



Chartered
Institute of
Arbitrators

CIArb

Styles and Effectiveness of Negotiation

by
James Savory

Reprinted from
(2010) 76 *Arbitration* 503–513

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(*Law Publishers*)

SWEET & MAXWELL

Styles and Effectiveness of Negotiation

James Savory

1. INTRODUCTION

In this article I present a review of suggested styles and studies of effectiveness of negotiation, and their application to commercial mediation. The genesis of this article is finding myself in the position of trying to encourage participants in a mediation to go beyond stating their positions: encouraging them to explore their interests and, even more radical, to show curiosity about the interests of the other party. Commercial mediators' training in the United Kingdom tends to suggest adopting the approach of Fisher and Ury's *Getting to Yes*,¹ discussed below. But other styles of negotiation exist that some participants, and indeed some mediators, may find more useful. What follows are just suggestions; is there any evidence to support the proposition that any negotiation style beyond "pitch it high and be awkward" really works?

My purpose is to explore leading academic work on the styles of, and behaviours in, negotiation, and to look at studies that investigate or measure their effectiveness. I then seek to extract conclusions that anybody trying to negotiate a settlement to a dispute or disagreement might use to inform strategy and behaviour. I am particularly interested in whether a negotiator who shuns the more aggressive negotiation styles is likely to be worse off than one who adopts them. Finally, I am interested in how these conclusions can be applied in commercial mediation and whether the model of mediation generally in use in commercial disputes is well suited to their implementation.

2. NEGOTIATING STYLES

While I do not suggest that Fisher and Ury were the first to consider the possibility that there might be styles of negotiation, the publication of the first edition of their *Getting to Yes*² galvanised interest in the subject. The early 1980s produced a flurry of thoughtful work on which our current orthodoxy is still firmly based.

Before Getting to Yes

Before 1981 there was little published guidance to negotiators that deviated from a traditional "hardball" view of negotiating. As Hoffman points out,³ Meltzer and Schrag⁴ suggested a long list of manipulative and deceitful tactics that a negotiator should adopt, including:

- appear irrational where it seems helpful;
- claim you do not have the authority to compromise;
- make your first demand very high;
- designate at least one demand as a pre-condition;
- use the "good cop/bad cop" tactic;

¹ R. Fisher and W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Boston: Houghton Mifflin, 1981).

² Fisher and Ury, *Getting to Yes*, 1981.

³ David Hoffman, "A Primer on Successful Negotiation" (2003). Available at: <http://www.bostonlawcollaborative.com/bic/resources/books-articles-and-videotapes.html?branch=main&language=default> [Accessed November 30, 2009].

⁴ M. Meltzer and P.G. Schrag, *Public Interest Advocacy: Materials for Clinical Legal Education* (Boston: Little, Brown and Co, 1974).

- make the other side compromise first, etc.

Hoffman draws the conclusion that:

“The unspoken assumption in these suggestions is that the opponent is willing to take advantage of the negotiator—fairly or unfairly—and therefore success requires using competitive negotiation techniques, and using them more effectively than the opponent.”⁵

But even before 1981 there were at least two areas in which something other than this pure competitive style was being considered. One of these areas was game theory, a tool that had been used to investigate negotiation tactics from the 1950s.⁶ This work involved looking at situations where a participant had to decide whether to stick to an agreement or renege on it, as in the “Prisoner’s Dilemma”. From this work Axelrod⁷ developed his theory of co-operation, discussed further below.

Another was the analysis of 1,000 lawyers in Arizona by Gerald Williams in 1976 and reported in Williams, 1983.⁸ In his survey he asked the participants to rate negotiators they had had to deal with in their last negotiation by reference to adjectives describing them (e.g. “astute”, “forceful”) and by reference to bipolar pairs of statements (e.g. “willing to stretch the rules”/“not willing to stretch the rules”). From this analysis he derived two different styles, co-operative and competitive. Even more interestingly, Williams enquired about the perceived effectiveness of the negotiators, and the results of his enquiry are referred to below.

