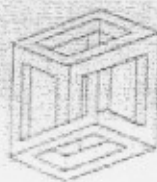


The Handbook of Dispute Resolution

Michael L. Moffitt and Robert C. Bordone
Editors



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CHAPTER EIGHTEEN

Negotiation

Bruce Patton

Negotiation can be defined as back-and-forth communication designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different.¹ As such, negotiation is one of the most basic forms of interaction, intrinsic to any kind of joint action, as well as to problem solving and dispute resolution. It can be verbal or nonverbal, explicit or implicit, direct or through intermediaries, oral or written, face-to-face, ear-to-ear, or by letter or e-mail.

This chapter describes the basic analytic elements of negotiation, uses them to define the goals of negotiation, and briefly discusses the implications of these elements for effective, systematic preparation. It then explores some of the most common approaches and choices in negotiation process, including their strengths and weaknesses, challenges to effective implementation, and guidelines for use. It takes a particularly close look at the "collaborative" approach to negotiation that has been proposed to deal with the complexities of shared, differing, and conflicting interests, including the critiques of that approach that have emerged since the publication of the seminal work *Getting to YES* in 1981.²

SEVEN ELEMENTS OF NEGOTIATION

There is no one right way to organize ideas, but some approaches work better than others for specific purposes. In defining a set of core variables or elements

of negotiation to be of help to a negotiator, a framework should help us define our goals and prepare effectively to minimize surprises and to identify and take advantage of opportunities. It should also help us appreciate and wisely evaluate the consequences of available process choices. It should be simple enough to remember and robust enough to incorporate any insight or learning we might have about negotiation. And ideally, such a framework should operate at a basic human level underneath cultural or even gender differences, so that the same framework can be used in different contexts.

The seven-elements framework for understanding and analyzing negotiation was developed at the Harvard Negotiation Project to meet these criteria. It is one way to define comprehensively the terrain of negotiation that needs to be understood and managed (whatever procedural tactics or strategies a negotiator might adopt). Each of the seven elements—interests, legitimacy, relationship, alternatives, options, commitments, and communication—is described in the following sections.

Interests

A party's basic needs, wants, and motivations are commonly referred to as its *interests*. For example, a negotiator seeking to settle a dispute might care about getting enough money to cover expenses, not setting a bad precedent, and getting the negotiation over with before leaving for vacation. Interests are the fundamental drivers of negotiation. People negotiate because they are hoping to satisfy their interests better through an agreement than they could otherwise. The measure of success in negotiation is how well your interests are met, which is also the criterion you use to compare and choose among different possible outcomes.

Interests are *not* the same as the positions or demands that people typically stake out and argue for in negotiation. A position is a proposed outcome that represents merely one way among many that issues might be resolved and interests met. For example, a small local magazine ran a disparaging article about an aspiring politician whom they had confused with a convicted felon of the same name and hometown. The politician sued for libel and demanded monetary damages (a position), but the plaintiff's underlying interest was to restore his reputation. When the magazine countered with an offer of a correction and a glowing front-cover biography, the politician accepted, because the offer met the politician's interests better than his own position.

The notion of interests encompasses a wide range of possibilities, from substantive goals such as money, deadlines, or guarantees to emotional desires such as respect, recognition, feeling fairly treated, or even seeing another person happy. One can think in terms of levels of interests, with something like Maslow's basic human needs at the root of a tree of interests that may include a wide range of needs and motivations beyond the purely instrumental.⁵

Often we have multiple interests at stake in a negotiation, some of which may be inconsistent and require setting priorities. For example, we may want to be honest and fair but also not have to admit error. More generally, we want certain things in the short term but also want to maintain leverage for future negotiations (by not expending all of our bargaining chips now) and at the same time not to upset the rules of the game that we rely on (such as no one resorting to violence), even if breaking the rules might improve our immediate return. Much of the challenge of negotiation is in figuring out how best to reconcile such conflicts or whether there are creative solutions that avoid our having to make such tough choices.

Between the parties, interests can be shared (neither of us wants to spend too much time negotiating; both of us want to set a good precedent), differing (I care about net present value; you care about cash flow), or conflicting (price, credit, ownership, who gets the corner office). While negotiation is often assumed to be an adversarial battle focused on conflicting interests, this assumption overlooks two important points. First, some of the most intense conflicts are often fueled by *identical* interests—both parties want to feel fairly treated. Negotiators are often shocked to discover this, which usually leads them to explore why their perceptions of fairness differ. Second, the potential value inherent in shared or differing interests may be as large or larger than the value in dispute. In one commercial litigation, for example, the parties' anger about something that had happened in the past caused them not to realize that, as circumstances had developed, the potential value of a continuing relationship was more than ten times greater than the amount in dispute. When an outsider pointed this out, the parties suddenly found the motivation to find a settlement.

Legitimacy

Fairness or *legitimacy* is one of the most powerful of human motivations, and thus constitutes a special category of interests. It routinely plays a major role in negotiation, too often (and unwisely) overlooked. It is not uncommon for negotiations to fail, for example, not because the option on the table is unacceptable, but because it does not feel fair to one or both parties. In effect, people pay to avoid accepting a solution that feels illegitimate. In experiments, for example, one person is told that he or she has \$10 to split with another (unknown) person and that he or she can specify who gets how much but will only get the money if the other person agrees to accept the split (otherwise neither person gets any money). Logically, the second person should be willing to accept any split of the \$10, even \$9.99 to the splitter and 1¢ for them, but in fact most people would rather get nothing than approve a split that feels too unfair.⁴

Often this interest in legitimacy and feeling fairly treated is the main driver in a dispute, though parties with divergent views on what is fair may fail to realize that beneath their conflicting positions is the same interest. In the Israeli-Palestinian

conflict, for example, the perceived legitimacy of where the border is drawn between Israel and a Palestinian state is at least as important as how many acres are on each side. In many business contexts, the issues at stake in any given dispute are less important than the precedent set for future dealings. In a famous example, President Ronald Reagan fired thousands of air traffic controllers for undertaking an illegal strike, even though the controllers had legitimate grievances and replacing them was far more costly than working out a settlement.

Relationship

A third important variable in negotiation is the *relationship* a negotiator has or wants with other parties.⁵ This includes the negotiator's relationship both with those across the table and with anyone else who might affect the negotiation or be affected by the negotiator's reputation coming out of it. Having a fond or trusting relationship may make dispute resolution easier, while hostile feelings can make it much harder. Perhaps more important, the conduct and outcome of a negotiation have the potential to either damage or strengthen a relationship in a variety of ways. As a result, the prospect of a dispute can be very stressful in an important ongoing relationship, such as that between a boss and an employee, or between sales and marketing. (Such a prospect should therefore motivate extra attention to the choice of negotiation process.)

