MEDIATION

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MEDIATION

THE ROLES OF ADVOCATE AND NEUTRAL

FOURTH EDITION

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To my wife, Helaine, who has taught me how much dispute resolution depends on the insights of psychology and the art of understanding people

—D.G.

To my children, Ross, Lisa, and Rachel, who taught me the necessity of mediation

—J.F.

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PREFACE

This book is based on three key assumptions: First, to represent clients effectively lawyers must be able to mediate effectively. Second, new lawyers are much more likely to encounter mediation as advocates or advisers than as professional neutrals. Finally, a textbook should be interesting to read, bring together the best writing on the process, be fully integrated with video, and support interactive learning.

Our book has a different emphasis than some other texts. It focuses on *legal* mediation—substantial disputes involving legal claims, in which lawyers are likely to be engaged. It also looks at mediation from the perspective of a lawyer representing a client as well as a mediator dealing with conflict.

We use examples drawn from actual disputes to illustrate the readings and pique students' interest. The introductory chapter on mediation, for example, features the comments of practicing lawyers about how they use the process in a wide variety of settings. It also includes accounts of how two high-profile disputes were mediated, one involving the death of a university student and the other a major antitrust case. The readings on mediation techniques and ethical issues are also interspersed with provocative examples drawn from our practice as mediators.

The book includes questions designed to provoke critical thinking about the readings and stimulate class discussion. The text is practical while grounded in theory, and lawyer-focused but enriched by interdisciplinary knowledge. Roleplays allow students to apply concepts about which they have read and bring the text to life. These roleplays again center largely on disputes that involve lawyers—cases with significant legal claims, as opposed to neighborhood or personal conflicts.

This is the first mediation book to include video as an integral part of the teaching materials. The website gathers more than 60 video excerpts created by the authors for this book. The videos show some of the best mediators in America as well as leading neutrals in Asia and Africa. Instructors have access to additional video and other materials they can use to enhance their teaching on a password-protected site. The videos show experienced lawyers and neutrals negotiating and mediating the same cases featured in the teaching materials, allowing students to see how professionals deal with the challenges they have just faced.

We begin the book with an overview of the disputing universe. It shows that actual legal disputes, unlike the appellate cases that dominate many law school texts, are not neatly packaged but instead arise as aspects of a near-endless universe of human conflict. Because mediation is a process of assisted negotiation, we next explain the basic concepts of bargaining and present a framework for effective negotiation. Part I of the book concludes with a chapter devoted to the strategic, cognitive, and emotional barriers that often make settlement difficult.

Part II, on mediation technique, begins with examples of mediation in action and goes on to describe the forms of commercial mediation lawyers are likely to encounter, including both mixed and all-caucus formats. We go on to examine the

process itself in depth, focusing on the methods mediators use to deal with process, emotional/cognitive, and merits-based barriers.

Perhaps the most practical section of the book is Part III, which focuses on how lawyers can represent clients effectively in the process. This unit is based on our experience conducting commercial and family mediations. Contrary to the image presented in some texts, we begin from the premise that legal mediators commonly do in fact exercise "power." We treat this as a challenge and an opportunity for lawyers, who can enhance their bargaining effectiveness by drawing on a neutral's influence. We show how good lawyers can become active participants in mediation, enlisting mediators to overcome barriers to settlement and achieve their clients' goals.

In Part IV we examine how mediation is applied in different settings, ranging from divorce cases to employment, high tech, public protest, and international disputes. We also analyze policy issues, including its use in situations where a disputant may be disadvantaged by culture, gender, or spousal violence. A separate chapter delves into ethical issues, presenting situations in which the profession's model standards come into conflict with each other. We conclude with a look at how mediation may evolve in the future.

This fourth edition follows the organization of earlier editions, but we have updated our narrative, cases, and excerpts from writings. We also take advantage of students' preference for electronic and video formats: Items that have traditionally gone into a paper appendix appear on the book's website.

A note about form: To focus discussion and conserve space we have substantially edited the readings and have deleted almost all footnotes and case citations. Deletions of material are shown by three dots, but omissions of footnotes and references are not indicated.

This book is the culmination of our combined experience teaching, practicing, and shaping dispute resolution in legal contexts. Although formal acknowledgments follow, we are grateful to the students and lawyers we have had the pleasure of teaching and from whom we have learned a great deal.

D.G.
J.F.

August 2021

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This mediation book evolved from our comprehensive coursebook, *Resolving Disputes: Theory, Practice, and Law*, which we wrote with Lisa Kloppenberg and Thomas Stipanowich and, the new Fourth Edition, with Jennifer Reynolds and Amy Schmitz. This volume has grown to become a text of its own, but it would not exist without our colleagues' collaboration in creating the survey text. We are grateful for their continuing encouragement and friendship. We benefited from their enthusiasm for this project, and we look forward to partnering with them in the future.

We are thankful for the support and assistance we have each received from the staffs and librarians of the law schools at Suffolk University and the University of San Francisco. Special thanks go to the anonymous reviewers, whose comments on the draft text were insightful and very helpful in refining the contents of this book. We are most grateful to the students and lawyers with whom we have trained and worked in mediation. They have inspired us and guided what we have selected here to present to the next generation of lawyers.

Finally, we are indebted to the many authors and publishers who have granted their permission for us to edit and include parts of their publications. More specifically, we thank the following sources for permission to publish excerpts of their work:

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MEDIATION

PART 1

INTRODUCTION

CHAPTER 1

THE ORIGINS OF DISPUTES

Legend has it that the use of lawyers in court evolved from disputants hiring warriors to fight in their place. Referring to attorneys as modern-day warriors is, however, a misnomer. It is the parties who bear most of the costs, risks, and injuries in modern legal combat.

Today people have options to resolve disputes other than traditional litigation, and to represent clients successfully lawyers must be skilled in using these techniques. The adage that to someone with only a hammer, everything looks like a nail suggests the limitations of an attorney who only knows how to litigate. This book seeks to teach you how to counsel clients about an increasingly popular alternative to legal combat—mediation—and the skills to represent clients effectively in the mediation process.

A. THE NATURE OF DISPUTING IN AMERICA

Most of the disputes clients bring to you will barely resemble the cases you encountered in first-year courses in law school. In place of a clearly defined contest between named parties over narrow issues, practicing lawyers typically deal with inchoate mixtures of grievances, emotions, and justifications. Clients are usually clear about the heroes and villains in their disputes, but many other key facts are in doubt. Lacking a precise appellate record, attorneys typically work with, and must make decisions based on, fallible witnesses and incomplete documentation. In many situations, a lawyer must rely heavily on experience and intuition to assess what a client's dispute is really about, and how it may unfold in court.

