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By Charles B. Craver[2]

I. INTRODUCTION

When attorneys negotiate with one another, most exhibit a *Cooperative/Problem-Solving* or *Competitive/Adversarial* approach.[3] Cooperative/Problem-Solvers usually employ a problem-solving approach designed to generate mutually beneficial agreements,[4] while Competitive/Adversarials use a more adversarial style that is intended to generate more one-sided results.[5] Opposite traits can be attributed to these different styles.

COOPERATIVE/PROBLEM-SOLVING	**COMPETITIVE/ADVERSARIAL**
Move Psychologically *Toward* Opponent	Move Psychologically *Against* Opponent

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[2] Freda H. Alverson Professor, George Washington University Law School. B.S., 1967, Cornell University; M. Indus. & Labor Rels., 1968, Cornell University School of Industrial & Labor Relations; J.D., 1971, University of Michigan.

[3] *See generally* GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).

[4] *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES (1981); ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING (2000).

[5] *See generally* JIM CAMP, START WITH NO (2002); ROGER DAWSON, SECRETS OF POWER NEGOTIATING (2d ed. 2001); ROBERT J. RINGER, WINNING THROUGH INTIMIDATION (1973).

Try to Maximize *Joint* Returns	Try to Maximize *Own* Returns
Strive for Reasonable Results	Strive for Extreme Results
Courteous and Sincere	Adversarial and Disingenuous
Begin with Realistic Opening Positions	Begin with Unrealistic Opening Positions
Rely on Objective Standards	Focus on Positions Rather than Neutral Standards
Rarely Resort to Threats	Frequently Resort to Threats
Maximize Information Disclosure	Minimize Information Disclosure
Open and Trusting	Closed and Untrusting
Work to Satisfy Underlying Opponent Interests	Work to Satisfy Underlying Interests of Own Side
Willing to Make Unilateral Concessions	Work to Induce Opponent to Make Unilateral Concessions
Try to Reason with Opponents	Try to Manipulate Opponents

Cooperative/Problem-Solvers usually commence interactions with realistic positions that are likely to generate positive bargaining environments.[6] They behave in a courteous and professional manner that is designed to create harmonious relationships. They are quite open with respect to their important information, and they work to explore the underlying interests of both sides to enable them to ascertain and expand the overall pie to be divided by the negotiating parties. This approach enables them to achieve efficient agreements that maximize the joint gains obtained by the interactants. They try to rely upon objective criteria to guide the discussions, to enable the bargainers to reach fair, win-win agreements. Cooperative/Problem-Solvers rarely employ threats or other disruptive tactics, preferring to rely upon cooperative strategies that are designed to generate reciprocal movement.

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[6] *See* LAURENCE J. BOULLE, MICHAEL T. COLATRELLA JR. & ANTHONY P. PICCHIONI, MEDIATION SKILLS AND TECHNIQUES 158-159 (2008); ROY J. LEWICKI & ALEXANDER HIAM, MASTERING BUSINESS NEGOTIATION 127-156 (2006).

Competitive/Adversarials usually commence their interactions with more extreme positions that are employed to intimidate their adversaries.[7] They endeavor to attain one-sided accords favoring their own side. They often resort to threats or other disruptive techniques in an effort to keep their adversaries on the defensive. They try not to disclose their negative information, and embellish their positive information to enable them to convince opponents that they possess greater strength than they actually possess. They work to induce adversaries to bid against themselves through the inadvertent articulation of unreciprocated concessions. When Competitive/Adversarials believe it will advance their own interests, they employ rude and unprofessional behavior.

This article will initially assess the relative effectiveness of the Cooperative/Problem-Solving and Competitive/Adversarial styles. Which approach is likely to generate optimal individual results and optimal joint results? How should Cooperative/Problem-Solvers interact with Competitive/Adversarials to avoid exploitation by such manipulative opponents? It will then consider a hybrid approach which incorporates the most effective characteristics of both styles in an effort to generate mutually beneficial accords which tend to favor one side more than the other.

