**Beyond Winning:**
*Negotiating to Create Value in Deals and Disputes.*

Mnookin, Robert H.,
Peppet, Scott R., and
Tulumello, Andrew S.

Cambridge, Mass.
The Belknap Press of Harvard University Press
2000.
ISBN: 0-674-00335-7

---

**Preface and Introduction**

- A problem-solving approach to negotiation
- The legal system alters feasible outcomes
- Construct fair and durable commitments
- Opportunity costs
- Context of the negotiation: deal v. dispute
  - Distributive issues = zero sum game
  - Create value = not a zero sum game

---

**Tensions inherent in all negotiations**

- Creating value v. distributing value
- Empathy v. assertiveness
- Principals v. agents
Deals and disputes are negotiated in the shadow of the law. Lawyers have special opportunities to create value. Misused, lawyers are wasteful and costly.

SYSTEMS OF RELATIONSHIPS

client A to client B
client A to lawyer A
lawyer A to lawyer B
client B to lawyer B

Any relationship can be a barrier or a bridge. Information exchange, filtering, value creation requires accurate and nuanced info.

fair and durable commitments are more likely if:
- Define and allocate risks
- Understand underlying interests rather than mere positions
- Understand and address legal opportunities and risks
- Identify and accommodate decision points
- Design efficient processes
- Manage expectations

Preparation for negotiation always is inadequate. Expect ethical dilemmas.

Part I: The Dynamics of Negotiation

Tensions are inherent. Can not eliminate, can only manage.

Distributive gain v. joint gains (create value)
- Asymmetric information fuels this tension
- Trust

Empathize v. assert
- An experiential tension
- Both, not either/or

Principal v. agent
- Incentives and monitoring
Chapter 1: The Tension between Creating and Distribution Value

negotiation’s central activity
search for value creating trades (not distribution)
search in divergent interests, resources, and capabilities

BATNA = Best Alternative To a Negotiated Agreement voluntary

Sources of Value
- differences between the parties
- non-competitive similarities
- economies of scale and scope

Sources of Value: Differences between the Parties
- resources
- relative valuation
- forecasts (belief and likelihood)
- risk preferences
  - averse v. neutral v. taker
  - risk shifting towards efficient carrier
- time preferences
  - event v. payment

Non-Competitive Similarities
- avoids zero sum game
- shared objectives

Economies of Scale
- production v. consumption
- MES = Minimum Efficient Size
  - absolute v. relative

Economies of Scope
- joint v. concurrent = shared
- network effects
  - positive and negative
The search for value creation opportunities necessarily creates the potential for exploitation via asymmetric information. Value distribution must occur. Unpack the distributive issues. Move away from positions and toward interests.

Alternatives
range of feasible options without agreement

BATNA
Reservation Value
minimum value prior to resort to BATNA

$ZOPA = \text{Zone Of Possible Agreement}$

Aspiration Value = high (reasonable?) estimate

Asymmetric information
material would change the conclusion see slides on Contracts latent a reasonable inspection will not discover

Strategic Opportunism
concealed: reservation value and BATNA
independent generation and confirmation of info

$ZOPA \text{ v. range of BATNA to aspiration value}$
sculpting perceptions

Hard Bargaining Tactics
1. Extreme claims followed by small, slow concessions.
2. Commitment tactics.
3. Take-it-or-leave-it offers.
4. Inviting unreciprocated offers.
5. Flinch.
6. Personal insults and feather ruffling.
7. Bluffing, puffing, and lying.
8. Threats and warnings.
9. Bedizzling the other party’s alternatives.
10. Good cop, bad cop.

Functional if [a] in a single transaction and/or [b] opponent is an aggressive negotiator.

Disastrous in sequential transactions with a reasonable negotiator.
Aggressive bargaining and information asymmetry increase the benefits from reducing transaction costs and dampening strategic opportunism.

**Lemons** = latent defects and adverse selection, but feedback loop to reputation

**Moral hazard** = after shifting the risk, the non-riskbearer may profit from induced losses due to lack of detection or consequence

Focus on value creation while minimizing exploitation risks.

Always prepare for a negotiation.
All preparations always are inadequate and misdirected.
Increase your preparation.
Evaluate, post-negotiation, your preparation.

