

NEGOTIATION

Everyone wants to be an effective negotiator. But what makes a negotiator effective? This article looks at the characteristics of cooperative problem-solvers and competitive adversarial bargainers and discusses how they interact. It reports on the effectiveness of these two negotiation styles, as well as a hybrid style that employs qualities of both. Perhaps the most effective negotiators are competitive problem-solvers who hope to obtain good deals for themselves, while simultaneously trying to improve the results for opponents.



Negotiation Styles



The Impact on Bargaining Transactions

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Attorneys and business-people negotiate constantly. They negotiate within their own organizations with superiors, subordinates and colleagues. They negotiate with prospective and current clients and customers, and on behalf of their clients and customers with other public and private entities. Most negotiators employ relatively "cooperative" or "competitive" styles.¹

Cooperative bargainers tend to behave more pleasantly, and they strive to generate mutually beneficial agreements. Competitive bargainers are often less pleasant, and they work to obtain optimal results for their own sides. Individuals look forward to interactions with cooperative opponents but often dread encounters with competitive adversaries.

Negotiator styles significantly affect bargaining interactions. This article looks at different negotiator styles and the impact of these styles on bargaining encounters.

Styles of Bargaining

Most negotiation books divide bargainers into two stylistic groups: the cooperative problem-solvers and the competitive "adversarial." Cooperative problem-solvers are epitomized by the book *Getting to Yes*.² These negotiators move psychologically *toward* their opponents. They try to maximize the joint returns achieved by both sides. They seek reasonable results and begin with realistic opening positions. They also behave in a courteous and sincere manner, and they rely upon objective standards to guide discussions. They rarely resort to threats. They maximize the disclosure of relevant information and are open and trusting. Their goal is to work diligently to satisfy their underlying interests and those of their opponents. To achieve this end, they are willing to make unilateral concessions and try to

reason with people on the other side.³

Cooperative problem-solvers are willing to disclose critical information and explore the underlying interests of the parties. They explore alternatives that may enable the bargainers to expand the overall pie through trade-offs that simultaneously advance the interests of both sides. For example, when money is involved, they may agree to future payments or in-kind remuneration that satisfy the underlying interests of the respective participants.

"Competitive adversarial negotiators [desire] to satisfy their own interests while making minimal concessions They are very manipulative."

Competitive adversarial negotiators are epitomized by the book *Secrets of Power Negotiating*.⁴ These individuals move psychologically *against* their opponents, as they try to maximize their own returns. They seek extreme results and begin with unrealistic opening offers. They are not known for their sincerity. Their behavior is adversarial and even insincere. They feel more comfortable in openly competitive environments. They focus primarily on their own positions, not objective standards, and often resort to threats. They are not open and trusting and they tend to minimize the disclosure of their information. Their goal is to satisfy their own interests while making minimal concessions. They tend to have higher goals than cooperative problem-solvers and they are less concerned about joint returns.⁵ They are very manipulative.⁶

Competitive adversarial often engage in disin-

generous game-playing. They conceal negative information that will hurt them and try to manipulate opponents into making offers that maximize the returns for themselves. They may even ignore alternative formulations that might benefit their opponents if those alternatives do not clearly advance their own interests.

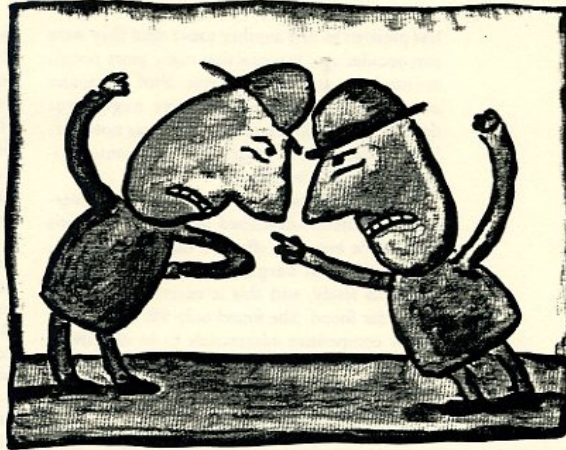
In the early 1980s, Gerald Williams conducted a study among attorneys in Phoenix and Denver to determine how their colleagues behave. He asked the respondents to indicate what percentage of the individuals with whom they had recently interacted were cooperative problem-solvers and what percentage were competitive adversarial. He found that the respondents considered 65% of their colleagues to be cooperative problem-solvers, 24% to be competitive adversarial, and 11% to be unclassifiable.

