

Chapter 5

NEGOTIATION: MAKE IT EASY

Key Topics

Negotiation Strategies
Dual Aspects of Negotiation
Five Psychological Approaches
Your Preferred Style
Preferred Style of Lawyers
Gender Triggers
Strategy Selection
Strategy Use

I. INTRODUCTION

Lawyers negotiate all the time — both formally on files for clients and in the day-to-day with clients, colleagues and assistants. Most lawyers, unless negotiating formally, do not realize how often they negotiate. It has been suggested that when dealing with others, many of us negotiate more than once every waking hour, but we do not recognize the majority of these interactions as negotiations.¹

In order to advance in law it is important to be able to negotiate well, and this starts with becoming aware of when you are negotiating and what you bring to the table when you negotiate, including the strategies you prefer and tend to overuse. This enhanced awareness will ensure greater success both in formal negotiations for clients and in interpersonal negotiations with colleagues.

This chapter sets out the two main negotiation strategies taught in most law school negotiation courses, as well as a detailed description of five psychological approaches in both negotiation and conflict. It discusses the dual aspects that underlie each approach and explains how these two

¹ Roy J. Lewicki, Alexander Hiam & Karen Wise Olander, *Think Before You Speak: A Complete Guide to Strategic Negotiation* (New York: John Wiley & Sons, Inc. 1996) at 1.

dimensions play a key role in strategy selection and preference. Section V, Strategy Use, provides scenarios to illustrate each approach, while section VI, Strategy Implementation, provides phrases for each approach. These illustrations and phrases will help you implement the selected strategy.

As with all skills, it is important to be self-aware and understand what you bring to the table — the strategies you prefer and the assumptions you hold about negotiation. These preferences and assumptions are informed by a multitude of personal factors, including personality preferences, professional training, experience, culture and gender. To become a skilful negotiator requires not only awareness of the importance of these factors personally, but also the ability to select and use the most appropriate strategy in the circumstance.

This chapter, with its focus on career development, provides the negotiation basics for advancing your career in law and, as such, is a great beginning point for becoming a better negotiator. It is not, however, an exhaustive examination of negotiation. At the end of this chapter is a list of further readings and resources, including such negotiation classics as *Getting to Yes* and *Essentials of Negotiation*. These readings provide a more comprehensive exposure to negotiation topics such as negotiation process and preparation, as well as the practical aspects of legal and business negotiation.

II. NEGOTIATION STRATEGIES

A. Two Main Categories

The vast array of names used to describe negotiation strategies can be both daunting and confusing. The most popular include positional, distributive, competitive, integrative, principled, interest-based, collaborative, cooperative, accommodating, avoiding, compromise, soft, hard, problem-solving, domination and adversarial. However, despite all these different names, these strategies can be sorted into two or three main categories. In *Getting to Yes*,² the authors refer to three types of strategies — soft, hard and principled — while Jeswald Salacuse³ posits three similar models — compromise, domination and joint problem-solving. However, most other academics divide negotiation strategy into just two categories — competitive (claiming) and collaborative (creating).⁴

² Roger Fisher, William Ury & Bruce Patton. *Getting to Yes: How to Negotiate Agreement Without Giving In*, 3d ed. (New York: Penguin, 2011) at 13.

³ Jeswald W. Salacuse, *The Global Negotiator: Making, Managing and Mending Deals Around the World in the 21st Century* (New York: Palgrave MacMillan, 2003) at 9.

⁴ See, for example, Colleen Hanyecz, “Introduction to the Negotiation Process Model” in C. Hanyecz, T. Farrow & F. Zemans, eds., *The Theory and Practice of Representative Negotiation* (Toronto: Emond Montgomery, 2008) at 41.

Very simply, competitive negotiation is most appropriately used in situations involving limited resources, such as money or land, where what one party loses the other party gains. The terms “zero-sum game”, “win/lose” or “fixed pie” are used to describe these situations. Interestingly, this is the situation and strategy most people think of when the term “negotiation” is used.

ADVANCEMENT TIP

Although most people think of great negotiators as competitive, the risks associated with this strategy are substantial. A skilful negotiator is versatile and flexible — using the most appropriate strategies for best results.

The second category — collaborative — involves co-creation by the parties; the negotiation process moves beyond the give-and-take of competitive negotiation, and existing items are expanded and new items created to satisfy the parties. For the successful implementation of this strategy, both the type of situation and the parties’ approaches have to align. The climate has to allow for creation and not be solely about a limited resource with no other interests. The parties have to trust each other and allow a sufficient amount of time to implement the process. Although collaboration maximizes both outcome and relationship, and is the most sophisticated and effective type of negotiation strategy, these factors tend to reduce the use of this strategy in law.

The hallmarks of both claiming and creating strategies are set out in Chart 5.1 below.

Chart 5.1: Hallmarks of Main Negotiation Strategies

Approach	Claiming	Creating
Types of Strategies	Competitive/ Adversarial/ Distributive	Collaborative/ Principled/ Integrative/Problem Solving
Type of Climate	Claiming climate where resources are scarce and each party wants the biggest piece of a fixed item	Creating climate where creation of items is possible and parties want to expand deal aspects
Goal	Goal is complete victory and getting what you want	Goal is a solution that works well for all parties

Approach	Claiming	Creating
Priority	Maximizing outcome	Maximizing relationship and outcome
Aim	Based solely on self-interests and getting what you want	Based on obtaining a fair and mutually satisfying outcome for all by expanding the items being negotiated
Initial Positions	Initial large demand or low offer with increasing demands	Focus is on mutual interests not positions
Concessions	None or very small concessions and each concession made for a reason	Concessions are based on objective criteria (external standards) or principles
Information Exchange	No information or very little information, misinformation or bluffs	Information is provided when appropriate for ensuring the best mutual agreement
Ethical Behaviour	May use unethical behaviour and distrusts the other party	Ethical and trustworthy but ensures other side is trustworthy before revealing important information
Tactics Used	Competitive tactics used may include intimidation, manipulation, lying, bluffing and threats.	Collaborative tactics focus on the issue and not the person; brainstorming used to generate options and objective criteria employed to test such options
Psychological Attitude	Negotiator seeks to reduce expectations of the other side so they will take less; moves psychologically against them to convince them that their case or position is weak	Negotiator seeks to understand the other's perspective and uses problem solving to obtain a mutually satisfactory agreement that is fair for all parties based on objective standards
Disadvantages	Impasse reached if both parties do not compromise or lopsided agreement in	Takes time to discover interests, brainstorm and evaluate options

Approach	Claiming	Creating
	favour of the competitive party that is vulnerable to breaches if too one-sided	objectively; collaborative negotiator is vulnerable to competitive negotiator

B. Dual Aspects of Negotiation

Most people are not aware that in each negotiation there are two aspects being negotiated — relationship and outcome. Each time you negotiate, you affect your relationship with the other person as well as obtaining a specific, tangible outcome. The way you approach negotiation and the ease with which you get agreement determines your reputation — the view or perception that others have of you. This is one of the most surprising aspects of negotiation and one of great importance in career advancement. Not only do these two aspects underlie all negotiations, the strategy you select is determined by which one you value more — relationship or outcome. And which one you value more is affected by various factors.⁵

ADVANCEMENT TIP

Determine the importance of relationship and outcome before each negotiation. This evaluation will help you select the most appropriate strategy for the circumstances.

Most people negotiate habitually without awareness of either the assumptions they hold or the strategy they prefer. To be a good negotiator requires conscious selection of strategy and the proper use of it. If relationship is more important, a cooperative or collaborative negotiation is best, whereas if it is solely about tangible outcome, such as in a price negotiation, being competitive is more appropriate. Assessment of the relative importance of each of the dual aspects is a key skill for the politically astute negotiator, as inter-office negotiations require a keen awareness of the most appropriate strategy and its impact on relationship and reputation.

ADVANCEMENT TIP

Assessment of relationship and outcome before each negotiation is a key skill for the politically astute lawyer, as every inter-office negotiation affects relationship and reputation.

⁵ For in-depth discussion of the types of factors and their impact, see section IV, Strategy Selection, below.

C. Five Psychological Approaches

The most thorough and relevant framework for negotiation strategies, which I use with all of my coaching clients and in my negotiation seminars, consists of the five modes or approaches proposed by psychologists Kenneth Thomas and Ralph Kilmann for conflict management, assessed using the Thomas-Kilmann Conflict Mode Instrument (“TKI”).⁶ These strategies flesh out more fully the various responses that are used to get agreement in negotiations and to settle differences. The first two, competing and collaborating, correspond to the two main negotiation strategies set out above.

All five approaches can and are often used within longer, formal negotiations. They may also be employed in sequence. Each approach or mode is valid if used appropriately and contextually, with selection determined by the importance of relationship or outcome. Thus a lawyer’s ability to manage conflict successfully and get the best negotiation results depends to a great extent on his or her skill at estimating the effectiveness of different strategies relative to the situation, the relationship among the parties, the future potential of a relationship, the relative power of the parties and other contextual factors.

