Competitive Negotiation

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A. Competitive and Cooperative Negotiation

We each have our own approach of how to get what we want. So it is with negotiation. Our negotiation approach or style is rooted in our values, assumptions, experiences, goals, and the situation. Even though you may have a general style, you may change your approach to a negotiation based on the specifics and the needs of your client. Many terms are used to describe different negotiating styles in a range from hard to soft. For purposes of introducing the approaches and distinguishing them, we use here two basic categories: competitive and cooperative.

Consider the following example of two different approaches applied to an intellectual property claim at different stages in the dispute.

> **MICROSOFT V. STAC**
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> Stac Electronics was an engineering company founded in 1983 by seven friends at Caltech. The company developed its ‘‘Stacker’’ disc compression software in 1990. Bill Gates, CEO of Microsoft, wanted Stac’s data compression technology and met personally with Stac’s president, Gary Clow, to discuss licensing of Stac’s software. The negotiations were turned over to other Microsoft executives and lawyers to negotiate. Although willing to pay Stac a modest gross license fee, Microsoft refused to pay Stac any per-user royalty for its patented compression technology. Microsoft took a hard line, saying that it could have other sources develop reliable data compression technology that could be incorporated into the MS-DOS operating system, which would have an immediate and adverse effect on the viability of Stacker and threaten Stac’s continued economic viability. Microsoft had a reputation of using its huge market share and resources to negotiate in a hard fashion and favorably license software that it incorporated into its products. Negotiations broke off, and in 1993, Microsoft released MS-DOS 6.0, which included a disk compression program called Double Space. Stac was outraged, as Microsoft had previously examined the Stacker code as part of the due diligence process in their earlier negotiations and Stac believed that Microsoft infringed its patent.
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> Microsoft would not budge on Stac’s claim, and Stac filed a patent infringement suit against Microsoft. Microsoft counterclaimed that Stac had misappropriatedthe Microsoft trade secret of a preloading feature that was included in Stacker 3.1. In 1994, a federal court jury in California awarded Stac $120 million in compensatory damages, coming to about

$5.50 per copy of MS-DOS 6.0 that had beensold. The jury also concluded that Stac misappropriated Microsoft's trade secret and simultaneously awarded Microsoft $13.6 million on the counterclaim.

Feelings on both sides were negative and intense. Mr. Clow appeared on CBS's *Eye to Eye with Connie Chung* and described his negotiations against Microsoft Chairman Bill Gates as ''like a knife fight.'' Bill Gates, the subject of a profile on the show, walked out of an interview when Ms. Chung asked him about Mr. Clow's charges.

A new round of negotiations commenced in the changed circumstances of the jury verdict. Both sides had the option of legal appeals over the jury verdicts. Instead, their lawyers negotiated in a more cooperative manner and created a deal that caught Wall Street off guard, favorably affecting the share price of both companies. Each side agreed to drop its claims in exchange for cross-licensing all of their existing patents, as well as future ones over the next five years. The pact called for Microsoft to pay Stac license royalties totaling $43 million over 43 months, while also investing $39.9 million for a 15-percent equity stake in Stac. The total $82.9 million outlay represented a gain for Microsoft, which had already charged off $120 million for the jury award in its fiscal third quarter and now was able to credit much of the difference in the current period. Stac also came out ahead, by getting a significant cash infusion without a long appeals process to collect money from Microsoft. Mr. Clow said that $82.9 million being turned over by Microsoft represented more than Stac would have gotten had the $120 million been paid, because income taxes and Stac's own $13.6-million penalty would have whittled the final amount to about $64 million. In addition, Stac formed an alliance with the most powerful player in the software industry. Mr. Clow stated that, ''this is not personal. This makes good business sense going forward…. This demonstrates it is possible to do win-win deals.'' Microsoft's executives concurred. ''This is a lot more fun than disagreeing,'' said Michael Brown, Microsoft's vice president of finance, referring to the more cooperative final round of negotiation.

