

The never-ending series of human interactions makes negotiation an inevitable part of life. The goal is always the same: get as much of what you need as possible. But the skills that go into it are as varied as those attempting it, from the petulant child throwing a tantrum in the hopes of getting more candy to the sophisticated diplomat patiently working through the details of a multi-nation trade agreement.

What principles define these behaviors? What practices increase a negotiator's chances of success? These questions have been the subject of lively discussions over the years, with volumes of advice from many quarters.¹ Opinions are diverse, based primarily on each writer's personal observations and experience. The advent of psychological science, however, has led to a systematic approach to negotiation theory, leading to a profusion of recent publications.

This column will give readers snapshots of this research, with some suggestions for use in their own practices. This writer's perspective comes from years of family law practice, but the research encompasses negotiation problems from across a wide range of subjects. Each installment will focus on an issue or two from the research on negotiation, with a perspective on applications to legal practice.

Negotiation: Rational or Emotional?

Initial research focused on the rational basis for negotiation. Game theory predicts how rational actors ought to behave when their choices interact to produce payoffs for each player. Perhaps the most famous is the prisoner's dilemma, a situation in which two people have committed a crime, been arrested, and are being separately interrogated. The district attorney knows she does not yet have enough evidence to convict them, but is certain they have committed the crime. So she presents each of them, separately, with a choice to confess or not. If only one confesses he will walk free, while the other will get the maximum five year sentence. If they both confess, each will get more than the minimum and less than the maximum (say, three years each). If neither confesses, they will each be held for one year on a lesser charge.

Each prisoner has to make his decision without information from the other, since they are held in separate cells. As long as each prisoner prefers going free and having his partner serve five years instead of them both serving one year in jail, the most rational thing for each to do is to talk. Unfortunately for them, once they each talk, they will both be sentenced to three years.

This is what social scientists call a social trap. Howard Raiffa, a noted researcher in the area, said the prisoner's dilemma is important "...because its message is so clear: uncoordinated, rational, self-interested behavior can result in awful outcomes. It's the essence of a social pathology, and evidence of its structure can be found extensively in our society."² The trap lies in the fact that what seems most rationally calibrated to serve one's self-interest in fact works against it.

Similar dilemmas confront attorneys in day to day practice:

- “If I don’t get a contract on this property by next Thursday, my client will lose a lot of money he can make developing it, because his investors will back out. If I tell the other attorney that this deal has to be finished by then, she may demand a higher price for the property, which will reduce the profit margin. If I don’t, we may not have time to put a deal together, costing my client any chance at a profit.”
- “If I bring that witness in for my case in chief, I have to disclose him to the other side. Then they are likely to bring in rebuttal testimony, and they will have time to prepare. Maybe I can just bring him in as a rebuttal witness, as long as the other witnesses offer testimony he can rebut. But if the other side brings in an expert on the same issue for their case in chief, the rebuttal may seem weak by comparison. Maybe I need to just declare the witness now.”

The outcomes for these situations are driven by what the actors think their counterparts will do. Let’s consider the first scenario. The buyer has a choice: whether or not to tell his counterpart that he needs to close a deal fast. If he discloses, then he might also have to explain the reason for his hurry, and the seller as a result might ask for a higher price. Assume a few facts: the seller has a vacant lot for sale for an asking price of \$3,000,000. The potential buyer would like to develop the property, anticipating a profit of \$800,000 if he can acquire the land for a \$2,500,000. Every dollar over that reduces the profit. The hitch is that the buyer is relying on an investor who will pull out of the deal if a contract is not signed by next Thursday.

The buyer needs to move this deal along, and fast, but he worries what the seller will do when he knows of the investor’s deadline. Instead of selling the property for \$2,500,000, it seems likely that the seller would demand his list price of \$3,000,000. If the deadline is not disclosed, however, the seller will not understand the urgency, and the deadline could pass. If that happens, the buyer would lose the opportunity to develop the property for a likely profit of \$300,000 (calculated using the expected \$3,000,000 price). What is the buyer willing to risk in the negotiation? Would he prefer to risk losing the deal, or pay extra for the property?

The Risk Profile

Fortunately for the buyer and his attorney, there are some rational ways to calculate the payoffs. One way is to create a risk profile for the various outcomes. There is no sure way to know exactly how much more the seller might demand, but the buyer can assign some reasonable probabilities to expected moves by the buyer. It might look something like this:

Table 1.