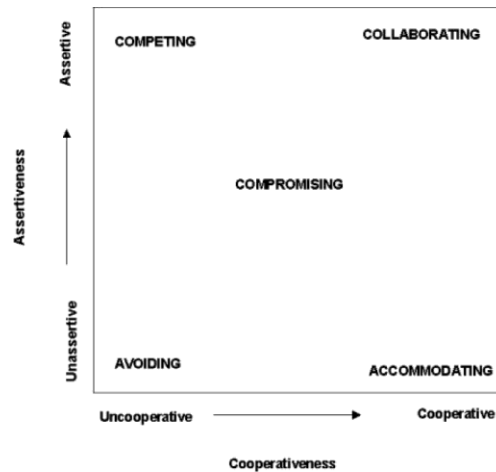
Each of these five approaches can be described according to two dimensions — assertiveness and cooperativeness.⁷ Assertiveness refers to the extent to which a person wants to satisfy self-interest (the priority is outcome), while cooperativeness refers to the extent to which a person wants to satisfy the interests of the other person (the priority is relationship). Interestingly, collaborating and competing are the most assertive, while accommodating and collaborating are the most cooperative. Compromising lies in the middle of these two dimensions, with avoiding being the least cooperative and least assertive. Some research has shown that the higher up in the organization a person is, the greater the use of the two most assertive strategies.⁸ Figure 5.1 below illustrates the approaches mapped on the two dimensions.

⁶ Ralph Kilmann & Kenneth Thomas, “Developing a Forced-Choice Measure of Conflict-Handling Behavior: The MODE Instrument” (1977) 37:2 Educational and Psychological Measurement 309; Joan Mills, Daniel Robey & Larry Smith, “Conflict-Handling and Personality Dimensions of Project — Management Personnel” (1985) 57 Psychological Reports 1135. For online assessment, see online: Kilmann Diagnostics <<http://www.kilmanndiagnostics.com/catalog/thomas-kilmann-conflict-mode-instrument>>.

⁷ This two-dimensional model is adapted from Kenneth Thomas, “Conflict and Conflict Management” in Marvin Dunette, ed., *Handbook of Industrial and Organization Psychology* (Chicago: Rand McNally, 1976).

⁸ Kenneth Thomas, Gail Thomas & Nancy Schaubhut, “Conflict Styles of Men and Women at Six Organizational Levels” (2008) 19:2 International Journal of Conflict Management 148.

Figure 5.1: Relative Importance of Dual Aspects for Each of the Five Modes⁹



A detailed description of each approach is set out in the section immediately below. For details on when to use these various approaches and the contextual factors involved in such selection, see section IV, Strategy Selection, below.

D. Description of Five Negotiation Approaches¹⁰

1. Competing/Directing¹¹

What It Is: You assert your position without considering opposing viewpoints — it is power-oriented and one-sided. High concern for outcome and low concern for relationship characterize this response. It is thus assertive (sometimes even aggressive) and uncooperative. When competing, you pursue your self-interest at the other's expense, using whatever tool or tactic necessary to win your position. Competing also refers to standing up for your rights, setting boundaries and directing others when you know you are right. The underlying aim throughout is to obtain what you want. Using this

⁹ Modified and reproduced by special permission of the Publisher CPP, Inc., Mountain View, CA 94043 from the Thomas-Kilmann Conflict Mode Instrument by Kenneth W. Thomas and Ralph H. Kilmann. Copyright 1974 2002 by CPP, Inc. All rights reserved. Further reproduction is prohibited without the Publisher's written consent.

¹⁰ Modes from the Thomas-Kilmann Conflict Mode Instrument ("TKI"). Note that the terms "modes", "strategies" and "approaches" are used interchangeably in this text. The section entitled When to Use it, below, is adapted from Kenneth W. Thomas & Ralph H. Kilmann, *Thomas-Kilmann Conflict Mode: Instrument Profile and Interpretive Report* (March 2, 2010), online: CPP, Inc. <<https://www.cpp.com/pdfs/smp248248.pdf>>.

¹¹ The second label "directing", refers to the use of this mode when you know you are right. The approach remains the same as in "competing". "Competing" is when you want your self-interests met.

approach, the parties view each other as adversaries and psychologically move against each other to ensure their individual needs are met.

Goal: The goal is to win, usually at any cost, with your interests taking priority over the interests of the other party.

Other Names for It: Positional bargaining, distributive, adversarial and claiming.

Dual Aspects: All about self-interest. Very little, if any, favouring of relationship. Very assertive and uncooperative.

Tools and Skills: Strategic moves and turns are important here. The tools of choice are those that pressure the other party to make more concessions than they intended. These tools include bluffing, limited or no real information disclosure, high demands, low offers, no concessions or limited concessions. The skills required for this type of response are the ability to argue or debate, assert position, power or influence, assert opinions, stand your ground, and be clear about your position.

When to Use It: This response is also appropriate when you are defending a position you know is correct or when quick action is required (*i.e.*, there is no time to negotiate the differences internally). This response will also afford protection in situations where you may be taken advantage of. In a negotiation, this strategy should be employed when the only issue is truly a single fixed resource, such as money. If other things are at stake, such as opportunity, goodwill, time or the quality of a relationship, then this strategy may be inappropriate.

How to Recognize It: This is a key skill when you are dealing with a “wolf in sheep’s clothing”. This is a tactic where the person appears cooperative and collaborative in demeanour and language, but the substance of the strategy used is competing. If the other side offers little information of worth, starts with an unusually high or low offer, makes no concessions (or very few and very small concessions) and spends most of the time reducing your expectations about the outcome, most likely the strategy employed is competing. If the other side is using this strategy and will not change even when the circumstances suggest other strategies will optimize outcome, the best response is to adopt competing strategy as well. In game theory this is called “tit-for-tat”.

Disadvantages: Since differences are accentuated and similarities minimized, the risk of damage to relationship is very high. The interaction will be characterized by lack of trust and conflict. Also, the chance of not getting agreement due to impasse is very high with the use of this strategy.

2. *Collaborating/Co-creative*¹²

What It Is: You use this mode where the relationship and outcome are equally important and of high priority. You work with the other person to find a solution that fully satisfies both parties' interests and maximizes outcomes while at the same time preserving or enhancing the relationship. It involves digging into an issue to identify the underlying interests of the two parties and to find options that meet both sets of interests. Options are generated through creative brainstorming and evaluated by objective criteria rather than subjective positions.

Goal: The goal is to achieve a mutually satisfying agreement, taking into account both parties' goals and underlying interests.

Other Names for It: Principled negotiation, interest-based negotiation, integrative, problem-solving negotiation, mutual gains and creating.

Dual Aspects: Maximizes both outcome and relationship. Gets buy-in from the other side through an understanding of their interests and perspective while obtaining an agreement that satisfies interests. Assertive and cooperative mode.

Tools and Skills: This type of strategy requires good communication skills, including not only what you say and how you say it, but also how well you ask questions and listen. Communication tends to be open and accurate, although information is not shared indiscriminately. The parties look for common needs and goals. Both parties realize that they are interdependent and that their cooperative effort can solve the problems and meet the needs of both sides. Being able to solve problems and create options that satisfy both sides are important skills when employing this strategy.

When to Use It: This approach is particularly appropriate within an organization or in situations where the parties want to establish or maintain a good working relationship. When the relationship and the outcome are equally important, or when your objectives are to learn and gain insights from other people with different perspectives on the problems, this is an appropriate strategy. If you want to get buy-in from others, this approach works well because it incorporates others' needs and interests into the agreement.

Disadvantages: If the issue to be settled is fairly straightforward, using this strategy may be time-consuming and costly relative to the outcome. Where the other party is competing and withholds information, you may be at a disadvantage in providing them with information about your interests and needs. The other side could use such information against you to get what they want (see "How to Recognize It", above under competing strategy), or, where the other party does not want to spend time finding out about your interests, you may end up in an accommodating mode rather than a collaborative one.

¹² This is the most effective and sophisticated negotiation strategy, as it enhances both outcome and relationship. This type of approach is typically underused by lawyers due to lack of time and trust factors. Without formal training, most people do not know how to use it.

3. *Avoiding/Deferring*

What It Is: You do not immediately pursue your own interests or those of the other person. You do not address the issue or conflict. Avoiding might take the form of diplomatically side-stepping the issue, postponing or deferring an item for discussion or decision in a larger negotiation, letting someone else deal with it or simply ignoring the concern, hoping that time will take care of it. There are many times when, for reasons of economic cost (in time and money) or relational cost (damage to a relationship due to escalating conflict), it is better to drop or avoid the issue altogether. It may also be the case that neither the outcome nor the relationship is of particular importance to you. You may feel that your needs can be met without the negotiation.

Goal: To avoid the costs associated with the negotiation, including both economic and relational costs, where the benefits are minimal.

Dual Aspects: All about the relationship with no emphasis on outcome. Unassertive and uncooperative. Note that it can hurt the relationship if the other party wants to deal with the issue.