Sometimes, as with a family member or a business partner, maintaining a certain kind of relationship may be a much more important interest than the particular substantive issues in dispute. In other contexts, the parties may lack any personal or formal connection but nevertheless face the prospect of ongoing dealings, including occasional disputes, in which they would prefer to have a way of working things through (a working relationship) that entails lower rather than higher transaction costs (an afternoon of tough negotiation rather than a year of litigation). However, even when there is neither a prior nor likely a future relationship with the other side, a negotiator still has to weigh the impact on the outcome of *this* negotiation of the working relationship between the parties *during* the negotiation. If that relationship becomes heated and hostile, the chances of agreement decline, and the chances of a creative value-maximizing agreement decline precipitously.

Finally, a negotiator also has an ongoing relationship with himself or herself that can influence the conduct of negotiation. Psychological drives to avoid inconsistency ("cognitive dissonance"⁶), to preserve key values that define one's identity,⁷ or to "do the right thing" (conscience) may shape a negotiator's choices. For example, a competitive type who believes "I'm someone who wins, no matter what it takes" may operate with few scruples, while someone deeply committed to fairness, to religious values, or to the Golden Rule may proceed quite differently.

Alternatives and BATNA

When we turn to thinking about how a negotiator can satisfy her or his interests, a critical question is what the negotiator could do in the absence of a negotiated agreement. That is, if the negotiation fails, what will each negotiator do—what are the *alternatives* to agreement or possible “walkaway” courses of action? By definition, an alternative to agreement must be a course of action that the negotiator can implement without the consent of the other negotiator(s). In trying to negotiate the resolution of a business dispute, for example, one party’s alternatives might include doing nothing, suing the other party, trying to sell out to a third party, holding a press conference, and so on.

Since a negotiator unable to reach agreement will have to choose one of his or her various alternatives to pursue, a key question is which one? Among the various alternative courses of action a negotiator could pursue, which would best satisfy that negotiator’s interests? This alternative is commonly referred to as the negotiator’s Best Alternative To a Negotiated Agreement, or BATNA.⁸

A negotiator always has some BATNA, even if he or she has not figured out what it is or it is not very attractive. For example, in negotiating with a mugger who puts a gun to your head and demands your money, your BATNA might be to refuse, to try to fight, or perhaps to do nothing. In many cases, there will be uncertainty involved in various of your alternatives (such as the outcome of litigation, for example) that may require probabilistic assessment to calculate expected values and thereby determine your likely BATNA, but this doesn’t change the concept.

Your counterpart also has a BATNA, as well as perceptions of its relative attractiveness, one or the other of which you may be able to affect. For example, one law professor confronted by a mugger promoted negotiation by emphasizing the downside of the mugger’s BATNA and offering attractive options: “You don’t really want to kill me; I have too many friends in the police department who would come after you. How much do you really need? \$20? \$50? Why don’t we avoid the need for a felony and just make it an indefinite loan?”

Options

A major reason to negotiate, of course, is to seek an outcome that offers more value than one’s BATNA, enough more to justify the investment of time and effort in negotiating. *Options* are possible agreements or pieces of a potential agreement upon which negotiators might possibly agree. Options can include substantive terms and conditions, procedures, contingencies, even deliberate omissions or ambiguities—anything parties might agree on that might help to satisfy their respective interests.

The most basic form of option is a trade. I give you money, you give me a car. We create value by an exchange of something that I have that I value less

than you do for something you have that I value more than you do. In general, options create value in negotiation by maximizing the satisfaction of shared interests (for example, we pool our efforts and exploit economies of scale) or by exploiting *differences* in interests (such as different capabilities, resources, valuations, risk preferences, time horizons, or predictions). For more detailed information on how to do this, see Chapter Eleven in this volume.

Commitments

Possible options for agreement are one thing. Actual decisions and agreements, even offers and demands, are quite another. A *commitment* is an agreement, demand, offer, or promise by one or more parties, and any formalization of that agreement. Commitment is commonly signaled by words such as "I will offer," "I demand," "We agree," or "I promise not to . . .". Commitments can occur at any point in a negotiation and encompass anything from a minor procedural point (for example, a shared understanding of an agenda) to final and complete agreement, and anything in between (agreement to meet again; agreement on some terms, but not all).

Communication

Finally, there is the *communication* process by which parties discuss and deal with the preceding six elements of negotiation. For example, do they begin by trading commitments or information about interests? Do they approach the process as adversaries or colleagues, beseech or threaten, trade concessions or brainstorm without commitment? Do they focus on advocacy, inquiry, or both? There are myriad ways to approach the process of negotiation, and many have predictable effects on the likely outcomes.

Collectively, these seven elements are one proven and useful way to organize the landscape of negotiation. However, it is not the only possibility, and it subsumes concepts to which others might give greater prominence. For example, some might include "parties" as a fundamental descriptive component of negotiation.⁹ In the seven-element model the question of who the parties are is subsumed under interests and left open. We look at our interests and those of others whose interests might enable the most attractive options for us. "Issues" is another concept that can be helpful, as well as how issues are "framed." In this model, issues are seen as more derivative of the parties' interests than an independent element, while framing is an important aspect of legitimacy and communication.¹⁰ "Perceptions,"¹¹ "doubts,"¹² and "emotional neediness"¹³ have also been raised as important concepts. Perceptions are certainly an important aspect of legitimacy and relationship, and perhaps interests as well. Doubts are an important aspect of legitimacy, and emotional neediness a critical aspect of how negotiators assess their interests and communicate about the relative attractiveness of their respective BATNAs. Likewise, aspiration levels undoubtedly

play an important role in the outcome of many negotiations, but we can see aspirations as derivative of a negotiator's perceptions of each side's BATNA and the available options. While all of these concepts are potentially useful, we are looking for a core list of variables that is no longer than it needs to be and short enough to remember. As long as additional useful concepts can fit within the core framework, we can meet our objectives without losing the usefulness of having a basic framework.

A very different descriptive framework, however, has been proposed by Robert Mnookin, Scott Peppet, and Andrew Tulumello.¹⁴ They argue that the essential challenges of negotiation are rooted in three "tensions": between creating and distributing value, between empathy and assertiveness, and between the interests of principals and agents. These three tensions are indeed important, and deserving (among other things) of much thought in determining how to conduct a negotiation (or in the case of principals with their agents, a set of linked negotiations). But they do not constitute a set of fundamental variables of negotiation, nor aid on their own in defining the goal of negotiation or a systematic approach to preparing. Indeed, Mnookin, Peppet, and Tulumello actually use the seven elements just described to explain the three tensions and develop advice for dealing with them. Their three tensions are probably better seen as issues to manage in the communication process, rather than as a possible alternative to the seven-elements framework.

DEFINING A GOOD OUTCOME IN NEGOTIATION

It is hard to do anything well if you are unclear on the goal or how to measure progress toward it. So what is the goal of negotiation? Most fundamentally, it is to meet your interests as well as possible, but in any event at least as well as they would be met by your BATNA. (This is an important point, because it means that the goal of negotiation is *not* necessarily agreement. An agreement makes sense only if it is better for you than your BATNA.) For an agreement to be possible and sustainable, it should also meet the other side's interests at least as well as their BATNA, and also any potential spoiler's interests well enough for them not to interfere.