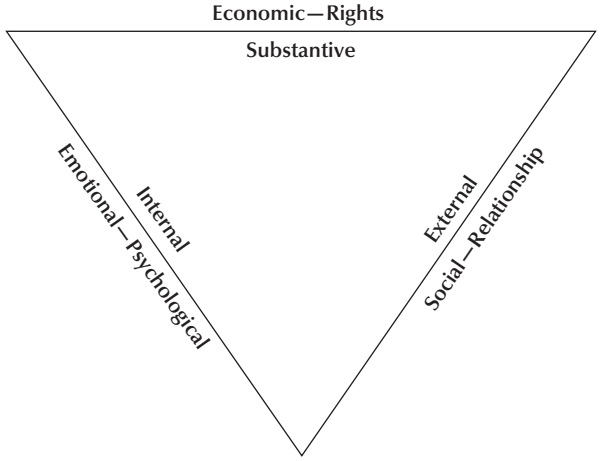
Most of us say we do not want conflict in our lives. Conflict can create a crisis mentality that can be destructive and draining, and every day we see examples of the damage it can create, from bickering neighbors to combative politicians to warring countries. And the Internet, which has created so many opportunities for community and collaboration, is often the site, if not the instigator and exacerbator, of intense conflicts.

Although conflict can cause distress, it can also function in positive ways, by motivating us to take actions that improve our lives and better fulfill our interests. Conflict may alert us to relationship problems, organizational shortcomings, or systemic inequities. In short, while conflict may be difficult, it is an unavoidable aspect of human life.

Lawyers, to whom clients often turn when conflict seems unmanageable, can help create more constructive outcomes or make difficult situations worse. The ability to help clients better understand a situation, reframe issues, and achieve their deeper interests is an important lawyering skill. To be an effective attorney you must therefore be able to assess and evaluate your clients' conflicts.

Conflict can be thought of as falling into two categories: *interpersonal* (differences between individuals or groups) and *internal* (conflicts within an individual). In interpersonal conflict, parties each want something that they perceive as incompatible with what the other person wants and may retain lawyers to help them obtain it. A client also may be conflicted internally; for example, does a terminated employee really want to return to her job, or only to restore her self-respect and get compensation for her economic losses? Does the father you represent in a divorce really want custody of the children, or is he ambivalent about divorcing and trying to hold onto the marital relationship? Recognizing the two different types of conflict can be critical in achieving client goals.

Another way of thinking about conflict is distinguishing *manifest* conflict, which is overt or expressed, from *underlying* conflict, which is hidden or not recognized. Lawyers most often deal with manifest conflicts, but a manifest conflict may be only a part or symbol of the parties' underlying differences. Two brothers may feel safer, for example, fighting over control of a family business than talking about their feelings over who was the favored child. A patent dispute may focus on lost revenue, while the parties' real conflict is about who should be recognized for creating it. Resolving a conflict well requires understanding and focusing on the emotional and relationship components and other interests which may be the driving it.



The Conflict Triangle

As this diagram shows, there are three sets of factors, or interests, at work in most conflicts which must be addressed to reach a satisfactory settlement. The three sides of the triangle are interrelated and affect each other.

- *Economic/Rights*: Money issues and legal rights, the focus of lawsuits.
- *Emotional/Psychological*: The internal influences that involve how parties feel about themselves and see a situation.
- *Social/Relationship*: How others will view what is going on, how the dispute will affect a person's status and self-respect, and similar factors.

The mix of what matters for purposes of resolving a conflict varies depending on the subject, sensitivities of the disputants, and perhaps their past interactions. Commercial disputes, for example, tend to focus on solely economic considerations, but other elements of the triangle are likely also to be involved to some degree. A businessperson sued for breach of contract, for instance, may dispute the plaintiff's money claim and also be angry at being accused and concerned about his reputation. Parties to a divorce may litigate over legal rights and money but be motivated by their concern about how their children, grandparents, or neighbors will think about their actions. A plaintiff in a wrongful termination case may be worried about how agreeing to a confidential settlement and dismissing his claim will appear to co-workers.

Traditionally lawyers have focused primarily on the manifest, interpersonal aspects of disputes and on economic considerations, rather than relationship or emotional concerns. But if a settlement addresses only the manifest issues in a conflict, it is less likely to be implemented successfully. Surfacing and addressing the underlying conflicts can generate new possibilities for resolution and improve relationships, but doing so may be uncomfortable both for clients and lawyers. We will look more into the emotional and psychological barriers to resolution in Chapter 4.

QUESTIONS

1. What is an example of a "good" conflict? What makes it good?
2. Even though conflict is pervasive in human life, it is not always obvious how to deal with it productively. In *The Conflict Paradox*, Bernie Mayer lists seven familiar dilemmas that emerge in conflict situations:

   - Compete or cooperate?
   - Avoid or engage?
   - Be optimistic or realistic about the potential for resolution?
   - Rely on principles or be ready to compromise?
   - Respond with emotion or logic? Stay neutral or advocate?
   - Concern yourself with autonomy or community?

   When you find yourself involved in a conflict, which of these dilemmas is most pressing for you? Does the context matter?
3. How would you describe your default approach to conflict?

B. HOW A CONFLICT BECOMES A DISPUTE

What pushes some people to engage lawyers to pursue claims while others do not? William Felstiner, Richard Abel, and Austin Sarat have described how harms do or do not become disputes through a sequence of "naming, blaming, and claiming."[1]

Naming occurs when people recognize that they have been harmed and want to do something about it. The distinguishing factor is not whether the victim is aware of the harm, but rather his reaction to it. Some persons accept harm simply as fate or an inevitable aspect of life and move on, while others feel that a particular injury is too great to be ignored.

In *blaming*, the person identifies a person and/or entity as having caused her injury (assuming she can identify them) and decides to hold them responsible. The victim must also engage in *claiming*, by voicing a complaint against the perceived wrongdoer and asking that the wrong be remedied. Many—arguably the vast majority of—persons who name and blame a wrongdoer do not voice a complaint, preferring to drop the matter—what some call "lumping" (as in "lump it") behavior.

