldenberg, Dina Nir, Eyal Maoz, *supra*, note 7.
[45] Linda Naiman, *supra*, note 19.
[46] Mind Tools, *Brainstorming*, 1995-2008, available at www.mindtools.com/pages/articles/newCT_00.htm.
[47] Bertram I. Spector, *supra*, note 19, 4 et seq. suggesting that the creative process may be critical at three stages of the negotiation: (1) "getting the parties to the table", (2) exchanging ideas and setting an agenda, and (3) during the negotiation itself.
[48] Howard Raiffa, *The Art and Science of negotiation*, Cambridge et al., 1982, 337.
[49] Max H. Bazerman, Margaret A. Neale, *supra*, note 1, Clark Freshman, Adele Hayes, Greg Feldman, *supra*, note 29, 21.

regard to communication, rapport and relationship building but moreover consider new approaches. Creativity may be used with regard to the following issues:

1. Creative venues

Frequently, the parties will not spend many thoughts on where the negotiations take place and rather chose one of the lawyer's offices or perhaps a convenient neutral conference facility. Commonly, negotiating on the own turf is considered being an advantage[50]. Thus, a pre-existing power relationship between the parties can be either increased or decreased by choosing the turf of one party. Several examples of international, mainly political negotiations exemplify that the choice of the venue can be of essence because the location is able to set the tone and raise positive associations[51].

Lawyers should be aware of those small details and always make a deliberate decision regarding the location. Perhaps a neutral forum or a less formal locale is less hostile. Depending on the circumstances it may be appropriate to overcome the usual formal business setting, and instead meet for a joint dinner or social activity in the evening before the negotiations. An informal setting may invite the participants to openly communicate with each other. Perhaps the disputants recognize that they have common private interests or views which are the basis for a more friendly relationship and facilitate the communication about the dispute the following day. Studies have established that groups of negotiators in a positive mood were able to achieve larger joint gains than negotiators in a neutral or negative mood[52].

2. Creative agendas

During the initial preparation, a lawyer will typically think of an agenda for the negotiation in order to structure the process. Already at this stage, creativity is important as the agenda is the first step of defining the issues and establishes priorities, hierarchies or dependences between issues. An agenda is therefore able to presume a certain order or priorities which are possibly not shared by all parties, and, thus, may limit communication as well as creativity.

[50] Leigh L. Thompson, *supra,* note 22, 35.
[51] *Id.*
[52] Clark Freshman, Adele Hayes, Greg Feldman, *supra,* note 29, 15.

The way parties frame a certain issue is able to determine whether or not they will be able to find a solution[53]. "Fractionating problems into solvable parts" is a basic creative technique facilitating problem solving during negotiations[54]. Especially where matters appear to be one-issue negotiations, which is likely when negotiating commercial disputes, negotiators should try to break one big issue down into parts and reach a multiple-issue negotiation[55].

Negotiators should also consider is the impact of links between issues. Ideally, multiple issues should be aligned in a way which allows an independent negotiation of each issue as well as a trading off of issues[56]. If, however, issues appear to be linked and one issue cannot be solved without causing impacts on other issues, a deadlock is likely to occur[57]. Consequently, it is again of essence to break down issues into parts and try to align these parts in a way which allows flexible solutions.

Overall, a lawyer should assess whether there are different aspects which impact on the conflict rather than focusing on only the main legal questions such as whether or not the contract was breached. For example, the parties may be in agreement or disagreement regarding particular facts, the results of expert opinions or particular legal evaluations. By setting an agenda which fractionates the main issue into multiple pieces the parties may have the opportunity to address all relevant issues and identify to what extent they disagree or perhaps agree. An agreement in one, even small area may encourage agreements in other parts.

Consequently, the agenda can be a useful tool to further creativity rather than preventing out-of-the-box-thinking by limiting issues and flexibility.

3. Other creative steps

Multiple other small, creative means may be used to facilitate the communication, relationship and outcome of the negotiation. In general, lawyers should consider what means are able to further mutual understanding, listening and communicating.

A lawyer should always identify the most efficient way of communication in light of the issue in dispute and the audience bearing in mind that, according to studies, only a small

[53] Bertram I. Spector, *supra*, note 19, 5.
[54] Leigh L. Thompson, *supra*, note 22, 180.
[55] *Id.*
[56] *Id.*
[57] *Id.*

portion of communication is through the spoken word[58]. Today it is well-established that using computer presentations, flipcharts or flowcharts helps visualizing the issue and improves the understanding of the audience[59]. Depending on the individual case, it may be beneficial to use demonstratives, show photos or videos, bring a model of the defective product, or run a test in order to explain a complex, possibly technical issue with which not all negotiators may be familiar.

Another example of creativity relates to the question who participates in a negotiation. Also in this regard, lawyers should not feel restricted by traditional habits. For instance, if a communication breakdown occurred or the personality and style of a certain negotiator appears to be an obstacle it may be worth considering a replacement of the negotiator. A new negotiator may be able to communicate the same message more effectively than the predecessor.

III. How lawyers can become more creative when negotiating commercial disputes: A four-step-approach

It is crucial for a lawyer to overcome general assumptions and limitations which are possibly build by past experiences. Moreover, the aim is reaching breaking new ground. However, as already mentioned above, creativity always requires a rational analysis. Thus, a sound balance has to be found while there is not only one possible way of improving the own creativity. As usual, the circumstances of each case and the characteristics and styles of the persons involved determine what creative means are likely to be successful and appropriate.

In order to find a reasonable and successful way of enhancing the own creative skills the following four-step approach may offer guidance how lawyers may approach the use of more creativity in negotiations:

1. Become aware of the benefits of creativity and the possible areas where creativity can improve the outcome
2. Find the right balance between highly innovative and inappropriate means – test creativity and get acquainted in a safe environment
3. Educate the client about the benefits of creativity and get the client's consent to using particular creative means

[58] Albert Mehrabian, *Nonverbal Communication*, Chicago, 1972, suggesting that only 7% of human communication are through verbal communication.
[59] *See* Bertram I. Spector, *supra*, note 19, 9.

4. Apply creativity in negotiations

IV. Conclusions

A lawyer has to strive for the best possible result for the client. Creativity should be used as an effective means of improving the client's results by improving the outcome of the negotiation. Creativity is a useful tool even when negotiating commercial disputes where typically a competitive bargaining over a perceived fixed-pie will be applied.

Creativity of different kinds may help reaching a settlement even in legal matters which we do not typically associate with creative negotiations. The above distinction between "substantive" and "procedural creativity" illustrates that creativity can not only create novel offers and options for integrative win-win solutions. If it is not possible to reach a win-win solution creativity can still be used to facilitate the negotiation process in various ways. Creativity may enhance the overall atmosphere of the negotiation, improve the communication between the negotiators and, eventually, the likelihood of reaching a settlement. Also, creativity never means that the lawyer should refrain from rational analyses which are always necessary. Moreover, using creativity is an additional skill lawyer should use.

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