Beyond this core, each of the elements suggests additional criteria of what, everything else being equal, would constitute a better outcome:

- A creative, elegant, no-waste solution that captures as much available value as possible—among the best of possible options¹⁵
- A legitimate solution—no one feels taken advantage of
- A firm, implementable, and sustainable commitment
- A process that is as efficient as possible, the product of good communication

- A process that helps to build the kind of relationship we want with this or other parties

In any given context there are likely to be trade-offs that need to be made among these various criteria, but this checklist helps us not to overlook any potentially important aspect of our goal.

PREPARING FOR NEGOTIATION

Because differences in context, personalities, knowledge, and skills make every negotiation to some extent unique, there is no one "right" way to negotiate. Moreover, because negotiation is an unpredictable interactive process not wholly within the control of any one party, good preparation should not focus on just one target "script." Instead, a useful method of preparation should help a negotiator to anticipate and deal with any variety of eventualities. Rather like a paratrooper jumping from a plane and unsure exactly where he or she will land, negotiators want to have a good knowledge of the entire negotiation terrain, so that they can readily assess at any given time where they are and the best route toward where they would like to be.

The seven elements of negotiation offer a roadmap for getting prepared in this way. While there may be no one best way to deploy the elements, as core variables in the negotiation process there is a standard set of questions one can ask about each of them, the answers to which will help a negotiator assess how best to proceed in any given context. A basic list of such questions is set forth in Figure 18.1.

The seven elements help negotiators use all-too-limited preparation time efficiently and effectively by offering a standard of relevance and importance. Negotiators are often advised, for example, to "know the facts cold." But which facts? There are too many that might potentially be useful, but it is the facts that help us answer the seven-element checklist of questions that are most likely to be relevant. The seven-element checklist also helps us implement other common preparation advice, such as "understand the other side" (think through what their interests might be) or "identify weaknesses" (analyze their alternatives and possible arguments).

NEGOTIATION PROCESSES

A seven-element checklist for defining success in negotiation and for preparing to negotiate is relatively manageable and easy to remember. But juggling seven variables simultaneously in the course of interaction is quite another story. Negotiators face almost limitless possibilities as they consider which elements

Interests

- What are our interests? What might theirs be?
- Are there third parties whose interests should be considered?
- Which interests are *shared*, which are just *different*, and which *conflict*?

Alternatives

- What is our BATNA? What might theirs be?
- Can we improve our BATNA? Can we worsen theirs?
- How could potentially unrealistic expectations be tested?

Options

- What possible agreements or pieces of an agreement might satisfy both sides' interests?
- What are some ways to use differing interests to create value?

Legitimacy

- What external criteria might plausibly be relevant?
- What standards might a judge apply? What "ought" to govern an agreement?
- What will *they* argue? Do we have a good response, one that *accepts* their point, then adds to it?
- What will each of us need to be able to justify an outcome to our constituents?

Commitments

- What is our authority? What is theirs?
- What are some illustrative, well-crafted commitments?
- What would be good products of this meeting?
- What are mechanisms for changing commitments over time? What are mechanisms for resolving disputes?

Relationship

- Which relationships matter? How is each now? How would we like it to be?
- What can we do to bridge the gap at low cost and risk? How should we start out?

Communication

- What do we want to learn from them? How can we improve our listening?
- What do we want to communicate? How can we do so most persuasively?
- What are our agenda and plan for the negotiation?
- What negotiation process approach would we like to use?
- How should we handle inevitable disagreements?

Figure 18.1. Systematic Seven-Element Checklist for Preparation.

to emphasize or ignore and how to handle each one. In practice, however, there are a few major archetypal approaches to the process of negotiation at the root of most interactions. Four of the most common are described here.

Positional Bargaining: The Dance of Concessions

The simplest and most common approach is haggling, or *positional bargaining*.¹⁶ One party stakes out a high (or low) opening position (demand or offer) and the other a correspondingly low (or high) one. Then a series of (usually reciprocal) concessions are made until an agreement is reached somewhere in the middle of the opening positions, or no agreement is reached and the parties walk away to pursue their respective BATNAs. "Your lawsuit has no basis in law, but to avoid the costs of litigation we're prepared to offer \$50,000." "We'd consider \$500,000. Have you seen these pictures of my maimed client?" "Perhaps \$100,000." "\$300,000." "\$200,000 is the most I can offer." "Done."

One explanation for the prevalence of positional bargaining is its simplicity. The focus is primarily on the element of commitment. And one can understand why that might be: since the goal of negotiation is a mutual commitment, it is natural for each party to suggest what they would like that commitment to be. The inevitable gap between the initial proposals focuses the process on whether and where in the middle the parties might agree. Since negotiation is generally not a subject taught in schools and negotiation analysis is a recent field of study, it is hardly surprising that a relatively simple and manageable approach to negotiation is widespread.

In addition to its simplicity, positional bargaining has the advantages that it is universally understood, frequently expected, and concrete. There are also strategic benefits from effectively staking out a favorable position. If you can "anchor" a position effectively, you can shift the other party's aspirations and the likely outcome in a direction favorable to you. Thus much of the lore of bargaining focuses on how to achieve effective anchoring through, for example, lock-in tactics ("My hands are tied," "It's company policy"), stubbornness and stonewalling, apparent sincerity, bullying (outbursts, guilt, psychological pressure), repetition, logic (real or contrived), and misdirection (changing the subject, counterattacks, non sequiturs). Finally, focusing on positions avoids the risk that by revealing information about your interests you invite the other side to hold them hostage. ("Oh, too bad you're interested in *that*. That will cost you.")

However, the simplicity of positional bargaining and its overwhelming focus on commitments has substantial drawbacks. Perhaps most significant, by discouraging the exploration of interests, it makes it difficult to find creative, value-maximizing options. Without knowing the parties' interests, it is hard to find opportunities for joint gain. Moreover, a negotiation climate focused on commitment discourages creativity and brainstorming—you cannot think expansively if you are worried that you will be committed to any idea you consider.

Second, positional bargaining tends to be slow and inefficient. Each party tries to make the smallest concessions possible, and even then only when necessary to avoid a failed negotiation. One way to signal to the other party that you are near the limits of your authority or ability to move is to take longer and longer between smaller and smaller concessions. And because reaching agreement is often perceived unpalatably as "giving in" or "backing down" to the other side, negotiators want to "hold out" as long as possible before doing so. The situation is even worse in multiparty negotiations. The number of arbitrary bilateral bargains required increases geometrically with the number of parties, but because each bilateral result tends to be arbitrary, it is impossible to find a common solution. The usual response is to form coalitions to make the number of parties manageable, but coalitions by their nature find it hard to make the myriad decisions needed to pursue an extended concession strategy.