Tools and Skills: Good judgment is required to know when to avoid a conflict or let others take it over for you, as well as patience and diplomacy. Other skills involve the ability to withdraw, to sidestep issues and leave matters unresolved.

When to Use It: This response is appropriate where the issue is trivial or of only passing importance, or when other, more important items are pressing. It is also appropriate when you perceive there is no chance of satisfying your concerns, such as when you have low power. Perhaps the best time to use it is when the potential cost of confronting a conflict outweighs the benefits of its resolution. An avoidance response also allows people to cool down and reduce tensions in order to gain perspective and composure. If there are others who can solve the conflict more readily, this response should be used.

Disadvantages: Refusing to respond when the other party wants to deal with the issue may have a negative effect on the relationship. If you overuse it, you won't learn how to deal with conflict well and you will never get the agreement you want.

4. *Accommodating/Allowing*

What It Is: You neglect your own concerns in the negotiation to accommodate the interests of the other. This is the approach where the relationship element is given total priority over the outcome. You bury your self-interest or forego your viewpoint to preserve the relationship; you intentionally "lose" on the outcome dimension in order to "win" on the relationship dimension. Using this strategy will show reasonableness, create goodwill and keep the peace.

Goal: To yield to the other side in order to build goodwill, get long-term gain, reduce tension, keep the peace and/or preserve the relationship.

Dual Aspects: All about the relationship and not about outcome unless used to build up good will for later use strategically. This is an unassertive mode and the most cooperative approach. Note the impact on reputation if it is always used as default mode.

Tools and Skills: The skills involved in the use of this mode include selflessness, forgoing your desires, obeying orders and/or the ability to yield.

When to Use It: You would choose this strategy to concentrate primarily on building or strengthening a relationship, or because you want something from the other party in the future. Giving something away creates a debt and the expectation that the party needs to give you what you want later on. A short-term loss is exchanged for long-term gain and goodwill. It can also be used to reduce hostile feelings where there is tension and the relationship is long-term. This strategy could also be used when the outcome is much more important to the other person or when continued competition would only damage your cause as you are outmatched and losing.

Disadvantages: If this response is overused, then others, particularly those who use the competitive mode, may begin to take advantage of you. People will perceive you as a “push-over” and a competitive player will view you as weak. This response may be overused where relationship concerns always have priority over outcome, regardless of the circumstances. Women tend to overuse this approach due to childhood learning and, due to gendered expectations, are expected to accommodate others. Push-back may be encountered where other strategies are used by women — especially competing.

5. *Compromising*

What It Is: The objective is to find an expedient, mutually acceptable solution that **partially** satisfies both parties. When compared with other strategies, it gives up more than the competing strategy but less than the accommodating strategy; it addresses the issue more directly than avoiding but doesn’t explore it in as much depth as with collaborating. In practice, compromising tends to involve splitting the difference, exchanging concessions, flipping a coin or seeking a quick middle-ground position.

Goal: To gain something in terms of both outcome and relationship, without too much time or effort.

Dual Aspects: Partially satisfies outcome and relationship. In the middle on assertiveness and cooperation.

Tools and Skills: The skills involve finding a “middle ground”, making concessions and assessing value.

When to Use It: This strategy is usually seen as an “adequate for most occasions” approach and is often viewed as an acceptable “second choice”. For

example, it is often used when the parties cannot achieve good collaboration, but still want to achieve some beneficial outcome and/or preserve the relationship. It is also often used when the parties need to come to a resolution quickly. Each party will give in somewhat to find common ground. It is used where the outcome or issue is of moderate importance, the parties have equal power and strong commitment and/or little negotiation training.

Disadvantages: As this mode is based on finding a middle ground, the resulting agreement does not maximize the outcome or relationship for either party. It is a response that avoids the disadvantages of other modes but also loses out on their advantages.

III. YOUR PREFERRED STYLE

A. Factors in Preferred Style

Interestingly, we all prefer and overuse one or two approaches from the five described above. We use them habitually, without thought. This style preference can be based on a variety of factors, including childhood experience (the mode used and rewarded in the family), profession (experience in law school and legal culture), personality preferences, culture (national and corporate) and gender (societal expectations moulding our approach). Our preference determines not only the success we have in getting agreement, but also the view that others have of us. Our preference as to mode is related to the relative value we place on outcome or relationship.

ADVANCEMENT TIP

Knowing your preferred style allows you to stop responding automatically and instead to consciously select the best strategy for the situation.

The goal of awareness of these different approaches is to start to use them strategically — to select the strategy or strategies that would work best in the circumstance. In short, to make the selection and use of the different approaches conscious. The TKI is available online¹³ if you wish to determine your use of the five modes — those that are overused and those that are underused.

To help you more fully understand and become aware of why you prefer the mode or modes you do, the section below discusses the various factors that influence and affect preferences.

¹³ See online: Kilmann Diagnostics <<http://www.kilmanndiagnostics.com/catalog/thomas-kilmann-conflict-mode-instrument>>.

1. Profession — Lawyers

Below are TKI results collected from a sample of lawyers consisting of 143 women and 120 men.¹⁴ As shown by the data, the vast majority of this group — both males and females — overuse the competing and avoiding strategies while underusing the collaborative and accommodating strategies. Not far behind in overuse is compromise. These findings are consistent with the results from studies showing that most lawyers, relative to other groups, are competitive, aggressive and like to win.¹⁵

Table 5.3: Underused and Overused Modes on the TKI Reported by Practising Lawyers (N=263)

Mode	Underused	Overused
COLLABORATING	91 (35%)	32 (12%)
COMPETING	44 (17%)	92 (35%)
AVOIDING	51 (19%)	77 (29%)
COMPROMISING	53 (20%)	72 (27%)
ACCOMMODATING	80 (30%)	54 (21%)

Given the demands, custom and culture of legal practice, as well as the adversarial paradigm of legal education, the overuse of competing and compromise is not surprising. It has been shown that most lawyers, regardless of practice area, use the competing strategy in the initial stages of negotiation in order to claim the biggest piece of the pie for their clients. As deadlines loom or time runs out, they switch to compromise.¹⁶ The particular personality traits displayed by most lawyers may be another contributing factor in the overuse of competing, in addition to custom and culture.¹⁷

The overuse of avoiding shown by the group data is also not surprising, as research findings and anecdotal stories suggest that lawyers tend to overuse avoiding in interpersonal situations. This preference for the

¹⁴ Data collected by the author from lawyers attending negotiation seminars.

¹⁵ John M. Houston, Danielle M. Farese & Terence J. La Du, "Assessing Competitiveness: A Validation Study of the Competitiveness Index" (1992) 13 *Personality and Individual Differences* 1153; Sue Winkle Williams & John C. McCullers, "Personal Factors Related to Typicalness of Career and Succession in Active Professional Women" (1983) 7 *Psychol. Women Q.* 343; Larry Richard, "Herding Cats: The Lawyer Personality Revealed" (2002) 29:11 *Report to Legal Management* — Altman Weil 1, online: <<http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20-%20WEBSITE%20-%20ARTICLE%20-%20Herding%20Cats%20-%20Richards1.pdf>>.

¹⁶ Donald Gifford, "A Context-Based Theory of Strategy Selection in Legal Negotiation" (1985) 46 *Ohio St. L.J.* 41 at 58-71; Donald Gifford, *Legal Negotiations: Theory and Applications* (St. Paul, MN: West Publishing Co., 1989) at 32.

¹⁷ See also section III.A.2, Personality, below.

avoiding strategy may reflect the prevalence of introverts in law, as research on personality and conflict management suggests that introverts tend to prefer avoiding.¹⁸ Still another reason may be that lawyers are simply too busy with their practices, where time is literally money, to invest time and energy in negotiating differences.

The low score on collaborating is also consistent with the factors involved in the use and selection of this type of strategy. There is often, especially initially, a general lack of trust between lawyers on different sides of a file. Where a low level of trust is perceived *but not actual*, both lawyers assume the need to protect their clients. In these circumstances, where trust is actually low or perceived to be low, a collaborative strategy would not be tried or discussed as a viable alternative strategy. To compound the issue, lawyers have been found to have a greater sense of urgency than the general population,¹⁹ and the lack of time, again perceived or actual, may curtail the use of this strategy both on files and in the office.

Another reason for the low use of the collaborative strategy generally might reflect the low level of formal negotiation training among lawyers. Although it is the most effective and sophisticated type of negotiation strategy, few individuals can naturally employ it without formal training. I am always surprised to see how few have had training when I ask a group of lawyers how many have taken negotiation training. Given the amount of time spent using this skill in an average day, this low number is astonishing. More and more law schools are including negotiation training in the curriculum; however, even where such courses are available, many schools are not able to keep up with the demand. The result? Not all students who wish to take the course are able to do so. Until negotiation training is more available to law students and more common for practising lawyers, the underuse of collaborative strategy will continue.