Position based or principled

In *Getting to Yes*⁹ the authors argue for the supremacy of interests-based or principled negotiation over position-based negotiation. Position-based negotiation involves each side putting forward the position it is prepared to accept. Thereafter each side reiterates and/or moves its position without any explanation.

Fisher and Ury accept that position-based negotiation can partly meet their stated criteria for methods of negotiation, in that it can produce the terms of an acceptable (if not necessarily wise) agreement. But they contend that it meets this criterion only “eventually”, and so fails to meet one of the others: that of efficiency. It also fails to meet, they argue, the third, namely that it should improve, or at least not damage, the relationship between the parties.

The authors subdivide position-based negotiation into soft and hard positional bargaining. Soft positional bargainers pay attention to relationships, see negotiation as being between friends and place a high priority on reaching agreement. Hard positional bargainers merely pursue what they want, seeing other parties as adversaries and the aim as victory. In a contest between hard and soft positional bargainers, the hard one wins.

In contrast, Fisher and Ury propose the technique of principled negotiation which involves a number of key approaches that differentiate it from position-based negotiation. First it separates the problem from the people who have the problem and secondly it focuses on interests rather than positions. This means that it focuses not just on what each disputant is requesting, but on the reasons for the request and the needs that it would satisfy. A third approach is to seek options for mutual gain, to seek to expand the pie rather than just divide it.

⁵ David Hoffman, “A Primer on Successful Negotiation”, 2003, p.3.

⁶ M.M. Flood, “Some Experimental Games” (Santa Monica, Cal.: Rand Corp, 1952), Research Memorandum RM-789; M. Dresher, *The Mathematics of Games of Strategy: Theory and Applications* (Englewood Cliffs, NJ: Prentice-Hall, 1961).

⁷ Robert Axelrod, *The Evolution of Co-operation* (New York: Basic Books, 1984).

⁸ Gerald R. Williams, *Legal Negotiation and Settlement* (St Paul, Minn.: West Publishing Co, 1983).

⁹ Fisher and Ury, *Getting to Yes*, 1981.

Distributive or integrative

Mayer,¹⁰ following others (e.g. Lax and Sebenius),¹¹ prefers the terms distributive and integrative to describe aspects of negotiation, depending on their aim. Integrative negotiation is the style used when negotiators are trying to meet their needs by making sure everyone's needs are adequately addressed—that is, those negotiating have the common interest of increasing the pie.

Distributive negotiation is about gaining as much as is possible of what is available. Unless, as Mayer puts it:

“[R]elatively unlimited amounts of benefits are available to be distributed (in which case a substantive negotiation is probably not necessary), people operating along the distributive dimension are trying to get their needs met at someone else's expense.”¹²

Problem solving or adversarial

Menkel-Meadow prefers the descriptions problem solving and adversarial¹³ as she believes the key is to look at the “total conception of the negotiation” rather than the tactics or strategy being used to implement that conception at any particular point in it.

Menkel-Meadow's theory is that people get trapped in adversarial negotiation by two underlying assumptions. The first of these is that the negotiation is a zero-sum game, meaning that to the extent one side wins the other side loses. While she accepts that there can always be parts of a negotiation that are like this, accepting this assumption seriously limits the potential for more radical solutions that might be nearer Pareto optimality (that is where the pie has been expanded to the maximum, so that all that is left is its division).

The second assumption is that only a limited number of items are available to be negotiated. This is based, she believes, on the idea that negotiation is “in the shadow of the court”, in a phrase derived from Mnookin's work.¹⁴ What she means by this is that negotiators concentrate on the limited rulings and awards that could emanate from court action if negotiation fails, and so confine themselves to discussing those issues alone.

