Cooperative or Interest-Based Negotiation

From JAY FOLBERG, DWIGHT GOLANN, THOMAS STIPANOWICH & LISA KLOPPENBERG, RESOLVING DISPUTES: THEORY, PRACTICE & LAW, Chapter 4 (2d ed. 2010)

A. Cooperative or Interest-Based Negotiation

Cooperative, collaborative or interest-based negotiation involves parties in an effort to jointly meet each others' needs and satisfy interests. In their best-selling book *Getting to Yes* (1991), which popularized non-adversarial negotiation, Roger Fisher, William Ury, and Bruce Patton suggest that ''you can change the game,'' so that negotiation need not be positional or competitive. They prescribe an interest-based approach with suggested tactics and the use of objective criteria for joint decisions that they refer to as ''principled'' negotiation or ''negotiation on the merits.'' *Getting to Yes* is recommended reading in many courses and training classes, so you may be familiar with it. The five basic elements of principled negotiation as listed by Fisher, Ury, and Patton are:

1. *Separate the people from the problem.* The negotiators should focus on attacking the problem posed by the negotiations, not each other.
2. *Focus on interests, not positions.* Distinguish positions, which are what you want, from interests, which are why you want them. Look for mutual or complementary interests that will make agreement possible.
3. *Invent options for mutual gain.* Even if the parties' interests differ, there might be bargaining outcomes that will advance the interests of both. The story is told of two sisters who are trying to decide which of them should get the only orange in the house. Once they realize that one sister wants to squeeze the orange for its juice, and the other wants to grate the rind to flavor a cake, a ''win-win'' agreement that furthers the interests of each becomes apparent.
4. *Insist on objective criteria.* Not all disputes and negotiations lend themselves to a ''win-win'' outcome. An insurance claim for damage to a car may create such a dispute, as each dollar paid by the insurance company is one dollar less for it. (Bargaining about issues of this nature is generally referred to as ''zero-sum'' bargaining.) Fisher, Ury, and Patton suggest that the parties first attempt to agree on objective criteria to determine the outcome. Thus, instead of negotiating over the value of a destroyed car, both parties might agree that the standard ''blue book'' price will determine the settlement amount. ''Commit yourself to reaching a solution based on principle, not pressure.''
5. *Know your Best Alternative to a Negotiated Agreement (BATNA).* The reason you negotiate with someone is to produce better results than you could obtain without negotiating. If you do not know the best you are likely to obtain without negotiating, you might accept an offer you should reject or might reject an offer better than you can otherwise get. Your BATNA is the measure to decide if you are better off agreeing to a negotiated outcome or pursuing your alternatives, whether it be a trial or a deal with someone else. Your BATNA is the basis of

comparison to protect you from bad negotiating decisions and permits the exploration of imaginative solutions to satisfy your interests.

Note: Positions vs. Interests

The central theme of cooperative negotiation is that the negotiators focus on the parties' underlying interests rather than on the positions they take. Interest-based bargainers begin with the assumption that a party's position is simply one way (and often not the most efficient or effective one) to satisfy a need or interest. In most disputes parties have multiple interests of varying intensities. In Chapter 2 we looked at the triangle of conflict and presented the three components of satisfactory settlements as the three ''Es'' : economic, emotional, and environmental. These relate to the interests that cooperative negotiators attempt to meet in working toward an integrative resolution. Similarly, *Getting to Yes* explains interests in terms of ''basic human needs,'' including security, economic well-being, a sense of belonging, recognition, and control over one's life (1991, 48). These needs or interests can be further explained as follows:

- *Process interests.* People have a ''process'' interest in having disagreements resolved in a manner they consider fair. This usually includes the opportunity to tell their story and have the feeling that they have been understood. A cooperative negotiator will sometimes address an opponent's process interest by listening quietly while he vents angry emotions or accusations, then demonstrating, for example, by summarizing what has been said, that while the listener does not agree with what the speaker has said, he has heard and made an effort to understand it—so-called active listening (''So if I understand you correctly, you believe that…''). Participants may also have an interest in having a negotiation proceed in an orderly and predictable way.
- *Personal interests.* Most people have a personal interest in feeling respected in their work and as human beings, and in being seen as acting consistently with what they have said in the past and in accordance with their moral standards. Negotiators might address these personal interests by treating everyone courteously and attending to ''face saving'' needs.
- *Relational interests.* The parties might also have an interest in preserving or creating an ongoing relationship. This is particularly true in contractual disputes, because the very existence of a contract indicates that the parties once saw a benefit in working together, but it can also be true in disputes that arise from less formal connections. Examples of situations with relational interests include divorce and child custody disputes, land use controversies between neighbors, workplace disputes, and disagreements between companies and longtime customers.
- *Economic interests.* Disputants usually have economic or substantive interests. This is where most negotiations begin and where many end unsuccessfully because other interests are not addressed. Economic interests are most easy to state in the form of demands and offers, which are statements of positions. These positions may be misleading when viewed only in terms of dollars. People need money to satisfy other needs, whether material, social, or emotional. Finding out

how the money will be used or what needs it will satisfy is essential to fashioning an interest-based agreement or integrative outcome.

Fisher, Ury, and Patton recognize that it is not always easy in negotiations to identify interests, as distinguished from positions. The technique they recommend is to ask ‘‘Why?’’ Why do you want a particular outcome, and why does the other side take the position it does? Do not ask the person with whom you are negotiating ‘‘Why?’’ to seek justification of his position or challenge it, ‘‘but for an understanding of the needs, hopes, fears, or desires that it serves’’ (1991, 44). If you understand why the person wants what he is insisting upon, you can better explore how his interests can be met so you can get from him what you need.

A variation of the cooperative approach, or perhaps another label for it, is *problem solving.* Problem-solving negotiators 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 do not want 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. Negotiation is viewed as a collaboration to solve the challenge of finding opportunities for creating additional value through complementary interests. An early voice for the problem-solving approach to negotiation summarized the process as follows: ‘‘The creative problem-solving approach outlined here depends on two structural components: (1) identifying the parties’ underlying needs and objectives, and (2) crafting solutions, first by attempting to meet those needs directly, and second, by attempting to meet more of those needs through expanding the resources available. By utilizing such a framework for negotiations, the parties should recognize the synergistic advantage of such an approach over the adversarial and manipulative strategies of zero-sum negotiations’’ (Menkel-Meadow, 1984).