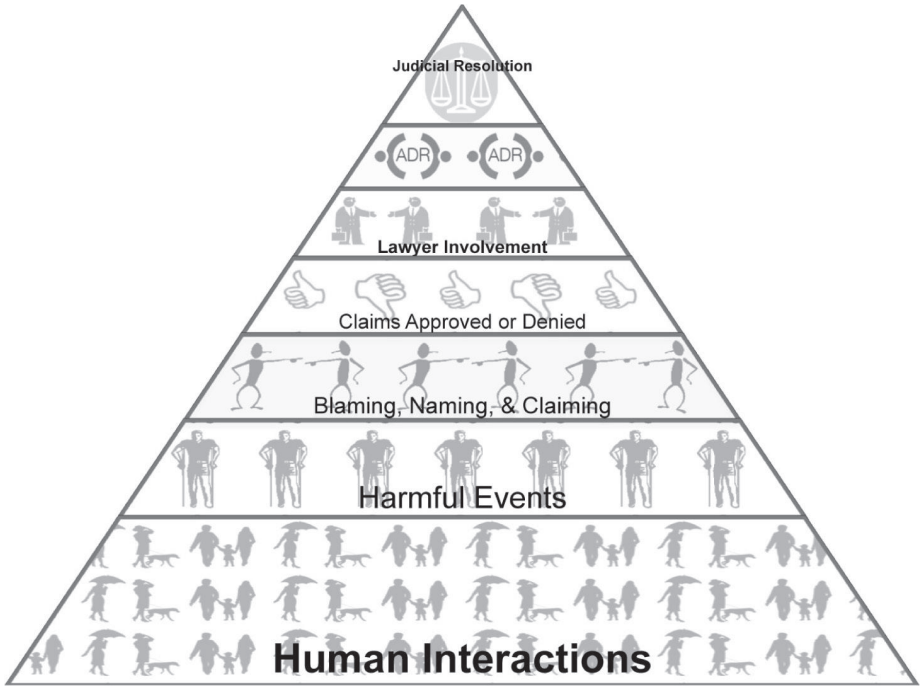
If a claim that has been voiced is rejected or responded to unsatisfactorily, the matter becomes a full-fledged dispute. Even then, however, it usually does not enter the legal system. Aggrieved persons often address disputes through informal mechanisms such as complaint hotlines, online resolution programs, social media posts or government agencies, usually without the help of a lawyer. Only a very small percentage of such disputes are brought to lawyers.

Even when disputes are presented to attorneys, they usually do not become formal legal cases. Good lawyers perform an important screening function, measuring their clients' grievances against the requirements of the law and, perhaps even more critically, the client's larger interests. Is there a viable legal theory? Will discovery produce evidence to support the claim? Will the client be willing to persevere after his initial anger and frustration have died down, and does he have the resources to do so? Is it in the client's best long-term interest to be involved in litigation? Is a court likely to rule in favor of the client, and if it does, will the defendant be able to satisfy a judgment?

Just as very few screenplays ever become movies, a large majority of potential legal cases never reach a courtroom, and many cases that are filed are later abandoned. (As one example, almost half of all claims of medical malpractice are later abandoned by the plaintiff without a court decision or monetary payment.)[2]

If a lawyer does take a case, there are usually further negotiations, before or after filing in court. Even including cases that are decided without a trial, *a large majority of civil cases are never adjudicated on the merits.* Adjudication thus forms only the tiny point of an immense triangle or pyramid. The possibility of going to trial, however, affects litigants' decisions out of proportion to its frequency. Parties' decisions to settle are often driven by a wish to avoid the risk of trial. Litigants, in other words, bargain in the "shadow of the law."[3]

The overall triangle might look like this—although the layers of human interactions and harmful events that make up its base are much too large to draw on a single page.



The Dispute Pyramid

QUESTIONS

4. Have you experienced a personal injury or an economic loss that you could attribute to a specific wrongdoer, but decided not to pursue the matter? What led you not to assert a claim?
5. What are some of the reasons that a person might decide to forgo or "lump" a valid legal claim?
6. Have friends or family ever asked you, as someone who they see as expert in law, if they should pursue a claim for an injury or a wrong? How did you advise them, and why?
7. People with higher education or income are much more likely to pursue claims related to products they buy than others. Why do you think this is so? Do issues of class, race, gender, or power affect whether someone moves from blaming to claiming?
8. When you were a child, how did your family deal with conflict? Has your upbringing in any way influenced your own instinctive response to dealing with disputes? How?

C. CONCLUSION

A lawyer's challenge is to select the right process for a particular client's problem and use it effectively. Litigation culminating in a trial is still the forum of choice when it is important to establish a public finding about what happened and force an unwilling adversary to act. A party can use adjudication, for example, to obtain a judgment to enforce a financial obligation or compel specific performance of a contract. Judicial decisions can establish precedent or rally people behind a principle or a cause. Disputants also use the litigation process to create the conditions for successful negotiation.

Of course, the irony is that most of these advantages also can be drawbacks: Each reason for you to pursue litigation can also be a reason for your opponent to do so. The ultimate curse may be to have a case in which both your client and the other side are sure that they are right and determined to persevere!

Mediation is a more appropriate choice when potential litigation costs are high relative to the amount in controversy or one or both parties do not want to bear the risk of an adverse result. Mediation is also likely to be appealing when the limited remedies available from a court do not meet the disputants' real needs or parties want a voice in shaping the outcome.

The kinds of disputes you encounter in practice will depend in large part on your professional path. As a transactional lawyer, you will help clients to evaluate and structure potential deals and negotiate terms that give them the greatest advantages and least possible risk. Clients will respect you for your ability to keep them out of disputes and value you for your skill in bringing disparate parties together.

If you become an inside counsel to a corporation or nonprofit organization, you will negotiate regularly as well, both with your counterparts in other entities and with colleagues in your own office. You may be surprised to learn that experienced corporate counsel often describe themselves as "mediators with a small 'm.'" Inside lawyers often find that they have multiple "clients," in the form of the different personalities and constituencies in their organization. Unless such a lawyer brings his internal constituencies to consensus on a common course of action, it is very difficult for him to negotiate effectively with outsiders. Thus, corporate counsel must often play the role of "honest broker," using mediative skills to forge agreement among their multidimensional client. They may also design systems to resolve disputes within a company or with customers and others outside the organization.

If you are a litigator, you will settle many more cases than will ever be decided by a court. Indeed, an increasing number of lawyers now resolve more cases through mediation than direct negotiation. Litigators, too, sometimes find themselves acting as "small m" mediators, for example, to forge a common bargaining position among several executives, or multiple plaintiffs or defendants in a case. The most direct and inexpensive path to resolving a dispute, however, remains negotiation, and mediation is itself a process of assisted bargaining. For that reason, we begin by exploring how lawyers negotiate.