II. RELATIVE EFFECTIVENESS OF COOPERATIVE/PROBLEM-SOLVING AND COMPETITIVE/ADVERSARIAL STYLES

An increasing number of lawyers seem to believe that Competitive/Adversarial negotiators who employ deceptive, aggressive, and occasionally abrasive tactics are more likely to achieve beneficial results for their own side than Cooperative/Problem-Solving

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[7] *See* BOULLE, COLATRELLA & PICCHIONI, *supra* note 6, at 152-153; LEWICKI & HIAM, *supra* note 6, at 73-91.

bargainers. I have observed this phenomenon both when I mediate employment law disputes and when I talk with attorneys at my continuing legal education courses on negotiating. When I was in practice thirty-five years ago in San Francisco, I almost never encountered a rude or unprofessional opponent. Although both sides sought to obtain agreements that were favorable to their respective clients, we did so in a courteous and professional way. As a society in general and a profession in particular, we are no longer as polite to one another. Lawyers frequently tell me about extremely rude adversaries, and I occasionally encounter such persons when I mediate. This approach is entirely contrary to the way in which people behave. When individuals are insulting, we want to reject their entreaties to avoid rewarding them for their improper conduct. On the other hand, when persons are kind and respectful, we feel guilty if refuse to provide them with what they are seeking.

The thought that Competitive/Adversarial negotiators are more effective than Cooperative/Problem-Solver bargainers was contradicted by separate empirical studies conducted by Professors Gerald Williams and Andrea Schneider. Professor Williams conducted his study of lawyers in Phoenix in 1976.[8] He asked respondents to indicate whether attorneys with whom they had recently interacted were Cooperative/Problem-Solvers or Competitive/Adversarials. He found that 65 percent were classified as Cooperative/Problem-Solvers, 24 percent as Competitive/Adversarials, and 11 percent did not fit within either category.[9] The respondents also indicated that they considered the results achieved by effective Cooperative/Problem-Solvers to be as beneficial for their

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[8] *See generally* WILLIAMS, *supra* note 3.

[9] *See id.* at 19.

clients as the results attained by effective Competitive/Adversarials.[10] Nonetheless, he found that far fewer Competitive/Adversarial negotiators were considered effective vis-à-vis Cooperative/Problem-Solvers.

Professor Williams asked the respondents to indicate whether the persons they had described were "effective," "average," or "ineffective" negotiators. Fifty-nine percent of Cooperative/problem-Solvers were considered to be "effective," 38 percent were considered to be "average," and only 3 percent were considered to be "ineffective."[11] On the other hand, only 25 percent of Competitive/Adversarials were considered to be "effective," 42 percent were considered to be "average," and 33 percent were considered to be "ineffective."

In 1999, Professor Schneider replicated the Williams study with lawyers in Chicago and Milwaukee.[12] Her respondents characterized 64 percent of their opponents as Cooperative/Problem-Solvers and 36 percent as Competitive/Adversarials.[13] She also asked whether these persons were "effective," "average," or "ineffective" negotiators. She found that 54 percent of Cooperative/problem-Solvers were considered to be "effective," 42 percent were considered to be "average," and 4 percent were considered to be "ineffective."[14] On the other hand, only 9 percent of Competitive/Adversarials were considered to be "effective," 37 percent were considered to be "average," and 53 percent

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[10] *See id.* at 41.

[11] *See id.* at 19.

[12] *See generally* Schneider, *supra* note 3.

[13] *See id.* at 163.

[14] *See id.* at 167.

were considered to be "ineffective." Although the ratings for Cooperative/Problem-Solvers did not change much from the Williams study, the ratings for Competitive/Adversarials changed significantly. The percentage of "effective" Competitive/Adversarials dropped from 25 percent in the Williams study to 9 percent in the Schneider study, and the percentage of "ineffective" Competitive/Adversarials increased from 33 percent in the Williams study to 53 percent in the Schneider study. These changes are not surprising when one considers the fact that the adjectives used to describe Competitive/Adversarial bargainers were more negative in the Schneider study than in the Williams study.[15]