Expected Desirability Values of Time Deadline Disclosure

Price expected to be demanded by buyer	Likelihood	Expected profit	Desirability	Expected Desirability Value
\$2,500,000	10%	\$800,000	100	10
\$2,750,000	60%	\$550,000	75	45
\$3,000,000	30%	\$300,000	50	15

Table 2.
Expected Desirability Values of Not Disclosing

Outcome of not disclosing deadline	Likelihood	Expected profit	Desirability	Expected Desirability Value
Deal closes anyway	30%	\$800,000	100	30
Deal lost	70%	\$0	0	0

The first table contains an analysis of the desirability of disclosing, and the second of not disclosing, the deadline. The price expectation and likelihood are based on subjective judgments by the buyer regarding what the seller will do. Of course, these cannot be known with certainty, and the quality of the buyer’s judgment drives the reliability of the calculation.

The desirability ratings are based on the subjective value of each outcome to the buyer. The ratings are proportionate, so that an \$800,000 profit (rated at 100) is twice as desirable as a \$300,000 profit (with a rating of 50). The measure is of the intensity of feeling, so that \$800,000 feels twice as desirable as \$300,000 to our buyer. Unlike the likelihood rating, there are no objectively right or wrong answers. The ratings can be done holistically, but in our example, desirability was easily convertible from the monetary payoffs. The range of payoff was \$0 to \$800,000, so a normative scale of 0 for \$0 to 100 for \$800,000 was created. Then the buyer rated where the \$300,000 profit would fall on the 0 to 100 scale. He considered that getting the first \$300,000 would be as desirable as the increase from \$300,000 to \$800,000, so the \$300,000 consequence was rated 50. From there, other monetary payoffs were rated in proportion with the desirability scale.

So what does the calculation show? Add the expected desirability values in table 1 (70) and compare the total to that from table 2 (30). The probabilities are clear: buyer should disclose.

The question of whether to disclose the witness can also be subjected to risk profile analysis. See tables 3 and 4 for the calculation of our hypothetical lawyer.

Table 3.
Expected Desirability Values of Witness Disclosure

Anticipated reaction of other side to disclosure	Likelihood	Desirability	Expected Desirability Value
No reaction	10%	100	10
Not naming their own witness, but preparing to cross-examine our witness	20%	50	25
Naming their own witness on the issue	70%	0	0

Table 4.
Expected Desirability Values of Not Disclosing the Witness

Outcome of not disclosing deadline	Likelihood	Desirability	Expected Desirability Value
Witness testifies anyway	30%	100	30
Witness excluded by court	70%	0	0

In this calculation, the lawyer used her experience (or that of a trusted mentor) to determine the desirability and likelihood of the various possibilities associated with disclosing or not disclosing the witness. The resulting desirability values, 35 for disclosure and 30 for non-disclosure, are close. A detailed knowledge of the other attorney and judge will of course make the ratings more meaningful.

The value of this sort of analysis is that it forces the negotiator (or litigator) to look at his options as rationally as he can. While the likelihood ratings in the end are based on subjective determinations, the act of quantifying them can be used to reevaluate what otherwise might not be more than gut feelings. Use this to quantify your and your client's best reasoning and add value to your representation.

Non-rational Elements of Negotiation

The risk profile, while incorporating the negotiator's intuition, is nonetheless fundamentally an exercise in reasoning. Other, non-rational, elements are crucial to

understanding the negotiation process and how to improve it. Among them are the concepts of decision frame, bounded awareness, motivation, psychological influence and defenses against such influence, negotiator personality and others. Future installments of this column will address these and other issues in negotiation science.

¹ Including ancient and Renaissance writers such as Sun Tzu, *The Art of War* and Niccolo Machiavelli,, *The Prince*, up through such modern sources as Roger Fisher and Richard Ury, *Getting to Yes*, 1981, Boston: Houghton Mifflin, and Dennis Ross, *Statecraft: How to Restore America's Standing in the World*, 2007, Farrar, Strauss and Giroux.

² Raiffa, Howard, with Richardson, John and Metcalfe, David, *Negotiation Analysis: The Art and Science of Collaborative Decision Making*, 2002, Belknap Press, Cambridge, Massachusetts/