Endnotes

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2. Golann, Dwight. (July 2011) *Abandoned Medical Malpractice Claims: Their Surprising Frequency, Apparent Causes, and Potential Remedies*, 30 Health Affairs 7.
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CHAPTER 2
NEGOTIATOR STYLES

Negotiation is the process of communication used to get something we want when another person has control over whether or how we can get it. Everyone negotiates as part of modern life, and some people—like lawyers—are paid to negotiate on behalf of others. The vast majority of disputes are negotiated to settlement or plea bargain without trial, and many transactions are also the result of negotiated agreements. In short, negotiation is at the core of what lawyers do in representing clients.

Most lawyers think they are skilled negotiators because they negotiate frequently. However, negotiating often does not necessarily result in negotiating effectively. Unlike trial practice, negotiation is usually done in private, without a clear measure of success or the opportunity to compare results or benefit from a critique. People with whom you negotiate rarely give you an honest assessment of how you did, and it is most often in their interest for you to believe you did well. Regardless of our intuitive ability, negotiation skills and results can be improved with analysis and understanding, as well as practice.

A. MATTERS OF STYLE

We begin by examining negotiation styles. Many terms are used to describe different negotiating styles, such as "hard and soft," "competitive and cooperative," or "adversarial and problem-solving." The distinctions between "hard" styles such as competitive and adversarial, on the one hand, and "soft" styles like cooperative and problem-solving, on the other hand, are not always clear. Depending on context, strategy and personal preferences, negotiators may move between competitive and cooperative styles in a single interaction. Deciding whether and how to shift styles is a key challenge for negotiators. Your style choices will depend on a variety of internal and external considerations.

Although now known as a philanthropist, Bill Gates became one of the richest people in the world by being smart, diligent, and keenly competitive. As a negotiator, he was known for being aggressive and competitive. In the following example, however, Gates used different approaches at different stages of the dispute.

PROBLEM: *MICROSOFT v. STAC*

Stac Electronics was a computer engineering company that developed software that expanded data storage capacity. Bill Gates wanted Stac's technology. He met personally with its president to discuss licensing its software, then turned the negotiations over to others. Microsoft was willing to pay a gross fee, but refused to pay a per-user royalty. It threatened that if Stac refused it would go to other sources for the technology, threatening Stac's existence.

Negotiations broke off and Microsoft released a new system that competed with Stac's. Stac believed Microsoft had stolen its IP and filed a patent infringement suit; Microsoft counterclaimed. A jury awarded Stac $120 million in damages, and simultaneously awarded Microsoft $13.6 million on its counterclaim. Feelings were intensely negative, and both CEOs made public statements demeaning the other's integrity.

Both sides could have appealed the verdicts, but they opted instead to negotiate a deal that increased the share price of both companies. The agreement provided for the dismissal of all claims and cross licensing of products. Microsoft also agreed to pay Stac a royalty and invest in the company. The total cost of the deal for Microsoft was less than it had already charged off for the jury verdict, while Stac received more money, net of taxes, than it would have obtained from winning in court and also allied itself with the most powerful player in the industry.

Stac's CEO said, "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.[1]

QUESTIONS

1. Why might Gates have played hardball when he first negotiated with Stac, and then have his lawyers negotiate a more cooperative deal?
2. What are the advantages and disadvantages of each bargaining approach?

B. COMPETITIVE AND ADVERSARIAL APPROACHES

1. Competitive Approach

We start with the competitive model because lawyers and others frequently use it in everyday bargaining and settlement negotiations. The *competitive* approach assumes that the purpose of bargaining is to obtain the best possible economic result for yourself, usually at the expense of the other side. A competitive bargainer is likely to think that negotiation involves a limited amount of resources that negotiators must divide—in effect, a fixed economic "pie"—in which anything gained by one side is lost by the other.

Competitive negotiating covers a continuum of behaviors, from simple unreflective actions to highly conscious, planned moves. Competitive tactics can range from "light," such as ingratiation or flattery, to "heavy," such as anger or threats. A skilled competitive negotiator may combine competitive moves with a friendly demeanor, even appearing cooperative. At their best, competitive bargainers are like athletes who fight hard, but fairly, to prevail.

To competitors the parties' relationships and other intangibles are not of primary importance. The competitive bargainer's goal is to pay as little as possible, if she is a buyer or defendant, or obtain as much as possible, if she is a seller or plaintiff, as a dollar more for an opponent is necessarily a dollar less for her. A competitive bargainer thus sees negotiation much as a litigator sees a trial: Someone must win and someone must lose, and the primary mission is to win. Competitive/adversarial approaches are also known as "distributive," "zero-sum," or "positional" bargaining because the negotiators see their task as trading positions to distribute a fixed resource between them.

All good negotiators are likely to seek out information, but a competitive negotiator's aim is to get as much information from the other side as possible while disclosing as little as he can about his situation. He sees the key as to sound out the party's bottom line, while concealing or misrepresenting what he will settle for. A competitor will often bluff, suggesting that he is ready to walk away unless he gets certain terms, even when he has no intention of doing so.

Although the classic competitive negotiation is over a single issue, money, competitive strategies are equally applicable to more complex negotiations that involve multiple issues or parties. As Gary Goodpaster writes, negotiators may choose a competitive approach when any of the following factors are present: "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."[2]

Negotiations between lawyers and insurance companies over how much the insurer will pay on an accident claim are typically competitive processes. If the lawyer and insurance adjuster are in distant cities and the client has changed insurance companies, neither side is likely to have much interest in nurturing a relationship. Rather, both usually want to get through the process as efficiently and quickly as possible. The lawyer and adjuster may treat each other politely, but their sole goal will be to agree on a dollar amount the company will pay the insured to give up his claim, with a better settlement for one resulting in a worse settlement for the other.

In this example, the accident victim's lawyer is expected to make an opening offer, or "demand," that is typically much higher than the amount she expects to receive in settlement. The bargainers are then likely to talk, with each side exaggerating the strength of its legal case and concealing any weaknesses, while denigrating the other's legal position. The insurer eventually will make a low, equally unrealistic counteroffer. The bargainers then trade concessions to narrow the gap while continuing to argue about the likely outcome in court.