Third, positional bargaining tends to produce arbitrary "split-the-difference" outcomes that poorly satisfy either party's interest in fairness, are hard to explain to constituents, and do little to set a precedent that reduces the need for additional (time-consuming) negotiation in the future. Consider a personal injury lawsuit. A typically bargained settlement might lead to this report: "We agreed on compensation of \$97,500 for the accident." "Why?" "Well, they started at \$250,000, we started at \$0 and then . . .". Each side wonders, "Could I have gotten more with a better negotiator?" In contrast, consider this report: "Of course they wanted more, but in the end we agreed on the usual standard, absent recklessness or egregious injury, of three times special damages, which comes to . . .". Whether the final number is more or less than the "split-the-difference" result, this outcome is far easier to explain, and each settlement reached using this rule strengthens the precedent for future negotiations.

Finally, positional bargaining tends to promote an adversarial relationship. It tends to focus on the areas of conflict between the parties and establish a distributive "win-lose" frame—who can more skillfully take advantage of whom? Moreover, inevitable perceptual bias leads people to see their own intentions and moves more positively and others' more negatively, often promoting an escalating (and self-fulfilling) cycle of hostility.¹⁷ While such biases exist in all negotiation, they are exacerbated by the incentives to dissemble in positional bargaining about your interests, your BATNA, your authority to commit, and so on. You routinely leave a haggled negotiation wondering what you don't know—whether you were "taken" or at least could have gotten "more." Such feelings can lead to resentment and a determination to exact revenge, or at least to "make it up next time."

Sometimes in an effort to preserve an important relationship or avert conflict, one or both negotiators will adopt a "soft" form of positional bargaining by putting the relationship first, taking reasonable positions, conceding generously, and making offers (versus threats). This can produce agreement quickly, but not necessarily a good agreement, because there has still been little

exploration of interests or possible creative options. Moreover, this approach to negotiation encourages the other side to take advantage. If you try to appease the other side and preserve the relationship by making a concession when they get upset, they may indeed calm down—for a while—but they will also learn to get upset if they want a concession.¹⁸ Over time, this can produce a lopsided dynamic that breeds resentment on one side and disrespect on the other, thereby damaging the very relationship it was intended to preserve.

To some extent, these drawbacks of positional bargaining can be overcome with more sophisticated and skillful implementation. Indeed, more skillful and experienced bargainers tend to temper the usual focus on commitments by adding others of the seven elements into the mix, for example using legitimacy arguments to justify positions, empathetic listening to buttress the relationship against the effects of tough positioning, or an interlude of brainstorming rules to explore options without commitment. Used in a genuine search for better outcomes, such skillful behaviors essentially begin to transform bargaining into the alternative archetype of "problem-solving negotiation" described later in this chapter. However, used manipulatively to enhance a competitive negotiation "victory," such efforts may exacerbate the relationship costs of positional bargaining and breed cynicism about the possibility of alternative approaches.

Positional bargaining tends to make the most sense as an approach for two parties with relatively simple, low-stakes issues and little commitment to the relationship, when there is a strong market context limiting the arbitrariness of outcomes (or when there are no independent measures of fairness), or when bargaining is well-established or expected or represents a game both sides want to play for fun. Stock markets, for example, are a context in which simple bargaining is efficient and effective. Traditional bazaars are a context in which bargaining is expected, stakes are typically low, market standards may be limited, and there is often an element of game playing.

Favors and Ledgers

A second important process archetype also involves trading commitments, but takes advantage of an ongoing relationship between the parties to produce more creative and value-maximizing outcomes. The basic idea is to agree to a one-sided outcome now—a "favor"—in exchange for a reciprocal favor in the future. Negotiators then keep a "ledger" of who owes whom what. The result is a creative way to "expand the pie" by relaxing the timeframe for trades, which often permits deals and dispute resolutions that otherwise seem impossible.

With varying degrees of formality, favors and ledgers ("logrolling" with a "bank") is common in many ongoing relationships, and ubiquitous in legislative bodies. It is operative, for example, when an alliance partner says, "We've refrained from poaching your accounts, even when we were invited in.

Now it's your turn to do the same." Or your boss says, "I know this is a nasty assignment, but someone's got to do it. We'll make it up to you."

While favors and ledgers has benefits, it also has drawbacks. First, parties need to ensure that they have a shared perception of the size of a favor and a reliable means of recording that, or they risk a serious rupture in the relationship when the creditor party seeks "repayment." More important, there is always a risk that the counterpart will no longer be in power when repayment is desired, and the counterpart's "heirs" may disclaim knowledge or obligation to repay. ("What favor? That deal set a precedent.") Finally, like regular positional bargaining, favors and ledgers tends to result in arbitrary outcomes. While these may feel fair overall to the negotiators, they may be very difficult to explain to constituents, and they tend to set no useful precedent. Indeed, one common legislative measure of the "size" of a favor is how far it goes against the interests of the legislator's constituents.

Chicken

A third common archetype of negotiation process focuses on alternatives—whose are better, and who can worsen the other's (threats). "Our walkaway is better than yours, and furthermore, we will make yours worse by . . ." This is commonly called the game of *chicken*—"Give in to my demands, or I will kill us both. There will be more mourners at my funeral than at yours and more flowers on my grave." A labor strike or lockout, much litigation, and certain kinds of military action are common examples of this approach in use.

Chicken is typically the unintended end result of an escalation process. It begins with each side frustrated by a lack of progress and blaming the *other* side's stubbornness and unreasonableness. Someone then issues an ultimatum or makes a threat. But the other side, with reciprocal perceptions of unfairness and an equal desire not to "back down" to bullying, responds with a counterultimatum or counterthreat, rather than a concession, starting a cycle of escalation.

Chicken tends to be extremely costly, with significant resources poured into the battle instead of into finding a good outcome. In the end, as with the proverbial teenagers driving their cars straight at each other, both sides may die. This is how Lebanon in 1975 went from being a stable, safe paradise known as "the Miami Beach of the Middle East" to a war-ravaged near-wasteland. Each of two armed factions was confident there would be no civil war, "because we have the ability to destroy this country, and the other side won't risk that."¹⁹

Playing chicken will sometimes pay off, but it is among the riskiest of negotiation strategies. For the most part, it represents a failure of skill and perspective on the part of negotiators. This is not to say, of course, that a negotiator should never hold firm or refuse to concede. A negotiator may wisely refuse to participate in discrimination or securities fraud, for example, out of principle.

As always, agreement makes sense only if it satisfies a negotiator's interests better than the negotiator's BATNA.

This illustrates an important but subtle distinction between a *threat* and a *warning*. A threat, as in the game of chicken, is not something you intrinsically want to do, but something you might do (or at least threaten to do) to coerce another party to do something you want. In contrast, a warning is a statement offered to educate the other side that your BATNA is better than their current offer (and may involve less pleasant consequences for them than they have anticipated). While a warning may influence the other side to change his or her offer, its purpose is primarily to ensure that he or she does not make an unwise choice based on inaccurate assumptions.