In the thirty-five years I have taught Legal Negotiating, I have not found Cooperative/Problem-Solvers to be less effective negotiators than Competitive/ Adversarials. The idea that persons must be uncooperative, manipulative, and intimidating to achieve beneficial results is incorrect. Bargainers only have to have the ability to say "no" with conviction to be able to attain good results. Proficient individuals can accomplish their objectives courteously and professionally, and be as effective as those who behave more demonstrably. I have only noticed three significant differences with respect to the outcomes achieved by Cooperative/Problem-Solver and Competitive/ Adversarial negotiators. First, when one-sided accords are reached, the prevailing party is almost always a Competitive/Adversarial bargainer. This reflects the fact that Cooperative/Problem-Solvers tend to be fair minded individuals who hesitate to take undue advantage of inept adversaries. Second, Competitive/Adversarials generate more

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[15] *Compare* Schneider, *supra* note 3, at 172 Tbl. 20, *with* WILLIAMS, *supra* note 3, at 26-27.

nonsettlements than Cooperative/Problem-Solvers. The inability of such persons to achieve accords is caused by their frequent use of manipulative and disruptive tactics which induce their opponents to more readily accept the consequences associated with nonsettlements.

The third factor concerns the fact that Cooperative/Problem-Solvers usually achieve more efficient combined results than Competitive/Adversarials. This phenomenon is due primarily to the fact that Cooperative/Problem-Solvers are open and trusting negotiators who strive to generate mutually beneficial agreements that maximize the joint returns attained. Individuals who hope to reach highly efficient agreements must be willing to work with their adversaries to determine areas for possible joint gains and to exploit those opportunities. Even when they endeavor to obtain terms beneficial to their own clients, they appreciate the fact that by expanding the overall pie to be shared they increase the likelihood of obtaining the results they desire.

How can lawyers who seek to employ the Cooperative/Problem-Solving approach increase the likelihood of interacting with like-minded negotiators? They can join the *Collaborative Law* or the *Cooperative Law* movement. The Collaborative Law approach began in the early 1990s by family law practitioners who wished to minimize the adversarial nature of their negotiations.[16] Attorneys who join these groups commit

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[16] *See generally* NANCY J. CAMERON, COLLABORATIVE LAW PRACTICE DEEPENING THE DIALOGUE (2004); SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION (2004); PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (2001); PAULINE H. TESSLER & PEGGY THOMPSON, COLLABORATIVE DIVORCE: THE REVOLUTIONARY NEW WAY TO RESTRUCTURE YOUR FAMILY, RESOLVE LEGAL ISSUES, AND MOVE ON WITH YOUR LIFE (2006); STUART G. WEBB & RON D. OUSKY, THE COLLABORATIVE WAY TO DIVORCE: THE

themselves and their clients to entirely open and cooperative interactions. They promise to be forthright and direct, and to avoid bluffing, puffing, or other value-claiming behavior. The most controversial aspect of the Collaborative Law approach concerns a provision requiring the selected legal representatives to withdraw from further representation of their respective clients when amicable resolutions are not developed. If these matters have to be litigated in court, the clients are required to obtain new counsel to represent them.

To avoid potential conflicts between attorney desires and client interests that might be generated by the disqualification provisions included in Collaborative Law representation agreements, some lawyers have formed the Cooperative Law approach which embodies the same disclosure and cooperative concepts associated with the Collaborative Law movement, but which does not require counsel to withdraw if mutual accords are not achieved.[17]

Collaborative Law and Cooperative Law participants are attorneys who have whole-heartedly embraced the *Getting to Yes* approach to negotiating. They are uncomfortable with the deception and manipulation associated with traditional bargaining interactions, and they wish to work with others who are completely forthright and interested in the formulation of agreements that are mutually beneficial. They believe that such cooperative exchanges most effectively protect the interests of their clients.

III. CONFLICTING NEGOTIATOR STYLE INTERACTIONS

REVOLUTIONARY METHOD THAT RESULTS IN LESS STRESS, LOWER COSTS, AND HAPPIER KIDS – WITHOUT GOING TO COURT (2006).

[17] *See generally* John Lande, *Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203 (2008).

