

CHAPTER

3

Competitive and Cooperative Negotiation

We each have our own approach of how to get what we want. So it is with negotiation. Many terms are used to describe different negotiating styles in a range from “hard” to “soft.” For purposes of introducing the approaches and distinguishing them, we use here two basic categories: competitive and cooperative. Following the problem situation presented below, we will contrast the characteristics and use of competitive negotiation with the cooperative approach. We will also look at adversarial bargaining, the more aggressive form of the competitive approach, and problem-solving negotiation, a close cousin of the cooperative approach. The distinctions between competitive and adversarial styles (often used interchangeably), on the one hand, and cooperative and problem-solving styles (also used interchangeably), on the other hand, are not always clear. We will also discuss the “negotiator’s dilemma” occurring when it comes time to divide the enhanced value created through cooperative moves.

Problem—Microsoft v. Stac

Bill Gates became the richest man in the world by being smart, diligent, and keenly competitive. As a negotiator, he is known for being aggressive and competitive, although there are accounts of him using his considerable creative skills to negotiate value-added cooperative outcomes. In the following example, Gates used two different approaches to an intellectual property claim at different stages in the dispute.

Stac Electronics was a computer engineering company founded by seven friends at Caltech. The company developed its “Stacker” disc compression software to substantially expand the data storage capacity of computer disks. Bill Gates, then CEO of Microsoft, wanted Stac’s data compression technology and met personally with Stac’s president, Gary Clow, to discuss licensing of Stac’s software. The negotiations were turned over to other Microsoft executives and lawyers to negotiate. Although willing to pay Stac a modest gross license fee, Microsoft refused to pay Stac any per-user royalty for its patented compression technology. Microsoft took a hard line, saying that it could have other sources develop reliable data compression technology that

could be incorporated into the MS-DOS operating system, which would have an immediate and adverse effect on the viability of Stacker and threaten Stac's continued economic viability. Microsoft had a reputation of using its huge market share and resources to negotiate in a hard fashion and favorably license software that it incorporated into its products. Negotiations broke off and Microsoft released a new system, which included a disk compression program called Double Space that provided disk capacity similar to that of Stac's data compression technology. Stac was outraged, as Microsoft had previously examined the Stacker code as part of the due diligence process in their earlier negotiations and Stac believed that Microsoft infringed its patent.

Microsoft would not budge on Stac's claim, and Stac filed a patent infringement suit against Microsoft. Microsoft counterclaimed that Stac had misappropriated the Microsoft trade secret of a preloading feature that was included in Stacker. A federal court jury in California awarded Stac \$120 million in compensatory damages, coming to about \$5.50 per copy for every one of the new Microsoft program sold. The jury also concluded that Stac misappropriated Microsoft's trade secret and simultaneously awarded Microsoft \$13.6 million on the counterclaim. Feelings on both sides were negative and intense. Both Clow and Gates made public statements the demeaning the others negotiation style and integrity.

A new round of negotiations commenced in the changed circumstances of the jury verdict. Both sides had the option of legal appeals over the jury verdicts. Instead, their lawyers negotiated in a more cooperative manner and created a deal that caught Wall Street off guard, favorably affecting the share price of both companies. Each side agreed to drop its claims in exchange for cross-licensing all of their existing patents, as well as future ones over the next five years. The pact called for Microsoft to pay Stac license royalties totaling \$43 million over 43 months, while also investing \$39.9 million for a 15-percent equity stake in Stac. The total \$82.9 million outlay represented a gain for Microsoft, which had already charged off \$120 million for the jury award in its fiscal third quarter and now was able to credit much of the difference in the current period. Stac also came out ahead, by getting a significant cash infusion without a long appeals process to collect money from Microsoft. Mr. Clow said that \$82.9 million being turned over by Microsoft represented more than Stac would have gotten had the \$120 million been paid, because income taxes and Stac's own \$13.6-million penalty would have whittled the final amount to about \$64 million. In addition, Stac formed an alliance with the most powerful player in the software industry. Mr. Clow stated that, "this is not personal. This makes good business sense going forward. . . . This demonstrates it is possible to do win-win deals." Microsoft's executives concurred. "This is a lot more fun than disagreeing," said Michael Brown, Microsoft's vice president of finance, referring to the more cooperative final round of negotiation.