I often ask attorneys who attend my legal negotiation courses the same question. They usually suggest a 50-50 split and they are surprised when I tell them about Professor Williams' empirical findings. What would account for this discrepancy? When we interact with others, we tend to remember the negative experiences better. Thus, if we interact with 20 people today, 15 of whom are pleasant and cooperative, and five of whom are aggressive and rude, we remember the unpleasant experiences and therefore over-estimate the number of competitive adversarial opponents we have encountered. But when we see a list of the names of the 20 people with whom we interacted, we recognize that most were cooperative problem-solvers.

Effectiveness of Negotiation Styles

Many people believe that effective negotiators are people who openly admit their desire to obtain better results for themselves than their opponents. Participants in my legal negotiation courses have suggested that discourteous behavior is used strategically by these negotiators specifically to intimidate weaker opponents.

How we react in a negotiation often depends on how we are approached. How would you react if a legal adversary came to your office and told you that he is going to take you to the cleaners in this negotiation and then insulted you? Would you think that if someone is going to lose, it might as well be you? Or would you motivate yourself to avoid exploitation by a manipulative adversary? It is surprising how quickly people change their demeanor to avoid exploitation. When this hypothetical was presented to my



negotiation class, their responses were classic. Most said they would respond in a competitive adversarial manner. For example, they said they would not disclose critical information, lest this opponent take advantage of their openness. They also said they would employ strategic tactics designed to neutralize the competitive behavior of their adversary. For example, they would begin with less generous opening positions and seek better terms for themselves.

What if, instead, a legal adversary visited your office and politely showed interest in achieving a mutually acceptable agreement that would satisfy the underlying interests of both sides? Most likely you would respond in kind, in an open and cooperative manner designed to maximize the joint results achieved. My students do. They begin to appreciate how much easier it is to obtain beneficial results when the negotiators cooperate with each other to reach their goals. They also recognize how much more difficult it is for openly competitive adversarial bargainers to achieve their one-sided objectives.

Prof. Williams asked the respondents in his study to classify opponents as "effective," "average," and "ineffective" negotiators. The respondents classified 59% of cooperative negotiators, and 25% of competitive negotiators, as effective.³ They considered 3% of the cooperative problem-solvers and 33% of competitive adversarial bargainers to be ineffective negotiators.

In the late 1990s, Andrea Kupfer Schneider replicated Prof. Williams' study using attorneys in Milwaukee and Chicago. Her findings reflect changes that have affected our society in general and the legal profession in particular. People are

less pleasant to one another today than they were two decades ago. It seems that many more people are impatient and less courteous." Prof. Schneider observed that "the competitive negotiator described by Williams in the 1980s was not nearly as unpleasant and negative" as the contemporary competitive bargainer.¹⁰

I would have expected the competitive adversarial negotiators described in Prof. Schneider's study to be even less effective than the competitive adversarial bargainers described in the Williams study, and this is exactly what Prof. Schneider found. She found only 9% of contemporary competitive adversarial negotiators to be effective,¹¹ compared to 25% in the Williams study. There was only a relatively slight decline in the effectiveness of cooperative problem-solvers: Schneider's respondents found 54% of them to be effective negotiators (compared to 59% effective in the Williams study).¹²

The findings with respect to negotiators who were considered to be ineffective are even starker. While there was barely any change in the percentage of cooperative problem-solvers considered to be ineffective bargainers (3% in the Williams study and 3.5% in the Schneider study),¹³ she found a profound change with respect to the percentage of ineffective competitive adversarial negotiators. In the Williams study, the respondents considered 33% of competitive

negotiators to be ineffective. Schneider's respondents found 53% to be ineffective.¹⁴ The increase in perceived ineptitude among competitive adversarial negotiators is most likely attributable to their bad manners and unpleasant demeanor. Since they are more irritating, stubborn and arrogant,¹⁵ they provoke negative feelings in their opponents, who would likely consider them to be less effective bargainers.

The notion that one must be uncooperative, selfish, manipulative and even abrasive to be successful is erroneous. To achieve beneficial results in a negotiation, negotiators must only possess the ability to say "no" forcefully and credibly to convince opponents that they must enhance the offer to achieve agreement. This objective can be accomplished courteously and quietly, and as effectively as those who behave more demonstrably.