When Cooperative/Problem-Solvers interact with other Cooperative/Problem-Solvers, their encounters are generally open and cooperative,[18] while interactions between Competitive/Adversarials tend to be closed and manipulative.[19] When Cooperative/Problem-Solvers interact with Competitive/Adversarials, their encounters tend to be more competitive than cooperative.[20] The Cooperative/Problem-Solving participants are compelled to behave in a more competitive fashion to avoid the exploitation that would probably result if they were overly candid and accommodating with their manipulative adversaries. Such cross-style encounters tend to generate less efficient agreements and an increased number of impasses.[21] This factor may explain why Professors Williams and Schneider found a far greater percentage of effective Cooperative/Problem-Solver negotiators than Competitive/Adversarial negotiators.

When Competitive/Adversarial bargainers interact with Cooperative/Problem-Solver negotiators, the Competitive/Adversarial participants enjoy a clear advantage – if their Cooperative/Problem-Solving opponents continue to operate in a naively cooperative fashion.[22] Competitive/Adversarial individuals feel more comfortable in an openly competitive setting than their Cooperative/Problem-Solving opponents who may

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[18] *See* HOWARD RAIFFA (WITH JOHN RICHARDSON & DAVID METCALFE), NEGOTIATION ANALYSIS 288-291 (2003).

[19] *See id.* at 298-301.

[20] *See* Catherine H.Tinsley, Kathleen M. O'Connor & Brandon A. Sullivan, *Tough Guys Finish Last: The Perils of a Distributive Reputation*, 88 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 621, 634-635 (2002).

[21] *See id.* at 635.

[22] *See* MICHAEL WATKINS, SHAPING THE GAME 78 (2006); LARRY L. TEPLEY, LEGAL NEGOTIATION IN A NUT SHELL 59-60 (2d ed. 2005).

be forced to behave in an uncharacteristically competitive manner to protect their own interests. Cooperative/Problem-Solvers are likely to disclose more critical information than Competitive/Adversarials, and they tend to seek less beneficial terms for themselves.

When Cooperative/Problem-Solvers commence interactions with persons they do not know well, they should be cautious with respect to the confidential client information they initially disclose. To protect themselves from exploitation by less open Competitive/ Adversarial opponents, they should initially disclose less critical information and see if their candor is being reciprocated. If they are confident that their adversaries are being equally open, they can continue to be forthcoming and work to jointly ascertain the underlying interests of the parties. Such candor will enable them to have open discussions that would be likely to maximize the joint returns generated. Nonetheless, if they suspect that their initial openness is not being reciprocated, they must behave more strategically and disclose less of their important information. Negotiators who fail to change their behavior in this fashion will leave themselves open to exploitation by Competitive/ Adversarial opponents who use the information imbalance to obtain one-sided accords favoring themselves.

IV. THE COMPETITIVE/PROBLEM-SOLVING APPROACH

When Professor Williams conducted his study of Phoenix attorneys, he discovered that certain traits are shared by both effective Cooperative/Problem-Solving negotiators and effective Competitive/Adversarial bargainers.[23] They are thoroughly prepared, conduct themselves in an honest and ethical manner, are perceptive readers of opponent verbal leaks and nonverbal cues, are analytical, realistic, and convincing, and

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[23] *See* WILLIAMS, *supra* note 3, at 20-30.

observe the customs and courtesies of the bar. He also found that skilled bargainers from both groups desire to *maximize* their *own side's returns*. Professor Schneider also found this client maximizing objective among both effective Cooperative/Problem-Solving and effective Competitive/Adversarial negotiators.[24] Since a desire to maximize one own side's returns is the quintessential characteristic associated with Competitive/Adversarial negotiators, the discovery of this common trait among both effective Cooperative/Problem-Solver and Competitive/Adversarial bargainers would indicate that many persons who are characterized by their opponents as effective Cooperative/Problem-Solving negotiators are actually wolves in sheepskin. They behave as if they are employing an open and cooperative style, but they subtly work to obtain competitive objectives.[25]

Skilled negotiators are able to combine the most salient traits associated with the Cooperative/Problem-Solving and the Competitive/Adversarial styles.[26] They work to maximize the returns they obtain for their own clients, but they endeavor to accomplish

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[24] *See* Schneider, *supra* note 3, at 188.

[25] *See* Hal Movius, *The Effectiveness of Negotiation Training*, 24 NEGOT. J. 509, 513-515 (2008); Keith G. Allred, *Distinguishing Best and Strategic Practices: A Framework for Managing the Dilemma Between Creating and Claiming Value,* 16 NEGOT. J. 387, 394-396 (2000).