Questioning individuals who have scored high on compromise makes it clear that this overuse is work-based. Many areas of legal practice involve this approach in getting agreement with others. It is an appropriate way to get agreement where there are time constraints, but it only gets parties some of what they want. And it does not allow for exploration of interests. In short, it is expedient but not always the best approach. Hopefully through experimenting with other approaches, this overuse of competing and compromise will decrease and the use of collaborative strategy will gain ground.

2. Personality

The most prevalent personality traits and preferences of lawyers are consistent with the overuse of competitive strategy. The personality traits of lawyers that

¹⁸ *Ibid.*

¹⁹ For more information, see section II.A, The Lawyer Personality, in Chapter 1 — Know Yourself: Personal Factors in Advancement.

specifically relate to this overuse include being more dominant, aggressive and competitive than the general public, with a particular emphasis on rights and obligations over emotions, harmony and relationships.²⁰ Since the competitive strategy is all about outcome and not relationship, the use of this approach by lawyers with these personality traits is entirely consistent.

With regard to personality preferences on the Myers-Briggs Type Indicator (“MBTI”), the vast majority of lawyers in both published and unpublished studies conducted over the past 30 years have shown a preference for the Thinking preference in decision-making style on the MBTI.²¹ Approximately 75 to 80 per cent of lawyers in these studies show a preference for Thinking, and these percentages are consistent with those shown by my results for both men and women. The Thinking preference emphasizes logical and objective analysis as well as cool and impersonal thinking — traits very valuable in the practice of law. The other preference in decision-making on the MBTI is Feeling. Individuals with this preference value harmony, personal values and relationships. Not surprisingly, outcome in negotiation tends to be more highly valued by Thinking types, while relationship is more valued by Feeling types.

ADVANCEMENT TIP

Knowing what you bring to the negotiation table and recognizing the styles and traits of others will greatly enhance your negotiation success.

Research examining the correlations between results on the TKI and MBTI support these different priorities. The research findings over the past 35 years²² suggest that Thinking types are assertive and tend to overuse competing, while Feeling types tend to seek harmony and overuse accommodation.²³ The only other dimension on the MBTI that has shown a consistent correlation over time with the conflict approach is the Introvert-Extravert dimension. Specifically, the research findings suggest that Introverts prefer avoiding. Thus, what you bring to the negotiation table is definitely influenced by personality traits and personality preferences.

²⁰ *Ibid.*

²¹ For information on MBTI personality preferences, see section II.B, The MBTI, in Chapter 1 — Know Yourself: Personal Factors in Advancement.

²² Ralph H. Kilmann & Kenneth W. Thomas, “Interpersonal Conflict — Handling Behaviour as Reflections of Jungian Personality Dimensions” (1975) 37:3 Psychological Reports 971; Joan Mills, Daniel Robey & Larry Smith, “Conflict-Handling and Personality Dimensions of Project — Management Personnel” (1985) 57 Psychological Reports 1135; Terrance Q. Percival, Verner Smitheram & Margret Kelly, “Myers-Briggs Type Indicator and Conflict-Handling Intention: An Interactive Approach” (1992) 23 Journal of Psychological Type 10.

²³ See online: Kilmann Diagnostics <<http://www.kilmann.com/conflict.html>>.

3. Culture

Much has been written on national culture and doing business, including negotiation. Indeed, an entire book publishing business has arisen out of it.²⁴ Given the growth of global corporations and the increased frequency of cross-border business activities, it is imperative for corporate lawyers of international clients to be culturally sensitive and to understand different cultural approaches and assumptions. This also applies to lawyers who deal with individual clients from different cultures.

ADVANCEMENT TIP

The negotiator who understands the nuances of cultural difference and has a way to bridge those differences has a decided advantage at the bargaining table.

To give you a sense of the impact of culture on the priority of the two aspects (outcome or relationship) and strategy choice (win-win or win-lose), Jeswald W. Salacuse²⁵ indicates that the goal of American lawyers tends to be a signed contract (outcome), while for certain Asian negotiators, the goal is often the creation of a relationship. Anecdotally, a teaching colleague who negotiates internationally tells of negotiating in Greece, where the initial days are filled with long lunches, dinners and drinking. This can be incredibly frustrating for a North American negotiator who wants to get “down to business” and negotiate substantive issues. However, in cultures where relationship is valued, this socializing is part of the negotiation. It is thought that where the relationship is solid, the negotiation of substantive issues and the resultant business deal will be enhanced. Also, in cultures where relationship is valued, the contract tends to be more general and less filled with specific contingencies.²⁶

As for strategy, based on survey results, it appears that 100 per cent of Japanese responders view negotiation as a win-win situation, while only 71 per cent of American and 55 per cent of German responders do. The country lowest on viewing negotiation as win-win is Spain at 37 per cent.²⁷

²⁴ *Kiss, Bow, or Shake Hands* books are guides for doing business in more than 60 countries. For example Terry Morrison & Wayne Conaway, *Kiss, Bow and Shake Hands*, 2d ed. (Avon, MA: Adams Media, 2006); Terry Morrison & Wayne Conaway, *Kiss, Bow, or Shake Hands: Asia* (Avon, MA: Adams Media, 2007); Terry Morrison & Wayne Conaway, *Kiss, Bow, or Shake Hands: Europe* (Avon, MA: Adams Media, 2007); Christalyn Brannen & Tracey Wilen, *Doing Business with Japanese Men: A Women's Handbook* (Berkeley, CA: Stone Bridge Press, 1993).

²⁵ Jeswald W. Salacuse, *The Global Negotiator: Making, Managing and Mending Deals Around the World in the 21st Century* (New York: Palgrave MacMillan, 2003) at 20.

²⁶ *Ibid.* at 103.

²⁷ *Ibid.* at 15.

It is beyond the scope of this book to delve into the nuances and the encyclopedic amount of information that has been written on this subject, so a list of further readings and resources is provided at the end of the chapter. However, a caveat is warranted. Although awareness of world cultural views — ours and others' — is important, giving too much weight to a person's culture may be detrimental.²⁸ It can result in both sides trying to adopt the other's anticipated and stereotypical negotiation style, potentially creating culture clashes and confusion.²⁹ For example, if you assume that you should be very formal with a negotiator from Germany and the German negotiator assumes that you as a North American will be informal, he or she may feel puzzled when treated formally and perhaps even rebuffed.

In addition to the problems with assuming certain individual characteristics and responses based on generalized cultural characteristics, research suggests that personality and profession tend to have a greater impact on negotiating behaviour than culture.³⁰ Based on this finding, while it is important to understand how a person's culture may differ from your own, it is also important to find out about the individual. Be respectful and curious. These two traits will serve you better than knowing the entire minutiae about a particular culture. People also revert to stereotypes when under pressure, so ensure that you keep stress levels — both yours and theirs — low during negotiation. If this proves difficult, you may find the techniques used in Chapter 3, section IV, Conflict Communication, helpful.

4. Gender

(a) Situational Triggers

Most men and women³¹ view and approach negotiation differently due to divergent values, attitudes, perceptions, assumptions, interpretations and beliefs learned in childhood.³² Over the past decade there has been growing

²⁸ Program on Negotiation Staff at Harvard Law, "Coping with culture at the bargaining table" *Harvard Negotiation Newsletter* 12:7 (2009).

²⁹ Wendi L. Adair, Masako S. Taylor & Catherine H. Tinsley, "Starting Out on the Right Foot: Negotiation Schemas When Cultures Collide" (2009) 2:2 *Negotiation and Conflict Management Research* 138.

³⁰ Program on Negotiation Staff, "Coping with Culture at the Bargaining Table" *Harvard Negotiation Newsletter* 12:7 (2009).

³¹ Note that not *all men* are the same, nor are *all women* the same. The percentage of men and women who follow traditional gender attitudes and behaviour, based on personality and negotiation studies, appears to be around 70 per cent, with 30 per cent being atypical.

³² See, for example, Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* (Princeton, NJ: Princeton University Press, 2003); Linda Babcock & Sara Laschever, *Ask for It: How Women Can Use the Power of Negotiation to Get What They Really Want* (New York: Bantam Dell, 2008); Deborah Kolb & Judith Williams, *Everyday Negotiation: Navigating the Hidden Agendas in Bargaining* (New York: Jossey-Bass, 2003); Deborah Kolb & Judith Williams, *The Shadow Negotiation: How Women Can Master the Hidden Agendas That Determine Bargaining Success* (New York: Simon & Shuster, 2000); Deborah Kolb, Judith Williams & Carol Frohlinger, *Her Place at the Table: A Women's Guide*

evidence of specific and consistent gender differences in negotiation shown by groups of business professionals, university students and academics. Researchers have labelled situations that trigger these gender differences in negotiation as situational triggers.³³

So what about lawyers — does gender matter in our profession? Studies looking at differences between men and women lawyers when they negotiate professionally show no differences. That is, they negotiate equally well when they negotiate as an agent for others. This equal performance may be explained by a situational trigger that creates an advantage for women — when negotiating on behalf of others, women get better results than men. Women say they feel empowered and energized when they negotiate for family members, colleagues and clients, and the findings support this. Female executives negotiating as a mentor for another person negotiated salaries 18 per cent higher than when they negotiated for themselves.³⁴ This increased performance was not shown by men.