As the process continues, the parties' dollar figures may become increasingly divorced from any objective standard or rationale, with their motivation being simply to close the remaining gap on terms as favorable as possible to their side. The process may have begun with information-based discussions, but at some point

becomes a game of "chicken" between two drivers hurtling toward each other, trying to get the best possible deal while avoiding a collision in court. If the bargainers are sensible and attuned to the customs of the "game" of dollar bargaining, they will succeed in arriving at a number both can accept.

2. Adversarial Approach

Beyond the boundaries of the competitive approach is the adversarial approach, a more aggressive or extreme version of competitiveness. A competitive bargainer will "play hard, but by the rules," for example, bluffing about her bottom line but not lying about whether a document exists. Adversarial bargainers, by contrast, view negotiation as a form of war and believe that all is fair in winning it. An adversarial negotiator will, if necessary, misstate evidence, renege on tentative agreements, misrepresent the limits of their authority, or make threats. Although such tactics may provide an advantage for the negotiator in the short term, they increase the risk of ending the negotiation with no agreement, jeopardize any continuing relationship, and affect the negotiator's reputation.

Adversarial bargainers often capture the imagination of the public because they remind us of tough, dramatic characters in a movie or story. Many guides to "tough" bargaining" appear to assume that the opposing side is ignorant or gullible and will never be able to retaliate, while others bemoan "hardball" tactics but warn you of what you might encounter. Roger Dawson, the author of *Secrets of Power Negotiating*, for example, suggests these gambits about how to bargain adversarially:

- *Ask for an outrageous amount*: You can get away with an extreme opening position if you imply some flexibility.
- *Flinch at proposals*: The other side may not expect to get what is asked for, but if you do not show surprise, you're communicating that it is a possibility.
- *Nibbling*: After you have agreed on everything and the other side has relaxed and committed itself, take away terms.
- *Red herring*: Make a phony demand, then withdraw it in exchange for a concession.
- *Time pressure*: If you sense the other side has a time constraint, create an artificial deadline to squeeze them.
- *Ultimatums*: If you are dealing with an inexperienced negotiator, make an ultimatum to strike fear in their heart.[3]

QUESTIONS

3. Do any of these tactics seem not merely tough, but unethical?
4. Is there a difference between hard, competitive negotiation and "dirty," adversarial bargaining tricks? If so, how would you distinguish them?
5. If any of these behaviors were used against a colleague, how would you advise her to respond?

C. COOPERATIVE AND PROBLEM-SOLVING APPROACHES

1. Cooperative Approach

A cooperative negotiator does not view the negotiation "pie" as fixed. Cooperative bargainers work to identify interests and examine differences in how the parties value items, searching 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. Along with working to "expand the pie," cooperative bargainers approach the task of dividing it up by seeking to understand one another's perceptions and arrive at a shared picture or a mutually acceptable allocation.

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, which are often more complex than monetary goals.

However, bargainers can also use a cooperative approach to resolve "pure money" issues, such as how much an accident victim will be paid for a claim. In such a case there might not be a "pie" to bake, but the dollar question would be resolved by referring to an accepted objective standard, such as how much is typically paid for such a claim, or a multiple of some component of the claim, such as lost wages.

In their best-selling book *Getting to Yes*, Roger Fisher, William Ury and Bruce Patton advocate this approach, suggesting that "you can change the game" and that negotiation need not be positional or competitive.[4] In addition to prescribing an interest-based approach to create value, they propose using objective criteria to allocate the fruits of cooperation, something they refer to as "principled" negotiation or "negotiation on the merits."

The cooperative or collaborative approach assumes that in most disputes parties have underlying needs, or interests, that go beyond money, and that because of this it is possible to find terms that have multiple interests of varying intensities, including:

- *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 this interest by listening attentively while an opponent vents his, or his client's, 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. Participants may also have a process 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 unique 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 often true of contractual disputes because the existence of a contract indicates that the parties once saw a benefit in relating, 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, 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 monetary demands and offers, but 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. And even when something is "just about money," it may be important to one side when or how it is paid.
- *Community interests.* A negotiation may consider the interests of people away from the table, and these impacts may be relevant considerations for the parties. For example, two companies bargaining over a supply chain agreement may want to take into account the effects of the agreement on employees, other businesses, and perhaps even neighboring communities.

NOTE: CRITIQUE AND RESPONSE

Not everyone is a fan of "principled" negotiation. Professor James White authored a powerful critique describing *Getting to Yes* as "often helpful" but also "frequently naïve" and "occasionally self-righteous." One of his primary concerns was that the authors did not deal realistically or effectively with the question of distribution:

> 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. . . .

In response, *Getting to Yes* co-author Roger Fisher emphasized the importance of process in managing distributional issues in a principled manner:

> 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. . . .

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?

PROBLEM 1: GETTING A RAISE

Imagine that you are counseling a colleague who wants a raise. "Tell me more," you say. "Why are you asking for more money?" Make a list of the possible reasons that your colleague may provide. Then think about these as the *underlying interests* informing your colleague's *position* that he wants a money raise. Based on this list, are there other terms, in addition to or in place of more money, that might satisfy your colleague's interests?

2. Problem-Solving Approach

A variation of the cooperative approach is *problem solving,* sometimes called "collaborative" bargaining. Problem-solving negotiators employ intensely cooperative, interest-based tactics. Problem solvers focus almost exclusively on finding solutions that maximize the value of the outcome for both parties. Problem solvers do not want to obtain a better result for their client if it comes at the unfair expense of their counterpart. They also insist on using genuinely neutral principles to accomplish the task of allocating benefits.

QUESTIONS

6. For lawyers, is it better to be more competitive/adversarial or more cooperative/problem-solving? Why? If you believe it depends on the context, in what contexts is one or the other approach better?
7. Do bargainers need particular skills or strengths to implement cooperative/problem-solving approaches? Are these skills within the repertoire of most attorneys? Why or why not?
8. Professor Menkel-Meadow writes that "[t]he attraction of the problem-solving approach to negotiations is that it returns the solution of the problem to the client." Why is involving the client beneficial? Is it possible that some clients want less involvement in the solution of their case?
9. Can cooperative/problem-solving negotiation occur if only one side wants to pursue this approach? Explain.

PROBLEM 2: VIDEO ANALYSIS

For this problem you are going to be viewing and analyzing some video clips of real lawyers negotiating a case. Video analysis is one of the most effective methods for assessing style, strategy, and tactics in bargaining, and we will offer it extensively in this book.