[26] *See* Robert J. Condlin, "*Every Day and in Every Way We Are All Becoming* Meta *and* Meta", *or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory*, 23 OHIO ST. J. DISP. RESOL. 231, 298-299 (2008); Margaret A. Neale & Allison R. Fragale, *Social Cognition, Attribution, and Perception in Negotiation: The Role of Uncertainty in Shaping Negotiation Processes and Outcomes* in NEGOTIATION THEORY AND RESEARCH 27, 32 (Leigh L. Thompson, ed.) (2006). *See generally* Robert J. Condlin, *Bargaining With a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1 (2007).

this objective in a courteous and seemingly cooperative manner.[27] They appreciate the childhood admonition expressed by many parents that "you get more with honey than you do with vinegar." They also recognize the importance of expanding the overall pie to be divided between the bargaining parties. Unlike less skilled bargainers who think of negotiation interactions as "fixed pie" situations in which one side's gain is the other side's corresponding loss, they understand that in multi-issue interactions the participants usually value the various items quite differently.[28] Even when the principle issue is money, the parties can agree to future payments or in-kind payments to generate more efficient final agreements. Adroit negotiators appreciate the inherent tension between "value creation" and "value claiming."[29] Although they strive to claim more of the distributive items desired by both sides, they look for integrative terms valued more by one side than by the other in recognition of the fact that if these terms are resolved efficiently, both sides will achieve better results.[30] They are quite open with respect to underlying client interests to enable the interactants to look for areas of possible joint gain, but they frequently over- or under-state the degree to which their clients actually want the various items to enable them to obtain more of the joint surplus than they give to

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[27] *See* ROBERT D. MAYER, POWER PLAYS 7-8, 92 (1996).

[28] *See* ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING 14-15, 174 (2000).

[29] *See* Alex J. Hurder, *The Lawyer's Dilemma: To Be or Not to Be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 271-279 (2007). *See generally* Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions,* __ CARDOZO J. CONFLICT RES. __ (2010) (firthcoming).

[30] *See* WATKINS, *supra* note 22, at 8-9; RONALD M. SHAPIRO & MARK A. JANKOWSLI, THE POWER OF NICE 45-61 (2001).

their opponents. If they think their adversaries really want several issues their side does not value highly, they may exaggerate their interest in those terms to make it appear that they are conceding more than they actually are. If their side really desires specific items they believe the opposing party does not consider important, they may under-state their actual interest in those terms to enable them to obtain them in exchange for less significant concessions.

Competitive/Problem-Solvers recognize that if the parties maximize the way in which the integrative terms are resolved, it is easier for them to claim more of the distributive items. Although they may manipulate opponent perceptions with respect to the degree to which they value particular terms, they do not employ truly deceitful tactics.[31] They realize that a loss of credibility would seriously undermine their capacity to obtain beneficial accords. Even though they hope to obtain a greater share of the joint surplus, they are not "win-lose" Competitive/Adversarial negotiators. Nor are they the "win-win" Cooperative/Problem-Solvers they appear to be. As Competitive/Problem-Solvers, they employ a hybrid style which Ronald Shapiro and Mark Jankowski characterize as "**WIN-win**: big win for your side, little win for theirs."[32] They understand

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[31] Although Model Rule 4.1 provides that it is unethical for an attorney to "make a false statement of material fact or law to a third person," Comment 2 expressly exempts statements regarding the degree to which clients value the items being exchanged. "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category . . ." THOMAS D. MORGAN & RONALD D. ROTUNDA, 2008 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 92-93 (2008). *See generally* Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. DISP. RESOL. 299 (2010).

[32] SHAPIRO & JANKOWSKI, *supra* note 30, at 5 (emphasis in original).

that the imposition of poor terms on their adversaries does not necessarily benefit their own clients. All other factors being equal, they wish to maximize opponent satisfaction, as long as this does not require significant concessions with respect to terms valued by their own side.[33] At the conclusion of bargaining encounters, they do not compare the results they have achieved with those obtained by their adversaries. They instead ask themselves whether their clients like what they received.