B. The Tension Between Creating Value and Claiming Value

The negotiation concepts popularized by *Getting to Yes*, whether labeled as cooperative or problem solving, have been widely taught and very influential since the book first appeared in 1981. However, some experienced negotiators believe the underlying theory and tactics espoused by Fisher, Ury, and Patton are naive and could set up adherents to this approach for failure. One frequently cited critic is James White, a well-respected professor and longtime teacher of negotiation. Professor White’s review, excerpted next, is followed by comments from Professor Fisher.

James J. White, PROS AND CONS OF ‘‘GETTING TO YES’’; AND ROGER FISHER, COMMENT ON WHITE’S REVIEW

34 J. Legal Educ. 115 (1984)

Getting to Yes is a puzzling book. On the one hand it offers a forceful and persuasive criticism of much traditional negotiating behavior. It suggests a variety of negotiating

techniques that are both clever and likely to facilitate effective negotiation. On the other hand, the authors seem to deny the existence of a significant part of the negotiation process, and to oversimplify or explain away many of the most troublesome problems inherent in the art and practice of negotiation. The book is frequently naive, occasionally self- righteous, but often helpful….

Unfortunately the book's emphasis upon mutually profitable adjustment, on the ''problem solving'' aspect of bargaining, is also the book's weakness. It is a weakness because emphasis of this aspect of bargaining is done to almost total exclusion of the other aspect of bargaining, ''distributional bargaining,'' where one for me is minus one for you…. [S]ome would describe a typical negotiation as one in which the parties initially begin by cooperative or efficiency bargaining in which each gains something with each new adjustment without the other losing any significant benefit. Eventually, however, one comes to bargaining in which added benefits to one impose corresponding significant costs on the other….

One can concede the authors' thesis (that too many negotiators are incapable of engaging in problem solving or in finding adequate options for mutual gain), yet still maintain that the most demanding aspect of nearly every negotiation is the distributional one in which one seeks more at the expense of the other. My principal criticism of the book is that it seems to overlook the ultimate hard bargaining. Had the authors stated that they were dividing the negotiation process in two and were dealing with only part of it, that omission would be excusable. That is not what they have done. Rather they seem to assume that a clever negotiator can make any negotiation into problem solving…. To my mind this is naive. By so distorting reality, they detract from their powerful and central thesis.

Chapter 5, entitled ''Insist on Objective Criteria,'' is a particularly naive misperception or rejection of the guts of distributive negotiation. Here, as elsewhere, the authors draw a stark distinction between a negotiator who simply takes a position without explanation and sticks to it as a matter of ''will,'' and the negotiator who is reasonable and insists upon ''objective criteria.'' Of course the world is hardly as simple as the authors suggest. Every party who takes a position will have some rationale for that position; every able negotiator rationalizes every position that he takes. Rarely will an effective negotiator simply assert ''X'' as his price and insist that the other party meet it.

The suggestion that one can find objective criteria (as opposed to persuasive rationalizations) seems quite inaccurate…. To say that there are objective criteria…in the case of a personal injury suit for a million dollars or an $800,000 judgment, is to ignore the true dynamics of the situation and to exaggerate the power of objective criteria. Any lawyer who has been involved in a personal injury suit will marvel at the capacity of an effective plaintiff's lawyer…to give the superficial appearance of certainty and objectivity to questions that are inherently imponderable…. Their suggestion that the parties look to objective criteria to strengthen their cases is a useful technique used by every able negotiator. Occasionally it may do what they suggest: give an obvious answer

on which all can agree. Most of the time it will do no more than give the superficial appearance of reasonableness and honesty to one party's position….

The author's consideration of ''dirty tricks'' in negotiation suffers from more of the same faults found in their treatment of objective criteria. At a superficial level I find their treatment of dirty tricks to be distasteful because it is so thoroughly self-righteous. The chapter is written as though there were one and only one definition of appropriate negotiating behavior…. The authors seem not to perceive that between ''full disclosure'' and ''deliberate deception'' lies a continuum, not a yawning chasm. They seem to ignore the fact that in one sense the negotiator's role is at least passively to mislead his opponent about his settling point while at the same time to engage in ethical behavior.

Finally, because the book almost totally disregards distributive bargaining, it necessarily ignores a large number of factors that probably have a significant impact on the outcome of negotiations…. There is evidence that the level of the first offer, and the pace and form of concessions all affect the outcome of negotiation, yet there is no consideration of those matters. Doubtless the authors can be forgiven for that. No book of 163 pages can be expected to deal with every aspect of negotiation. Yet this one suffers more than most, for implicitly if not explicitly, it seems to suggest that it is presenting the ''true method.'' …

Comment by Roger Fisher

…White is more concerned with the way the world is, and I am more concerned with what intelligent people ought to do. One task is to teach the truth, to tell students the unpleasant facts of life, including how people typically negotiate. But I want a student to negotiate better than his or her father. I see my task as to give the best possible prescriptive advice, taking into account the way other human beings are likely to behave as well as one's own emotions and psychological state….

The world is a rough place. It is also a place where, taken collectively, we are incompetent at resolving our differences in ways that efficiently and amicably serve our mutual interest. It is important that students learn about bluffing and hard bargaining, because they will certainly encounter it. It is also important that our students become more skillful and wise than most people in dealing with differences. Thus to some extent, White and I are emphasizing different aspects of what needs to be taught….

The most fundamental difference between White's way of thinking and mine seems to concern the negotiation of distributional issues ''where one for me is minus one for you.'' …By focusing on the substantive issues (where the parties' interests may be directly opposed), White overlooks the shared interest that the parties continue to have in the process for resolving that substantive difference. How to resolve the substantive difference is a shared problem. Both parties have an interest in identifying quickly and amicably a result acceptable to each, if one is possible. How to do so is a problem. A good solution to that process-problem requires joint action….

The guts of the negotiation problem, in my view, is not who gets the last dollar, but what is the best process for resolving that issue. It is certainly a mistake to assume that the only process available for resolving distributional questions is hard bargaining over positions. In my judgment it is also a mistake to assume that such hard bargaining is the best process for resolving differences efficiently and in the long-term interest of either side….

White seems to find the concept of ‘‘raw power’’ useful for a negotiator. I do not. For a negotiator, the critical questions of power are (1) how to enhance one’s ability to influence favorably a negotiator on the other side, and (2) how to use such ability as one has. My ability to exert influence depends upon the cumulative impact of several factors: skill and knowledge, the state of our relationship, the legitimacy of our respective interests, the elegance of a proposed solution, my willingness and ability to commit myself, and the relative attractiveness to each side of its best alternative. In advance of a negotiation I can work to enhance each of those elements…

Without knowing the particular subject matter of a negotiation or the identity of the people on the other side, what is the best advice one can give to a negotiator? People may prefer to ask different questions, but I have not yet heard better answers to the question on which we were and are working….