The distinction is important because a threat, essentially extortion, is illegitimate, while a warning is not. (This is why recipients will try to construe a warning as a threat—if they succeed, they can try to ignore the threat as “inappropriate.”) Consider a simple example. This is a threat: “If you don't meet our demand for a discount on old-style gas lasers, we're going to delay paying our huge outstanding invoice and put your loan repayment at risk.” This is a warning: “If we can't reach agreement on a fair discount for gas lasers, it is going to make economic sense for us to create a homegrown substitute component using newer (cheaper and more reliable) semiconductor lasers and stop buying from you. If we do that, it will also make sense for us to sell such a component to others who want it (to spread our costs). Before you decide about a discount, you should probably consider what that might do to demand for the gas lasers you are trying to sell.”

Problem-Solving “Circle of Value” Negotiation

As scholars began to subject the negotiation process to more systematic analysis, the drawbacks of positional bargaining became more starkly apparent. The outline of an alternative *problem-solving* approach emerged from a combination of theoretical analysis on the one hand and case studies and extrapolations from (allegedly) atypical negotiations on the other. This approach was first succinctly articulated in *Getting to YES*, and has been elaborated in various ways since. In essence, it argues that (1) negotiators should work together as colleagues to determine whether an agreement is possible that is better for both than no agreement, (2) in doing so they should postpone commitments while exploring how best to maximize and fairly distribute the value of any agreement, and (3) it makes sense for one party to take this approach even if the other does not.

This problem-solving approach is intended to overcome the drawbacks of traditional positional bargaining:

- Rather than focusing on positions, which represent each party's uninformed first thoughts about possible solutions, the problem-solving approach focuses on the parties' underlying interests, looking for ways to maximize the

satisfaction of shared interests and create value by "dovetailing" divergent interests

- Rather than making early commitments and then concessions, which limits creativity and can slow progress, the problem-solving approach explicitly postpones all formal commitments to the end—"Nothing is agreed until everything is agreed." Demands and offers are avoided or sidelined in favor of brainstorming and improving multiple options to create and distribute value. Tentative commitments begin to form informally and gradually strengthen as negotiators become increasingly confident about what options make the most sense. They become firm commitments, usually fairly quickly, only at the end of the negotiation when there is a complete package.

- Rather than arbitrary, split-the-difference results, the problem-solving approach encourages explainable, well-reasoned outcomes that set sustainable precedents. Problem-solving negotiators change the question from what the parties are *willing* to do to what they *should* do based on independent standards and principles of fairness.

- Rather than put the relationship at risk in an adversarial process, the problem-solving approach allows parties to maintain and build their relationship *even as they disagree* by uncoupling the quality of the relationship from the degree of agreement. (This is described as "separating the people from the problem" in *Getting to YES*.) Like two scientists who may disagree about the explanation for a problem neither fully understands, the relationship is maintained by remaining both forcefully candid *and* respectful—explicitly aware of the possibility that it may be your own view (however obvious it may seem and however strongly felt it may be) that is incomplete or even in error. Problem-solving negotiators are prepared to put their views to a fair test. In this way the problem-solving approach avoids a commonly felt need to choose in a negotiation whether you care more about maintaining your relationship with the other side or about achieving a favorable substantive outcome. This is welcome news for those involved in negotiations (among family, with business partners, between nations) in which both substance and relationship are of vital importance.

Mnookin, Peppet, and Tulumello argue that the problem-solving approach also helps manage each of their three tensions. The first tension, between creating and distributing value, is also sometimes called the "negotiator's dilemma,"²⁰ because to create value requires that negotiators disclose their interests, but disclosing first can put you at a strategic disadvantage in capturing the resulting value. (Labor may care more about a wage increase and management about capping health care costs, permitting a mutually beneficial trade if these preferences are discovered. But if management reveals its preference and labor does not, labor may achieve a proportionately larger wage increase.) The problem-solving approach helps manage the tension between creating and distributing value by fostering a collaborative working relationship that permits

gradual and reciprocal disclosure of interests while brainstorming options without commitment, and that helps negotiators address distributional questions side-by-side with objective standards, rather than through adversarial "claiming" and subjective valuation.

Mnookin and others point out that their second tension, between empathy and assertiveness, is widely perceived, but not inescapable—it is an artifact of insufficient skill. The problem-solving approach helps people overcome this tension by postponing commitments and encouraging the exploration of different views, making it easier to empathize without agreeing, and by depersonalizing the discussion, allowing negotiators to assert their views about the problem without it being framed as an attack on their counterpart.

The third tension, between the interests of agents and principals—which are never perfectly aligned and often quite different—is also eased by a more open and collaborative problem-solving approach. Normally this tension produces some mutual distrust and a struggle over the degree of the agent's authority. Principals are often cagey about their interests and BATNA and give their agent rigid instructions about process and limited authority to commit. Predictably, this limits the ability of the negotiators to find optimal solutions. By taking a problem-solving approach, the tension becomes discussable as a challenge to be jointly managed (by using tailored incentives, gradually increasing delegations of authority, and other creative options). This improves both the relationship between agent and principal and the prospects for an optimally satisfying outcome.

The problem-solving method is sometimes called the "circle of value" approach to negotiation,²³ because the core of the process involves negotiators exploring options for creating and distributing value (through an iterative discussion of interests, options, and standards of legitimacy) with a collaborative, side-by-side, problem-solving mentality. This way of working together has to be carefully created and maintained, like a special space or "circle." Negotiators create the circle by managing how they communicate and managing the working relationship that nurtures and is nurtured by that way of interacting. The elements of commitment and BATNA (especially threats) are kept out of the circle (except for alternatives based on legitimate standards, such as a market price, that come into the circle as part of legitimacy). Indeed, commitments and threats "break" the circle. A commitment, even an offer, because of its anchoring effect, creates a strong incentive for the other side to counteranchor. But as soon as they do, the discussion naturally devolves into a dance of concessions, absent a careful effort to re-create the circle by turning commitments back into options and refocusing on brainstorming. ("Paying you \$1,000,000 in diamonds is one option. Another might simply be agreeing to continue doing business. But before we decide what makes the most sense, let's figure out what the range of options is and the implications of each.") Likewise, threats (either to go to