In my legal negotiation course exercises I have noticed only three significant differences with respect to the outcomes achieved by different styles of negotiators. First, if a truly extreme agreement is reached, the prevailing party is usually a competitive adversarial negotiator. Since cooperative problem-solving bargainers tend to be more fair-minded, they generally refuse to take unconscionable advantage of inept or weak opponents. Second, competitive adversarial bargainers generate more "nonsettlements" than their cooperative cohorts. The extreme positions taken by competitive bargainers and their frequent use of manipulative and disruptive tactics (such as threats or rudeness) make it easy for their opponents to accept the consequences associated with nonsettlements.

Third, cooperative problem-solvers tend to achieve more efficient combined results than their competitive adversarial colleagues—*i.e.*, they tend to maximize the benefits to all parties. Because they are willing to work cooperatively, they share information and try to see the problem from more than one side. Thus, they are more likely to attain higher joint values than bargainers who are primarily interested in getting the most for themselves.¹⁶ Advocates who hope to achieve mutually efficient agreements that benefit both sides must be willing to cooperate sufficiently to permit the participants to explore areas of possible joint gain. While these people may simultaneously act in their own interests to achieve their own goals, their attention to opponents' interests increases the likelihood of agreement and the probability of mutually efficient terms.



In addition, the more the participants can expand the pie, the more likely each side will obtain more satisfactory results.

Negotiation Interactions

When cooperative problem-solving bargainers interact together, their encounters are usually cooperative and open. Interactions between competitive adversarial negotiators are generally

cooperative problem-solving and the competitive adversarial styles.¹⁹ They seek to accomplish their business objectives in a congenial and seemingly ingenuous manner.²⁰ Unlike less proficient negotiators who view bargaining encounters as "fixed pie" endeavors in which one side's gain is the other side's corresponding loss, effective bargainers realize that the parties generally value various terms differently.²¹ So while they may attempt to

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competitive, and characterized by minimal exchanges of information and manipulative tactics to advance each side's own interests.

When cooperative problem-solvers negotiate with competitive adversarial bargainers, their transactions tend to be more competitive than cooperative. Cooperative problem-solvers who behave too cooperatively give the advantage to their competitive adversaries. They quickly realize that it does not pay to be naively open with such adversaries because it does not make them more forthcoming. As a result, information imbalances develop that favor the competitive adversarial negotiators. Thus, cooperative negotiators must be more competitive to avoid the exploitation that would result if they are too accommodating. These cross-style interactions generate less efficient agreements than encounters between cooperative problem-solvers, and they increase the likelihood of nonsettlements.

The Combined Style

Prof. Williams found that certain traits are shared by effective bargainers of both types. Successful negotiators are thoroughly prepared, behave in an honest and ethical manner, are perceptive readers of others, and are analytical, realistic and convincing.¹⁷ Both endeavor to *maximize their own client's return*. Prof. Schneider's study also made this finding.¹⁸ Maximizing client returns is the quintessential characteristic of competitive adversarial negotiators. The fact that it is common to both groups suggests that many effective negotiators who are identified by their peers as cooperative problem-solvers are really wolves in sheepskin. They adopt a cooperative style, but seek competitive objectives.

Most successful negotiators are able to combine the most salient traits associated with the

claim more of the distributive items desired by both sides,²² they will both look for shared values, which is more likely to lead to agreement and increase the potential for settlements. They seek what Ronald Shapiro and Mark Jankowski characterize as "win-win" results—optimal deals for themselves while providing opponents with the best terms possible given what they have achieved for themselves.²³

Proficient negotiators of both types may manipulate the perceptions of opponents to achieve their own goals, but they rarely resort to truly deceitful tactics. They are more likely to engage in "puffing" and "embellishment," rather than outright misrepresentation.²⁴ Skilled negotiators appreciate the value of credibility and realize that its loss would undermine their ability to achieve beneficial results for their clients. Without credibility it is extremely difficult to induce adversaries to disclose the true underlying interests in ways that would enable the parties to expand the pie and maximize the returns to both sides.