Questions and Note

8. Are you more persuaded by White or Fisher? Is Professor Fisher naive, or is Professor White too skeptical? Can they both be correct in some ways?
9. Have you experienced situations in which you were open and cooperative initially and then felt that you might have revealed too much or been too accommodating, so that you did not get what you wanted for yourself? If you were in that same situation again, would you behave differently? What are the trade-offs?
10. If a positional negotiator views the person across the table as an opponent, and if an adversarial bargainer views that person as an adversary, then what is the most apt designation for the person at the table with a cooperative or problem-solving negotiator?
11. Does an attorney’s reputation for openness and cooperation present a particular attraction to a client willing to pay a premium for that attorney to engage in ‘‘hard bargaining’’ or sharp tactics on his behalf? (For an interesting real-life example, see David McKean and Douglas Frantz’s *Friends in High Places: The Rise and Fall of Clark Clifford*, 1995.)
12. Can ‘‘problem-solving’’ negotiation occur if only one side wants to pursue this approach?

The distributional bargaining to which Professors White and Fisher refer occurs when a single, quantitative issue is being negotiated or all apparent possibilities of joint gain have been exhausted. Negotiation by a tourist over the cash price of an item from a transient merchant at a bazaar is a simple example of a zero-sum distributional game, in which a dollar more for the seller is a dollar less for the purchaser and no future

relationship is anticipated. Where the possibility exists to go beyond a zero-sum situation and create additional value, such as in the Microsoft–Stac dispute reported earlier, the negotiation becomes more complex and tactical choices must be made.

The next reading, from an influential book by David Lax and James Sebenius, introduces the ‘‘negotiator’s dilemma,’’ the tension that exists between the behaviors that tend to create value and those that individually claim the value jointly created. They identify some of the sources of creating value in negotiation and suggest open communication and sharing information to avoid leaving joint gains on the table. The critique by Gerald Wetlaufer, which follows our note on differences and joint gains, is more cautionary about buying into ‘‘win-win’’ negotiation and advises against sharing certain information, at least for the pecuniary reasons offered by Lax and Sebenius.

David A. Lax and James K. Sebenius, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN*

29, The Free Press (1986)

The Negotiator’s Dilemma: Creating and Claiming Value

We assume that each negotiator strives to advance his interests, whether they are narrowly conceived or include such concerns as improving the relationship, acting in accord with conceptions of equity, or furthering the welfare of others. Negotiators must learn, in part from each other, what is jointly possible and desirable. To do so requires some degree of cooperation. But, at the same time, they seek to advance their individual interests. This involves some degree of competition.

That negotiation includes cooperation and competition, common and conflicting interests, is nothing new. In fact, it is typically understood that these elements are both present and can be disentangled.

Deep down, however, some people believe that the elements of conflict are illusory, that meaningful communication will erase any such unfortunate misperceptions. Others see mainly competition and take the cooperative pieces to be minimal. Some overtly acknowledge the reality of each aspect but direct all their attention to one of them and wish, pretend, or act as if the other does not exist. Still others hold to a more balanced view that accepts both elements as significant but seeks to treat them separately…. [W]e argue that all these approaches are flawed.

A deeper analysis shows that the competitive and cooperative elements are inextricably entwined. In practice, they cannot be separated. This bonding is fundamentally important to the analysis, structuring, and conduct of negotiation. There is a central, inescapable tension between cooperative moves to create value jointly and competitive moves to gain individual advantage. This tension affects virtually all tactical and strategic choice. Analysts must come to grips with it; negotiators must manage it. Neither denial nor discomfort will make it disappear.

Warring Conceptions of Negotiation

Negotiators and analysts tend to fall into two groups that are guided by warring conceptions of the bargaining process. In the left-hand corner are the ‘‘value creators’’ and in the right-hand corner are the ‘‘value claimers.’’

Value Creators

Value creators tend to believe that, above all, successful negotiators must be inventive and cooperative enough to devise an agreement that yields considerable gain to each party, relative to no-agreement possibilities. Some speak about the need for replacing the ‘‘win-lose’’ image of negotiation with ‘‘win-win’’ negotiation, from which all parties presumably derive great value….

Communication and sharing information can help negotiators to create value jointly. Consider the case of a singer negotiating with the owner of an auditorium over payment for a proposed concert. They reached impasse over the size of the fee with the performer’s demands exceeding the owner’s highest offer. In fact, when the amount of the fixed payment was the issue, no possibility of agreement may have existed at all. The singer, however, based his demand on the expectation that the house would certainly be filled with fans while the owner projected only a half-capacity crowd. Ironically, this difference in their beliefs about attendance provided a way out. They reached a mutually acceptable arrangement in which the performer received a modest fixed fee plus a set percentage of the ticket receipts. The singer, given his beliefs, thus expected an adequate to fairly large payment; the concert hall owner was happy with the agreement because he only expected to pay a moderate fee. This ‘‘contingent’’ arrangement…permitted the concert to occur, leaving both parties feeling better off and fully willing to live with the outcome.

In addition to information sharing and honest communication, the drive to create value by discovering joint gains can require ingenuity and may benefit from a variety of techniques and attitudes. The parties can treat the negotiation as solving a joint problem; they can organize brainstorming sessions to invent creative solutions to their problems. They may succeed by putting familiar pieces of the problem together in ways that people had not previously seen, as well as by wholesale reformulations of the problem.

Roger Fisher and Bill Ury give an example that concerns the difficult Egyptian Israeli negotiations over where to draw a boundary in the Sinai. This appeared to be an absolutely classic example of zero sum bargaining, in which each square mile lost to one party was the other side’s gain. For years the negotiations proceeded inconclusively with proposed boundary lines drawn and redrawn on innumerable maps. On probing the real interests of the two sides, however, Egypt was found to care a great deal about sovereignty over the Sinai while Israel was heavily concerned with its security. As such, a creative solution could be devised to ‘‘unbundle’’ these different interests and give to each what it valued most. In the Sinai, this involved creating a demilitarized zone under the Egyptian flag. This had the effect of giving Egypt ‘‘sovereignty’’ and Israel

‘‘security.’’ This situation exemplifies extremely common tendencies to assume that negotiators’ interests are in direct opposition, a conviction that can sometimes be corrected by communicating, sharing information, and inventing solutions….

