

Negotiation Science: Part III – Motivation, How do I know it when I see it?

The last installment addressed the importance of understanding the other negotiators' motivations. But how do you learn the others' true motives?

Individualistic versus Cooperative Motivation

Motivation in the context of negotiation can be thought of in two broad categories, individualistic and cooperative.¹ Individualistic motivation characterizes the desire to maximize one's own goals and is displayed as adversarial negotiating behavior. Cooperative motivation refers to the desire to maximize both parties' goals and is characterized by problem-solving negotiation.

An individualistically oriented negotiator is likely to engage in conduct such as positional arguing, substantiation and threats. His perspective on the negotiating relationship is likely to be in terms of equity and dominance. He aims to influence his opponent while guarding against being exploited in the interchange.

A cooperatively oriented negotiator's perspective on the negotiating relationship is one of trust and equality. He will emphasize problem-solving strategies like information exchange, reciprocal concessions and process management.

A negotiator wishing to engage in cooperative bargaining needs to know if her counterpart is similarly motivated, or if he is approaching the interchange individualistically. If there is no reciprocity, then the would-be cooperative negotiator who provides information might be exploited by the individualistic bargainer. The fundamental problem is how to conduct the negotiation in a way that makes cooperation possible but still protects the parties from such exploitation.

This has been referred to as a "sorting problem."² In Scott Peppet's phrase, the question is how to sort the collaborators from the hard-bargainers. The problem creates genuine difficulty for lawyers, many of whom would like to use a problem-solving approach but, according to research, instead default to positional bargaining.³ As Peppet points out, "repeat play" can solve the sorting problem, since lawyers who deal with one another on a repeated basis will understand that deception or overly adversarial behavior in today's negotiation can lead to retribution in the next negotiation with the same attorney. The significant problem arises when the lawyers believe that this negotiation is the only one they will ever have together. He recommends a reputational solution to this problem, which is to determine the reputation of the negotiation counterpart in the legal community. This certainly can work when you have references available to comment on the unknown attorney. When such a reference point is unavailable, however, there are still ways to ferret out at least the negotiation style of the other attorney. Once you have this information, you can modulate your approach accordingly.

Signaling for Positional Negotiation

First, consider what the other attorney has done in the days and months leading to a negotiation. He may have signaled the likelihood that negotiation with him will be positional. Some of the more obvious signals in the context of negotiation to settle litigation would include the following:

- Aggressive filing of motions. If your counterpart seemingly never misses an opportunity to file another motion, then the probability is high that he is using the filings as a dominating strategy.
- Use of legal arguments during negotiations. This is another technique to assert dominance, through a display of legal acumen. It can serve a dual purpose of not only asserting a kind of intellectual dominance, but also perhaps actually serving to persuade the other party of the weakness of a position.
- Withholding of information. This can take the form of an active refusal, but more often is accomplished through failure to deliver promised documents. It is used to keep the other party in the dark about a fact which might undercut the withholder's position.
- Imposition of artificial timelines. The tactic of imposing a deadline for agreement can be used in an attempt to force concessions from a party anxious to settle, and not wanting to lose the perceived opportunity for settlement.
- Delivery of an ultimatum. The take-it-or-leave-it approach may be employed to convey that one really does not care whether the case is settled or not.
- Statement of position. Obviously a clear indicator is the statement that, "My client's position is..." When this occurs prior to any inquiry about the other party's concerns or interest, it is pretty obvious that the negotiation is not interest based.

While these are clear signals of a positional approach, does their absence indicate an interest based negotiation is occurring? Not necessarily. Further, given the absence of these signals, what does one do when the other side asks what it is that your client really wants? If you signal clearly and honestly what the interests are, you may expose yourself to exploitation by a hard-bargainer who has simply been cunning enough to not signal his true intentions, in an effort to cause your "unilateral disarmament."

So what does one look for in trying to decipher the other negotiator's approach in the absence of clear positional signaling, when you suspect he is being deceptive about his willingness to truly cooperate? The answer may lie in some more subtle characteristics which have been associated with adversarial negotiators.

The Schneider Study

In 2002, Andrea Kupfer Schneider published a study in the Harvard Negotiation Law Review comparing adversarial and problem-solving negotiation styles.⁴ Twenty-five hundred lawyers in Milwaukee and Chicago were surveyed. Each was sent an eleven-page, ten-part questionnaire which asked the recipient to describe the other lawyer in his or her most recently concluded case or transaction in which a significant negotiation occurred. This description included, among other things, demographic

information about the other lawyer, size of law firm, area of practice, and ratings of the lawyer's behavior in the negotiation, approach to the negotiation and goals in the negotiation.

Ratings of lawyer behavior were done using a list of 89 adjectives. These included such words as "accommodating," "argumentative," "creative," "egotistical," "objective," "rude," "suspicious," "trustworthy," and many others. The recipient was asked to rate the attorney on each adjective, using a six-point scale ranging from "slightly characteristic" to "highly characteristic."