Bill Gates became the richest man in the world by being smart, diligent, and keenly competitive. As a negotiator, he was known for being aggressive and competitive, although there are accounts of him using his considerable creative skills to negotiate value-added cooperative outcomes. In the above example, Gates played hardball when he first negotiated with Stac's Clow because he thought it was to the advantage of Microsoft. That competitive approach, which in the past had served Microsoft's interest, backfired. Gates then changed his approach, having his lawyers negotiate a more cooperative deal going forward. Although the competitive and cooperative approaches are treated as seperate negotiation models, a skilled negotiator may at times employ one or the other, depending on assessment of the circumstances and goals. As we will see, your choice may also be a matter of your personal comfort zone.

The *competitive* approach assumes that the purpose of bargaining is to obtain the best possible economic result for your client, usually at the expense of the other side. A competitive bargainer is likely to think that negotiation involves a limited resource or fund that must be distributed between competing parties—in effect, a fixed economic ''pie.'' In a competitive approach, the parties' relationships and other intangibles are not of primary importance. The competitive bargainer's goal is to pay as little as possible (if a buyer or defendant) or obtain as much as possible (if a seller or plaintiff), as a dollar more for your opponent is necessarily a dollar less for you. A competitive bargainer, in other words, sees negotiation much as a litigator sees a trial: Someone must win and someone must lose, and her central mission is to win. This approach is also known as ''distributive'' or ''zero sum'' bargaining, because the negotiators see their task as distributing a fixed, limited resource between them.

A simple example of where competitive bargaining is likely to occur is when a lawyer negotiates with an insurance adjuster in a distant city to settle a client's claim for property damage to a car caused by a falling tree limb. The client, we will assume, has since changed insurance companies, and the lawyer does not expect to do business with this adjuster again, so neither sees any interest in nurturing a relationship. In this situation both sides have a limited joint interest in conducting the bargaining process efficiently. Both the lawyer and the adjuster are likely to see their sole goal as agreeing on a dollar amount that the company will pay the insured to give up his claim, and to assume that a better settlement for one will necessarily be worse for the other.

In this negotiation, each side may posture about the dimensions of the issue or conflict, initiate a demand or offer (a specific proposal for resolving the dispute), and bargain over that proposal or present a counterproposal. A competitive negotiator will attempt to change the other side's perception to persuade them that their case is weaker and worth less than they thought and that her case is stronger and more valuable than her opponent previously recognized. Incremental concessions are usually made that narrow the bargaining range. Finally, a compromise settlement may be agreed upon. This approach to negotiation centers on predetermined positions and maximizing individual gain.

A *cooperative* bargainer, by contrast, does not view negotiation ''pies'' as fixed. Cooperative bargainers work to identify interests and examine differences in how the parties value items. They then search jointly with the other negotiator—viewed more as a partner rather than an opponent—for options and a solution that will best satisfy both parties' interests. Cooperative negotiation is marked by an effort to understand one another's perceptions and reexamine them together to arrive at a shared picture or a mutually acceptable valuation. This cooperative approach is frequently called ''integrative'' bargaining, because it emphasizes integrating the parties' needs to find the best joint solution. It is also referred to as ''interest-based'' negotiation because it sees the goal of bargaining as satisfying people's underlying interests.

Rather than moving from positions, to counter-positions, to a compromise settlement, cooperative negotiators search for a variety of alternatives that optimize the interests that

they have prioritized. The parties can then create an outcome from a combination of generated options so that a joint decision, with more benefits to all, can be achieved. This more collaborative approach does not necessarily produce a simple compromise between competing positions. It seeks a creative settlement not bound by predetermined positions.

A classic situation that calls for cooperative bargaining is an effort by two businesses to form a joint venture. Cooperative bargainers would first ask what special resources and capabilities each partner could bring to the deal (for example, does Partner A have special expertise in marketing, whereas Partner B has more strength in design? Does one have good access to financing, whereas the other has open office space?). The negotiators would also ask whether either partner had particular needs, for example, one for an assured stream of income and the other for cutting-edge technology. Cooperative bargainers would focus on finding terms that best exploit each partner's abilities and minimize weaknesses, creating the strongest possible future partnership.