1. Why might Gates have played hardball when he first negotiated with Stac's Clow?
2. Why did Gates then change his approach and have his lawyers negotiate a more cooperative deal going forward?
3. What are the advantages and disadvantages of each approach to negotiation?
4. How do you decide when to use a competitive or cooperative negotiation style?

A. Competitive/Adversarial Approach

1. *Competitive Approach*

We begin with the competitive model because it is frequently encountered in everyday bargaining as well as in many lawyer encounters. It was considered the negotiation norm prior to the popularization of cooperative negotiation spurred by the publication in 1981 of *Getting to Yes* (now in its third edition, Fisher, Ury, and Patton 2011). Understanding competitive/adversarial negotiating will provide a base to contrast cooperative/problem-solving negotiation. The *competitive* approach assumes that the purpose of bargaining is to obtain the best possible economic result for your client, usually at the expense of the other side. A competitive bargainer is likely to think that negotiation involves a limited resource or fund that must be distributed between competing parties—in effect, a fixed economic “pie.” In a competitive approach, the parties’ relationships and other intangibles are not of primary importance. The competitive bargainer’s goal is to pay as little as possible (if a buyer or defendant) or obtain as much as possible (if a seller or plaintiff), as a dollar more for your opponent is necessarily a dollar less for you. A competitive bargainer, in other words, sees negotiation much as a litigator sees a trial: Someone must win and someone must lose, and her central mission is to win. This approach is also known as “distributive” or “zero-sum” bargaining, because the negotiators see their task as distributing a fixed, limited resource between them.

Competitive negotiating covers a continuum of behaviors from the simplest, unreflective actions to improve your position and achieve a better outcome to highly conscious, planned moves. So, competitive bargaining may consist of natural responses in some situations and advantageous scripted strategies in others.

A competitive negotiator often begins a negotiation as a contest of hiding the ball. The object is to get as much information from the other side as possible while disclosing as little information as possible. The information sought goes to the other party’s unrevealed, real bottom line. What’s the least he will take or the most he will give to reach agreement? While the competitive negotiator wants to convince the other side that the negotiator’s own asserted bottom line is firm. He may try to persuade his opponent that he will stick to his asserted no-deal point or walk, when he has no intention of doing so.

Competitive approaches may be used in complex negotiations involving multiple issues and parties. The competitive negotiation may occur in stages where it is hard to determine at the outset if the process will take on a more competitive or cooperative or mixed approach. A skilled competitive negotiator may cloak competitive moves with a benign cover or a cooperative demeanor. Competitive bargaining, however, is most transparently used in non-complex situations that involve the simple payment of money or exchange of goods.

An example of where competitive negotiating is likely to occur is when a lawyer negotiates with an insurance adjuster in a distant city to settle a client’s claim for property damage to a car caused by a falling tree limb. The client, we will assume, has since changed insurance companies, and the lawyer does not expect to do business with this adjuster again, so neither sees any interest in

nurturing a relationship. In this situation both sides have a joint interest in conducting the bargaining process efficiently and quickly. Both the lawyer and the adjuster are likely to see their sole goal as agreeing on a dollar amount that the company will pay the insured to give up his claim, and to assume that a better settlement for one will necessarily be worse for the other.

In this negotiation, each side may posture about the dimensions of the issue or conflict, initiate a demand or offer (a specific proposal for resolving the dispute), and bargain over that proposal or present a counterproposal. A competitive negotiator will attempt to change the other side's perception to persuade them that their case is weaker and worth less than they thought and that her case is stronger and more valuable than her opponent previously recognized. Incremental concessions are usually made that narrow the bargaining range. Finally, a compromise settlement may be agreed upon. This type of competitive negotiation, with predetermined positions and the trading of dollar numbers that simply chop from a high demand or add to a low offer, is akin to marketplace bargaining or haggling. The parties' progressively closer dollar figures are not connected to any reason or rationale, other than a desire to close the remaining gap between the previously stated numbers. Basically, both buyer and seller, or claimant and defendant, are seeking to maximize their gain by seeing how far the other party can be pushed.