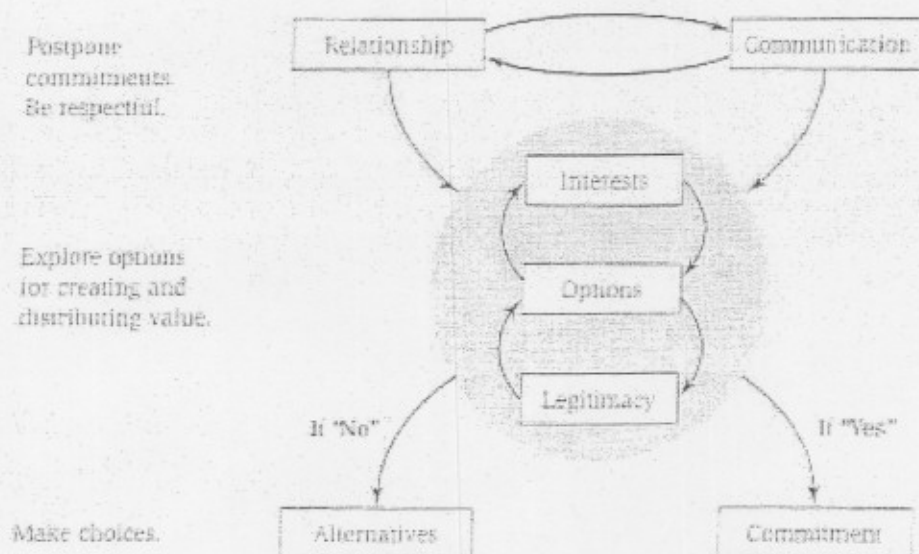


Figure 18.2. The Circle of Value Approach to Negotiation.

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my own "great" BATNA or to make yours more uncomfortable) immediately tend to provoke counterthreats and escalation, effectively ending any efforts or ability to create value. This way of understanding the problem-solving approach is modeled visually in Figure 18.2.

The problem-solving or circle of value approach is most useful for situations in which the stakes are high, relationships or the precedential value of the outcome are important, issues are multiple or complex, or there are many parties. In other words, it applies to most real-world negotiations.

CRITIQUES OF THE PROBLEM-SOLVING APPROACH

Various commentators have offered a range of critiques of the problem-solving approach to negotiation. Four of the most common are discussed here.

It Glosses Over the Hard Facts of Distributive Life

The earliest critique was that the guidelines for problem solving are useful for finding creative, value-enhancing options but ultimately offer little help in coping with the reality of distributive conflict in which interests are opposed. Or, put another way using a traditional dichotomy (inspired by labor negotiations) that divides negotiation into integrative and distributive contexts,²² problem solving is helpful with the former, but generally not with the latter.²³

There are several answers to this critique. One is that distributive negotiation has no objective reality. Negotiators always have at least some shared interests, including minimizing the transaction costs of negotiation and finding such value-creating opportunities as may exist, which analysts believe may often be significant, even when parties believe there are none.²⁴ A heated negotiation between a teachers' union and a school board is an example. The union and the board may see the issues between them as strictly distributive, but miss their shared interest in developing the confidence of the taxpaying public—who determine the size of their shared budget pie—and the mutually disastrous erosion of that support likely to result from mutual attacks. A few critics persist in the argument, inviting us to “assume that only distributive issues remain.” But this ignores the fact that the parties still have a shared interest in reaching agreement, if one is possible, because no value can be realized until the deal is done.

A second answer is that even distribution need not be a relentlessly adversarial process. Sometimes this is because the precedent that is set may cut both ways over time. But even when the parties across the table have no ongoing relationship, each party always has an ongoing relationship with themselves and a desire to maintain their identity and self-image. That self-image is likely to include some sense of being fair and “doing right,” as well as some sense of being able to do well for yourself or your client. This allows issues of distribution to become another problem to be worked through in a collaborative and tough-minded dialogue. While there may still be disagreement about *what* is fair, at the end of the day the parties might choose to use a fair procedure (such as flipping a coin, or even splitting the difference) to resolve remaining disagreement. Or they might seek still greater joint gain by trading off which standard to apply on different issues based on an issue's relative importance to one side or the other.

A third answer is that the problem-solving approach offers very specific and effective advice for achieving a favorable distribution of value. Legitimacy is a very powerful tool for moving the human psyche, and it is much easier to accede to a good argument than to coercion. Reaching agreement requires that *both* sides agree, and seeking to persuade the other side with good arguments can be among the most expeditious routes to that end. Of course there are likely to be multiple conflicting legitimate arguments about what the outcome should be, and the parties may well not agree on which is the “best.” They could become positional over principles. But conflicting standards need not be a dead end, any more than they would be for judges analyzing a difficult case. First, the parties can dig deeper for standards and principles with which to distinguish among different standards and for an understanding of how different views and approaches might be reconciled or balanced. Such a process will favor a party that is better prepared, more articulate, and more sincere, all of which are good systemic incentives. Second, if needed, negotiators can resort to fair procedures or trade off whose standard will prevail, as discussed above.

An interesting concrete example of not only the applicability of a problem-solving approach to distributive issues but its superiority involved a company locked in a half-billion-dollar dispute with a foreign government over the renewal of a contract. The contract, negotiated years ago in a notoriously corrupt era, was renewable "under identical terms and conditions at the company's sole option." The current government, believing the contract an obvious product of corruption, refused to renew it, leading to expensive and prolonged litigation. (Interestingly, the company negotiators *also* privately assumed the contract was corrupt, fueling a willingness to make concessions.) Over most of a decade, multiple tentative settlements were reached through haggling, and every one was scuttled by political opposition from one group or another. Indeed, it became apparent that no settlement bargained under these conditions could survive the necessary political and regulatory scrutiny needed for approval.

Successful settlement required two fundamental changes. First, it was necessary to show negotiators on both sides that the original contract was actually *not* the result of corruption. Luckily, credible records were available explaining the contract as a creative solution *proposed by the government* to a simple regulatory dilemma (the company needed a contract longer than that allowed by law, except through renewal). It was also possible to show that even today around the world similar contracts are for as long or longer. Second, a new contract had to be negotiated on the merits, so that each term could be explained and justified in terms of current industry standards. No arbitrary haggling could produce a result that would withstand politically motivated scrutiny and garner the full lobbying support of the negotiators on both sides.

Of course many terms were still contentious and many alternative approaches were possible. The negotiators explored, debated, and weighed many options. Especially on the government side, many parties still had entrenched demands and expectations that were not justifiable on the merits. In each case, patient inquiry and advocacy ("Where does that number come from? How would we explain that?"), combined with a firm resolve not to agree to anything arbitrary, eventually produced a coherent and defensible outcome with very substantial monetary gains for each side, one that was then approved without hiccup.

Ultimately, this critique may be more about the willingness and ability of some negotiators to work in a collaborative, problem-solving way than about the ability of that approach to produce good results.

It Takes Two to Tango

A second common critique of the problem-solving approach is that it only works if both sides are committed to it. Of course, to a large extent this is true of any approach to negotiation, so it is not on its own a reason to stick with the status

quo. Moreover, there are three good reasons to pursue the problem-solving approach whether or not the other side is like-minded. First, given good preparation and thoughtful prudence, there is no downside. A prepared negotiator knows what can be shared about his or her interests without inviting or enabling extortion. A prudent one insists on incremental and reciprocal disclosure, as well as on not rewarding pressure or agreeing to anything without a good reason. A skillful negotiator can also reframe the other side's commitments as merely options to consider, reinforcing the lack of commitment by putting multiple options on the table, and at the same time counteract any possible anchoring effects of the other's commitments by mentioning reciprocally "extreme" options as possibilities.