Cooperative and competitive bargaining are not mutually exclusive. Working to ''bake'' the biggest possible ''pie'' does not, in itself, say anything about how the final pie will be divided. Savvy competitive negotiators, for example, will look earnestly for ways to ''expand the pie.'' Competitors, however, are likely to see expanding the pie as less important than getting the largest possible piece for their clients. Cooperative bargainers must also face the pie-dividing problem, but tend to give it less significance than competitors. In the joint venture example described above, cooperatives would emphasize creating the best possible deal. They would then look for a principle for dividing the benefits (that is, the ''pie'') that both partners saw as fair, rather than trying to outfox their partner to get the lion's share.

In practice, cooperative and competitive approaches may be mixed or sequenced, depending on the setting, subject matter, and personalities of the negotiators. However, descriptions of cooperative and competitive styles, as well as distinctions between these two approaches, provide a paradigm for understanding the dynamics of negotiation.

There are styles of negotiating that go beyond either cooperative or competitive, which might be seen as more intense versions of each approach. Those competitive negotiators that we label *adversarial* bargainers view negotiation as a kind of war and believe that all is fair in winning it. Extreme adversarial bargainers may be willing to renege on tentative agreements, misrepresent their authority, make empty threats, and distort facts that cannot easily be checked or challenged, if such tactics seem likely to win them a better outcome.

By contrast, *problem-solving* bargainers employ intensely cooperative, interest-based tactics. Problem solvers focus almost exclusively on finding solutions that will maximize the value of the deal for both parties. Problem solvers are extremely reluctant to obtain a better outcome for their client at the expense of their counterpart and insist on using genuinely neutral principles to accomplish the task of allocating benefits.

For simplicity, we follow the convention of generally referring to bargaining styles in terms of *competitive* and *cooperative*, but we also separately discuss adversarial and problem-solving techniques. The distinctions between adversarial and competitive styles (often used interchangeably), on the one hand, and cooperative and problem-solving styles (also used interchangeably), on the other hand, are not always clear. We will examine the underpinnings of the contrasting negotiation approaches and some of the strategies and tactics associated with each.

1. Competitive/Adversarial Approach

Gary Goodpaster, *A PRIMER ON COMPETITIVE BARGAINING*

J. Disp. Resol. 325 (1996)

One cannot understand negotiation without understanding competitive behavior in negotiation. It is not that competing is a good way to negotiate; it may or may not be, depending on the circumstances. Understanding competition in negotiation is important simply because many people do compete when they negotiate, either by choice or happenstance….

Competitive Negotiation Strategy

In competitive negotiation or distributive bargaining, the parties' actual or perceived respective aims or goals conflict. In this context, the negotiator's aim is to maximize the realization of its goals. Since the goals conflict, either in fact or supposition, one party's gains are the other party's losses. Therefore, a negotiator's goal is to win by gaining as much value as possible from the other party…. Not only is the competitive negotiator out to gain as much as he or she can, but he or she will take risks, even the risk of non-agreement, to secure a significant gain.

The competitive negotiator adopts a risky strategy which involves the taking of firm, almost extreme positions, making few and small concessions, and withholding information that may be useful to the other party. The intention, and hoped-for effect, behind this basic strategy is to persuade the other party that it must make concessions if it is to get an agreement. In addition to this basic strategy, competitive negotiators may also use various ploys or tactics aimed at pressuring, unsettling, unbalancing or even misleading the other party to secure an agreement with its demands.

In an important sense, the competitive negotiator plays negotiation as an information game. In this game, the object is to get as much information from the other party as possible while disclosing as little information as possible. Alternatively, a competitive negotiator sometimes provides the other party with misleading clues, bluffs, and ambiguous assertions with multiple meanings, which are not actually false, but nevertheless mislead the other party into drawing incorrect conclusions that are beneficial to the competitor.

The information the competitive negotiator seeks is the other party's bottom line. How much he will maximally give or minimally accept to make a deal. On the other hand, the competitive negotiator wants to persuade the other side about the firmness of the negotiator's own asserted bottom line. The competitive negotiator works to convince the other party that it will settle only at some point that is higher (or lower, as the case may be) than its actual and unrevealed bottom line.

In skillful hands the bargaining position performs a double function. It conceals, and it reveals. The bargaining position is used to indicate—to unfold gradually, step by step—the maximum expectation of the negotiator, while at the same time concealing, for as long as necessary, his minimum expectation.

