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Negotiate better: lessons from empirical research

By Wayne Brazil

There is a whole lot of empirical research that explains why so many negotiations fail to yield optimal results — and that teaches us ways to improve the odds that we will do better. On the hunch that most busy lawyers don't spend much time reading social science journals, I thought I'd summarize some of the key points.

First, how bad is the problem? One key source of poor negotiating is overconfidence — and it is ubiquitous. Studies show that overconfidence intensifies with the complexity and level of uncertainty in the task and is particularly severe among litigators. When cases go to trial after a 998 offer is rejected, 86 percent of the time a party fares worse by ploughing forward, according to a study by Randal Kiser. And study after study shows that negotiators often fail to identify trades that would leave both parties better off. In fact, about half the time negotiators even fail to discover that they share a common goal.

Why is failing to get the best deal so common? The sources of the problem are pretty deep — but, surprisingly, not insurmountable. Humans have survived in part because we have such a sensitive, sophisticated sensory apparatus. But because that apparatus is constantly bombarded with stimuli, our brains have to build “heuristics” to enable us to avoid an incapacitating overload. Heuristics are comprehension cheat sheets — short cuts to “understanding” that we take when we encounter stimuli of certain kinds or in certain patterns. These short cuts are essential — and sometimes right.

The more complex and uncertain the circumstances, the more we resort to heuristics. Negotiating, especially in the context of trying to settle a lawsuit, is a complex undertaking in an environment permeated with uncertainty. Social scientists, however, have discovered that some of the heuristics which negotiators most commonly bring to the table end up hurting their chances of getting the best deal. Overconfidence, for example, can have roots in “the confirmation bias” — our tendency to “overcredit” information that is consistent with our pre-existing views.

There are two heuristics, however, that are especially threatening to good negotiations. One takes the form of an expectation — that the other party will engage in competitive (“distributive”) bargaining — using an array of untrustworthy tactics to try to get as much for himself as possible. The other, related heuristic is what the researchers call “the fixed pie bias” — an assumption that the subject or target of the negotiations is just one thing, that its size is permanently fixed, and that the name of the game is to take home as much of it as possible.

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These heuristics can create serious problems. The fixed pie bias is wrong much of the time — a lot more often than we would think. Competitive bargaining, on the other hand, is very common. The social scientists teach us that this state of affairs is not an inevitable by-product of our “nature,” but an unnecessary and very often counterproductive artifact of expectation and habit. We have the capacity to escape the competitive bargaining syndrome. But why would we want to? What's the incentive?

Empirical research provides some compelling answers. Negotiators who have a “distributive” (competitive) reputation simply don't do as well as negotiators who are not as encumbered. In the social science vernacular, a “distributive” reputation leaves a negotiator less able to create joint value and *less able to claim individual value*. Why is that? Research shows that an expectation that a counterpart will engage in competitive bargaining fixes and sometimes distorts a negotiator's perception-filter, leading her to interpret her counterpart's conduct as self-serving and untrustworthy, even when it isn't. This expectation disables the negotiator's ability to read or interpret her counterpart's conduct reliably. Disabled, she is less likely to take the risks that she would need to take to discover the highest quality terms that are accessible.

The upshot of all this, the social scientists have found, is that when negotiations are dominated by reciprocally competitive bargaining they are less likely to produce deals — and the deals they manage to produce are less likely to be optimal.

The good news is that empirical studies also suggest ways to escape imprisonment in distributive bargaining.

A first step is to elevate the level of responsibility the negotiators feel for the success of the process. Sophisticated studies show that when participants feel more invested in and responsible for a negotiation they are more likely to shed disabling heuristics (like the fixed pie bias) and are able to process information more objectively and systematically. Armed with a more accurate understanding of the situation, if common ground exists, they are more likely to find it.

But how can we get participants to feel more responsible for the quality of negotiations? We could do the radical thing: tell them that we want to maximize the productivity of the negotiations and that tons of studies show that we have a much better chance of doing so if everyone pays attention to *the process* and makes suggestions about how to keep it as healthy as possible. Short of something so bold, at specific junctures that seem significant we could ask our counterparts to suggest (or discuss) the most constructive way to proceed. Ask them what they think would be best to do next. Get them involved in thinking about process.

Negotiators who believe that they share common goals do better than negotiators who don't. It pays to help everyone understand that they share the same immediate goal: to identify as reliably as possible what is possible (through negotiations). Everyone wants to know what terms of settlement really are accessible. We will have a better chance of achieving that goal if all of us think about the best ways to get there.

The studies also have demonstrated that there is a reciprocally reinforcing relationship in negotiations between sharing information, developing trust, and the extent to which parties engage in “problem solving behavior” — as opposed to purely

competitive behavior. Sharing information encourages trust, trust encourages risk taking contributions to the process, and problem solving behavior increases the odds of getting positive outcomes. Get the cycle started by sharing information, especially information that your counterpart might not expect you to share, information that might disclose underlying interests or that might have ambiguous or even potentially damaging (to some extent) implications.

Social scientists also suggest steps we can take during negotiations to reduce the likelihood that our counterpart will resort to “ethically ambiguous” tactics that ultimately damage prospects for success. Toward this end, we should (1) be optimistic about the odds of getting a deal; (2) emphasize what the parties have in common (values, associations, experiences, etc.); (3) use shared norms to explain why our proposals are “fair;” (4) emphasize progress that has been made; (5) make concessions so as to preserve our counterpart's self-esteem but on a measured basis and a deliberately paced track; (6) identify things we could do for the other side (introductions, messages to customers, advertised endorsements, supportive presentations at trade shows, etc.); (7) be sure our counterpart knows that we have viable alternatives (if plausible); and (8) look for ways to postpone the pain that terms might impose on our counterpart.

While some of these steps might seem counterintuitive, the people who have studied thousands of negotiations tell us that we will do better if we are brave enough to take them.

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