Despite the fact that effective bargainers generally hope to attain as much as they can for their side, they are not "win-lose" negotiators. They recognize that they do not necessarily benefit from imposing bad terms on adversaries. All other factors being equal, they hope to increase opponent satisfaction as long as it does not necessitate significant concessions by them. And when they conclude bargaining, they don't judge their success by how poorly their opponents have done. They ask, instead, whether they like what they got, realizing that if they attained their objectives, they were successful.

Proficient negotiators do not seek to enhance opponent returns merely for altruistic reasons. They do so because this approach allows them to

advance their clients' interests. They have to offer adversaries sufficiently generous terms to induce them to reach agreements. They also want to be sure that adversaries will honor their agreements, since adversaries who experience post-agreement "buyers remorse" may try to back out of the deal. Finally, they know that it is likely that they will encounter the same opponents in the future. If the opponents remember them as courteous and professional negotiators, their future bargaining interactions also are likely to be successful.

People tend to work more diligently to satisfy the needs of opponents they like personally.¹⁴ Overtly competitive bargainers are rarely perceived as likeable. They exude competition and aggression, and they generate similar responses from opponents.¹⁵ Since seemingly cooperative negotiators are more enjoyable to interact with, they find it easier to induce unsuspecting opponents to lower their guard, behave more cooperatively, and make greater concessions.¹⁷

Eclectic negotiators can be characterized as competitive problem-solvers. Their style is a composite of the cooperative problem-solver and the competitive adversarial. These negotiators have competitive objectives (maximum client returns), but they endeavor to accomplish their goals through problem-solving strategies.¹⁸ This may partially explain why Profs. Williams and Schneider found more effective cooperative problem-solvers than effective competitive adversarial bargainers. It is likely that many competitive negotiators were so successful in their use of "problem-solving" tactics that they induced opponents to characterize them as cooperative rather than competitive in the dichotomous system employed in the Williams and Schneider studies.

POSSIBLE STEPS IN NEGOTIATING A SETTLEMENT OF A WRONGFUL DISCHARGE CLAIM

Assume a wrongful discharge claim that is not without merit. The plaintiff is demanding reinstatement, back pay and compensatory damages, but what she would really like is to obtain employment from another firm that values her services. The defendant employer opposes reinstatement. If the defendant agrees to give the plaintiff a positive reference, it can avoid reinstating her and she can obtain another job. If the defendant also apologizes to the plaintiff for her emotional distress, which she considers important, the parties can then move on to negotiate how much money the defendant will give to the plaintiff as compensation for her discharge.

Conclusion

While most experts classify negotiators as cooperative problem-solvers or competitive adversarial bargainers, the most effective negotiators may be those who employ a hybrid competitive problem-solving style. This style incorporates the optimal traits from both classifications. Negotiators who employ this style may be better able to expand the overall pie and maximize adversaries' returns once they achieve their own objectives. These negotiators have a cooperative attitude and behave professionally. They realize that courteous conduct is more likely to generate positive moods in bargaining participants that increase the probability of cooperative behavior and the joint returns.

Unfortunately, however, over the past several decades, lawyers have become less courteous. Experienced attorneys who take my legal negotiation courses regularly bemoan the decreasing civility they encounter in daily practice. Many attorneys today are "win-lose" oriented. They fear that if the opponent attains her objectives, they will be unable to achieve their own goals. These attitudes are adversely affecting legal practice in general and bargaining interactions in particular.

Lawyers should recognize that rudeness is simply inappropriate behavior. It is not a sign of proficiency as a negotiator but just the opposite. Uncivilized behavior is a substitute for bargaining competence. Skilled negotiators do not engage in offensive conduct. They know that bad behavior is unlikely to induce an adversary to give them what they desire. This is basic psychology. When we dislike an opponent, we look for ways to deny that person what he or she wants. This is strong motivation for lawyers to behave better in negotiations.

Another critical reason for behaving professionally during bargaining encounters comes from recent studies indicating that people who commence negotiations in a positive mood bargain more cooperatively and achieve larger joint gains, compared to those who bargain in a negative mood.¹⁹ Negotiators who behave badly are likely to generate negative moods in opponents, thus increasing the probability of nonsettlements.

Lawyers should not take the negotiation process personally and they should never view legal adversaries as the "enemy." In fact, these individuals are their best friends because without them, there would be no business arrangements to structure, no licensing agreements to develop, and no disputes to resolve. ■