A university teaching colleague, after hearing me talk about this particular trigger, told me that this information allowed him to finally figure out something that had puzzled him for years. At a large aeronautics company where he worked, the only female manager was paid the least of all the managers, but her team received the highest compensation of all the teams. And now he finally knew the reason. She negotiated the highest salaries for her team but not for herself.

This story also illustrates another gender trigger — the differences between men and women when they negotiate for themselves. Most men tend to ramp up when they negotiate for themselves. This is consistent with the reported exhilaration that men report during competitive negotiation. As a result, they negotiate to promote their self-interests far more often than women do. In direct contrast, most women, including women lawyers, feel uncomfortable negotiating for themselves and they do it far less often. One lawyer, to fortify her negotiation prowess, confessed that she stayed in her office to negotiate any work relating to her home.

These gender differences in negotiating self-interests are reflected in the findings that most women see fewer opportunities for negotiation and accept what is offered to them. This is particularly highlighted by the findings that 57 per cent of men negotiated their first employment package versus only 7 per cent of women.³⁵ This gender difference has a huge

to *Negotiating Five Key Challenges to Leadership Success* (New York: Jossey-Bass, 2004); Lee Miller & Jessica Miller, *A Women's Guide to Successful Negotiating* (New York: McGraw Hill, 2003).

³³ For detailed discussion, see Delee Fromm, "Gender and Negotiation" in C. Hanycz, T. Farrow & F. Zemans, eds., *The Theory and Practice of Representative Negotiation* (Toronto: Emond Montgomery, 2008).

³⁴ Dina W. Pradel, Hannah Riley Bowles & Kathleen L. McGinn, "When Does Gender Matter in Negotiation?" *Harvard Negotiation Newsletter* (November 2005) at 4.

³⁵ *Ibid.* at 1.

economic impact on women and has been proposed as a reason for the large gender gap in wages. A small salary difference at the beginning of a career today, accumulated over a lifetime, can end up costing the non-negotiator at retirement in excess of \$1,500,000.³⁶

ADVANCEMENT TIP

Often you don't get what you deserve, you get what you negotiate. Do your research, seek opportunities for making your value visible and ask in a way that works best with your audience.

This gender trigger is not only related to level of compensation. Often women lawyers will take what is offered and not negotiate for more or different. Once you are aware of the resources that can be negotiated, you will start to see more negotiating opportunities. Be assured that negotiating for self-interests makes your value visible if you ask with skill and awareness. It assists others with whom you work to know what your interests are. Many women I have coached or who have attended my seminars have told me that the response to their asking was unexpectedly positive. So look for negotiating opportunities and learn how to ask in a way that promotes relationship and outcome.

A third gender trigger is evoked in ambiguous situations. Where it is not clear what the negotiating parameters are, women set their aspirations low. For women lawyers this gender trigger can help to explain the latest survey data (2012) collected by NAWL which show that the gap between male and female compensation at the equity partner level does not correlate with male/female differences in billable hours, total hours or books of business.³⁷ This particular trigger may also be related to the exceedingly low numbers of women lawyers in leadership positions in law firms compared with the percentage of women in law school. This mirrors what is seen in corporations with low numbers of women at the C-level³⁸ in corporations and on corporate boards.

ADVANCEMENT TIP

Recognize your gender triggers by becoming aware of what causes you to ramp up your negotiation prowess and what may cause you to stumble.

³⁶ For details of this calculation, see Linda Babcock & Sara Laschever, "First You Have to Ask" *Harvard Negotiation Newsletter* (January 2004) at 3.

³⁷ See Business Wire, "National Association of Women Lawyers and NAWL Foundation Releases Seventh Annual Survey" (October 22, 2012), online: <<http://www.businesswire.com/news/home/20121022006432/en/National-Association-Women-Lawyers-NAWL-Foundation-Releases>>.

³⁸ C-level denotes the top level of management in corporations, such as CEO, CFO, COO and CCO.

Awareness, experience and training can mitigate challenges and harness strengths.

The gender differences in attitude, beliefs, approaches and assumptions that underlie these gender triggers are clearly demonstrated in survey results collected over the past 10 years.³⁹ The results are amazing and consistent with what is disclosed in seminars. For example, 78 per cent of corporate women, 65 per cent of women lawyers and 17 per cent of men say *they give in or compromise in order to maintain the connection they have with others*. When asked *if they accept the terms of a new assignment or project rather than negotiate them*, 66 per cent of corporate women, 55 per cent of women lawyers and 27 per cent of men say they usually take what is offered to them. As for value creation in negotiation, 100 per cent of women lawyers, 95 per cent of corporate women and 89 per cent of men said *they tried to create value for themselves and others in a negotiation*. Interestingly, while most women lawyers show no difference from male lawyers in their preference for using competitive strategy, they are similar to corporate women in that they don't like the gamesmanship involved. Seventy-six per cent of women lawyers, 62 per cent of corporate women and 38 per cent of men indicate that *when others push too hard for what they want it affects their relationship with the other party*.

The reasons put forward for gender differences in negotiation include: increased anxiety for women when negotiating in conflict situations; the tougher stance taken in negotiations against women; men being more competitive and outcome-oriented; and women valuing relationship more than outcome. As to the origin of these gender differences, most authors agree that they derive from societal expectation and conditioning during childhood,⁴⁰ although some evidence on gender differences in neuroanatomy suggests that the origin may be a combination of both nature and nurture.⁴¹

³⁹ Survey responses collected by the author from approximately 400 corporate women in the industries of technology, food and commercial real estate, 100 women lawyers from large and medium-size law firms and 78 men who were educational professionals.

⁴⁰ See, for example, Pat Heim & Susan Golant, *Hardball for Women: Winning at the Game of Business* (New York: Penguin Group, 2005) and Deborah Tannen, *You Just Don't Understand: Women and Men in Conversation*. (New York: Harper Collins, 1990).

⁴¹ Louann Brizendine, *The Female Brain* (New York: Morgan Road Books, 2006) at 5. Brain studies reveal that females have more neurons in the brain centres for language, hearing, emotion and memory. Males in contrast have two-and-a-half times the brain space devoted to sex drive as well as larger brain centres for action and aggression. Laura Spinney in "Boy Brain, girl brain: How the sexes act different" *New Scientist* (March 8, 2011) 12 reveals that women have larger proportionate brain areas related to decision-making and problem-solving as well as emotional regulation. Activity levels are revealed in Michael Gurian & Barbra Annis, *Leadership and the Sexes: Using Gender Science to Create Success in Business* (San Francisco: Jossey-Bass, 2008) whereby women have more activity than men even when at rest.

(b) Negotiation Approaches

Gender differences have also been consistently shown in the types of negotiation approaches preferred by men and women; most men prefer competitive negotiation while most women prefer cooperative strategies. Most women are uncomfortable with the competitive strategy and, as a result, prefer a cooperative response based on relationship such as accommodating or compromising. Most likely due to both personality and profession, the majority of women lawyers are comfortable with competitive strategy. Based on survey data,⁴² 60 per cent of corporate women say they find it hard to negotiate for themselves while only 40 per cent of women lawyers have the same difficulty. Thus it appears that personality and profession trump gender socialization for women lawyers. This finding is mirrored in the TKI group results shown in Tables 5.4 and 5.5 below for men and women, respectively.

Table 5.4: Underused and Overused Modes on the TKI Reported by Practising Male Lawyers (N=120)

Mode	Underused	Overused
COLLABORATING	47 (39%)	12 (10%)
COMPETING	17 (14%)	52 (43%)
AVOIDING	19 (16%)	34 (28%)
COMPROMISING	25 (21%)	38 (32%)
ACCOMMODATING	30 (32%)	18 (15%)

Similar to the large group's data, male lawyers tend to overuse the competing and compromising strategies while underusing collaborative and accommodating strategies. The results for women lawyers show a very similar pattern and are consistent with the larger group's data. Thus gender does not have a significant influence in the approaches used by male and female lawyers. Rather, personality and profession appear to be more influential for lawyers in the use of preferred and non-preferred approaches. The only difference of note is that the avoiding strategy is the second-most overused approach for women, whereas for men it is the compromising strategy. This gender difference may be reflective of the high relationship and low power orientation of the avoiding relative to the compromising strategy. However,

⁴² Survey responses collected by the author from approximately 400 corporate women in the industries of technology, food and commercial real estate, 100 women lawyers from large and medium-size law firms and 78 men who were educational professionals.

given that male lawyers also show a predominant use of the avoiding strategy, this difference does not appear significant.

Table 5.5: Underused and Overused Modes on the TKI Reported by Practising Women Lawyers (N=143)

Mode	Underused	Overused
COLLABORATING	44(31%)	20(14%)
COMPETING	27(19%)	40(28%)
AVOIDING	32(22%)	43(30%)
COMPROMISING	28(20%)	34(24%)
ACCOMMODATING	41(29%)	36(25%)

IV. STRATEGY SELECTION

In addition to the situational factors set out above in section II.D, Description of Five Negotiation Approaches, above, such as the relative importance of the dual aspects or when to use each approach, there are other factors in strategy selection. Becoming familiar with these factors will allow you to more easily select the most appropriate strategy in the circumstances.