In contrast, she argues, disputants are better served by a problem-solving approach. Such an approach would involve the negotiators identifying and attempting to meet the disputants' underlying needs and objectives (an approach that is not dissimilar to interests-based negotiation). Menkel-Meadow quotes the example of negotiation between a husband who prefers to holiday in the mountains and a wife who prefers the seaside. An adversarial approach would result in splitting the time between sea and mountains or taking turns from year to year. A problem-solving approach would identify that the husband likes fishing and hill walking and the wife prefers swimming, sunbathing and seafood. A solution might therefore be found at a seaside resort near mountains or a mountain resort with a pool and a good restaurant with a reputation for fish.

Schneider also adopts the descriptions problem solving and adversarial in her updating of the work of Williams,¹⁵ further referred to below. Where she uses these terms, however, she is using them as labels for specific groups of behaviours, which is different from Menkel-Meadow's “total conception of the negotiation”.

¹⁰ Bernie Mayer, *The Dynamics of Conflict Resolution* (San Francisco: Jossey-Bass, 2000).

¹¹ D. Lax and J. Sebenius, *The Manager as Negotiator* (New York: Free Press, 1986).

¹² Bernie Mayer, *The Dynamics of Conflict Resolution* (San Francisco: Jossey-Bass, 2000), p. 146.

¹³ Carrie Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem Solving” (1984) 31 UCLA L. Rev. 754.

¹⁴ R. Cooter, S. Marks and R. Mnookin, “Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior” (1982) 11 J. Legal Stud. 225, 227.

¹⁵ Andrea Schneider, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 Harv. Negot. Rev. 143.

3. EFFECTIVENESS OF NEGOTIATING STYLES

The works referred to above that differentiate between and advocate different styles of negotiation do so mainly from a theoretical perspective. Most have plenty of examples of situations where the advocated style would be likely to produce better results than the less favoured style. Examples include the sisters arguing over a single orange where one wants the juice and the other the peel (quoted by Fisher and Ury, but attributed to Mary Parker Follett—see Kolb), and the children arguing over chocolate cake where one wants just the icing and the other the sponge (Spencer).¹⁶ However few have any empirical study of the effectiveness of the styles to back up the claimed supremacy. There are two strands of research that do this, both of which have already been mentioned. One is the study by game theorists of the choice between co-operative and non-co-operative stances in “Prisoner’s Dilemma” situations and the other is the research first done by Williams and followed up by Schneider.¹⁷

Game theory, “Prisoner’s Dilemma”, etc.

The “Prisoner’s Dilemma” concerns the position of two fellow criminals who have committed a crime together and have agreed that if caught neither will blame the other. The police have enough evidence for both of them to receive, say, a one-year sentence so long as they both stick to the agreement. However if A sticks to the deal and B reneges, telling the police it was A, A would get seven years and B would get off completely. But if both renege they would both get four years. What would you do? Stick to the deal and get a tolerable result, or renege in the hope of getting off completely, but only if your colleague honours the deal?

Axelrod¹⁸ argues that the most successful strategy in such co-operative/non-co-operative situations is so-called tit for tat. This is based on the results of the competition he organised for computer modellers to play iterative “Prisoner’s Dilemma”, so that participants could take into account the other player’s strategy before deciding their next move. He allocated points to the different outcomes: 3 each for both co-operating by sticking to the deal, 5 to A and 0 to B where A reneges (defects, as he calls it) and B co-operates, and 1 each where both defect.

Tit-for-tat strategy, which won Axelrod’s competition, starts co-operatively, responds to co-operation with co-operation and responds to non-co-operation with non-co-operation. Axelrod suggested that a successful strategy should be “nice”, meaning that the first move would be co-operative, subsequent moves would be “retaliating” (meeting non-co-operation with non-co-operation), “forgiving” (prepared to reward co-operation with co-operation, even from the previously non-co-operative) and “non-envious” (that is, not motivated by a desire to do better than the other party).

Research studies

Williams conducted the best-known research study.¹⁹ Schneider repeated his work, with some amendments to the methodology.²⁰

¹⁶ Fisher and Ury, *Getting to Yes*, 1981; D.M. Kolb, “The Love for Three Oranges, Or: What Did We Miss about Ms. Follett in the Library?” (1995) 11 *Negotiation* 339, 339; D. Spencer, *Mediation Law and Practice* (Cambridge: Cambridge University Press, 2007).