We create value by finding joint gains for all negotiating parties. A joint gain represents an improvement from each party’s point of view; one’s gain need not be another’s loss. An extremely simple example makes the point. Say that two young boys each have three pieces of fruit. Willy, who hates bananas and loves pears, has a banana and two oranges. Sam, who hates pears and loves bananas, has a pear and two apples. The first move is easy: they trade banana for pear and are both happier. But after making this deal, they realize that they can do still better. Though each has a taste both for apples and oranges, a second piece of the same fruit is less desirable than the first. So they also swap an apple for an orange. The banana-pear exchange represents an improvement over the no-trade alternative; the apple orange transaction that leaves each with three different kinds of fruit improves the original agreement—is a joint gain—for both boys.

The economist’s analogy is simple: Creativity has expanded the size of the pie under negotiation. Value creators see the essence of negotiating as expanding the pie, as pursuing joint gains. This is aided by openness, clear communication, sharing information, creativity, an attitude of joint problem solving, and cultivating common interests.

Value Claimers

Value claimers, on the other hand, tend to see this drive for joint gain as naive and weak minded. For them, negotiation is hard, tough bargaining. The object of negotiation is to convince the other guy that he wants what you have to offer much more than you want what he has; moreover, you have all the time in the world while he is up against pressing deadlines. To ‘‘win’’ at negotiating—and thus make the other fellow ‘‘lose’’ —one must start high, concede slowly, exaggerate the value of concessions, minimize the benefits of the other’s concessions, conceal information, argue forcefully on behalf of principles that imply favorable settlements, make commitments to accept only highly favorable agreements, and be willing to outwait the other fellow.

The hardest of bargainers will threaten to walk away or to retaliate harshly if their one-sided demands are not met; they may ridicule, attack, and intimidate their adversaries…. At the heart of this adversarial approach is an image of a negotiation with a winner and a loser: ‘‘We are dividing a pie of fixed size and every slice I give to you is a slice I do not get; thus, I need to claim as much of the value as possible by giving you as little as possible.’’

A Fundamental Tension of Negotiation

Both of these images of negotiation are incomplete and inadequate. Value creating and value claiming are linked parts of negotiation. Both processes are present. No matter how much creative problem solving enlarges the pie, it must still be divided; value that

has been created must be claimed. And, if the pie is not enlarged, there will be less to divide; there is more value to be claimed if one has helped create it first. An essential tension in negotiation exists between cooperative moves to create value and competitive moves to claim it.

[T]he concert hall owner may offer the singer a percentage of the gate combined with a fixed fee that is just barely high enough to induce the singer to sign the contract. Even when the parties to a potential agreement share strong common interests, one side may claim the lion's share of the value an agreement creates….

The Tension at the Tactical Level

The tension between cooperative moves to create value and competitive moves to claim it is greatly exacerbated by the interaction of the tactics used either to create or claim value.

First, tactics for claiming value (which we will call ''claiming tactics'') can impede its creation. Exaggerating the value of concessions and minimizing the benefit of others' concessions presents a distorted picture of one's relative preferences; thus, mutually beneficial trades may not be discovered. Making threats or commitments to highly favorable outcomes surely impedes hearing and understanding others' interests. Concealing information may also cause one to leave joint gains on the table. In fact, excessive use of tactics for claiming value may well sour the parties' relationship and reduce the trust between them. Such tactics may also evoke a variety of unhelpful interests. Conflict may escalate and make joint prospects less appealing and settlement less likely.

Second, approaches to creating value are vulnerable to tactics for claiming value. Revealing information about one's relative preferences is risky…. The information that a negotiator would accept position A in return for a favorable resolution on a second issue can be exploited: ''So, you'll accept A. Good. Now, let's move on to discuss the merits of the second issue.'' The willingness to make a new, creative offer can often be taken as a sign that its proposer is able and willing to make further concessions. Thus, such offers sometimes remain undisclosed. Even purely shared interests can be held hostage in exchange for concessions on other issues. Though a divorcing husband and wife may both prefer giving the wife custody of the child, the husband may ''suddenly'' develop strong parental instincts to extract concessions in alimony in return for giving the wife custody.

In tactical choices, each negotiator thus has reasons not to be open and cooperative. Each also has apparent incentives to try to claim value. Moves to claim value thus tend to drive out moves to create it. Yet, if both choose to claim value, by being dishonest or less than forthcoming about preferences, beliefs, or minimum requirements, they may miss mutually beneficial terms for agreement.

Indeed, the structure of many bargaining situations suggests that negotiators will tend to leave joint gains on the table or even reach impasses when mutually acceptable agreements are available.

Note: Differences Can Create Joint Gains

Lax and Sebenius go on to summarize the differences that can lead to joint gains and creation of value. In an article published in 2002, they elaborate on differences that may be the source of unrealized value. These differences can be summarized as follows:

- Differences in relative valuation or priorities can lead to exchanges, directly or by ‘‘unbundling’’ differently valued interests. The apple and orange fruit exchange noted in the reading is an example of differences in relative valuation that create trading value.
- Differences in tolerance for risk and *risk aversion* suggest insurance-like risk-sharing arrangements in negotiated transactions. A risk-averse litigant may be willing to discount what she will receive or pay more as a certain amount rather than bear the risk of losing at trial. If the opposing side is more risk tolerant, they can be rewarded by paying less or receiving more because they are not so averse to the risk of trial.
- Differences in *time preference* can lead to altered patterns of payments or actions over time. If a claimant needs money immediately and a defendant has a reserve set aside for settlement of the claim, a quick payment can create value for both sides and enhance the chance of an agreement.
- Different *capabilities* can be combined. Companies with complementary capabilities can negotiate deals and mergers to create value that neither could achieve alone. For example, a company with strong production capacity can combine forces with a company that has sophisticated marketing and distribution abilities to collectively enhance profitability and create value between them.
- Differences in *cost/revenue structure* can create cost-saving trades. For example, if a butcher, who gets meat wholesale, can trade meat with a shoe merchant, who gets shoes wholesale, they have created value for themselves by each getting what would not otherwise be available to them at wholesale cost.
- Differences in *forecasts* can lead to contingent agreements when the items under negotiation are uncertain and themselves subject to different probability estimates, or when each party feels that it will fare well under, and perhaps can influence, a proposed contingent resolution procedure. In a negotiation over executive compensation where the prospective executive has a more optimistic view of her abilities to produce revenue than does the company, she may agree to a lower salary with a higher bonus contingent on revenue increases. Both negotiating sides might feel better off because they have structured an employment deal based on their own forecasts and have, in effect, created value for themselves.
- Other differences (evaluation criteria, the importance of precedent, the value of personal reputation, constituency attitudes, the organizational situation, conceptions of fairness, and so on) can also be fashioned into joint gains. For example, a law firm being threatened with a suit by a former clerk for sexual

harassment might be willing to settle a claim for much more if it is cast as payment for wrongful termination.