A. Factors

1. **The Other Side's Strategy:** This is the most important factor in determining which type of negotiation strategy to employ. Be sure to evaluate the substance of the responses and not just the form or demeanour in determining the other side's strategy. If the other side has made a very high initial demand and few concessions, despite appearing very congenial and friendly, then it would be best to "call" the strategy and, if possible, negotiate the use of a different, more effective strategy.⁴³ If this fails, game theory suggests it would be best to adopt a competitive strategy also. Some academics recommend the use of the collaborative strategy in all situations. However, when the other side is using a competitive strategy and is unwilling or unable to switch to a cooperative strategy, it is important that you be able to use competitive as well.

⁴³ This is called a *meta-negotiation*, where you negotiate with the other side about the negotiation strategy that will be used. If they won't play, you might want to employ *Negotiation Jujitsu*. See Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: How to Negotiate Agreement Without Giving In*, 3d ed. (New York: Penguin, 2011) c. 7 at 109. See also section IV.A.8, Dealing with Competitive Verbal Tactics, in Chapter 3 — Communication: Make it Clear.

2. **Future Dealings:** Using a competitive strategy does not promote a good relationship between the parties. Protracted negotiations, which are a hallmark of competitive strategy, are also not conducive to a good relationship. For day-to-day negotiations with colleagues and staff, this is an important factor to consider.
3. **Pressure to Reach an Agreement:** Research has shown that time pressures result in lower initial demands, faster concessions and lower expectations.. Compromise is theoretically the fastest strategy, as mutual concession-granting concludes negotiations quickly, while tactics involved in competitive and collaborative negotiation require more time.
4. **Stage of Negotiation:** Researchers have observed that in practice lawyers typically use a competitive strategy at the beginning of negotiation to appear tough, and then become more cooperative as the negotiation continues.⁴⁴ Although most negotiations require both claiming and creating, they are best in the reverse order. Once you have expanded and added items to the negotiation, it is important to be able to claim effectively.
5. **Number of Issues:** When the item under negotiation is money, or a single item, either competitive or compromise strategies may be used. Where there are multiple issues, collaborative negotiation is the strategy of choice to avoid impasse and optimize outcome.
6. **Needs of the Parties:** These include economic, legal, social, psychological and moral needs. These needs can be used to expand the number of items being negotiated for by the parties.
7. **Number of Parties:** Where there are only two parties, any type of negotiation strategy may be chosen. When there are more than two parties, the best strategy is collaborative while the worst is competitive. Compromise strategy may be used if no other party is competitive. If a competitive strategy is used, the risk of an impasse is very great where multiple parties are involved.
8. **Level of Trust:** Where the level of trust is low or perceived to be low, most parties use a competitive strategy to protect themselves and/or their clients. If a collaborative strategy is best in the situation, then it is important to build trust at the beginning of the negotiation and to maintain it.
9. **Amount of Power:** If you or your client has little power relative to the other side, using a collaborative strategy in order to encourage the other side to adopt it is advantageous as such strategy reduces the effect of power. Also, evaluate why the other side needs to negotiate

⁴⁴ Donald Gifford, "A Context-Based Theory of Strategy Selection in Legal Negotiation" (1985) 46 Ohio St. L.J. 41 at 58.

with you. This exercise may make you aware of a source of power you had not appreciated.

These factors are shown in Chart 5.2 below for ease of reference. Only three of the five approaches are shown — competitive, compromise and collaborative. Although avoiding works well in combination with other strategies within larger legal negotiations, avoiding by itself is usually not an option where a document needs to be finalized or a litigation case settled. Similarly, accommodation is rarely the sole strategy of choice in larger legal negotiations, although, like avoiding, it works well within the context of larger legal negotiations.

Chart 5.2: External Factors to Determine Your Negotiation Strategy⁴⁵

		COOPERATIVE		
		Competitive	Compromise	Collaborative
1.	Other Side's Strategy: Competitive Compromise Collaborative	X	X X	X X
2.	Future Dealings/ Relationship Priority		X	X
3.	Pressure to Reach Agreement (limited time)		X	
4.	Stage of Negotiation: Initial Later	X	X	X
5.	Number of Issues: Single/Fixed Pie Multiple	X	X X	X
6.	Needs of the Parties: Different Same	X	X	X
7.	Multiple Parties			X
8.	Low Level of Trust	X	X	

⁴⁵ Taken in part from Donald Gifford, "A Context-Based Theory of Strategy Selection in Legal Negotiation", *ibid.* at 58.

9.	Less Power than Other Side		X	X
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V. STRATEGY USE

A. Illustration of Competitive Negotiation

Now that you have a better idea of the approach you prefer and most likely overuse, it is important to understand when to use strategies appropriately and contextually. To further your understanding of the five strategies and show how they are used in negotiations, below is an example of a negotiation at a garage sale. We negotiate all the time and are seldom aware of it until we are conducting formal negotiations. The example below illustrates not only the strategy employed, but also how reputation and relationship are affected by the strategy used.

Pete, Debbie's neighbour, has found a golf sock at the sale that he likes. It is marked \$5.

Pete: Wow, this is a rather high price for this golf sock — \$5 has to be pretty close to what you originally paid for it. (*competitive move — reducing expectations*)

Debbie: That's a good one, Pete. It was quite a bit higher than that (*correcting competitive move*), but since we are next-door neighbours I am willing to sell it to you for a better price — how about \$2.50? (*compromise*)

Pete: Well, since we are neighbours (*competitive move using relationship*), how about you just give it to me for nothing? I am sure you don't want it anymore and I am happy to take it away. (*competitive*)

Debbie: Pete, if you want it that much you can have it for nothing. (*accommodating*)

Note that in this negotiation Pete makes no concessions in relation to Debbie's concession — her concessions are all one-sided. This negotiation from Debbie's side is based solely on relationship and not on monetary outcome, *i.e.*, getting money for the golf sock. There is a gendered aspect to the negotiation approach illustrated in this example in that most women tend to overvalue relationship, while most men tend to overvalue outcome. Unfortunately, overvaluing one or the other without evaluating the importance of each in the negotiation causes habitual rather than strategic responses.

When a negotiation is based solely on price, the range of responses is limited to: (1) compromise by both parties doing a ritualistic dance to a middle position between demand and offer; (2) complete accommodation by one side through unilateral concessions that speed up the negotiation and

keep the relationship intact; or (3) no movement by either party from their original positions, leading to an impasse.

When the negotiation is only about one item — usually money — it is called a *zero-sum game* or *fixed pie*. This situation is appropriate for competitive negotiation or claiming. Each of the parties claims because what one person gains the other person loses — a win/lose situation.

B. Illustration of Collaborative Negotiation

One of the key differences with collaborative or principled strategy is that it allows for the creation of additional negotiation items — items based on the interests of each party and used to satisfy those interests. A *zero-sum game* is all about what each party will ultimately get of the item being negotiated, while collaborative strategy, although it is also about outcome, focuses on the interests or needs of the parties rather than on the position of the parties regarding the item being negotiated.

Now let's see how collaborative strategy would play out in the same scenario.

Pete: Wow, this is a rather high price for this golf sock — \$5 has to be pretty close to what you originally paid for it. (*competitive move — devaluing the value of the item and reducing expectation of the seller*)

Debbie: You are such a kidder, Pete. That sock cost \$50 new at a pro shop and is in really good shape. I doubt that my husband Ted ever used it. (*using fact to correct competitive assertion*) Ted has a lot of golf items he is selling today and I assume you want to buy golf items — is that correct? (*collaborative — probing interests*)

Pete: Well I just started golfing, so yeah. (*confirming interest*)

Debbie: Did you see the other golf items we have over there? Ted really has a lot of duplicates. (*collaborative — expanding the items being negotiated based on Pete's interest*)

Pete: These are great. What else do you have?

Debbie walks over to another table to show him the other golf items.

Debbie: These are priced to sell, Pete, based on a huge discount from the original price. Most of them are 10 per cent of the original price. Would you agree that these are fair prices? (*using objective criteria to set the price and to evaluate it*)

Pete: Yeah, these are good prices.

Debbie: I know that Ted will be pleased to hear that his extra golf paraphernalia went to you. Hey — Ted just lost one of his regular golf partners for this Saturday — would you be interested in golfing with him? (*collaborative — building relationship through options that satisfy interests*)

Pete: I would be very interested — thanks for mentioning it.

Debbie: Great. I'll ask Ted to give you a call.