¹⁷ Gerald R. Williams, *Legal Negotiation and Settlement* (St Paul, Minn.: West Publishing Co, 1983); Andrea Schneider, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 *Harv. Negot. Rev.* 143.

¹⁸ Robert Axelrod, *The Evolution of Co-operation* (New York: Basic Books, 1984).

¹⁹ Gerald R. Williams, *Legal Negotiation and Settlement* (St Paul, Minn.: West Publishing Co, 1983).

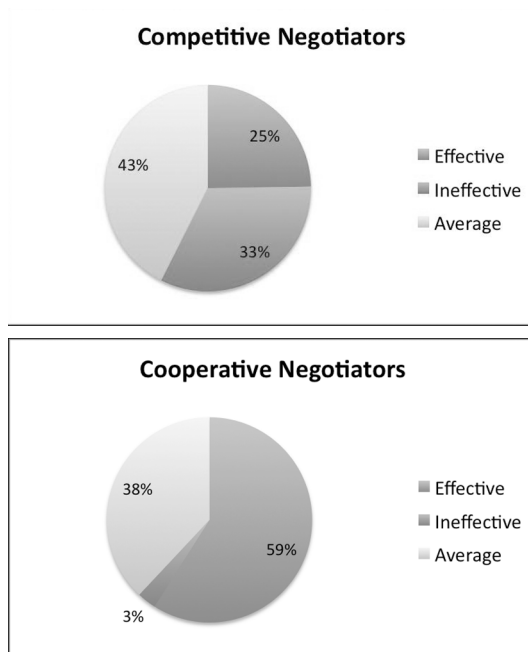
²⁰ Andrea Schneider, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style” (2002) 7 *Harv. Negot. Rev.* 143.

As mentioned above, the common methodology involved several strands. The researchers asked participating lawyers about the lawyer with whom each had last negotiated and asked them to rate the other lawyer by reference to a list of adjectives, bipolar statements, goals and objectives and effectiveness. The adjectives included, for example, “accommodating”, “perceptive” and “spineless”. Each respondent rated the lawyer from 0 (not at all characteristic) to 5 (highly characteristic). They rated bipolar statements, such as “took an unrealistic opening position”/”took a realistic opening position”, and goals and objectives, such as “obtaining a profitable fee for self”, “getting a ‘fair’ settlement” and “maintaining or establishing good relations between parties” similarly. Finally they rated the opposing lawyers on a scale from ineffective negotiator through average negotiator to effective negotiator.

Williams and Schneider first used statistical theory to divide the lawyers about whom they had received responses into clusters which they labelled competitive or co-operative (Williams) and adversarial or problem solving (Schneider). They then looked at the perceived effectiveness of the lawyers in each of those clusters.

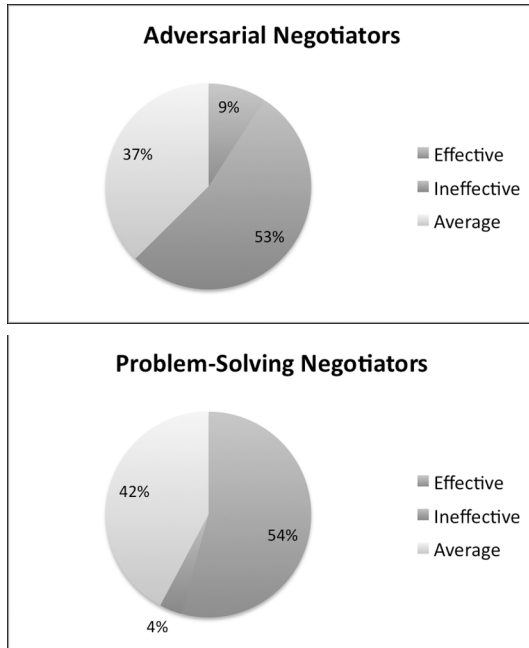
Williams’ results identified 73 per cent of the sample as co-operative and 27 per cent as competitive. Of the competitive negotiators 33 per cent were seen as ineffective, 42 per cent as average and 25 per cent as effective. Of the co-operative negotiators, only 3 per cent were seen as ineffective, 38 per cent as average and 59 per cent as effective. See figures 1 and 2 for the spread of effective, ineffective and average negotiators amongst the competitive and co-operative negotiators respectively.