Competitive/Problem-Solvers appreciate the importance of negotiation *process*. Studies indicate that persons who believe that the bargaining process has been fair and they have been treated respectfully are more satisfied with objectively less beneficial final terms than they are with objectively more beneficial terms achieved through a process considered less fair and less respectful.[34] This explains why proficient Competitive/Problem-Solvers always treat their adversaries with respect and act professionally. They are also careful at the conclusion of interactions to leave opponents with the feeling those persons obtained "fair" results.

Competitive/Problem-Solvers do not work to maximize opponent returns for purely altruistic reasons. They appreciate the fact that such behavior most effectively enhances their ability to advance their own interests. They understand that they must offer their opponents sufficiently generous terms to induce those persons to accept the agreements they are proposing. If they fail to propose accords within opponent settlement

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[33] *See generally* Leaf Van Boven & Leigh Thompson, *A Look into the Mind of the Negotiator: Mental Models in Negotiation*, 6 GROUP PROCESSES & INTERGROUP RELS. 387 (2003).

[34] *See* Rebecca Hollander-Blumoff & Tom Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOCIAL INQUIRY 473 (2008).

ranges, no agreements will be achieved. They also want to be certain that adversaries will honor the terms agreed upon. If opponents experience post-agreement "buyers remorse," they may refuse to effectuate those accords. The final consideration concerns the fact that attorneys often interact with the same opponents in the future. If those individuals feel that their current encounters have been pleasant and beneficial, they will look forward to future interactions with those persons.[35]

Why are Competitive/Problem-Solvers more able to obtain beneficial results for their clients than Cooperative/Problem-Solvers or Competitive/Adversarials? They appreciate the fact that true Cooperative/Problem-Solvers are too open and trusting. Those negotiators are too quick to disclose their actual underlying interests and the degree to which they value the different items to be exchanged. Such bargainers tend to have modest aspirations, and their desire for true "win-win" results causes them to generate efficient but personally modest agreements. Competitive/Adversarial bargainers establish elevated aspirations and seek one-sided results favoring their own side, but they frequently behave in an aggressive and adversarial manner. Such behavior turns off cooperative opponents, and generates an excessive number of nonsettlements where accords could have been achieved. It also produces less efficient terms when agreements are reached.

Negotiators who employ the hybrid Competitive/Problem-Solving approach are able to obtain optimal results for their clients by appearing to be entirely open and cooperative, when they are actually being somewhat closed and manipulative. Keith Allred found this approach to be highly effective when he conducted empirical studies of

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[35] *See* DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION 17-18 (2006).

the factors possessed by skilled negotiators. He conducted exercises used to ascertain the degree to which adroit bargainers employ "strategic practices" designed to enable them to claim more of joint surpluses for themselves and "integrating and accommodating practices" designed to maximize the joint returns achieved. He discovered that the most successful negotiators were individuals who were considered by their adversaries to use primarily "integrating and accommodating practices," even those these persons admitted that they frequently employed "strategic practices" to advance their own interests.[36]

The fact that many Competitive/Problem-Solver negotiators are considered by their opponents to be conventional Cooperative/Problem-Solver bargainers may partially explain why Professors Williams and Schneider found more effective Cooperative/ Problem-Solving negotiators than effective Competitive/Adversarial bargainers. It is likely that many effective Competitive/Problem-Solving negotiators who subtly employed competitive tactics were so successful in their use of seemingly cooperative techniques, that they induced their opponents to characterize them as "cooperative" rather than "competitive."

Although many people seem to believe that Cooperative/Problem-Solving negotiators generate more efficient agreements than individuals who may be subtly or overtly competitive, an empirical study by Professors Kathleen O'Connor and Peter Carnevale contradicts this assumption.[37] Their study concerned "common-value issues" that both sides wished to have resolved in the same manner even though the participants

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[36] *See* Allred, *supra* note 25, at 394-395.

[37] *See* Kathleen M. O'Connor & Peter J. Carnevale, *A Nasty But Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue*, 23 PERSONALITY & SOC. PSYCH. BULLETIN 504 (1997).

were not aware of their positional overlap. Some of the bargaining pairs were entirely open and cooperative with respect to their interests, while other dyads included negotiators who could be disingenuous with respect to their actual interests. O'Connor and Carnevale found that the individualistically motivated pairs generated higher *joint* outcomes than the cooperatively motivated pairs. This was apparently due to the fact the individualistically motivated negotiators established higher overall objectives for themselves than did the cooperatively motivated participants. The individualistically motivated persons recognized that by generating the most efficient overall agreements they increased the likelihood they would obtain optimal results for themselves.