By indirect means, such as the manner and timing of the changes in your bargaining position, you, as a negotiator, try to convince the other side that your maximum expectation is really your minimum breaking-off point…. Since you have taken an appropriate bargaining position at the start of negotiations, each change in your position should give ever-clearer indications of your maximum expectation. Also, each change should be designed to encourage or pressure the other side to reciprocate with at least as much information as you give them, if not more.

Taking a firm position and conceding little will incline the other party to think the competitor has little to give. Thus, if there is to be a deal, then the other party must give or concede more.

1. Pure Bargaining, Haggling, and Just Trading Figures

When the parties are apart and have no reason, other than their mutual choice, to settle at any particular point between them, they are in a ‘‘pure bargaining’’ situation. It is easy to see how the simple negotiation game …can degenerate into a contest of haggling or just trading figures. The parties' positions—the particular dollar figures they are offering—are not connected to any reason or rationale. Basically, both buyer and seller are seeking to maximize gains. Each attempts to accomplish this by seeing how far the other party can be pushed.

Often this happens in competitive bargaining, particularly with unsophisticated competitive bargainers and usually in the late and ending stages of a negotiation. When it occurs, the ‘‘take as much as you can’’ grab is transparent and signals that the parties, or at least one party, is bargaining just to win as much as possible. Automobile dealers' sales practices exemplify this phenomenon. A new car dealer usually pegs an asking price to a manufacturer's suggested retail sticker price and to items the dealer adds to the car. Once those starting prices are left behind, the dealer and buyer usually just trade dollar figures until they reach one they are both comfortable with. Similarly, travelers who visit native markets or bazaars, or those who visit flea markets or garage sales in this country, sometimes experience much the same kind of trading. Offers and counteroffers are thrown back and forth, each party testing the other party's resolve to stick with a figure

by refusing to budge further or threatening to walk away. In essence, bargaining in this fashion is really nothing but a contest of firmness or a game of chicken.

2. Focal Points or Mutually Prominent Alternatives

It is revealing to analyze a pure bargaining situation where two equally competitive negotiators bargain with each other. Once the bargaining parties have assured their bottom lines or reservation values and have staked out their respective positions on the bargaining range, nothing inherently seems to impel settlement at any particular point between the positions, except each party's expectations regarding what the other side in fact will accept. This is problematic, however, for with each guided by expectations and knowing that the other is too, expectations become compounded. A bargain is struck when somebody makes a final, sufficient concession. Why does he concede? Because he thinks the other will not. ''I must concede because he won't. He won't because he thinks I will. He thinks I will because he thinks I think he thinks so….'' There is some range of alternative outcomes in which any point is better for both sides than no agreement at all. To insist on any such point is pure bargaining, since one always would take less rather than reach no agreement at all, and since one always can recede if retreat proves necessary to agreement. Yet if both parties are aware of the limits to this range, any outcome is a point from which at least one party would have been willing to retreat and the other knows it!…

Because people bargain competitively for various reasons, negotiators and mediators need to understand competition in negotiation in order to respond appropriately. Some people bargain competitively without giving much conscious attention to the matter. Others compete in response to the other party's competitive behavior. In this response, they follow the common pattern that a particular kind of behavior elicits a similar behavior in response. In other words, one party frames the negotiation as a contest, and the other party picks up the competitive cues and behaves accordingly. Further, people naturally incline to competitive bargaining when they are non-trusting. In such situations, in order to avoid putting themselves at risk, non-trusting people act guardedly and adopt elements of the competitive strategy, for example, withholding information or misrepresenting a position. Finally, one can readily imagine ambiguous bargaining situations, in which at least one party is non-trusting, quickly devolving into a competitive negotiation between both parties. The non-trusting party acts defensively, and the other party senses this as competitive behavior and, therefore, acts in a similar fashion.

Negotiators, however, can also consciously adopt a competitive strategy. Negotiators are most likely to compete purposefully when:

- the parties have an adversarial relationship;
- a negotiator has a bargaining power advantage and can dominate the situation;
- a negotiator perceives an opportunity for gain at the expense of the other party;
- the other party appears susceptible to competitive tactics;

- the negotiator is defending against competitive moves; or
- there is no concern for the future relationship between the parties.