Quality Quarry is a large company that has purchased a 2,500-acre tract and wishes to mine it. One of their neighbors, the Branams, have lived on an adjoining 100-acre tract for generations and operate a farm stand on the land. The Branam family has challenged the Quarry's application for a mining permit and the Quarry has proposed to resolve the case by buying the Branams' land.

1. On the companion Web site for this book, watch the video excerpt entitled Quarry 1, showing the first few minutes of the negotiation between Boston lawyers for the Branams and Quality Quarry. Note what style each lawyer is using. Which appears to be more effective and why? Which style would you use? One of the lawyers is a litigator and one is a transactional lawyer. Can you tell which is which?
2. Now watch Quarry 2, which shows the first meeting in the same case with the parties represented by Cincinnati lawyers. These lawyers chose to start in a different way, reflecting, they said, bargaining customs in their community. Does the setting appear to have any effect on the process?
3. How would you characterize the styles of these lawyers? How do their styles differ from the Boston lawyers? The woman is the general counsel of a financial services company and the man is a lawyer and former judge. Do their backgrounds affect how they bargain?

4. Finally, watch Quarry 3, showing the last few minutes of the Boston negotiation. Has either lawyer changed her style, or use elements of different styles? How do the lawyers use references to each side's alternative to settlement, objective principles, and/or interests? Quarry's lawyer states at one point that it has an "absolute cap . . . a hard stop," but then goes higher. How does the Branams' lawyer make this happen?

D. CREATING VALUE AND CLAIMING VALUE—THE NEGOTIATOR'S DILEMMA

In the Microsoft-Stac dispute, negotiators faced a dilemma: should they pursue cooperative moves to enhance the total value available, or should they use competitive behavior to individually claim value and gain an advantage? Moving between cooperative and competitive approaches can create tension, because after value is created through cooperation and sharing information about interests, value claiming is likely to occur, and the information we share in the first phase can be used against us.

David Lax and James Sebenius have described this tension as the "negotiator's dilemma," the potential conflict that exists between behaviors that create value and those claim it. They write:

> 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. . . . Moves to claim value . . . 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.[5]

A cooperative approach has clear advantages. It can add value to what is being negotiated and is more likely to preserve and improve relationships. But cooperative methods also pose what has been called the "negotiator's dilemma"—even the largest pies must be divided up.

Cooperatives look for a way to divide pies fairly, usually by finding a fair principle. They discuss possible standards in good faith, with the goal of achieving consensus about what is fair. This can be difficult at times, however, even for people who mean well, because near the end of the process it is usually clear which rule will give each bargainer more of the "pie." Faced with such a disagreement, one option for problem-solving bargainers is to recognize that they have a good-faith difference and agree to split evenly the difference between the outcomes under each principle.

When bargainers have a competitive streak, however, problems arise because tactics used to create value, such as disclosing what you want most, can expose a

bargainer to exploitation. A competitive bargainer may exaggerate how expensive it would be to give up a term or pretend that an item she wants badly is worth little to her. When principles are discussed, a competitive negotiator selects a principle that provides him with more of the value in play, then proposes to split the difference with his fair-minded counterpart.

Making things even more complex, competitive bargainers may not act that way. Savvy competitors, in fact, often use a cooperative *manner* while pursuing competitive *goals*. This makes them what Professor Charles Craver has called "competitive/problem-solvers."[6]

> Competitive/Problem-Solvers are individuals who strive for *competitive* objectives — maximization of their own side's returns — but work to accomplish this goal in a *non-adversarial way*. . . . They actually endeavor to *create value* . . . but they are not entirely forthcoming. They may over- or under-state the value of items they desire . . . to *claim* more of the joint surplus than they give to their opponents . . . As a result of [their] apparent openness . . . opponents usually think they are Cooperative/Problem-Solvers . . . when they are really endeavoring to obtain "WIN-win" distributions favoring their own side. . . .
>
> Competitive/Problem-Solvers are successful because they recognize the fact that most negotiators judge their satisfaction with bargaining outcomes more by the degree to which they believe the *process* was fair and respectful than by the objective value of the terms obtained. Competitive/Problem-Solver negotiators are personable and respectful. They avoid overtly competitive behavior, and act as if they are Cooperative/Problem-Solvers. Their adversaries are so appreciative of their seemingly open and courteous conduct that they over-value the actual worth of the terms they obtain.
>
> [Even] competitive persons . . . work diligently to ascertain the non-distributive needs of their opponents and to satisfy those desires. They do not do this because of altruistic considerations. They instead appreciate the fact that if they provide their adversaries with what those parties require in these areas, it will be easier for them to obtain more of the . . . surplus which has been created.

Professor Craver notes that good competitive/problem solvers do not lie about material facts, though they may engage in puffery about their bottom line and withhold information. In addition, he comments that they always treat their opponents with respect and professionalism, keeping in mind the likelihood they will encounter their adversaries in the future.

QUESTIONS

10. Would you feel comfortable using the approach described by Professor Craver? Would you use it if a client told you he wanted you to? Why or why not?

11. Have you experienced situations in which you were open and cooperative initially, but later felt that you might have revealed too much or been too accommodating?
12. What tactics or approach would you recommend that a cooperative negotiator use to deal with a competitive/problem solver?
13. What should an attorney do if she suspects that a client is willing to pay a premium to take advantage of the attorney's reputation for openness and cooperation to engage in competitive bargaining or sharp tactics in a specific case?

1. Dealing with Adversarial Bargainers and "Dirty Tricks"

Among competitive bargainers, deception is common. Negotiators accept some "tricks" as "part of the game," like a basketball player who feints one way and cuts the other, or a tennis player who uses back spin to place a ball where the other player does not expect. Being sportsmanlike, in other words, does not usually require total candor. Other forms of trickiness in sports, however, are not allowed: A basketball player cannot grab an opponent's clothing, and a tennis player who manipulates line calls is unethical.

Competitive bargainers similarly accept certain forms of deception in bargaining, misleading each other about their true bottom lines, exaggerating the strength of their legal cases, and so on. Other conduct, however, marks a bargainer as adversarial or unethical. Where is the boundary between an honest competitor and a "dirty player" in bargaining? In general terms, adversarial tactics are:

- *Inefficient*: They waste time and opportunities. A negotiator who bargains for days to arrive at a deal, for example, then reneges on a term seeking to "nibble" for advantage, wastes everyone's time.
- *One-sided:* The perpetrator usually won't allow a counterpart to use the same tactic. An adversarial bargainer, for example, may yell, but doesn't like being yelled at back.
- *Egregious:* The tactic is "out of bounds" in a specific setting. Lawyers in small towns or a narrow legal specialty who engage with each other repeatedly, for example, are much more civil and open than "sharks" in large metropolitan areas who don't expect to encounter an opponent again.