This "naked-number" competitive bargaining often occurs in the ending stage of a negotiation that may have started with information-based discussions and rationalized demands and offers. Having narrowed the gap between the initial offer and demand, and having exhausted persuasion pinned to facts and merits, "final" offers and counteroffers are thrown back and forth, each testing the other's resolve to stick close to their side of the gap or walk away. The negotiators move toward a compromise point where both are willing to get the deal done rather than leave empty-handed, or not. This is the typical style of bargaining in flea markets and garage sales. It often becomes little more than a contest of wills, much like a game of chicken.

Questions

1. Have you experienced competitive negotiation? What were the circumstances?
2. Why do some people negotiate competitively?

❖ Gary Goodpaster, *A PRIMER ON COMPETITIVE BARGAINING*

J. Disp. Resol. 325 (1996)

Some people bargain competitively without giving much conscious attention to the matter. Others compete in response to the other party's competitive behavior. In this response, they follow the common pattern that a particular kind of behavior elicits a similar behavior in response. In other words, one party frames the negotiation as a contest, and the other party picks up the competitive cues and behaves accordingly. Further, people naturally incline to competitive

bargaining when they are non-trusting. In such situations, in order to avoid putting themselves at risk, non-trusting people act guardedly and adopt elements of the competitive strategy, for example, withholding information or misrepresenting a position. Finally, one can readily imagine ambiguous bargaining situations, in which at least one party is non-trusting, quickly devolving into a competitive negotiation between both parties. The non-trusting party acts defensively, and the other party senses this as competitive behavior and, therefore, acts in a similar fashion.

Negotiators, however, can also consciously adopt a competitive strategy. Negotiators are most likely to compete purposefully when:

- the parties have an adversarial relationship;
- a negotiator has a bargaining power advantage and can dominate the situation;
- a negotiator perceives an opportunity for gain at the expense of the other party;
- the other party appears susceptible to competitive tactics;
- the negotiator is defending against competitive moves; or
- there is no concern for the future relationship between the parties.

This list suggests that competitive bargaining most likely occurs in situations such as labor and lawsuit negotiations, insurance and similar claims type settlements, and in one-time transactions between a relatively experienced party and a relatively inexperienced party. One would, for example, expect to see it in sales transactions where the parties will probably not see each other again.

Representative bargaining or bargaining for a constituency may also prompt competitive bargaining even when there will be future negotiations between equally sophisticated parties. The negotiator's accountability may override relationship concerns and reasons for cooperation. The concerned audience, consisting of a client, constituency, coalition partner, or other phantom party at the table, is, in effect, looking over the negotiator's shoulder. The negotiator, therefore, takes positions and makes moves she believes her client either expects or would approve. International negotiations between countries, union-management, lawsuit negotiations, and negotiations between different parties in interest-group coalition negotiations sometimes evidence this pattern.

Aside from circumstantial or situational pressures, there are some parties who bargain competitively because they believe that is the way to conduct business. There are also parties who are simply predisposed to bargain competitively and will incline to do so opportunistically in any bargaining situation if possible.

Finally, it is important to note that one can bargain competitively in a negotiation on some issues and cooperatively on others. In other words, a negotiator can selectively use competitive strategy or tactics on particular issues, while using a cooperative or problem-solving strategy on other issues. In such a case, extracting gain competitively may not greatly endanger future relationships. . . .

Obviously, competitive bargaining covers a continuum of behaviors from the simplest, unreflective adversarial actions to highly conscious and virtually scripted contests. As such, competitive bargaining moves are natural responses in some negotiation situations and advantageous or profitable actions in others. . . .