Identify positions, issues, and interests.
both yours and theirs
Contemplate value creation opportunities
Know your BATNA and translate into a reservation value if possible, increase your BATNA
Estimate their BATNA, reservation value, & aspiration
Estimate the ZOPA
Establish an ambitious, but good faith, aspiration
Know yourself, know your assumptions, AND verify.

see Summer 1999 web page for negotiation preparation form

Negotiation building blocks
good faith
reciprocity
brainstorming
without evaluation or commitment
side payments
dynamic, not static
Only a zero sum transaction is solely distributive.
Chapter 2: The Tension between Empathy and Assertiveness

**empathy** = understanding the other person and demonstrating that understanding
nonjudgmental not = agreement

**assertiveness** = express and advocate your own interests
not belligerent
emotionally charged
often grounded on assumptions (erroneous?)
shades the substance of the transaction

Negotiation focused on problem solving with both empathy and assertiveness is:
win - win if both sides do it
win for the one that does it
reduces transaction costs and strategic opportunism

If increase perspective-taking abilities and behaviors,
then increase
anticipation of strategic problems
 correction of misperceptions
earning of trust
inspiration of openness

Assertiveness is beneficial in a zero sum transaction.

Unproductive Tendencies: suboptimal lack of nimbleness

**Competitor** (high assertion)
advantage with distribution

**Accommodator** (high empathy)
focused on sustaining a relationship
but, imbalanced and prone to exploitation

**Avoider** (low assertion and low empathy)
conflict unproductive, wait for it to go away
competitor - competitor
strategic dance to stalemate
competitor - avoider
annoyance and alienation
competitor - accommodator
unceasing exploitation
accommodator - accommodator
overlook value creation in rush to agreement
accommodator - avoider
both end up avoiding
avoider - avoider
neither aware of the other

page 55, Figure 3, nimble upper right corner

PREPARE
- to minimize your (plural) most likely errors
- to maximize your (plural) outcome

INTROSPECTION
- know thyself

CURIOSITY
- know thy opponent
- verify assumptions
- ask
- demonstrate understanding
- paraphrasing

SHARE
- process for perspective-taking behaviors
- key points in a story framed without blame

At the Table
reciprocal processes
empathy loop
- inquire > respond > demonstrate > test > inquire
- do not agree if you disagree
- unambiguous understanding
- unambiguous lack of agreement
transition from empathy to assertion
- verify understandings
assert your story
- verify they heard what you said
- and that you said what they heard
dynamic process
- focused on fair and durable commitments
Chapter 3: The Tension between Principals and Agents

an agent acts instead of and on behalf of the principal

an agent brings the principal advantages in

- knowledge
- resources
- skills
- strategic

advantages

- absolute v. relative
- competitive v. comparative

outweighed by agency costs?

Agency Costs

agent's interest will not necessarily align with the principal's

PREFERENCES

- reputation as a repeat player

INCENTIVES

- "success" reach with different outcomes

INFORMATION

- availability
- kinds
- discovery

Management Mechanisms

- none are cost free
- none eliminate the tension
- exploitation can cut both ways

Incentive Contracts

- align definitions of "success"
- competition with asymmetric information

Monitoring Systems

- observe v. distinguish
- creates another set of incentives

Bonding

- reputation validated by another agent
- most effective with repeat players and info flows
- short term v. long term flexibility
Incentive Contracts

contingency fee  
champerty  
not for criminal  
hourly fee  
time value of money  
fixed fee  
total quality constrained  
mixed fee  
off setting deficiencies?  
salary  
no profit motive

Professional Norms

prior commitments with high claims  
reputational aspect  
strength of peer group  
express v. implied  
statute v. judicial  
mores v. norms  
intent v. negligence  
good faith

Capturing the agency benefits  
and  
minimizing the agency costs.

acknowledge "the agency problem"  
do not avoid  
problem is shared by the principal and the agent
focus on comparative advantage and strategy

scope of authority

only process? only deal? only dispute?
no single bottom line if multiple issues

dynamic during negotiation

candor between principal and agent

BATNA and reservation

principal can not distinguish and must trust agent

segments of the agreement v. the whole

your opponent also has the “agency problem”

misused, agents can destroy value