In this scenario, interests are explored and additional items brought in to the negotiation to satisfy the parties. If Pete had only bought the golf sock using competitive strategy, the outcome would have been sub-optimal for both parties and the relationship between the neighbours might possibly have deteriorated. It is by exploring interests in a situation that allows for value creation that it is possible for negotiating parties to be mutually and optimally satisfied. However, a garage sale is typically not a value-creating situation. In the scenario above, all of the expansion was suggested by Debbie, and let's hope Debbie truly knew what Ted's interests were. In a truly collaborative situation, both parties, after discovering their interests, would suggest options to satisfy those interests. A detailed examination of the process and all elements of collaborative or principled negotiation is beyond the scope of this chapter, so refer to *Getting to Yes*⁴⁶ and *Essentials of Negotiation*⁴⁷ for more information.

C. Lease Negotiation

To further illustrate the use of the five approaches, set out below is a hypothetical discussion of a lease between two lawyers, with Sam acting for the tenant and Ann acting for the landlord. As you read this, think about how you discuss clauses in a legal document and which approaches you tend to use. Are they the same as those shown in this discussion?

Ann: My client is okay with the deletion of clauses 4, 12, 19 and 25 (*accommodation*)

Sam: What about clause 35 on Landlord repair? We want at least 24 hours' notice on visits by the landlord for repairs.

Ann: Sometimes that length of notice is not possible in certain circumstances — for example, if an emergency repair is required. I am sure your client would not like water dripping into its office due to the requirement of a notice period.

Sam: How about we make an exception to the requirement of 24 hours' notice for emergencies or where the tenant waives the notice period? (*compromise*)

Ann: The exception might be acceptable to my client. I will check. (*deferral and possible accommodation*) My client is unable to allow deletion of clauses 16, 24, 32 and 37. (*directing*)

⁴⁶ Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: How to Negotiate Agreement Without Giving In*, 3d ed. (New York: Penguin, 2011) at xxvii.

⁴⁷ Roy Lewicki, David Saunders & Bruce Barry, *Essentials of Negotiation*, 4th ed. (Boston: McGraw-Hill/Irwin, 2006).

Sam: Fine (*accommodation*) on all but 32. I want to check with my client on that. (*deferral*). I suspect that it will continue to insist that it be deleted. (*directing*) With regard to the section on HVAC, I want to explore the issue of operating the system on weekends and after 6 on weekdays. How flexible is your client on this point? This is an important interest of my client as it is a tech company and staff tend to work non-regular hours. (*collaborative — exploring interests*)

Ann: I know that my client has other tenants who have also been interested in this issue and they have come to a mutually satisfactory arrangement with my client. Tell me more about what your client is asking and what is important to it. (*collaborative*)

Sam: Here is the information I have on its use outside of the regular workday in its previous space. Can you tell me more about the arrangements your client has with other tenants?

Ann: I will have to get permission from my client to provide that information. How about I give you a call in the next few days once I know more? (*deferral*)

Being aware of the strategies that you use and that others use is a first step in being able to choose strategies consciously and to prepare for the negotiation session. Most people don't know how often they negotiate in the day-to-day, or which approach they are using. Once you are aware of this, you will better be able to consciously select the one that is most appropriate for the situation. Also, recognizing which approach your negotiating partner is using will help you to determine how best to respond.

VI. STRATEGY IMPLEMENTATION

Once you have selected a strategy, if you don't know how to implement it or use tactics to move it along, then it may not matter that you have selected the best one for the circumstances. Also, knowing how to use it will help you recognize its use by others. Find the strategy below whose phrases come most easily to you. This ease most likely reflects your preferred strategy. If competing or directing phrases come easily, be aware that this strategy, if overused in the day-to-day, will not assist you in being politically astute or in cultivating relationships. The strategy that maximizes both relationship and outcome is collaborative. Although it takes time to implement, with repeated use it will become easier and quicker, especially if used with the same colleagues or with those who also are skilled in using it. Note that if you are already excellent at using and implementing accommodation, you may wish to get comfortable with directing phrases.

ADVANCEMENT TIP

A key to using a strategy well is easy implementation. Knowing the language of an approach makes it easy to use and enables you to recognize when it is being used by the other side.

Figure 5.2: The Language of the Five Modes⁴⁸

Competing/Directing — You assert your position without considering the opposing viewpoint. It can also involve stating what is correct or right in the circumstances. You tell others what you want and what you think.

- Here is my position.
- I am not going to move from this amount.
- This position is valid and movement is not possible.
- I want you to ...
- I am not ... and that is final!
- You need to ...
- This is what we are going to do.
- I expect you to ...
- No.
- Here is how we will proceed ...
- My client will not agree.

Collaborating/Co-creating — You use this mode where the relationship and outcome are equally important and of high priority, or a creative solution needs to be found. You work with the other person to find a solution that fully satisfies both of your concerns and maximizes outcomes while at the same time preserving or enhancing the relationship. You are open to finding a good solution and ask a lot of questions of the other side.

- Help me to understand ...
- Tell me what you think about ...
- Perhaps we can come up with a solution that works for both of us.
- That is one option, what about some others?
- How can we both get what we want from this?
- Money is one interest, do you have others?
- Can you explain to me what it is you are interested in getting from this agreement?
- **Why** do you want that? **Why not** this option? **What if** we were to do this?
- I am interested in your thoughts.
- Let's review all of the options.

⁴⁸ Modes are based on the Thomas- Kilmann Conflict Mode Instrument ("TKI"). The phrases are created by the author.

Avoiding/Deferring — When avoiding, you do not immediately pursue your own concerns or those of the other person. You do not address the conflict.

- Is that a new suit?
- Is that a new haircut?
- I don't have time to talk about that issue right now.
- Isn't this weather weird?
- Maybe we can talk about this later.
- Let me think about it and get back to you.
- We can't deal with that now.
- So how was your weekend?

Compromising — When compromising, the objective is to find an expedient, mutually acceptable solution that partially satisfies both parties.

Why don't we meet in the middle?

- Let's flip a coin.
- Let's split the difference.
- If you give me option A, you can have option B.
- Why don't we do it your way this time and next time this issue arises, we can do it my way.
- You can deal with the first half of the agenda and I will deal with the last half.

Accommodating/Allowing — Accommodating is an unassertive and very cooperative response that is the opposite of competing. In this response, the relationship element is given priority over the outcome.

- It would be my pleasure.
- Of course you can do that.
- I trust your judgment, we'll do it your way.
- What would work best for you?
- I'm open to whatever you think is best.
- Just let me know what you want me to do.
- It's no problem — really.

Avoiding may seem less valid than the others, especially based on the phrases above illustrating this approach. However, this can be one of the most politically astute approaches to use in office situations. One of the most politically savvy partners I knew used it adroitly to deflect a difficult conversation with an associate. Suddenly, the coffee stains on the floor became the focus of attention and the contentious current topic died. So watch for its tactical and strategic use by others.

TRY IT OUT

Think about a situation you are currently in that requires you to settle a difference or come to an agreement with a colleague. Go through each of the different phrases for each of the five strategies and pick one. Look at the different factors involved, then evaluate which approach would be best in the circumstance. Or use the following example:

You have been asked to prepare a memo with a colleague for a senior partner. **Your colleague wants to insert information that you don't want in the memo.** Go through the language guide and select a phrase to say to your colleague from each mode. Once you have done that, evaluate and determine the approach that would be best in the situation.

[the answers are found at the end of this chapter]

VII. YOUR SKILLS DEVELOPMENT PLAN — NEGOTIATION

As with all skills development plans, it is important to understand what you bring to the table and at which level you are currently operating. Figure 5.3 below provides a guide to the various skill levels. Once you have assessed your level and *know where you are*, determine *where you want to be*. Go one level up. Use this information to fill in the skills development plan found in Chapter 2 (See Figure 2.5). Think about the resources you will need to go to the next skill level. Read section V.A, Tools in Skills Development, in Chapter 2. Fill in your plan and then work consistently with your plan. Work on it at least weekly in order to achieve the level of skill you want. Often when people complete the analysis they feel that they are done. Be aware of that trap and find ways to keep at it. It will be worth the effort!

Figure 5.3: Skill Levels in Negotiation

Dimensions: Negotiation Strategies, Strategy Use, Preferred Style, Strategy Selection, Gender Triggers, Negotiating Self-Interests

Expert — flexibly uses multiple negotiation strategies; recognizes and easily mitigates situational triggers that decrease performance; harnesses triggers that create great outcomes; creates opportunities for negotiation (for self and others); negotiates self-interests with ease; is able to negotiate the use of strategy with the other side when necessary; is able to forego preferred style for most appropriate approach in the situation; recognizes opportunities for negotiation and seizes them; is politically astute in assessing the value of relationship and outcome in each negotiation.

Confident — is able to use most negotiation strategies with versatility and flexibility; combines them within larger negotiations; almost always uses personal triggers to get better results; frequently selects the most appropriate negotiation strategy in the situation; recognizes others' personal styles in negotiations; is

aware of preferred style and how it affects negotiations; is usually politically astute in office negotiations.

Good — comfortable using different negotiation strategies; occasionally overuses competitive and compromise strategies; selects strategies based on outcome versus relationship; mitigates personal triggers; is aware of the factors for selection of the most appropriate strategy; is aware of personal style; is in the process of expanding the use of strategies to suit the context.