These ‘‘differences’’ relate to the role perceptions play in understanding conflict, as explained in Chapter 3, particularly by Rummel in his excerpt on ‘‘The Subjectivity Principle.’’ You will note that we have come full circle in connecting the cause of conflict—different perceptions that are all in our heads—to a suggested approach for constructively resolving conflicts, recognizing the different perceptions and trading on them.

Gerald B. Wetlaufer, *THE LIMITS OF INTEGRATIVE BARGAINING*

85 Geo. L.J. 369 (1996)

It is now conventional wisdom that opportunities for integrative bargaining are widely available, that they are often unrecognized and unexploited, and that as a result both parties to negotiations and society as a whole are worse off than would otherwise have been the case. The failure to recognize and exploit these opportunities may reflect a failure of education, curable either by reading or by attending a course or seminar. It may reflect the ‘‘I’m right, you’re wrong, and I can prove it’’ style of discourse associated with law school education and historically male modes of moral reasoning. Or it may be the result of the ‘‘negotiator’s dilemma’’ in which the open and cooperative tactics thought appropriate to integrative bargaining are systematically exploited and driven out by the more combative tactics generally associated with distributive bargaining—starting high, conceding slowly, concealing and misrepresenting one’s own interests, arguing coercively, threatening, and bluffing.

If the problem at hand is our failure to recognize and exploit opportunities for integrative bargaining, the solution, we are told, is to shift away from the tactics of distributive bargaining and toward the tactics appropriate to integrative bargaining: cooperation, openness, and truthtelling. Individual negotiators should embrace these tactics not because they are good or ethical, or because they will help to build a better society, but instead because they will promote the individual’s immediate pecuniary self-interest….

The proponents of integrative bargaining usually assert that opportunities for such bargaining are widely, if not universally, available. Lax and Sebenius, in the most important contribution yet made to our understanding of these matters, catalogue the opportunities for integrative bargaining. Their list includes differences between the parties in terms of (1) their interests, (2) their projections concerning possible future events (3) their willingness to accept risks, and (4) their time preferences regarding payment or performance…. All four of these circumstances will sometimes, but only under certain further conditions and with certain important qualifications, afford opportunities for the parties to expand the pie through integrative bargaining….

[The author next argues and attempts to demonstrate that the listed differences between negotiating parties rarely provide opportunities to lastingly expand the pie and create joint, integrative gains. He discusses negotiating ‘‘contingent agreements,’’ which you will read about in the next chapter.]

A final claim that can now be evaluated is that opportunities for integrative bargaining necessarily imply that it is in a negotiator’s immediate pecuniary self-interest to engage in the tactics of cooperation, openness, truthtelling, honesty, and trust. First, I have demonstrated that opportunities for integrative bargaining, especially meaningful opportunities for integrative bargaining (e.g., where the pie may be made to expand and to stay expanded), exist within a narrower range of circumstances than sometimes has been claimed. Some of the differences cited by Lax and Sebenius simply do not create opportunities for integrative bargaining. Others, namely those involving different assessments regarding future events, create opportunities to expand the pie only if the parties are willing to bet on their projections. And even when the parties are willing to bet, there will be opportunities for integrative bargaining only some of the time and only in ways that will sometimes prove self-defeating in the sense that the pie may eventually return to its original size. If the pie shrinks back, one or both of the parties will be worse off than they had expected to be and, potentially worse off than they would have been had they not entered the agreement. Other circumstances named by Lax and Sebenius—multiple issues differently valued, differing projections concerning future events, differing time preferences, differing levels of risk aversion—sometimes offer opportunities for integrative bargaining but sometimes do not. Although the general claim is made that opportunities for integrative bargaining provide a reason, based solely on immediate pecuniary self-interest, to engage in openness and truthtelling, those opportunities are considerably less pervasive than has been announced. Thus, this argument for openness and truthtelling is, in that degree, narrower and less persuasive.

Second, even within the range of circumstances in which there are significant opportunities for integrative bargaining, the bargainer must almost always engage in distributive bargaining as well. Therefore, it is in the bargainer’s self-interest not just to adopt the tactics of openness and truthtelling that are said to be appropriate to integrative bargaining, but somehow also to adopt the tactics of truth-hiding and dissimulation that are said to be appropriate in distributive bargaining. However we might manage these incompatible tactics, this situation presents at most a weak and highly qualified argument for openness and truthtelling. Moreover, the argument for openness and truthtelling is not an argument for openness and truthtelling with respect to everything, but instead, is limited to information useful in identifying and exploiting opportunities for integrative bargaining. Thus, an opportunity for integrative bargaining will present an occasion for a certain amount of truthtelling with respect to one’s relative interest in various issues (or one’s projections about the future or aversion to risk) without also presenting even a weak argument for truthtelling with respect to one’s reservation price….

If there is a general case for cooperation, openness, and truthtelling in negotiations, that case is multidimensional and parts of it are expressly ethical. Certainly, because there are opportunities for integrative bargaining, a measure of openness and truthtelling is

sometimes warranted as a matter of a negotiator's immediate pecuniary self-interest. Similarly, a negotiator's long-term pecuniary self-interest may sometimes be served by openness and truthtelling because of the costs that may be associated with a reputation for sharp dealing. But it is also true that a negotiator's pecuniary self-interest is, at best, only a portion of his true self-interest. Thus, it may be in his true self- interest to accept some pecuniary costs for the sake of living in a community in which cooperation, truthtelling, and ethical behavior are the norm. Moreover, Plato's Socrates may have been right when he argued that a person who has some combination of wealth and virtue may be happier and better off than a person who has more wealth but less virtue....