2. Adversarial Approach

A negotiator may push the boundaries of the competitive approach and bleed into a style of negotiating which is a more aggressive or extreme version. These more aggressive negotiators, which we label adversarial bargainers, view negotiation as a kind of war and believe that all is fair in winning it. The boundaries and the labels are fussy and not always distinguishable. An adversarial negotiator may provide the other party with misleading clues, bluffs, and distorted facts that cannot easily be checked or challenged, for the purpose of creating incorrect conclusions that are beneficial to the competitor. Extreme adversarial bargainers may be willing to renege on tentative agreements, misrepresent the limits of their authority, make threats, and may also use tactics aimed at pressuring, or unbalancing the other party to secure a better outcome. Although these adversarial moves may provide an advantage for the negotiator, they increase the risk of ending the negotiation with no agreement, jeopardize any continuing relationship, and be long remembered.

There is no shortage of advice about how to be a tough, adversarial bargainer and how to get what you want in a negotiation. Check the self-help and business-advice sections of large booksellers for an array of titles on this subject. Many of these guides appear to assume that the opposing side is ignorant or gullible and will have no future opportunity to retaliate. Other books and articles bemoan "hardball" tactics, but catalog them to warn you of what you might encounter. These writings are premised on the theory that to be "forewarned is forearmed." Roger Dawson, the author of *Secrets of Power Negotiating* (2001), challenges the myth of cooperative "win-win" negotiation before sharing his adversarial secrets and what you need to watch out for so you do not become the victim of others' hardball tactics. His list of power negotiating gambits includes the following:

- *Ask for more than you expect to get:* You can get away with an outrageous opening position if you imply some flexibility.
- *Never say yes to the first offer:* Saying yes triggers two thoughts in the other person's mind: "I could have done better," and "something must be wrong."
- *Flinch at proposals:* The other side may not expect to get what is asked for; however, if you do not show surprise, then you're communicating that it is a possibility.
- *Always play the reluctant seller:* This is a great way to squeeze the other side's negotiating range before the negotiation even starts.
- *Use the vise technique:* "You'll have to do better than that."
- *Don't let the other side know you have the authority to make a decision:* Don't let the other person trick you into admitting that you have authority.
- *Don't fall into the trap of thinking that splitting the difference is the fair thing to do:* Splitting the difference doesn't mean down the middle, because you can do it more than once.
- *Always ask for a trade-off:* Any time the other side asks you for a concession, ask for something in return.
- *Good guy/bad guy:* It's an effective way of putting more pressure on the other person without creating confrontation.
- *Nibbling:* Using the nibbling gambit, you can get a little bit more even after you have agreed on everything.

- *Taper concessions*: Taper concessions to communicate that the other side is getting the best possible deal.
- *Withdrawing an offer*: You can do it by backing off your last price concession or by withdrawing an offer, for instance, to include freight, installation, and so on.
- *The decoy*: Use a decoy to take attention away from the real issue in the negotiation.
- *Red herring*: This is a phony demand that can be withdrawn, but only in exchange for a concession.
- *Cherry picking*: Ask for alternatives and then pick the best parts from multiple choices.
- *Escalation*: Raising demands after both sides reach an agreement.
- *Time pressure*: The rule in negotiating is that 80 percent of the concessions occur in the last 20 percent of time available.
- *Be prepared to walk away*: Project to the other side that you will walk away from the negotiations if you can't get what you want.
- *The fait accompli*: This occurs when one negotiator simply assumes the other will accept an assumed settlement rather than go to the trouble of reopening the negotiations.
- *Ultimatums*: Ultimatums are very high-profile statements that tend to strike fear into inexperienced negotiators.

Questions

3. Do any of these tactics seem unethical? Negotiation presents a fertile area for ethical transgressions, with relatively little guidance as to ethical limits. The ethics of negotiation are addressed in Chapter 10.
4. Is there a difference between hard, competitive negotiation and "dirty" bargaining tricks? If so, how would you distinguish them?
5. Are there any gambits or techniques that you could add to Dawson's list?
6. If the tactics listed by Dawson were used against you, what would you do?
7. If any of these behaviors did produce an adverse result for your client, what would be your approach the next time you found yourself matched against this opponent?