Figures 1 and 2



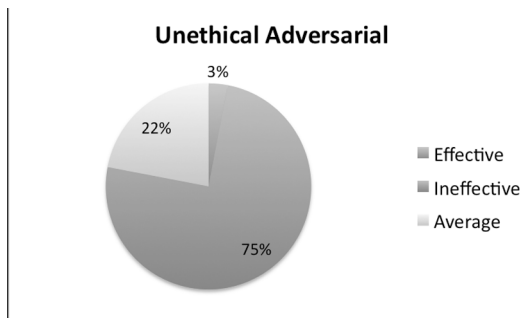
Schneider took her examination further, looking at two-, three- and four-cluster analyses. Her two-cluster analysis, between problem-solving and adversarial negotiators, divided the lawyers into 64 per cent problem solving and 36 per cent adversarial. Of the adversarial negotiators, 53 per cent were ineffective, 37 per cent average and 9 per cent effective. In contrast, 54 per cent of problem-solving negotiators were effective, 42 per cent average and only 4 per cent ineffective. See figures 3 and 4 for the spread of effective, ineffective and average negotiators amongst the adversarial and problem-solving negotiators respectively.

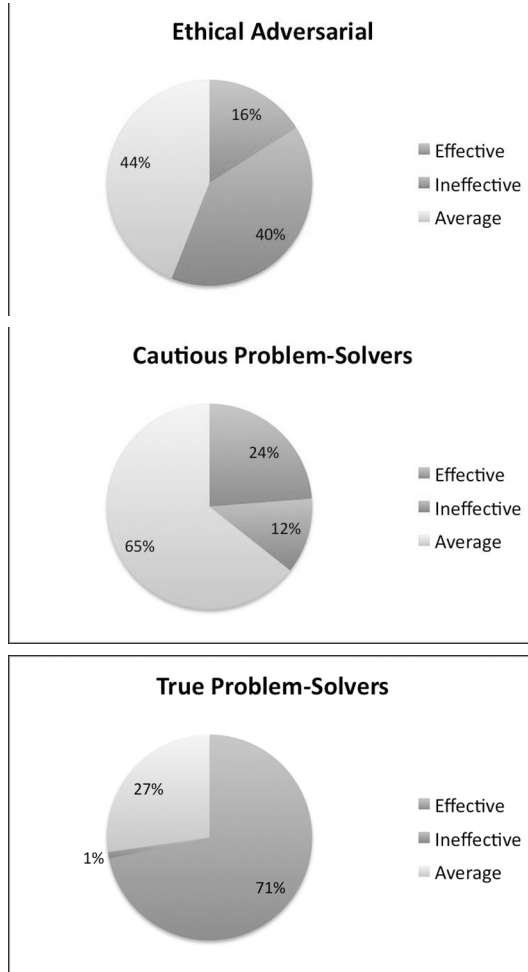
Figures 3 and 4



The differences between the effectiveness of the lawyers in the clusters are starkest in Schneider’s four-cluster analysis, labelled “true problem-solving” (39 per cent), “cautious problem-solving” (28 per cent), “ethical adversarial” (21 per cent) and “unethical adversarial” (12 per cent). The unethical adversarial were 75 per cent ineffective, 22 per cent average and 3 per cent effective. The ethical adversarial were 40 per cent ineffective, 44 per cent average and 16 per cent effective. The cautious problem solvers were 12 per cent ineffective, 65 per cent average and 24 per cent effective. The true problem solvers were 1 per cent ineffective, 27 per cent average and 72 per cent effective. See Figures 5, 6, 7 and 8 for the spread of effective, ineffective and average negotiators amongst the unethical adversarial, ethical adversarial, cautious problem-solving and true problem-solving negotiators respectively.