The lawyer's approach to the negotiation was evaluated using pairs of descriptive terms to create "bipolar ratings." These are ratings on a scale, at each end of which is a descriptive word or phrase. The recipient was asked to rate the other lawyer on each of these using a seven-point continuum. Sixty-one of these were provided in the survey rating the lawyer on such things as "unintelligent...intelligent," "reasonable...unreasonable," "emotionally involved...emotionally detached," "willing to share information...unwilling to share information," and so on.

The third rating was of the other attorney's goals in the negotiation, and used a six-point rating of fourteen descriptions. Some examples are "getting a 'fair' settlement," "obtaining a profitable fee for self," "maximizing the settlement for his or her client," "conducting self ethically" and "reaching an agreement that met underlying interests of both sides."

The results of the survey were subjected to cluster analysis, which is a statistical technique that breaks data down into naturally occurring groups by finding similar patterns in descriptions given in a survey. The cluster-analyzed data was then used to divide the attorneys into groups. This is done mathematically in the computer, rather than subjectively by the human researcher. The information set forth below is based on the most simplistic cluster analysis contained in the study, which broke the lawyers into only two groups, problem-solving and adversarial. The study went on to break the groups into three and four clusters. This yielded further insights into the type and effectiveness of different negotiation behaviors, but that is a topic for a later date. For now, we consider insights from the two-cluster analysis.

Identifying the adversarial negotiator

The value in the study with regard to identifying the adversarial negotiator lies in the clustering of lawyer characteristics. For instance, the top five adjectives associated with adversarial attorneys were, in order, stubborn, headstrong, arrogant, assertive and irritating. Thus, if anything about that attorney, his conversation in the negotiation, or his behavior prior to the negotiation, would lead you to label him with one of these identifiers, chances are good that you are in for an adversarial negotiation.

The top five bipolar ratings associated with adversarial attorneys are the following: “disinterested in my client’s needs,” “extreme opening demand,” “unrealistic opening position,” “interested in his client’s needs,” and “arrogant.” Some of these may be unknown to you prior to the negotiation. However, there is a good chance you will already have an opening demand prior to meeting together to negotiate. Also, your previous conversations with the other attorney should have provided you with some clue as to her interest in your client’s needs. And arrogance is something which can be measured in a variety of contexts, well prior to the negotiation.

The top goal ratings for adversarial lawyers were “maximizing settlement,” “outdoing you,” “profitable fee,” and “meeting client’s needs.” Maximizing settlement and meeting client’s needs also appear in the top five goals of the problem-solving negotiator. Thus, outdoing you and profitable fee are descriptive of the adversarial negotiator. These are probably of less value in identifying the adversarial negotiator in real time, since as inferred goals their identification relies upon interpretation of negotiator behaviors.

Identifying the problem-solving negotiator

Problem-solving negotiation, not surprisingly, is associated with substantially different descriptors. The top five adjectives describing the problem-solving negotiator were, in order, ethical, experienced, personable, rational and trustworthy.

The top bipolar behavioral ratings for the problem-solvers were “did not make derogatory personal references,” “interested in his client’s needs,” “courteous,” “did not use offensive tactics,” and “honest.” The top five goals associated with problem-solving negotiators were “ethical conduct,” “maximizing settlement,” “fair settlement,” “meet both sides’ interests,” and “meeting client’s needs.” These reflect the general proposition that in order for cooperative, problem-solving negotiation to occur, the negotiator must listen and care about each party’s needs, and must share information with the other side.

If your knowledge of the other attorney leads you to apply any of these descriptors to her, then chances are good you will be able to engage in cooperative negotiation. Your dealings with opposing counsel in the days and weeks leading to the first substantive negotiation should provide opportunity to evaluate her for at least some of these characteristics.

Effective Negotiation with Either the Problem-solver or Adversary

Once you determine which kind of negotiator you are addressing, you can choose your approach. You can speak clearly and honestly with a problem-solver, but will want to guard your words more carefully with an adversary. If you and the other attorney can problem-solve together, the chances of a resolution that maximizes the benefit for each party is substantially higher than if one or both attorneys take an adversarial approach.

Interestingly, even if only one attorney is a good problem-solver, the likelihood of a better agreement is increased.⁵ But that is a topic for another day.

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¹ Olekalns, M. and Smith, P. L. (2003), Testing the relationships among negotiators' motivational orientations, strategy choices, and outcomes. *Journal of Experimental Social Psychology*, 39; 101-17.

² Peppet, S. R. (2005), Lawyers' bargaining ethics, contract, and collaboration: The end of the legal profession and the beginning of professional pluralism. *Iowa Law Review*, 90: 475-538.

³ Milton Heumann & Jonathan M. Hyman (1997), Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want," *Ohio State Journal on Dispute Resolution*. 12:253, 255. This study found that even though sixty-one percent of the participating attorneys thought that problem-solving strategies should be used more often, seventy-one percent of them nonetheless adopted a positional or hard-bargaining strategy.

⁴ Schneider, A.K. (2002) Shattering negotiation myths: Empirical evidence on the effectiveness of negotiation style. *Harvard Negotiation Law Review*, 7, 147- 233.

⁵ See Barry, B. and Friedman, R. (1998) Bargainer characteristics in distributive and integrative negotiation. *Journal of Personality and Social Psychology*, 74, 345-59.