This list suggests that competitive bargaining most likely occurs in situations such as labor and lawsuit negotiations, insurance and similar claims type settlements, and in one-time transactions between a relatively experienced party and a relatively inexperienced party. One would, for example, expect to see it in sales transactions where the parties will probably not see each other again.

Representative bargaining or bargaining for a constituency may also prompt competitive bargaining even when there will be future negotiations between equally sophisticated parties. The negotiator's accountability may override relationship concerns and reasons for cooperation. The concerned audience, consisting of a client, constituency, coalition partner, or other phantom party at the table, is, in effect, looking over the negotiator's shoulder. The negotiator, therefore, takes positions and makes moves she believes her client either expects or would approve. International negotiations between countries, union-management, lawsuit negotiations, and negotiations between different parties in interest-group coalition negotiations sometimes evidence this pattern.

Aside from circumstantial or situational pressures, there are some parties who bargain competitively because they believe that is the way to conduct business. There are also parties who are simply predisposed to bargain competitively and will incline to do so opportunistically in any bargaining situation if possible.

Finally, it is important to note that one can bargain competitively in a negotiation on some issues and cooperatively on others. In other words, a negotiator can selectively use competitive strategy or tactics on particular issues, while using a cooperative or problem-solving strategy on other issues. In such a case, extracting gain competitively may not greatly endanger future relationships….

Obviously, competitive bargaining covers a continuum of behaviors from the simplest, unreflective adversarial actions to highly conscious and virtually scripted contests. As such, competitive bargaining moves are natural responses in some negotiation situations and advantageous or profitable actions in others….

Questions

1. What are the advantages of adopting a competitive approach to bargaining?
2. What are the downsides of competitive bargaining?
3. Have you experienced competitive negotiation? What were the circumstances?

We turn now to a more aggressive form of competitive negotiation, which we refer to as *adversarial*. There is no shortage of advice about how to be a tough bargainer and how to get what you want in a negotiation. Check the self-help and business advice sections of large booksellers for an array of titles on this subject, including *Guerrilla Negotiating* (1999). Although adversarial negotiation may at times be advantageous, many of these

guides appear to assume that the opposing side is ignorant or gullible and will have no future opportunity to retaliate. Other books and articles catalog ‘‘hardball’’ ‘ tactics to warn you of what you might encounter. These writings are premised on the theory that to be ‘‘forewarned is forearmed.’’ Roger Dawson, the author of *Secrets of Power Negotiating* (2001), challenges the myth of cooperative ‘‘win-win’’ negotiation before sharing his adversarial secrets and what you need to watch out for so you do not become the victim of others’ hardball tactics. His list of power negotiating gambits includes the following:

- *Ask for more than you expect to get:* You can get away with an outrageous opening position if you imply some flexibility.
- *Never say yes to the first offer:* Saying yes triggers two thoughts in the other person’s mind: ‘‘I could have done better,’’ and ‘‘something must be wrong.’’
- *Flinch at proposals:* The other side may not expect to get what is asked for; however, if you do not show surprise you’re communicating that it is a possibility.
- *Always play reluctant seller:* This is a great way to squeeze the other side’s negotiating range before the negotiation even starts.
- *Use the vise technique:* ‘‘You’ll have to do better than that.’’
- *Don’t let the other side know you have the authority to make a decision:* Don’t let the other person trick you into admitting that you have authority.
- *Don’t fall into the trap of thinking that splitting the difference is the fair thing to do:* Splitting the difference doesn’t mean down the middle, because you can do it more than once.
- *Always ask for a trade-off:* Anytime the other side asks you for a concession, ask for something in return.
- *Good guy/bad guy:* It’s an effective way of putting more pressure on the other person without creating confrontation.
- *Nibbling:* Using the nibbling gambit, you can get a little bit more even after you have agreed on everything.
- *Taper concessions:* Taper concessions to communicate that the other side is getting the best possible deal.
- *Withdrawing an offer:* You can do it by backing off your last price concession or by withdrawing an offer to include freight, installation, and so on.
- *The decoy:* Use a decoy to take attention away from the real issue in the negotiation.
- *Red herring:* This is a phony demand that can be withdrawn, but only in exchange for a concession.
- *Cherry picking:* Ask for alternatives and then pick the best parts from multiple choices.
- *Escalation:* Raising demands after both sides reach an agreement.
- *Time pressure:* The rule in negotiating is that 80 percent of the concessions occur in the last 20 percent of time available.
- *Being prepared to walk away:* Project to the other side that you will walk away from the negotiations if you can’t get what you want.

