

Talking the talk

Every negotiator has a preferred style, based on their experience of what works best in practice. But what is the actual evidence for the effectiveness of different styles, and can lessons be learnt from it? **James Savory** investigates

Before 1981, there was little published guidance for negotiators that deviated from a traditional 'hardball' view of negotiating. A typical list of tactics a negotiator should adopt might include appearing irrational where it seems helpful; claiming you do not have the authority to compromise; making your first demand very high; using the 'good cop / bad cop' tactic; and making the other side compromise first. The underlying assumption in these suggestions is that success requires competitive negotiation techniques and using them more effectively than the opponent.

The publication, in 1981, of Robert Fisher and William L. Ury's *Getting to Yes* presented, as most negotiators will know, the idea of exploring "interests" rather than "positions". This was followed by a flurry of thoughtful work, by various academics, advancing other styles of negotiation, on which much of our current orthodoxy is still firmly based. But these suggested styles are theoretical. Is there any real evidence for their effectiveness over more competitive styles?

My purpose in this article – which is based on one that first appeared in *Arbitration* (2010) 76 503–51 – is to review various styles briefly and then look at studies that investigate or measure their effectiveness in settling disputes. I am particularly interested in evidence of whether a negotiator who shuns the more aggressive negotiation styles is likely to be worse off than one who adopts them.

I then advance some views as to what implications this evidence might have for negotiators in practice.

POSITION-BASED / PRINCIPLED

In *Getting to Yes*, 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 this style can partly meet their criteria for methods of negotiation: it can produce the terms of an agreement. But they contend that it is not efficient and fails to meet their third criterion: that it should improve, or at least not damage, the relationship between the parties.

In contrast, Fisher and Ury propose principled negotiation, which separates the problem from the people and focuses on interests rather than positions. This means it focuses not just on what each disputant is requesting, but on the reasons for the request and the needs it would satisfy. A third ingredient is to seek options for

mutual gain – to expand the pie rather than just divide it.

DISTRIBUTIVE / INTEGRATIVE

Others prefer 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 Bernie Mayer puts it in his book, *The Dynamics of Conflict Resolution*, "relatively unlimited amounts of benefits are available to be distributed (in which case a

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substantive negotiation is probably not necessary), people operating along the distributive dimension are trying to get their needs met at someone else's expense".

PROBLEM-SOLVING / ADVERSARIAL

Carrie Menkel-Meadow, in her article 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1984, 31 UCLA L.Rev 754) prefers the descriptions "problem-solving" and "adversarial", because 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 is that negotiation is a 'zero-sum game' – meaning that, to the extent that 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 limits the potential for more radical solutions. The second 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" – that is, negotiators concentrate on the limited rulings and awards that could emanate from court action if negotiation fails, and so confine themselves to discussing only those issues.

She argues that disputants are better served by a problem-solving approach, which involves the negotiators identifying and attempting to meet the disputants' underlying needs and objectives (an approach similar 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 their 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 to mountains or a mountain resort with a pool and a good fish restaurant.

EFFECTIVENESS OF THESE STYLES

The works referred to above that differentiate between, and advocate,

different styles of negotiation do so mainly from a theoretical perspective. Most include plenty of examples of situations where the advocated style would be likely to produce better results than the less-favoured style, such as the sisters arguing over a single orange without unearthing that one wants the juice and the other the peel (quoted by Fisher and Ury).

However, few include any empirical study of the effectiveness of the styles to back up the claimed supremacy.

There are two strands of research that do this. One is the study by game theorists of the choice between "cooperative" and "non-cooperative" stances in 'Prisoner's Dilemma' situations and the other is the research first done by Gerald Williams and followed up by Andrea Schneider.

GAME THEORY

This work was developed by Robert Axelrod and reported in *The Evolution of Cooperation*. The Prisoner's Dilemma concerns the hypothetical 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,

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so long as they stick to the agreement.

However, if A sticks to the deal and B reneges, telling the police it was A, A will get seven years and B will get off completely. If both renege, they will each 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?

Axelrod organised a competition for computer modellers to play iterative Prisoner's Dilemma, so participants could take into account the other player's strategy before deciding their next move. He found the best strategy in that competition was what he called "tit for tat". This starts cooperatively, then responds to cooperation with cooperation and to non-cooperation with non-cooperation.