The Competitive/Problem-Solving approach can be especially effective when employed by Collaborative Law or Cooperative Law movement members. If these manipulative negotiators can convince their colleagues that they are being completely open and cooperative when they are not being entirely forthright and they subtly employ distributive techniques to enable them to claim more of the joint surplus being generated, they should be able to achieve terms that are more beneficial to their own clients than the terms being obtained by their opponents.

When Collaborative Law, Cooperative Law, or other legal practitioners commence bargaining interactions with individuals they do not know extremely well, they should be circumspect. If the behavior of their opponents indicates that they are competitive negotiators seeking to maximize their own results, these persons should be less candid and more circumspect. If their adversaries begin with more extreme positions, they should also articulate positions favoring their own clients. If they instead open with positions close to where they really hope to end up, they will almost always obtain less

beneficial results. Parties tend to move from their opening positions toward the center, and the parties beginning with more skewed opening offers or demands tend to obtain skewed results favoring their own side.

As noted in Part III, naturally open negotiators should not be excessively open at the commencement of interactions with others. They should expose some non-critical information regarding their needs and interests and see if their candor is being reciprocated. If it is, they can continue to cautiously disclose more information. If it is not, however, they have to be less open. If one side is entirely open while the other side is being less candid, an information imbalance is created which favors the less open participant. If individuals think their adversaries are over- or under-stating the value of different items for strategic purposes, they should not naively disclose their own true needs and interests. Although they would be most effective if they similarly over- or under-stated their own circumstances, some truly cooperative bargainers might not feel comfortable with such manipulative tactics. Such persons could alternatively withhold – rather than misrepresent – their true needs and interests, to avoid placing themselves and their clients at a bargaining disadvantage.

Is it ethical for members of formal Collaborative Law or Cooperative Law movements to employ the Competitive/Problem-Solving style when they interact with other group members? I think that such a manipulative approach would be entirely improper. Members of such groups have formally committed themselves and their clients to complete disclosure and to cooperative conduct. The only way in which individuals can be true to such undertakings is to employ the Cooperative/Problem-Solving approach. When they withhold or even minimally distort client information or they seek to obtain

an inappropriately large portion of the joint surplus, they violate their group norms. Nonetheless, Collaborative Law and Cooperative Law group members must appreciate the possibility that some of their cohorts may actually employ the Competitive/Problem-Solving style in a fashion that may be undetectable by most of their opponents.

V. CONCLUSION

Most negotiation books and courses divide lawyers into Cooperative/Problem-Solving or Competitive/Adversarial groups. Cooperative/Problem-Solvers are open and cooperative, and they work to generate mutually beneficial agreements. Competitive/ Adversarials are less open, more manipulative, and work to maximize their own side returns. Studies conducted by Professors Williams and Schneider found that twice as many attorneys are considered by their peers to be Cooperative/Problem-Solvers than Competitive/Adversarials, and that far more Cooperative/ Problem-Solvers are considered to be effective bargainers than Competitive/Adversarials.

When Cooperative/Problem-Solvers interact with Competitive/Adversarials, they have to modify their behavior to avoid exploitation by such manipulative opponents. They have to be less open and behave more strategically. If they are excessively candid or begin with naively generous opening positions, they provide such adversaries with a distinct bargaining advantage.

Many proficient negotiators employ a hybrid Competitive/Problem-Solving style. They behave in a seemingly open and cooperative manner, but are not entirely open, and they subtly employ manipulative techniques to obtain a greater share of the joint surplus that is created. They behave in a courteous and professional manner, in recognition of the fact that this increases the likelihood they will achieve their objectives. Although their

opponents think they are behaving in a cooperative fashion, they admittedly employ disingenuous tactics to advance their interests. Opponents who do not appreciate the degree to which the Competitive/Problem-Solving style may be employed successfully are likely to concede more to these adversaries than they should.