Note: Responses to Competitive Hardball and Difficult People

Some of the books and articles cataloging competitive negotiation tactics also prescribe competitive antidotes that could be used in response. Most of these reactive "hardball" tactics are either responses in kind or intended to notch up the positioning in a dance of "one-upmanship." The most effective countermove or response to sharp competitive tactics will depend on the context of the negotiation, your relationship with the other negotiators, your alternatives to continued negotiations, the strength of your own position, your goals in the negotiation, and the information available to you. The key to any effective response is being able to recognize aggressive and deceptive tactics and

understanding their potential effect in distorting your perspective and masking the opposition's weaknesses.

There are alternatives to responding in kind to hardball tactics or ending the negotiation. The behavior can be recognized and labeled for what it is and then dismissed by making light of it, or you can just ignore it. You can be direct by making it clear that the tactic is not working and is interfering with either of you getting what you want out of a possible deal or settlement, and that it will not be tolerated. In effect, you can discuss and set ground rules for further negotiations. Hardball tactics are most commonly used in the absence of an ongoing relationship or friendship. Taking time to become friendlier before the bargaining begins or emphasizing the likely continuing contact or repeat plays following this negotiation might discourage hardball tactics—or it might not.

The subject of responding to aggressive moves is related more generally to how we can best negotiate with people we consider difficult. Seminars and training programs are frequently offered to help us deal with "difficult people." The proliferation of these programs, including ones offered for attorneys, reflects the commonly experienced frustration most of us have had in trying to work or negotiate with others whom we perceive as being insensitive, obstinate, selfish, overly competitive, or generally unreasonable. It is an interesting paradox that experience with difficult people should be so common when few, if any, of us view ourselves as being difficult. Do you think the people you consider difficult believe themselves to be so? Studies show that opponents usually see us as more demanding and less reasonable than we view ourselves (Thomas and Pondy 1977).

Negotiating with difficult people can be—well, difficult. Here are a few techniques you can use:

- Become an observer to an opponent's bad behavior rather than getting sucked into the game. This means controlling your own behavior and distancing yourself from your reactive impulses and emotions.
- Ask questions to figure out what motivates the difficult behavior and then defuse the anger, fear, or other causes of the bad behavior.
- Reshape the negotiation to address the issue you want to resolve and to move the negotiation in the direction you want it to move.
- Make your preferred outcome the opponent's idea by involving him in the solution, and helping him "save face" and look good.
- Act more like a mediator than an adversary by making it clear that what you are offering is better than the realistic alternatives. (See William Ury, *Getting Past No: Negotiating with Difficult People* (1991).)

Questions

8. How have you dealt or negotiated with difficult people?
9. If you had to choose, would you categorize your negotiation style as more competitive or more cooperative?

B. Cooperative/Problem-Solving Approach

1. *Cooperative Approach*

A cooperative negotiator does not view negotiation “pies” as fixed. Cooperative bargainers work to identify interests and examine differences in how the parties value items. They then search jointly with the other negotiator—viewed more as a partner rather than an opponent—for options and a solution that will best satisfy both parties’ interests. Cooperative negotiation is marked by an effort to understand one another’s perceptions and reexamine them together to arrive at a shared picture or a mutually acceptable valuation. This cooperative approach is frequently called “integrative” bargaining, because it emphasizes integrating the parties’ needs to find the best joint solution. It is also referred to as “interest-based” negotiation because it sees the goal of bargaining as satisfying people’s underlying interests.

Rather than moving from positions to counter-positions to a compromise settlement, cooperative negotiators search for a variety of alternatives that optimize the interests that they have prioritized. The parties can then create an outcome from a combination of generated options so that a joint decision, with more benefits to all, can be achieved. This more collaborative approach does not necessarily produce a simple compromise between competing positions. It seeks a creative settlement not bound by predetermined positions.

A classic situation that calls for cooperative bargaining is an effort by two businesses to form a joint venture. Cooperative bargainers would first ask what special resources and capabilities each partner could bring to the deal. (For example, does Partner A have special expertise in marketing, whereas Partner B has more strength in design? Does one have good access to financing, whereas the other has available office space?) The negotiators would also ask whether either partner had particular needs; for example, one for an assured stream of income and the other for cutting-edge technology. Cooperative bargainers would focus on finding terms that best exploit each partner’s abilities and minimize weaknesses, creating the strongest possible future partnership.