We have, in certain respects, allowed ourselves to be dazzled and seduced by the possibilities of integrative or ''win-win'' bargaining. That, in turn, has led to a certain amount of overclaiming. The reason, I think, is that if we hold these possibilities in a certain light and squint our eyes just hard enough, they look for all the world like the Holy Grail of negotiations. They seem to offer that which we have wanted most to find. What they seem to offer—though in the end it is only an illusion—is the long-sought proof that cooperation, honesty, and good behavior will carry the day not because they are virtuous, not because they will benefit society as a whole, but because they are in everyone's individual and pecuniary self-interest. But however much we may want ''honesty'' to be ''the best policy'' in this strong sense, the discovery of integrative bargaining has not, at least so far, provided that long-sought proof.

Perhaps the time has finally come to consider the possibility that this proof will always elude us, for the simple reason that the world in which we live does not, in this particular way, conform to our wishes. Even if there is just the chance that this is so, and it looks much more like a certainty than a chance, it would be appropriate to acknowledge the ultimate insufficiency of understanding self-interest in narrowly pecuniary terms. It would be appropriate to attend in a systematic way to the facts that, even when it is contrary to our pecuniary self-interest, relationships matter; that we care about our reputations, not just for effectiveness but also for decency and good behavior: that we care about living in—and helping to create—communities in which pecuniary self-interest is not the only language that is spoken; and that Plato's Socrates may have gotten it right. And it would be appropriate to acknowledge the central importance of the ethical case against certain forms of competitive and self-interested behavior, especially those forms of behavior, central to the process of negotiations, that involve misrepresentations and other conduct that imposes harm upon others.

Questions

13. Are the suggestions made by Lax and Sebenius for creating value by focusing on differences equally applicable to settlement of legal disputes and to deal-making negotiations? What differences on the above list could be utilized in settling a claim for damages by an injured driver against an insurance company?
14. Do Gerald Wetlaufer's comments reflect the same concerns as those of James White? Is there any fundamental difference in their expressed view of ''win-win'' negotiation or in how negotiators should behave? If so, how do they differ?

15. Professor Wetlaufer concludes that being open and cooperative in negotiations might not benefit immediate pecuniary interests, but that relationships matter and that Plato may have been correct in teaching that virtue is more important than wealth. Even if we believe this is true when we negotiate for ourselves, as lawyers can we trade off a client's potential gain for our personal sense of virtue?
16. Do the immediate pecuniary interests of the client and the longer-term interests of the attorney in maintaining good working relations with other lawyers create a conflict of interest between attorney and client?

C. Choosing an Effective Approach

Problem

Assume that you have established yourself as an effective attorney with a good reputation for your straightforward, cooperative style. You have been a guest lecturer at local law schools about civility in the practice of law and the importance of maintaining a credible professional reputation. Your largest individual client, the president of a regional bank, which your firm also represents, has retained you to represent him in a divorce action initiated by his wife, knowing that you have experience in domestic relations practice. He explains that his highest priority is to retain total control of the bank with no share of the bank stock going to his wife, even though the law might give her a claim to some of it. He wants you to seek for him primary custody of their two middle-school-aged children, for whom he and his wife have both been active parents, so you can use that as a bargaining chip later to assure his retention of the bank stock. What would you tell him? Who should decide negotiation strategies and approaches, you or your client?

1. Negotiating Within Your Comfort Zone

Being cooperative, problem solving, competitive, or adversarial is, at least in part, a matter of choice. The choice you make depends on a number of factors: The subject of the negotiation, the expectations of your client, ethics considerations, the customs and conventions where the negotiation occurs, the interrelation between issues, the past or anticipated future relationship between the parties and between the attorneys, your counterpart's negotiation approach, the amount of time available, and the amount at stake can all influence your approach to negotiation. The biggest factor, however, is your own comfort zone, formed by your personality and values. To the extent that how you negotiate is driven by personality and values, it could be better described as a matter of style rather than approach. Behavioral style is in large part a function of who you are. Choosing a style that does not fit your personality and values, if not a recipe for failure, is likely to make your work as a negotiator difficult and dissatisfying. To succeed as a professional and find satisfaction in what you are doing, you must negotiate within your personal comfort zone.

Defining our negotiating comfort zone is not always an easy task. It is a common desire to be liked rather than disliked. We know that we are more likely to be liked when we are cooperative and giving than when we are adversarial and taking. However, we

also know that winners are admired, and we want to be respected for vigorously representing our clients' interests and succeeding when we negotiate on their behalf. Law students without legal experience may hold the view of attorneys popularized in movies and television series as hard-charging, aggressive lawyers. The dramatic, adversarial scenes popularly portrayed in dramatized jury trials may be transposed in our minds to all opposing lawyer interactions. As a result, many students have a latent fear that their preference for cooperation and friendliness will not serve them or their clients well in negotiation.

Other students may have thrived on competition and winning in sports and other contests. We know that law students are a self-selected group of achievers who have succeeded, at least academically, and made it into law school through a competitive admissions process. Competition appears to be encouraged by the legal system, where cooperation and generosity may be viewed as a virtuous but less valued quality. So it is understandable that some students are conflicted about whether negotiation should be approached as a professional game in which their competitive qualities are let loose and rewarded with success.

Those of you who have enjoyed competition know from your experience that good competitors can be friendly, gracious, and ethical. Similarly, not all competitive negotiators manifest an adversarial persona. A pleasant and respectful personal style is not necessarily inconsistent with competitive negotiation, any more than being cordial in competitive sports is inconsistent with wanting to win. The style you choose in negotiation may depend on how you define the game and the relationship you want with your negotiation counterpart.

Your negotiation style might also depend in large measure on your ingrained personality pattern. If personality patterns drive how we and others approach negotiation, can we discern those patterns in ourselves and others, and how can we benefit from the information?

Because personality does matter in how we interact with others, how we deal with conflict, and how we negotiate, researchers have attempted to test and measure personality traits that influence these functions. The *Thomas-Kilmann Conflict Mode Instrument* (or ''Thomas Kilmann test'') is one of the best methods available to assess one's tendencies as a negotiator and is administered in some law school negotiation courses. This widely used personality test measures five dimensions of how individuals deal with conflict and negotiation to determine their degree of assertiveness and/or cooperation. The Thomas-Kilmann Instrument asks test takers to respond to 30 statements (for example, ''I feel that differences are not always worth worrying about'' or ''I make some effort to get my way'') and self-score their answers. The results give the taker a profile of how strongly she scores in all five categories: Competitor, Accommodator (sometimes also called Cooperator), Avoider, Compromiser, and Collaborator (sometimes called Problem Solver).