Figures 5, 6, 7 and 8





4. GUIDANCE FOR NEGOTIATING A SETTLEMENT

What conclusions might someone who is about to negotiate a settlement of a dispute or disagreement draw from these works?

First, there is overwhelming academic and theoretical support, backed by research, for the proposition that the old style of competitive bargaining alone is unlikely to produce the best results. It would be a resistant negotiator who determined to follow an exclusively adversarial, distributive and position-based strategy. But it is clear that an individual’s interests cannot be served by following the opposite styles alone.

A negotiator can usefully bear in mind Axelrod’s conclusion about “nice”, “retaliating”, “forgiving” and “non-envious” styles as a guide during a negotiation but should not pay too much attention to them. Axelrod’s analysis provides less clear guidance once it becomes more divorced from the complexities of real life and concentrates on the intricacies of the game. For example, there are different levels of points for different rounds (the equivalent of different negotiation points having different levels of significance) and retaliation against non-co-operative behaviour having lower significance towards the end of the game (when the trust built up by earlier co-operation becomes less valuable). Indeed the results of the

game change radically when he factors in A being unable to tell, in even as few as 10 per cent of the rounds, whether B is being co-operative or non-co-operative, as sometimes happens in real life.

To get the best from the suggested styles of negotiation a participant needs to compare and consider them carefully. Although *Getting to Yes*²¹ is perhaps the best-known book on negotiation, it has been criticised for being naive and self-righteous.²² Even Fisher, in his comments on White's criticism,²³ acknowledges that *Getting to Yes* is less about the world as it is and more about how intelligent people should behave. But negotiators cannot rely on their counterparts to behave as intelligent people should, in the view of Ury and Fisher, behave.

However, if we disregard the term "principled negotiation", with its moral tone and implication for any other style of negotiation, valuable guidance remains. The four techniques listed by Fisher and Ury—"problem not people", "interests not positions", "options for mutual gain" and "objective criteria"—are themselves useful, and can be fitted into any negotiator's toolkit.

The other two contrasting pairs, distributive/integrative and problem-solving/adversarial, have different purposes and are not just different words with similar meanings. Distributive/integrative refers to the aim of the negotiation at a particular moment whereas problem-solving/adversarial refers to the overall style of the negotiator. Thus it is possible to have a problem-solving negotiator operating in the distributive phase of a negotiation or, although slightly more difficult to envisage, an adversarial negotiator in the integrative phase.

No one suggests that a negotiation should always be integrative. There will be a time for integrative negotiation and one for distributive. The point is that if a negotiation moves straight to the distributive phase a huge opportunity is missed: the opportunity to increase the amount to be distributed. So those who use the distributive/integrative distinction argue that all negotiators should ensure that there is an integrative phase to the negotiation.

As regards the problem-solving/adversarial distinction, a reader of Schneider's study could criticise the labels she uses; they do not arise empirically from the study but are just terms that she chose. However negotiators can learn from the characteristics of the cluster they prefer. Thus, negotiators could ask themselves whether they would prefer to be in cluster A, with 54 per cent effective negotiators, 42 per cent average and 3.5 per cent ineffective, or cluster B, with 9 per cent effective, 37 per cent average and 53 per cent ineffective. If their answer is cluster A then they can model their behaviour on the characteristics of that cluster.