Second, there are many benefits to the problem-solving approach, whether or not the other side is in the same mind-set. Looking for shared interests and creative options and postponing commitments makes it more likely that no value-creating opportunities will be overlooked. Offering and asking about principles and standards of fairness not only helps you protect yourself, it ensures that the outcome is shaped by the wisdom of the community—those who have grappled with similar issues in the past.

Finally, to the extent that what ensues is a negotiation (whether tacit or explicit) over how to negotiate, the problem-solving approach will tend to trump by force of logic and legitimacy. Because legitimacy is a basic human driver to which only sociopaths by definition are indifferent, it is easier to remain firm on principle than mere will, and more likely to be persuasive. After all, the other side also wants a successful outcome, and will tend to follow the path of least resistance to get it.

In any event, empirical research contradicts this critique, finding that "enlightened" or educated negotiators tend to be successful in achieving superior outcomes even when negotiating with more traditional negotiators.²⁵

Sometimes the Person Is the Problem and Can't Be "Separated"

This persistent critique questions the ability of a negotiator to take a collaborative, "side by side" stance when the other negotiator's behavior and role in the relationship is itself the issue. The response given in *Getting to YES* is that you can separate the behavior from the person's character and address the behavior side-by-side, which has the advantage of assuming in a potentially self-fulfilling way that others are capable of changing their behavior.²⁶ By maintaining a respectful stance, you create the psychological safety to change (the other is a good person who was simply unaware of his or her impact) and the incentive to do so (keeping your respect).²⁷

This response is helpful as far as it goes, but is perhaps inadequate in two ways. First, it does not address the fact that behavioral change can also sometimes be negotiated with a forcefully judgmental stance that is not at all collaborative. The military, for example, has occasionally been successful with

such a tack, getting recruits to master skills they believed were beyond them by sheer force of intimidation and repetition, and raising the recruits' self-esteem in the process. However, the judgmental approach is most likely to work when your respect is important to the other party (more than their autonomy or identity), their BATNA is weak, and they accept at some psychological level your moral authority. Such conditions are uncommon.

The second point is more telling. It may be true that there is a difference between a person's behavior and their essential character, because they could choose to act differently. Still, the behavior at issue was chosen and likely is reflective of the person's chosen identity and personality (at the least, by their unawareness or uncaring about its impact). So in that sense you *are* criticizing who they are, or more precisely, who they have chosen to be, and therefore should expect that pointing out the impact of their chosen behavior is likely to create some defensiveness. The respectful, side-by-side approach is probably still the most viable, but we should not expect it to eliminate all difficulty.²⁶

It Sounds Simpler Than It Is (And a Bad Effort May Be Worse Than None)

The last critique of the problem-solving approach is that it is presented as much easier to pull off and much safer to try than it really is. This critique has at least some validity.

First of all, a masterful effort can require a great deal of skill, subtlety, and technical expertise simply on the substantive level, before we get to the interpersonal. Even the concept of "interests" is much more slippery than it first appears. People actually have bundles of interests that are routinely inconsistent and the relative salience of which at any given time may change depending on the context and stimulus. Nor do people find it easy to figure out what their interests really are. We've all had the experience of asking for something, getting exactly what we asked for, and then realizing it wasn't really what we wanted after all. Interests also can be understood at different levels. On the surface, for example, I may want my view to prevail because I think it is most likely to work, but underneath there is a strong desire for vindication, and underneath that a need for recognition and acceptance. Likewise, finding the most value-creating ways to dovetail interests can require serious analytic tools and familiarity with a broad repertoire of templates. And assessing both options and alternatives typically requires the ability to think systematically about how to put an expected value on things that are probabilistically uncertain.

Second, the ability to remain respectful when you strongly disagree with another's view (and perhaps even doubt whether they believe it or even could believe it) requires a level of maturity and cognitive development greater than most people possess.²⁷ You have to be comfortable with a certain amount of relativism and have some awareness and acceptance of the fact that your own views are less objective than they seem. The subjective nature of our perceived "reality" is well-established by social psychologists, but an equally strong

finding is people's failure to appreciate that subjectivity.³⁰ It may be that pursuing a problem-solving approach to negotiation furthers one's development of such awareness, but that hypothesis has not yet been tested.

Finally, it has been observed that people learning the problem-solving approach are prone to a number of characteristic errors, mostly related to the skills of combining empathy and assertiveness (or inquiry and advocacy). These errors tend to degrade the value of their outcomes. For example, when told to be firm on substance but also friendly, many negotiators in fact become more accommodating on substance, agreeing to things-in-essence "for the sake of the relationship."³¹ Others, when told to insist on using objective criteria, use positional lock-in tactics to promote favorable but relatively unpersuasive criteria, leading to deadlock, much wasted time, and mutual frustration. Still others, working hard to make arguments in good faith, tend to interpret a lack of acquiescence by the other side as a lack of reciprocal good faith, leading to resentment that these negotiators do not know how to surface or test constructively. The tragic result is that mutual good intentions sometimes lead to an escalating cycle of hostility.³²

In theory, these potential costs should be weighed against the likelihood of eventual benefits as the problem-solving approach is pursued more skillfully, and the cumulative expected value weighed against that of more familiar approaches. For now, this calculation is largely a matter of faith, though the potential benefits of the problem-solving approach are clearly substantial, both for individual negotiators and for society as it becomes more prevalent. If nothing else, this suggests that society would benefit from investing in systematic negotiation education, it might even make sense to offer incentives for the use of the problem-solving approach. In any event, as more and better role models develop and as the analytic insights underlying problem-solving negotiation become more generally understood and accepted, this alternative approach to negotiation will become easier to learn and master. Certainly the prevalence of a problem-solving perspective in public and private discourse about negotiation has steadily increased since the publication of *Getting to YES* in 1981.

Notes

1. This definition differs slightly from that in R. Fisher, W. Ury, and B. Patton, *Getting to YES: Negotiating Agreement Without Giving In* (2nd ed.) (New York: Perigee, 1991), p. xvii, first by including explicitly the possibility of differing—but not conflicting—interests, and second by requiring only the possibility of conflict. The strategic challenges in managing disclosure and other aspects of negotiation process are similar whether there is merely a possibility that interests conflict or they are known (or assumed) to do so.
2. See R. Fisher and W. Ury, with B. Patton (ed.), *Getting to YES: Negotiating Agreement Without Giving In* (New York: Houghton Mifflin, 1981).