Axelrod suggested that a successful

starting strategy should be "nice", meaning the first move would be cooperative. Subsequent moves would be "retaliating" (meeting non-cooperation with non-cooperation), but "forgiving" (prepared to reward cooperation with cooperation, even from the previously non-cooperative) and "non-envious" (that is, not motivated by a desire to do better than the other party).

RESEARCH STUDIES

The most comprehensive research studies were those carried out by Gerald Williams and published in *Legal Negotiation and Settlement* (1983) and in a follow-up article by Andrea Schneider 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002, 7 Harv. Negot. Rev. 143).

The common methodology involved asking lawyers to rate the lawyer with whom each had last negotiated, by reference to a list of adjectives; bipolar statements; goals and objectives; and their effectiveness as a negotiator. The adjectives included, for example, "accommodating", "perceptive" and "spineless". The bipolar statements included "took an unrealistic opening position" / "took a realistic opening

position". Goals and objectives included "obtaining a profitable fee for self", "getting a 'fair' settlement" and "maintaining or establishing good relations between parties". Finally, effectiveness was rated on a scale from ineffective, through average, to effective.

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

The conclusion of these studies is that the cooperative / problem-solving negotiators are significantly more effective than the competitive / adversarial ones.

According to Schneider, 54% of problem-solving negotiators, but only 9% of adversarial ones, were seen as effective.

The differences between the effectiveness of the lawyers in the clusters are starkest in Schneider's four-cluster analysis, labelled "true problem-solving", "cautious problem-solving", "ethical adversarial" and "unethical adversarial". The unethical adversarial were rated 75% ineffective and only 3% effective, whereas the true problem-solvers were rated 72% effective and only 1% ineffective.

The full results for both studies are summarised in my *Arbitration* article.

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 up 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 also 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 it has its limitations. Axelrod's analysis provides clear guidance only in its simplest form. Once Axelrod started to build in complexities to mimic real life, the results began to change, particularly when he factored in parties being unable to tell whether the other is being cooperative or non-cooperative.

Although *Getting to Yes* has been criticised for being naive and self-righteous, 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 useful and can be fitted into any negotiator's toolkit.

The other 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.

No one suggests a negotiation should always be integrative. There will be a time for integrative negotiation and one for distributive. But if a negotiation moves straight to the distributive phase, a huge opportunity – to increase the amount to be distributed – is missed.

As regards the problem-solving / adversarial distinction, negotiators can learn from the characteristics of the cluster they prefer and then decide, based on the effectiveness of each cluster, which one they would like to model themselves on (the most effective, as mentioned above, being "true problem-solving"). They can then start to adopt the specific styles and actions encompassed by that cluster, as well as steer themselves away from less effective behaviours.

THE CHALLENGE

Even with empirical support for more cooperative styles of negotiating, there are pitfalls. One of the most challenging aspects of negotiation is the interplay between being cooperative and being competitive – dealing with the tension between creating value and claiming it.

As David A. Lax and James K. Sebenius point out in *The Manager as Negotiator*, all negotiations will include "value-claiming". Unfortunately, as they put it: "First, tactics for claiming value ... can impede its creation Second, approaches to creating value are vulnerable to claiming value." So how 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?

Lax and Sebenius devote a chapter to this topic. 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 "petard tactics". For instance, in a situation where a negotiator suspects 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 where they suspect the other party is overstating the value of a point to gain greater concessions for giving it up – they call this "bait and switch". The negotiator can lure the other party into further exaggerating the value it attaches to the point, and then offer to give it in exchange for concessions from the seller in other areas.

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 thereby build up trust.

Another technique is to separate value creating from value-claiming, by breaking up the process into a cooperative value-creating phase and a later value-claiming phase. More fundamentally, they see the value of involving a mediator. They identify several advantages: enhancing ingenuity; blunting emotional conflict escalation; facilitating information flow; and enhancing communication.

CONCLUSION

In this article, I have argued, based on the evidence outlined, that more principled negotiation techniques are likely to be more effective than aggressive ones, and have suggested some guidance, based on that conclusion, for a negotiator to take into a settlement negotiation. But I have also acknowledged that the path to a satisfactory agreement does not involve merely relying on cooperative techniques. Negotiators have to be prepared for competitive counterparties and for the value-claiming phase of any negotiation. ■

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