Common Tricks

The following tricks are common in hard bargaining situations:[7]

- *Stonewalling:* Taking a position, then refusing to offer concessions or to give a reasonable explanation ("$1,000 is all we'll pay . . . We're not interested in talking about it. . . .")

- *Deceiving:* Lying about facts or breaking agreed rules of procedure. ("My shipping department won't be able to provide the discount we talked about yesterday. But we have a deal on everything else. . . .")
- *Threatening:* Threatening harm on an issue outside the negotiation. ("Drop the infringement suit or we'll see to it that you won't get business from anyone in our trade association.")
- *Attacking:* Challenging another person's competence, ethics or dignity. ("You [fill in ethnicity, gender, age, etc.] people just can't understand sales. . . .")

Common Responses to Dirty Tricks

- *Accept the tactic.* You can allow the other side to use the tactic, "We *really* need this deal!" By giving in, you avoid an immediate confrontation, but your response won't motivate them to change their approach and may encourage them to escalate. It may also make you or your client angry, leading to additional problems.
- *Retaliate with a similar tactic.* Fighting fire with fire may be necessary in some situations. It is dangerous, however; unless you are careful, your opponent will probably answer by escalating its own tactics.
- *Break off the process completely.* Walking away from the table may be the right response in some situations and may change the other side's behavior. But if the negotiation ends, you'll lose whatever could have been achieved through agreement.

General Strategies for Dealing with Adversarial Bargainers

Instead of adopting these responses consider the following five-point strategy:

- Don't react immediately; instead, distance yourself.
- Analyze the situation.
- Work to reform, rather than punish, them.
- Negotiate over process rules.
- Retaliate if necessary, but do so in a controlled way.

Don't React Immediately; Instead, Distance Yourself

Don't make a gesture or say anything right away, unless the situation demands it and you're confident of making the right response. Except in unusual situations, try not to give in to strong emotions, which distort judgment. Instead, take a moment to collect your thoughts; in William Ury's memorable phrase, "go to the balcony" (metaphorically speaking). You may want to take a break to do this—say, for example, that you want to consult with others.

Analyze the Situation

Unless your opponent is irrational, his trick is probably an intentional tactic. Use whatever time is available to ask yourself or your team what he's trying to accomplish. Why is he doing this, and what does it tell you about his view of the

situation? For example, is he lashing out because he feels powerful or because he feels frustrated? What's your goal in this negotiation? How good is your alternative to continuing and what is your opponent's likely alternative? Considering everything, is it in your best interest to end the process now? If in doubt, don't terminate.

Work to Reform Rather than Punish Them

The first response to a dirty trick is often to retaliate in kind but focusing on reform is usually more effective. This means giving your opponent an incentive to change her behavior and making it as easy as possible for her to do so.

Sometimes an adversary is simply testing you and if you ignore the trick, she will drop it. If a bargainer makes a "stonewall" demand and you treat it as a wish or request and continue to bargain, she may move on as well. Similarly, negotiators who act angry may become embarrassed if you ignore their ranting. Some adversaries, however, read a lack of response as an invitation to escalate their tactic and some ploys, such as giving false information, make it hard to continue bargaining.

Another option is to note the tactic but in a non-confrontational way that allows the other side to retreat. You can, for instance, recharacterize a stonewall offer as a wish (e.g., "I understand that it's very important to you that. . . ."). Attacks can also be recast (e.g., "I'm going to treat that as a high inside fastball. . . .").

If a trick is motivated by strong emotions or a distorted view of your position, partially agreeing can change your opponent's attitude. You should not, of course, concede entirely, but you may be able to adopt their perspective on small points.

These responses share a common theme: None punish the other side, and all make it easier for the adversary to retreat without suffering loss of face.

Negotiate over Process Rules

You can label the tactic and negotiate openly over it. In doing this you are in essence bargaining about how the negotiation will be conducted. Your goal should be to make the ground rules efficient, non-abrasive, and reciprocal.

If this is a fair tactic, it should be based on a principle. What is the other side's reason for doing what it did? If, for instance, it has given you inaccurate data, you can ask why that's useful—it just slows the process as you verify it.

Apply a standard of reciprocity: Would they object to you using that tactic too? Can we agree on ground rules? If, for example, the other side nibbles at a deal, suggest that all terms remain open for 24 hours after tentative acceptance, or that both sides be allowed to reopen terms at will (note the difference between raising this option openly and responding by reneging yourself).

Consider bringing in an outside monitor whom your adversary will be reluctant to offend or who can report the conduct to outsiders. This can be as simple as cc'ing someone on emails.

Retaliate if Necessary, But in a Controlled Way

At some point you may have to retaliate—but do so carefully. Communications in adversarial negotiations are often confusing with each side putting a

negative interpretation on what the other does.[8] In such an atmosphere it is easy for even mild retaliation to escalate out of control.

Warn them first (e.g., "If you can't find a comfortable room for our side to talk, let's hold the meetings at our place") and don't up the ante. It's natural to retaliate at a higher level to show an opponent that bad behavior does not pay, but escalation often leads to counter-escalation.

Be clear; to reform the adversary must understand why you are retaliating. If there is any doubt explain what you are going to do in non-inflammatory, "I'm simply reciprocating your action" language.

Allow the other side to reform. The goal, after all, is ordinarily to re-establish the bargaining process, not destroy it. One option is to split warnings and retaliations into stages, so that your opponent can return to a sensible process.

Finally, give them a choice; don't end a negotiation without giving the other side a final chance to reform. Be careful how you present the choice, however: Warnings are often heard by an opponent as threats. And beware particularly of issuing warnings that you aren't ready to carry out.

2. Comfort Zones

Behavioral style is in large part a function of who you are and what your "comfort zone" is in a particular situation. Choosing a negotiation style that does not fit your personality and values may be a recipe for failure. Indeed, even in the best of circumstances, choosing an ill-fitting style may make negotiating difficult and dissatisfying. To succeed as a professional and find satisfaction in what you are doing, you must understand your own comfort zone.