3. See C. Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem-Solving," *UCLA Law Review*, 1984, 31, 734-849; see also C. Menkel-Meadow, "Aha! Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?" *Harvard Negotiation Law Review*, 2001, 6, p. 109, n. 52. For Maslow's framework, see A. Maslow, *Motivation and Personality* (New York: HarperCollins, 1954).
4. See R. Thaler, *The Winner's Curse: Paradoxes and Anomalies of Economic Life* (New York: Free Press, 1991).
5. "Relationship" can mean many things: personal affection or antagonism, interdependence, contractual obligations, good teamwork, or an ability to resolve differences efficiently and effectively, among others. For our purposes in robustly describing the terrain of negotiation, the variable of "relationship" could include any of these that matter to one or both negotiators. In contrast, our focus narrows when we seek to advise a negotiator on tactics. A hard bargainer, for example, might be served by a relationship in which the other side feels intimidated and fearful, whereas a collaborative negotiator might seek a working relationship that can resolve differences smoothly and independent of personal affection.
6. See L. Festinger, *A Theory of Cognitive Dissonance* (Palo Alto, Calif.: Stanford University Press, 1957).
7. For an introductory discussion of the concept of identity, see D. Stone, B. Patton, and S. Heen, *Difficult Conversations: How to Discuss What Matters Most* (New York: Viking/Penguin, 1999).
8. See Fisher, Ury, and Patton, *Getting to YES*, 1991.
9. The importance of parties as a variable has been emphasized especially by Professors James Laue, Lawrence Susskind, and others who tend to focus on multiparty negotiations and public contexts in which "parties" are often not well-defined.
10. See Donald Schön, *The Reflective Practitioner* (New York: Basic Books, 1983) for a deep explanation of the concept of framing. See also Chapter Ten in this volume.
11. The role of perceptions and cognitive bias in conflict has been a major focus of social psychologists and some economists. See, for example, the work of Ralph K. White, Jeffrey Ruben, Max Bazerman, Lee Ross, Margaret Neale, and Amos Tversky and Daniel Kahneman.
12. The political consultant Tom Korologos argued at the Program on Negotiation in the early 1980s that the central task of a negotiator is to nurture doubts in the other side about the strength of their arguments.
13. See, for example, J. Camp, *Start with No* (New York: Crown Business, 2002), for the latest argument on the importance of not appearing desperate in negotiation. For similar arguments, see also H. Cohen, *You Can Negotiate Anything* (New York: Bantam, 1980); C. L. Karrass, *Give & Take: The Complete Guide to Negotiating Strategies and Tactics* (New York: Thomas Y. Crowell, 1974); and G. Nierenberg, *The Art of Negotiating* (New York: Hawthorn, 1968).

14. See R. H. Mnookin, S. R. Peppet, and A. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Boston: Belknap Press of Harvard University Press, 2000).
15. Technically this is called a *pareto optimal* outcome (after the Italian economist Vilfredo Pareto) and defined as a solution in which neither party can be made better off without making the other party worse off.
16. See Fisher, Ury, and Patton, *Getting to YES*, 1991, Chapter One.
17. For an overview of research on partisan bias and cognitive distortion with implications for negotiation see E. Pronin, T. Gilovich, and L. Ross, "Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others," *Psychological Review*, 2004, 111, 791-799; M. H. Bazerman, and M. A. Neale, *Negotiating Rationally* (New York: Free Press, 1992); M. H. Bazerman, R. J. Lewicki, and B. H. Sheppard, (eds.), *Handbook of Negotiation Research* (Greenwich, Conn. and London: JAI Press, 1991); and J. Z. Rubin and B. R. Brown, *The Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975).
18. See G. A. van Kleef, C.K.W. De Dreu, and A.S.R. Manstead, "The Interpersonal Effects of Anger and Happiness in Negotiations," *Journal of Personality and Social Psychology*, 2004, 86(1), 57-76, for research showing that expressions of anger and frustration tend to produce concessionary behavior. More generally, see B. F. Skinner, *The Behavior of Organisms: An Experimental Analysis* (Upper Saddle River, N.J.: Prentice Hall, 1958), for ample evidence that in general, rewards increase the amount of behavior rewarded.
19. Firsthand report of interviews conducted in 1975 by Professor Roger Fisher of Harvard Law School (as reported to the author in 1977).
20. See D. Lax and J. Sebenius, *The Manager as Negotiator* (New York: Free Press, 1986).
21. See B. Patton, "Building Relationships and the Bottom Line: The Circle of Value Approach to Negotiation," *Negotiation*, 2004, 7(4), 4-7.
22. See R. Walton and R. McKersie, *A Behavioral Theory of Labor Negotiations* (2nd ed.) (Ithaca, N.Y.: ILR Press, 1991), for an introduction to the concepts of distributive and integrative bargaining.
23. See, for example, J. J. White, "The Pros and Cons of 'Getting to YES'," *Journal of Legal Education*, 1984, 34, 115-124; and L. M. McCarthy, "The Role of Power and Principle in 'Getting to YES,'" *Negotiation Journal*, 1985, 1, 59-66, for the two best-known critiques of problem solving in distributive contexts.
24. Not only do negotiators have shared interests, but where their interests differ, they tend to exaggerate the degree of conflict and difference. See R. J. Robinson, D. Keltner, A. Ward, and L. Ross, "Actual Versus Assumed Differences in Construal: 'Naïve Realism' in Intergroup Perception and Conflict," *Journal of Personality and Social Psychology*, 1995, 68, 404-417; and R. J. Robinson and D. Keltner, "Much Ado About Nothing? Revisionists and Traditionalists Choose an Introductory English Syllabus," *Psychological Science*, 1996, 7, 18-24.

25. See C. H. Tinsley, K. M. O'Connor, and B. A. Sullivan, "Tough Guys Finish Last: The Perils of a Distributive Reputation," *Organizational Behavior and Human Decision Processes*, 2002, 88: 621-642; and G. Berger, M. C. Kern, and L. Thompson, *The Enlightened Negotiator: What Is the Best Type of Interaction?* paper presented at the 16th Annual IACM Conference, Melbourne, Australia, 2003 (cited with permission).
26. See Fisher, Ury, and Patton, *Getting to YES*, 1991, Chapter Two and p. 159.
27. See Edmondson, who developed the concept of psychological safety (Edmondson, A. "Psychological Safety and Learning Behavior in Work Teams," *Administrative Science Quarterly*, 1999, 44(2), 350-385).
28. See Stone, Patton, and Heen, *Difficult Conversations*, 1999, for more detailed and realistic advice for managing such conversations.
29. See R. Keegan, *In Over Our Heads: The Mental Demands of Modern Life* (Cambridge, Mass.: Harvard University Press, 1994).
30. See Pronin, Gilovich, and Ross, "Objectivity in the Eye of the Beholder," 2004.
31. This is the phenomenon that underlies Jim Camp's critique of collaborative negotiation in *Camp, Start with No*, 2002.
32. For a fuller description of this danger see R. Fisher and S. Brown, *Getting Together: Building Relationships as We Negotiate* (New York: Penguin, 1988).