- *The fait accompli:* This occurs when one negotiator simply assumes the other will accept an assumed settlement rather than go to the trouble of reopening the negotiations.
- *Ultimatums:* Ultimatums are very high-profile statements that tend to strike fear into inexperienced negotiators.

Questions

4. Do any of these tactics seem unethical? Negotiation presents a fertile area for ethical transgressions, with relatively little guidance as to ethical limits. The ethics of negotiation are addressed in Chapter 7.
5. Is there a difference between hard, competitive negotiation and ‘‘dirty’’ bargaining tricks? If so, how would you distinguish them?
6. Are there any gambits or techniques that you could add to Dawson’s list?
7. If the tactics listed by Dawson were used against you, what would you do? If any of these behaviors did produce an adverse result for your client, what would be your approach the next time you found yourself matched against this opponent?

Note: Responses to Competitive Hardball and Difficult People

Some of the books and articles cataloging competitive negotiation tactics also prescribe competitive antidotes that could be used in response. Most of these reactive ‘‘hardball’’ tactics are either responses in kind or intended to notch up the positioning in a dance of ‘‘one-upmanship.’’ The most effective countermove or response to sharp competitive tactics will depend on the context of the negotiation, your relationship with the other negotiators, your alternatives to continued negotiations, the strength of your own position, your goals in the negotiation, and the information available to you. The key to any effective response is being able to recognize aggressive and deceptive tactics and understanding their potential effect in distorting your perspective and masking the opposition’s weaknesses.

There are alternatives to responding in kind to hardball tactics or ending the negotiation. The behavior can be recognized and labeled for what it is and then dismissed by making light of it, or you can just ignore it. You can be direct by making it clear that the tactic is not working and is interfering with either of you getting what you want out of a possible deal or settlement, and that it will not be tolerated. In effect, you can discuss and set ground rules for further negotiations. Hardball tactics are most commonly used in the absence of an ongoing relationship or friendship. Taking time to become friendlier before the bargaining begins or emphasizing the likely continuing contact or repeat plays following this negotiation might discourage hardball tactics—or it might not.

The subject of responding to aggressive moves is related more generally to how we can best negotiate with people we consider difficult. Seminars and training programs are frequently offered to help us deal with ‘‘difficult people.’’ The proliferation of these programs, including ones offered for attorneys, reflects the commonly experienced frustration most of us have had in trying to work or negotiate with others whom we

perceive as being insensitive, obstinate, selfish, overly competitive, or generally unreasonable. It is an interesting paradox that experience with difficult people should be so common when few, if any, of us view ourselves as being difficult. Do you think the people you consider difficult believe themselves to be so? Studies show that opponents usually see us as more demanding and less reasonable than we view ourselves (Thomas and Pondy, 1977).

William Ury, in his book *Getting Past No: Negotiating with Difficult People* (1991), outlines problem behavior from difficult people in negotiations and offers five easy-to-remember counter-tactics, to which we have added our summary of his advice:

Stage One: Don't React—Go to the Balcony. This means controlling your own behavior and distancing yourself from your natural impulses and emotions. Become an observer to an opponent's bad behavior rather than getting sucked into the game.

Stage Two: Disarm Them—Step to Their Side. Don't fight your opponent, join him. Defuse anger, fear, and suspicion. Feel his pain and empathize, without agreeing to his demands or conceding.

Stage Three: Change the Game—Don't Reject…Reframe. Ask questions to figure out what motivates the difficult behavior. Reshape the negotiation to address the issue you want to resolve and in the direction you want it to move.

Stage Four: Make It Easy to Say Yes—Build Them a Golden Bridge. Make your devised outcome the opponent's idea, involve him in the solution, and help him ''save face'' and look good. Act more like a mediator than an adversary.

Stage Five: Make It Hard to Say No—Bring Them to Their Senses, Not Their Knees. Now that you have made it easy for the opponent to say yes, educate him so it is difficult to say no. Make it clear that his alternatives are worse than what you are offering.