Defining our negotiating comfort zone is not always an easy task. It's common to wish to be liked rather than disliked, and we know that we are more likely to be liked when we are cooperative and giving than if we are adversarial and taking. We also know that winners are admired, and we want to be respected for vigorously representing our clients' interests. Students may extrapolate from the highly adversarial scenes portrayed in the media, and 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 process. Competition appears to be encouraged by the legal system, where cooperation and generosity may be viewed as a virtuous but less-valued quality. It is understandable that some students are conflicted about whether negotiation should be approached as a professional game in which they let loose their competitive qualities to achieve success.

Those of you who have enjoyed competition know from your experience that good competitors can be friendly, gracious and ethical, without adversarial attitudes. A pleasant and respectful personal style is not inconsistent with competitive negotiation, any more than being a "good sport" is inconsistent with wanting to win. Likewise, those of you who tend toward cooperative approaches may know from experience that sometimes the situation calls for a tougher stance. The style

you choose in negotiation depends in part on how you define the "game," what the stakes are, and what kind of relationship you want with your counterpart during and after the negotiation.

A considerable literature exists on the role of personality in negotiation styles and outcomes, based on studies of personality test results and experimental research. Sheila Heen and John Richardson, for example, have argued that although personality differences are real, the available research does not answer definitively which traits lead to better outcomes in negotiation and traits are not consistent across different situations or over time. They recommend developing deeper knowledge about yourself and others, then applying that knowledge strategically when making choices around negotiation style:

> 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. . . .
>
> Familiarity with personality differences can also be a self-reflection and coaching tool for you, helping you identify and work on behavior that doesn't come naturally. It can also help you to explain your traits 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 factors that affect your ability to negotiate, mediate or respond well to disputes can help you become more aware of the situations that bring out these traits, and other ways of handling them.[9]

QUESTIONS

14. How accurate are personality or style tests, in your experience? What kinds of factors may affect how people respond?

15. Given that most personality tests rely on self-assessment, do you think your assessments are likely to match the assessments by opponents, family, friends, and colleagues?

Ultimately, choices around negotiation style must be made with an eye toward situational factors, strategy, effectiveness, and comfort zone, as well as relationships and the value of a reputation for honest dealing. You need not choose to negotiate collaboratively merely out of self-interest, but also because doing so is virtuous, decent, and key to building a better society.[10]

E. COOPERATION vs. COMPETITIVENESS—WHO DECIDES?

Lawyers do not make choices around negotiation styles in a vacuum. Read and think about this next problem before continuing to the discussion below.

PROBLEM 3: NEGOTIATING WITH A CLIENT

You have established yourself as an effective attorney with a good reputation for your straightforward, cooperative style and have lectured at a local law school 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 stock going to his wife, even though the law may give her a claim to some of it. He wants you to seek to have him granted primary custody of their two middle-school-aged children, for whom he and his wife have both been active parents, to use as a bargaining chip to assure retention of the bank stock.

1. What would you tell him?
2. Who should decide negotiation strategies and approaches, you or your client?
3. Do the immediate pecuniary interests of the client and the longer-term interests of the attorney in maintaining good working relations with other lawyers or a reputation for honesty and cooperation create a conflict of interest between attorney and client?

In general clients are accorded the power to choose the objectives of a negotiation, while lawyers have discretion to use their judgment in selecting the means of achieving those objectives. Of course, it's not quite so simple. As a lawyer pursues an objective, for example, he must also act consistently with the requirement of honest dealings with others.

Professor Robert Condlin points to practical norms that may differ from ethical norms for attorneys, distinguishing between the reality of what lawyers do in negotiation and what ethical rules appear to demand. According to Condlin, lawyers must be substantively competitive in negotiating for clients but can choose their own personal style.

We suggest you assume that lawyers, when negotiating for clients, do have a choice whether to be more cooperative or competitive in their negotiation approach. Cooperation may be the best approach when an integrative outcome is possible that allows each party to get enough of what they want. A competitive approach may produce a favorable outcome for a party but increase the risk of impasse and affect the reputations of both lawyer and client.

Endnotes

1. Carlton, Jim. (1994) *Microsoft, Stac End Battle with Pact, A Win-Win Cross-Licensing Agreement,* Wall Street Journal.
2. Goodpaster, Gary. (1996) *Primer on Competitive Bargaining*, 1996 J. Disp. Resol. 325, 375-376.
3. Dawson, Roger. (2001) *Secrets of Power Negotiating* (2d ed.).

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5. *See* Lax, David A., & Sebenius, James K. (1986) *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain.*
6. Craver, Charles B. (2010) "*The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions*," 12 Cardozo J. of Conflict Resolution 101.
7. These categories, and some of the suggested responses, are taken from Ury, William. (1991) *Getting Past No: Negotiating with Difficult People*, which should be read for more information.
8. This is the phenomenon of "attribution bias," discussed in Chapter 4. For a discussion of how suspicion escalates in the context of litigation, *see* Arrow, Kenneth J., et al. (1995) *Barriers to Conflict Resolution*, 191-192.
9. Heen, Sheila, & Richardson, John. (2005) *I See a Pattern Here and the Pattern Is You*, in *The Handbook of Dispute Resolution* (Michael Moffitt and Robert C. Bordone, eds.).
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CHAPTER 3

THE NEGOTIATION DANCE—STEP BY STEP

A. THE SEVEN STAGES OF NEGOTIATION

Negotiation, whether carried out through a competitive, cooperative or mixed approach, occurs in stages. In practice the stages overlap and vary from one negotiation to another, but breaking bargaining into segments will help you understand and prepare for the process. It will also assist you to maintain your inner balance and composure as the bargaining unfolds, a key to negotiating effectiveness.

Listed below are activities that typically occur in seven stages of competitive or cooperative negotiation. The activities mix and alternate between competitive and cooperative styles. As we have seen, the styles themselves can be complex. Also, the timing of similar steps may vary depending on a bargainer's style: Making explicit offers, for example, usually occurs more quickly in a competitive than a cooperative process.

Stage	*Competitive/adversarial approach activities*	*Cooperative/problem-solving approach activities*
1. Preparing to Negotiate	➢ Interviewing and counseling client about negotiation ➢ Setting goals ➢ Assessing power of each party ➢ Formulating best alternative to negotiated agreement (BATNA), reservation point, and starting position	➢ Interviewing and counseling client about negotiation ➢ Setting goals ➢ Assessing needs and interests of both parties ➢ Formulating best alternative to negotiated agreement (BATNA) and reservation point
2. Managing Initial Interactions	➢ Setting tone ➢ Establishing credentials/power ➢ Making first demand or offer	➢ Setting tone ➢ Establishing rapport and trust ➢ Agreeing on agenda