Alternatively they could choose to be in a cluster that is 72 per cent effective, 27 per cent average and only 1 per cent ineffective derived from Schneider's four-cluster analysis, labelled "true problem-solving". To be in the true problem-solving cluster negotiators would mould their behaviour on the characteristics associated with that cluster. Thus they would aim to be "ethical", "trustworthy", "fair-minded", "dignified" and "communicative" and they would be "courteous and honest", would "represent their (or their client's) interests zealously, but within bounds", and would "view the negotiation as possibly having mutual benefits". Their goals would include "reaching a fair settlement that met both sides' interests" as well as "maximising the settlement from their own (or their client's) point of view".

Interested negotiators will look at the full results and use the adjectives and other traits attributed to other clusters to steer themselves away from less effective behaviours. Perhaps most significantly, they can gain considerable comfort from learning that to pursue these values, which could also be described as the nobler ones, is also more effective than pursuing the old-fashioned aggressively adversarial approach.

²¹ Fisher and Ury, *Getting to Yes*, 1981.

²² J.J. White, "The Pros and Cons of Getting to Yes" (1984) 34(1) *J. Legal Education* 115–116.

²³ J.J. White, "The Pros and Cons of Getting to Yes" (1984) 34(1) *J. Legal Education* 115–116; R. Fisher, "Comment" (1984) 34(1) *J. Legal Education* 120.

But even with empirical support for more co-operative styles of negotiating there are pitfalls. One of the most challenging aspects of negotiation is the interplay between being co-operative and being competitive; dealing with the tension between creating value and claiming it. As Lax and Sebenius point out,²⁴ endorsing the above comments, all negotiations will include value claiming but, if negotiators claim value only by following a distributive path, joint gains will not be made. Unfortunately, as they succinctly put it: “First, tactics for claiming value ... can impede its creation Second, approaches to creating value are vulnerable to claiming value.”

So how in practice do negotiators find the path to the creation of the maximum value while not laying themselves open to exploitation by the tactics of the negotiator who pretends to join in value creation while in fact claiming it?

In *The Manager as Negotiator* Lax and Sebenius devote one chapter to this topic. Their advice operates at a number of levels. They advocate being alert to duplicitous value creating, where the value claimer is wearing the disguise of a value creator, and suggest tactics to head it off. One such is termed “petard tactics”: in a situation where a negotiator suspects that the seller is making inflated claims of future profitability, the negotiator could offer a higher future payment if the seller’s claims turn out to be accurate. By this tactic the negotiator may trap the seller into accepting the contingent payment rather than reveal a lack of confidence in the claim. The authors suggest that negotiators can use another tactic (termed “bait and switch”) where they suspect that the other party is overstating the value of point A in order to gain greater concessions for giving it up. The negotiator can lure the other party into further exaggerating the value it attaches to point A, and then give in on this point in exchange for concessions from the seller in other areas.

But apart from making these suggestions Lax and Sebenius support structural changes to negotiation. Where possible, they advocate, parties should build mutual trust through repeated dealings. Many negotiations proceed through rounds of creating and claiming on a succession of different points. Negotiators should start with smaller points where the risk, should the counterparty present misleading information, is smaller, and so build up a momentum of trust. Another technique is to separate value creating from value claiming by breaking up the process into a co-operative value-creating phase and a later value-claiming phase.

More fundamentally, they see the value of involving a mediator. They identify a number of advantages: enhancing ingenuity, blunting emotional conflict escalation, facilitating information flow and enhancing communication.

5. APPLICATION TO COMMERCIAL MEDIATION

A participant in a commercial mediation can make use of many of the above conclusions. It is straightforward to be problem solving rather than adversarial, at least in the way that Schneider uses the term, and participants can generally see that adopting this approach is likely to be effective in reaching an acceptable settlement. Of course some people use adversarial tactics, even at mediation. However, in my experience, it is lawyers who have been more inclined to do so, rather than the parties themselves, and not always as part of a planned “good cop/bad cop” strategy.

What is much less easy to do in a commercial mediation is to have a genuinely integrative, interests-based phase. In how many mediations do the parties discuss any matters other than the strength, taking litigation risk into account, of the respective cases, the likely costs to trial and where, given those estimates, they think they might be able to meet?