Competent — knows the theory of the different negotiation strategies; is somewhat aware of personal preference in styles; often overuses competitive strategy; in inter-office situations overuses avoiding strategies; is not aware of the dual aspects of negotiation; recognizes personal gender triggers.

Novice — negotiates somewhat adequately for client; is unaware of gender triggers and personal style; likes negotiating competitively; generally avoids getting agreement or settling differences with colleagues; is not politically astute in the use of negotiating skills.

VIII. KEY IDEAS

- In order to advance in law it is important to negotiate well, and this starts with becoming aware of what you bring to the negotiating table, including the strategies you prefer and tend to overuse.
- Although there is a vast array of names used to describe negotiation strategies, they generally fall into two main categories — claiming and creating.
- Competitive, which is a claiming strategy, is most appropriately used in situations with limited resources so that what one party loses the other party wins (*win-lose*). Collaborative involves co-creation by the parties, where the negotiation process involves expanding or creating new items to satisfy the parties' interests. This is called *win-win*.
- In every negotiation, two aspects are being negotiated — relationship and outcome. Determination of which aspect is most important will help you select the most appropriate type of strategy and more easily recognize the strategy used by others.
- We all have a negotiation style that we use automatically. Knowing your preferred style will help you to stop responding habitually and allow you to consciously and contextually select the best strategy.
- Many factors contribute to the selection of our preferred style, including childhood experience, personality preferences, culture (national and corporate), gender and profession.
- Due to personality and profession, most lawyers (both men and women) overuse competitive and underuse collaborative strategies.

- There are no gender differences when lawyers negotiate professionally. However, when they negotiate self-interests they display the same gendered responses as non-lawyers.
- A key skill of a politically astute negotiator is the ability to evaluate the impact of strategy choice on reputation and relationship, and to weight this impact against outcome.

IX. FAQ

Should you throw out the first number in a competitive negotiation? The first number is typically put forward by the seller in a sales negotiation. The seller knows the value of the item being sold. The first number anchors the negotiation — it sets up the parties psychologically for the negotiation price range. That is why it is important to do your research so that you know the target range before you start to negotiate. A competitive negotiator will set the demand or offer unreasonably high in the hopes that the other negotiator will buy into that negotiation range. By responding with a low but fair number, you signal that you are playing the negotiation game, but you are not agreeing to the subjectively high range of the competitive player. Many lawyers say they wait for the other side to reveal its position. However, the initial position sets the expectations of the parties, and thus the initial position in many cases significantly influences the final outcome. This is why it is called anchoring. Thus, you want to be the first to put out a number when you have done the research and the range is knowable. If the range cannot be ascertained, such as with art or in a new legal situation where the parameters have not yet been adjudicated, you still want to put out the first number. It sets up expectations of outcome — sometimes even unconsciously. So always do the research and think carefully about how to anchor the negotiation.

How do you convince the other side to switch from competitive to collaborative strategy? Most competitive players, especially those who are not trained in negotiation and who have adopted this strategy by default, don't have other strategies in their repertoire. Thus, changing their use of strategy can be very difficult. Some suggest sending the other side a book on collaborative strategy and then negotiating which strategy is to be used. This is called a *meta-negotiation* or negotiating how to negotiate. This approach will not be welcomed by truly competitive players. Another approach is to "call it". As with any tactic that is designed to work psychologically against a negotiator, naming the tactic or the strategy defuses its power. The game is up. Once the strategy being used has been named, the game rules are no longer hidden and can be openly discussed. If the factors are not conducive to using competitive, then it is important to have this discussion so that you obtain the best results you can for your client. Another approach, which is the most sophisticated, is to model the behaviour you want the other negotiator to use; ask about interests, use objective criteria to evaluate the other side's positions and your own, and come up with creative options to expand

the pie. One note of caution: if the other side is truly competitive, do not provide any important information that can be used against you to provide a better deal for the other side. Being collaborative does not mean sharing information indiscreetly. If you fail to convince the other side to use a different strategy, and you need to negotiate with them to get agreement, then adopt competitive strategy as well.

Is there a “silver bullet” tactic? Everyone is looking for a move that will cause the other negotiator to capitulate completely and agree to whatever you are asking. There are no miraculous moves or tactics, as each one loses its power when exposed. However, there is one that you must watch for; it can be very successful and difficult to detect. I call it the *wolf in sheep’s clothing*. This is where the substance of the strategy is separated from demeanour and language. Collaborative language is used with a friendly and pleasant demeanour while the substance of the move is based on competitive strategy. When it is used successfully, you will wonder why the negotiation is not moving forward, why the parties seem willing to get agreement but nothing is getting resolved, solved or agreed to. If the negotiator appears reasonable and friendly, is using lots of “win-win” language but is providing very little valuable information, is making very few or no concessions and is staying put on the initial position, then you are dealing with a wolf in sheep’s clothing. See the discussion above for suggestions on switching a competitive player to collaborative strategy.

ANSWERS TO TRY IT OUT EXERCISE

Phrases from Each Mode

Competing: *No, we are not going to include that information.*

Avoiding: *Is that a new suit?/not responding to calls/ letting the senior partner deal with it*

Accommodating: *Sure, let’s include that information.*

Compromise: *Let’s include half of the information / Let’s put that information in an appendix / Let’s footnote the information to narrow its impact in the memo / Let’s each of us prepare a separate memo.*

Collaborating: *Help me to understand why you want this information included in this memo? Why is this information important?*

Evaluating the Most Appropriate Mode: *Collaborative in this circumstance is the most appropriate, as it allows you to gather facts about the information, shows respect for your colleague and increases your reputation for openness and reasonableness; in short, it maximizes outcome (an impressive and accurate memo), relationship (your colleague will want to work with you again) and reputation.*

X. RECOMMENDED READING AND RESOURCES

Listed below are the books and online resources I have found most helpful and recommend to clients.

Books

- Babcock, Linda, & Sara Laschever. *Ask for it: How Women Can Use the Power of Negotiation to Get What They Really Want*. New York: Bantam Dell, 2008.
- . *Women Don't Ask: Negotiation and the Gender Divide*. Princeton, NJ: Princeton University Press, 2003.
- Brannen, Christalyn, & Tracey Wilen. *Doing Business with Japanese Men: A Women's Handbook*. Berkeley, CA: Stone Bridge Press, 1993.
- Brett, Jeanne. *Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries*. 2d ed. San Francisco: Jossey-Bass, 2007.
- Brizendine, Louann. *The Female Brain*. New York: Morgan Road Books, 2006.
- Daicoff, Susan. *Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses*. Washington, DC: APA, 2004.
- Fisher, Roger, William Ury & Bruce Patton. *Getting to Yes: How to Negotiate Agreement Without Giving In*. 3d ed. New York: Penguin, 2011.
- Gurian, Michael & Barbra Annis. *Leadership and the Sexes: Using Gender Science to Create Success in Business*. San Francisco: Jossey-Bass, 2008.
- Hanyecz, Colleen, Trevor Farrow & Frederick Zemans, eds. *The Theory and Practice of Representative Negotiation*. Toronto: Emond Montgomery, 2008.
- Harvard School of Business. *The Essentials of Negotiation*. Boston: Harvard Business School Press, 2003.
- Heim, Pat & Susan Golant. *Hardball for Women: Winning at the Game of Business*. 2d ed. New York: Penguin Group, 2005.
- Kolb, Deborah, & Judith Williams. *Everyday Negotiation: Navigating the Hidden Agendas in Bargaining*. New York: Jossey-Bass, 2003.
- Kolb, Deborah, Judith Williams & Carol Frohlinger. *Her Place at the Table: A Women's Guide to Negotiating Five Key Challenges to Leadership Success*. New York: Jossey-Bass, 2004.
- Lewicki, Roy, Alexander Hiam & Wise Olander. *Think Before You Speak: A Complete Guide to Strategic Negotiation*. New York: John Wiley & Sons, Inc. 1996.
- Lewicki, Roy, David Saunders & Bruce Barry. *Essentials of Negotiation*. 4th ed. Boston: McGraw Hill/Irvin, 2006.

- . *Negotiation: Readings, Exercises and Cases*. 6th ed. Boston: McGraw Hill/Irvin, 2010.
- Morrison, Terry, & Wayne Conaway. *Kiss, Bow and Shake Hands*. 2d ed. Avon, MA: Adams Media, 2006.
- . *Kiss, Bow, or Shake Hands: Asia*. Avon, MA: Adams Media, 2007.
- . *Kiss, Bow, or Shake Hands: Europe*. Avon, MA: Adams Media, 2007.
- Salacuse, Jeswald. *The Global Negotiator: Making, Managing and Mending Deals Around the World in the 21st Century*. New York: Palgrave MacMillan, 2003.
- Tannen, Deborah. *You Just Don't Understand: Women and Men in Conversation*. New York: HarperCollins, 1990.

Online Resources

Link to Kilmann's website and/or to purchase Thomas-Kilmann Conflict Instrument ("TKI") for self and/or group assessment, online: <<http://www.kilmann.com/conflict.htm>>.