Cooperative and competitive bargaining are not mutually exclusive. Working to create the biggest possible pie does not, in itself, say anything about how the final pie will be divided. Savvy competitive negotiators, for example, will look earnestly for ways to “expand the pie.” Competitors, however, are likely to see expanding the pie as less important than getting the largest possible piece for their clients. Cooperative bargainers must also face the pie-dividing problem, but tend to give it less significance than competitors. In the joint venture example described above, cooperators would emphasize creating the best possible deal. They would then look for a principle for dividing the benefits (the “pie”) that both partners saw as fair, rather than trying to outfox their partner to get the lion’s share.

In practice, cooperative and competitive approaches may be mixed or sequenced, depending on the setting, subject matter, and personalities of the negotiators. However, descriptions of cooperative and competitive styles, as well as distinctions between these two approaches, provide a framework for understanding the dynamics of negotiation.

Cooperative negotiation involves parties in an effort to jointly meet each other's needs and satisfy interests. In their best-selling book *Getting to Yes* (2011), Roger Fisher, William Ury, and Bruce Patton suggest that "you can change the game" so that negotiation need not be positional or competitive. They prescribe an interest-based approach with suggested tactics and the use of objective criteria for joint decisions, which they refer to as "principled" negotiation or "negotiation on the merits." *Getting to Yes* is recommended reading in many courses and training classes, so you may be familiar with it. The five basic elements of principled negotiation as listed by Fisher, Ury, and Patton are:

1. *Separate the people from the problem.* The negotiators should focus on attacking the problem posed by the negotiations, not each other.
2. *Focus on interests, not positions.* Distinguish positions, which are what you want, from interests, which are why you want them. Look for mutual or complementary interests that will make agreement possible.
3. *Invent options for mutual gain.* Even if the parties' interests differ, there might be bargaining outcomes that will advance the interests of both. There is a story of two sisters who are trying to decide which of them should get the only orange in the house. Once they realize that one sister wants to squeeze the orange for its juice, and the other wants to grate the rind to flavor a cake. A "win-win" agreement that furthers the interests of each becomes apparent.
4. *Insist on objective criteria.* Not all disputes and negotiations lend themselves to a "win-win" outcome. An insurance claim for damage to a car may create such a dispute, as each dollar paid by the insurance company to the claimant is one less dollar that it has. (Bargaining about issues of this nature is generally referred to as "zero-sum" bargaining.) Fisher, Ury, and Patton suggest that the parties first attempt to agree on objective criteria to determine the outcome. Thus, instead of negotiating over the value of a destroyed car, both parties might agree that the standard "blue book" price will determine the settlement amount. "Commit yourself to reaching a solution based on principle, not pressure."
5. *Know your Best Alternative to a Negotiated Agreement (BATNA).* The reason you negotiate with someone is to produce better results than you could obtain without negotiating. If you do not know the best result you are likely to obtain without negotiating, you might accept an offer that you should reject or you might reject an offer that is better than you can otherwise get. Your BATNA is the measure to decide if you are better off agreeing to a negotiated outcome or pursuing alternatives, whether it be a trial or a deal with someone else. Your BATNA is the basis of comparison to protect you from bad negotiating decisions and permits the exploration of imaginative solutions to satisfy your interests.

Note: Positions vs. Interests

The central theme of cooperative negotiation is that the negotiators focus on the parties' underlying interests rather than on the positions they take. Interest-based bargainers begin with the assumption that a party's position is

simply one way (and often not the most efficient or effective one) to satisfy a need or interest. In most disputes parties have multiple interests of varying intensities. In Chapter 1 we looked at the triangle of conflict and presented the three components of satisfactory settlements as the three "Es": economic, emotional, and extrinsic. These relate to the interests that cooperative negotiators attempt to meet in working toward an integrative resolution. Similarly, *Getting to Yes* explains interests in terms of "basic human needs," including security, economic well-being, a sense of belonging, recognition, and control over one's life. These needs or interests can be further explained as follows:

- *Process interests.* People have a "process" interest in having disagreements resolved in a manner or process they consider fair. This usually includes the opportunity to tell their story and have the feeling that they have been understood. A cooperative negotiator will sometimes address an opponent's process interest by listening quietly while he vents angry emotions or accusations, then demonstrating, for example, by summarizing what has been said, that while the listener does not agree with what the speaker has said, he has heard and made an effort to understand it—so-called active listening ("So if I understand you correctly, you believe that . . ."). Participants may also have an interest in having a negotiation proceed in an orderly and predictable way.
- *Personal interests.* Most people have a personal interest in feeling respected in their work and as unique human beings, and in being seen as acting consistently with what they have said in the past and in accordance with their moral standards. Negotiators might address these personal interests by treating everyone courteously and attending to "face saving" needs.
- *Relational interests.* The parties might also have an interest in preserving or creating an ongoing relationship. This is particularly true in contractual disputes, because the very existence of a contract indicates that the parties once saw a benefit in working together, but it can also be true in disputes that arise from less formal connections. Examples of situations with relational interests include divorce and child custody disputes, land use controversies between neighbors, workplace disputes, and disagreements between companies and longtime customers.
- *Economic interests.* Disputants usually have economic or substantive interests. This is where most negotiations begin and where many end unsuccessfully because other interests are not addressed. Economic interests are most easy to state in the form of demands and offers, which are statements of positions. These positions may be misleading when viewed only in terms of dollars. People need money to satisfy other needs, whether material, social, or emotional. Finding out how the money will be used or what needs it will satisfy is essential to fashioning an interest-based agreement or integrative outcome.

Fisher, Ury, and Patton recognize that it is not always easy in negotiations to identify interests, as distinguished from positions. The technique they recommend is to ask "Why?" Why do you want a particular outcome, and why does the other side take the position it does? Do not ask the person with whom you are negotiating "Why?" to seek justification of his position or challenge it, "but

for an understanding of the needs, hopes, fears, or desires that it serves." If you understand why the person wants what he is insisting upon, you can better explore how his interests can be met so you can get from him what you need.

2. Problem-Solving Approach

A variation of the cooperative approach, or perhaps another label for it, is *problem solving*. Problem-solving negotiators employ intensely cooperative, interest-based tactics. Problem solvers focus almost exclusively on finding solutions that will maximize the value of the deal for both parties. Problem solvers do not want to obtain a better outcome for their client at the expense of their counterpart and insist on using genuinely neutral principles to accomplish the task of allocating benefits. Negotiation is viewed as a collaboration to solve the challenge of finding opportunities for creating additional value through complementary interests. An early voice for the problem-solving approach to negotiation, Professor Carrie Menkel-Meadow, explains the process, beginning with interviewing your client to ascertain her interests and objectives.

❖ *Carrie Menkel-Meadow, TOWARD ANOTHER VIEW OF LEGAL NEGOTIATION: THE STRUCTURE OF PROBLEM SOLVING*

31 UCLA L. Rev. 754 (1984)

The Structure of Problem Solving

1. Identifying the Parties' Underlying Needs and Objectives

Unlike the adversarial model which makes assumptions about the parties' desires to maximize individual gain, problem solving begins by attempting to determine the actual needs of particular clients. The problem-solving model seeks to avoid a lawyer who acts for a hypothetical, rather than a real, client by creating a "standardized person to whom he attributes standardized ends."

Ascertaining the client's needs will, of course, begin with the initial interview. This is not the place to review the extensive interview literature, but in thinking ahead to the negotiation which might occur, a lawyer might begin by asking the client such general questions as "how would you like to see this all turn out?" or "what would you like to accomplish here?" before channeling the client's objectives in directions the lawyer knows are legally possible. The client may be the best source of ideas that go beyond what the court or the legal system might commonly permit. Once the client's ideas are brought to the surface, the lawyer can explore the needs they are meant to satisfy, and the legal and nonlegal consequences of these and other solutions.

Since so many legal problems are reduced to monetary solutions, consideration of the economic needs and objectives of the client faced with a dispute or transaction is a good place to begin. What are the monetary requirements now—compensation, return on investment, liquidity for payment? What might be the future monetary needs? What is the money needed for? Are any cheaper