²⁴D. Lax and J. Sebenius, *The Manager as Negotiator* (New York: Free Press, 1986).

This is, I believe, for two main reasons. First, as Lax and Sebenius point out,²⁵ it is difficult for parties to pursue the joint creation of value without opening themselves up to the possibility that one will take advantage of the other. Some of the tactics these authors advocate for use where such behaviour is suspected can work within a mediation, for example the “petard” and “bait and switch” tactics mentioned above. But the most effective ways for negotiators to build up the trust necessary to maximise the creation of value require time and the standard mediation model, usually allocated just one day, does not allow much.

Secondly, commercial mediation is now a more or less accepted part of litigation. But that in itself undermines the chances that the negotiations during mediation will be as effective as they could be. In the phrase adopted by Carrie Menkel-Meadow, the negotiations take place “in the shadow of the court”. And this handicap is not surprising, given that the parties are the very people who have been devoting energy and ingenuity to devising means of fighting the litigation. It is hardly likely that those people will be able easily to switch from focusing on litigation to focusing on finding the best settlement just because a particular day is designated for mediation.

Does it matter that the standard commercial mediation model is less than perfect for ensuring more than distributive negotiation? Often, it probably does not. In many cases there is little for the parties to discuss apart from the strength of the case, costs, the litigation risk and the need to meet. In such cases, if the mediator were to ask what interest would be served by the position “Pay me £1m”, the answer would be: “The interest of getting as much out of this dispute as possible”!

But where the dispute is more complex, where commercial relationships continue, the one-day mediation model may well not serve participants well. It may well be more effective for them to have mediation working alongside litigation rather than have it as one step within litigation. Indeed, some argue that there should be two separate teams, one trying to negotiate the settlement and another pursuing the litigation: see, for instance, Fisher.²⁶

Perhaps in such cases mediators could make more radical suggestions for an appropriate process for reaching a settlement. Most mediators already recognise that mediation can continue beyond the mediation meeting itself, but also realise that it is worthwhile reaching an in-principle agreement while the decision makers are engaged. Many mediators do, of course, start the process well before the meeting, making suggestions for pre-mediation “homework” and having telephone conversations with the participants themselves and not just their lawyers.

I suggest that there is merit in holding an initial meeting between all the participants at which they discuss all the items that could go into a settlement, without at that stage assigning any relative values to them. Might this not tap into one suggested advantage that mediation has over litigation, of participants being able to design their own settlement? Given that possibility, it is perhaps a pity that, in so many mediations, discussion does not go beyond the outcomes that the court could award.

Mediators generally see mediation as an effective way of reaching a settlement, and one in which more can be achieved than merely choosing from the elements a court could award. If so, could we not design models that allow for the use of the best methods of negotiation? Such models would take commercial mediation into a new phase, to stand alongside litigation as a complementary conflict resolution technique.

²⁵ Lax and Sebenius, *The Manager as Negotiator*, 1986.

²⁶ Roger Fisher, “Dear Lawyer” (2002) 80(4) *Harvard Business Rev.* 128.

6. CONCLUSION

In this article I have reviewed some of the leading work on negotiation styles and effectiveness. I have derived from this work guidance that a negotiator can take into a settlement negotiation. I have demonstrated that there is evidence to support the proposition that more principled negotiation techniques are likely to be more effective than aggressive ones.

But I have acknowledged that the path to a satisfactory agreement does not involve merely relying on co-operative techniques. Negotiators have to be prepared for competitive counterparties and for the value-claiming phase of any negotiation.

Finally, I have questioned whether the typical one-day commercial mediation model gives participants much opportunity to engage in integrative negotiation. I have suggested that it does not and that, at least in some cases, this is to be regretted. I have proposed one or two ways in which even the slightly adventurous mediator might look to flex the model and I have challenged the mediator community to come up with more. If they accept this challenge commercial mediation can, as I see it, truly take its place as a technique for conflict resolution rather than remain as just a step within litigation.