One of the strengths of the test is that it provides relative scores rather than a simple yes–no or categorical placement: When you take the test, you receive a score along a continuum from very high to very low as a Competitor, for instance. Test takers receive scores in all five categories. This gives the taker a nuanced portrait of herself as a composite of several sometimes-conflicting tendencies. Each of the Thomas-Kilmann style categories has advantages and disadvantages in negotiation.

The five categories of conflict management styles are:

- *Competing:* High on assertiveness and low on cooperation;
- *Accommodating:* Low on assertiveness and high on cooperation;
- *Avoiding:* Low on assertiveness and cooperation;
- *Collaborating:* High on assertiveness and cooperation; and
- *Compromising:* Moderate on assertiveness and cooperation.

Another personality test is the *Five-Factor Model* of personality, also known as the Big Five taxonomy. This test is used extensively in experimental psychology to determine the five major categories describing broad personality traits, and has been applied to negotiation outcomes as well (see Barry and Friedman, 1998). The five factors that comprise the test are:

- *Extroversion:* Sociable, assertive, and talkative;
- *Agreeableness:* Flexible, cooperative, and trusting;
- *Conscientiousness:* Responsible, organized, and achievement oriented;
- *Emotional stability:* Secure and confident; and
- *Openness:* Imaginative, broad-minded, and curious.

The best known and most widely referred to personality test is the *Myers-Briggs Type Indicator*. You might have taken this test. It is administered more than 2 million times a year by large companies, the U.S. government, and academic institutions. It is the subject of countless research studies and articles, including ones that analyze the impact of personality variables on negotiation (see Peters, 1993). The Myers-Briggs measures four personality dimensions:

- introverted or extroverted;
- sensing or intuitive;
- thinking or feeling; and
- perceiving or judging.

There is now considerable literature on the role of personality in negotiation styles and outcomes, based on studies of personality test results and experimental research. However, the utility of this literature for instructional purposes is limited because of the lack of consensus among the studies and the limitations of their methodology. The following reading recognizes those limitations, but offers answers to the questions most often asked about personality and negotiation.

Sheila Heen and John Richardson, *''I SEE A PATTERN HERE AND THE PATTERN IS YOU'' : PERSONALITY AND DISPUTE RESOLUTION*

in The Handbook of Dispute Resolution 202 (M.L. Moffitt and R.C. Bordone eds., 2005)

Anyone who has more than one child knows that differences in personality are real. The first born may be quiet, eager to please, and shy in new situations. His sister comes along and is an extrovert—smiling early and befriending strangers as a toddler. These traits may remain constant throughout life as the firstborn becomes a writer and his sister makes friends easily and often as a college student, professional, and retiree….

The hard question is this: are there ways to describe the differences in people's personalities that can be useful in conducting and advising negotiations? After all, negotiation is all about dealing with people, getting along with them, and persuading them. Shouldn't knowing how people are different (and what to do about it) be an integral part of negotiation theory and strategy?

One would think so. And yet, the intersection of dispute resolution and personality is a tangle of confusion and contradiction. It is not unexplored territory—scholars have tried to find answers. And it is interesting—there is fascinating work going on and much speculation about what is being learned. Yet there are few clear, satisfying answers to questions that interest dispute resolution professionals most: Are particular personalities better negotiators? Should I negotiate differently with different personalities? And what about when the people and their problematic personalities really are the problem?

[After reviewing the most widely used personality tests, their limitations, and the literature about the reported results, the authors address six questions asked about personality and negotiation.]

1. *Is there really such a thing as personality differences?* It certainly seems so. Whether hard wired by genes or chemical mix, prompted by experience or influenced by the context, two people in a similar situation will often respond differently. This may be particularly so in the pressurized context of a dispute.

Personality researchers attempt to identify and isolate traits that are consistent across situations and different between individuals. This is where things get tricky. Human beings are complex enough, and adaptable enough, that defining and tracking traits, particularly through the dynamic process of negotiation, has proven very difficult.

2. *Or are there particular personality traits that give better outcomes?* With the exception of cognitive ability (more is better), there is no strong answer in the current research. Although you can find small-scale studies suggesting this or that trait is helpful, you can also find studies that say it does not improve outcomes.

3. *Okay, so should I negotiate differently with different personality types?* The biggest obstacle to setting your negotiation strategy based on the other person's personality is figuring out what it is. Because people act differently in different situations, researchers have found that people consistently misperceive the personality traits of those with whom they negotiate or are in dispute.

The best advice is to be aware of your own tendencies, have a broad repertoire of approaches and strategies, and be able to engage difficulties constructively as they come up. Pay attention to particular behavior you see, rather than trying to globalize how the other person ''is.'' And if one approach doesn't seem to be working, try another.

4. Isn't it true that some disputes are hopeless because people's personalities just aren't going to change?

It is certainly true that there are limits to what can change, and that some differences between people are harder to reconcile than others. And there are definitely limits to *your ability to change the other person's personality*.

Yet the impulse to throw up our hands and attribute the problem to the other person's personality flaws is a dangerous one. It blames the other person for the dispute, blinding us to our own contributions to the problem. It may also encourage us to give up on a relationship or dispute too easily or too quickly, when finding a way to work together with less frustration remains possible.

In addition, there are at least three paths forward that personality finger-pointing ignores. Remember that human beings' *behavior* can often change without a grand *personality* change. You might shift the context—offering a private caucus or written channel of communication, for example. You can try to influence the other person's behavior by influencing the story he or she tells about what's going on. Or you might try changing your contribution to the dynamic between you. The other person is reacting both to you and to his or her own experiences, tendencies, and stories, and that's a complex enough set of factors to suggest that progress is possible.

Finally, do not underestimate people's ability to change over time. As a person ages, encounters different life experiences, and makes the transition to new phases in life (where he or she may feel more secure or happier, or have more room for reflection for example), his or her traits and tendencies evolve. You may find that your personality gradually moves into a different era, one you would not have predicted from where you stand now.

5. *Why is personality profiling so popular, if it's so inconclusive?* People love to talk about themselves. And they especially love to talk about other people. Personality profiling also fits our interest in simplifying the world and the infinitely complex relationships in it. Researchers have long documented the effects of the fundamental attribution error, where we believe we know why people act the way they do, and tend to attribute especially bad behavior to their problematic personality.

People are so complicated that we can't really describe them with few enough variables to meet our needs for parsimony. People can only keep about seven items in their head at one time, before they go into cognitive overload. So they make up something that they can handle in their heads, whether or not it is accurate.

6. *So why pay attention to personality at all?* The fields of personality and negotiation are both relatively young. Our ability to map interaction in negotiation and dispute resolution, and to recommend paths of influence, is in its infancy. And our ability to isolate traits and trace them through complex interaction is still maturing.

Still, familiarity with common differences between individuals is useful. It reminds us that not every approach to influence works with every person. It can help us generate diagnostic hypotheses about why a negotiation is in trouble (''Ah! We may proceed to closure at different paces''), and come up with prescriptive advice to try out. It may also help us be more forgiving of others' seemingly crazy behavior if we can spot it as a difference in the way the two of us see and respond to the world.

Familiarity with personality differences can also be a self-reflection and coaching tool for yourself. It can help you identify and work on behavior that doesn't come naturally to you. It can also help you explain your behavior to others: ''I've learned that I'm not very comfortable making commitments before I have a chance to think things through. Can you give me the weekend and we'll nail this down on Monday?'' Becoming familiar with some of the traits that affect your ability to mediate, negotiate, or respond well to disputes can help you become more aware of the situations that bring out these traits, and other choices you might make.

Questions

17. Are the style categories and personality dimensions used by the three test instruments just different ways to label the same personality traits, or do they really measure different aspects of personality?
18. After 18 years or more as a student and as an experienced test taker, if your negotiation course readings and class discussion gave you the impression that your instructor valued collaboration more than avoidance or competition, do you think your responses to the statements on the Thomas-Kilmann test (e.g., ''I feel that differences are not always worth worrying about'' or ''I make some effort to get my way'') might be influenced by the instructor's values or not provide a totally accurate measure of your conflict style?
19. Given that all three of the personality tests described above rely on self-assessment answers, do you think the results are likely to match the assessment of your personality by opponents, family, friends, and colleagues? Does your style differ when negotiating with a close friend compared to negotiating professionally?
20. Do you feel that personality testing is helpful as an aid to better understand and improve how you negotiate? Does your answer depend on your view of whether personality traits and behavior can be altered? Do you consciously take stock of

the personality type of your counterparts when negotiating? Are there ways you can find out about their personalities before engaging with them?

2. Effectiveness and Style

As you know, negotiation is usually done in private and accompanied by confidentiality, so there is little opportunity to compare results. How lawyers behave in negotiation and what they do is not fully known. Lawyers' tales of negotiations, as well as personality tests, are filtered through the lens of the tellers' perceptions. Unless negotiations can be systematically observed on a grand scale, we will never know what really works best to produce desired negotiated outcomes. Few lawyers ever ''lose'' a negotiation, or tell about it if they believe they did not do well. Spoken and written ''war stories'' of successful negotiations are not reliable descriptions of what typically occurs, or even of what occurred in the reported negotiation. (There do not appear to be any books on ''How I Failed as a Negotiator.'') Obstacles to the study and profiling of negotiations leave new lawyers little reliable guidance on what is successful in negotiation and how to weigh the polar tensions they may feel between competition and cooperation to negotiate effectively within their comfort zone.

Two studies help fill the void of information about how lawyers negotiate and which behaviors and styles are effective. Both studies are necessarily limited because they rely on attorneys responding to questionnaires and reporting their perceptions of effective and ineffective negotiation behavior by their opponents in recent negotiations. Nonetheless, both studies provide sources of information about how lawyers negotiate and what is considered effective, as well as ineffective. Because the studies were similar and conducted more than 20 years apart, we can obtain clues about changes over time in how attorneys negotiate (see Schneider, 2000).

The news from the studies, is both good and bad. The good news for students struggling with the tension of deciding on their negotiation comfort zone and not knowing if what they are inclined to do is the right way to negotiate is that there is no one right way.

Both competitive and cooperative styles can be effective approaches to negotiation if done well and with integrity. Being an effective competitive negotiator does not require the use of tricks or deceit. Some competitive techniques can be legitimate ways to pursue negotiation goals, provided they are not carried to extremes. Being a cooperative negotiator need not be based on naiveté or being a pushover. Cooperative attorneys, who appear from the studies to predominate in numbers and perceived effectiveness, are most successful when they are mindful of the interests they are pursuing and set limits on their cooperation.

The studies indicate that although the percentage of attorneys who are adversarial has increased, about two-thirds of lawyer negotiators are classified as cooperative. The rating of cooperative negotiators as more effective than adversarial negotiators has increased. Again, it should be noted that adversarial attorneys are also rated as effective, but in a

much lower proportion. Some admirable behaviors of negotiators (like preparation, a focus on the client's interests, and high ethical standards) are shared by effective competitive and effective cooperative attorney negotiators.

The bad news is that the more recent study reported that adversarial negotiators are becoming more extreme and unpleasant. The terms most frequently used to describe them are more negative than 20 years ago. This might not bode well for the legal profession or for clients, if the reports are accurate, because this group as a whole appears less effective as negotiators than previously reported.

3. Cooperation vs. Competitiveness—Who Decides?

Generally clients get to choose the objective of negotiation, and lawyers use their professional judgment in selecting the means of obtaining the client's objectives. Of course, it's not quite so simple. In matters of litigation, the lawyer may owe the client an ethical obligation of zealous advocacy in pursuit of a client's interests. Some scholars interpret the ethical norms to mean, ''the final authority on important issues of strategy rests with the client; and the client may discharge his lawyer at will, but the lawyer has only limited ability to withdraw from representation'' (Gilson and Mnookin, 1995). Mnookin and Gilson believe that a lawyer who wishes to pursue a cooperative approach, with sensitivity for long-term professional relationships with other attorneys, may not be able to do so in the litigation context, or at least that the client calls the negotiation shots. They also point out that the client can fire the lawyer at will if the lawyer seems more cooperative than the client wishes, but that ethical norms do not always allow the lawyer to quit if the client insists on a more aggressive strategy.

Professor Robert Condlin believes that lawyers must be substantively competitive in negotiating for clients but can choose their own personal style. Competitive attorneys can adopt a cordial and respectful persona in their negotiations, although this can be a fine and difficult distinction. Condlin refers to this tug between a client's wishes for the lawyer to defect from a pattern of cooperation and the lawyer's desire for long-term cooperation as the ''bargainer's dilemma.'' Like the prisoners' dilemma, different negotiation tactics may be called for if the situation is viewed as a single- or multiple-round game. Clients tend to view litigation and some deals as one-round events. Lawyers usually view their negotiation with other lawyers as unlimited multiple rounds, where any defect will bring future retaliation and a blemished reputation (Condlin, 1992). We will return to this issue in Chapter 7, where we probe deeper into negotiation ethics.