

5 Insist on Using Objective Criteria

However well you understand the interests of the other side, however ingeniously you invent ways of reconciling interests, however highly you value an ongoing relationship, you will almost always face the harsh reality of interests that conflict. No talk of “win-win” strategies can conceal that fact. You want the rent to be lower; the landlord wants it to be higher. You want the goods delivered tomorrow; the supplier would rather deliver them next week. You definitely prefer the large office with the view; so does your partner. Such differences cannot be swept under the rug.

Deciding on the basis of will is costly

Typically, negotiators try to resolve such conflicts by positional bargaining—in other words, by talking about what they are willing and unwilling to accept. One negotiator may demand substantive concessions simply because he insists upon them: “The price is \$5,000 and that’s that.” Another may make a generous offer, hoping to gain approval or friendship. Whether the situation becomes a contest over who can be the most stubborn or a contest over who can be the most generous, this negotiating process focuses on what each side is willing to agree to. The outcome results from the interaction of two human wills—almost as if the negotiators were living on a desert island, with no history, no customs, and no moral standards.

As discussed in Chapter 1, trying to reconcile differences on the basis of will has serious costs. No negotiation is likely to be

efficient or amicable if you pit your will against theirs, and either you have to back down or they do. And whether you are choosing a place to eat, organizing a business, or negotiating custody of a child, you are unlikely to reach a wise agreement as judged by any objective standard if you take no such standard into account.

If trying to settle differences of interest on the basis of will has such high costs, the solution is to negotiate on some basis *independent* of the will of either side—that is, on the basis of objective criteria.

The case for using objective criteria

Suppose you have entered into a fixed-price construction contract for your house that calls for reinforced concrete foundations but fails to specify how deep they should be. The contractor suggests two feet. You think five feet is closer to the usual depth for your type of house.

Now suppose the contractor says: “I went along with you on steel girders for the roof. It’s your turn to go along with me on shallower foundations.” No owner in his right mind would yield. Rather than horse-trade, you would insist on deciding the issue in terms of objective safety standards. “Look, maybe I’m wrong. Maybe two feet is enough. What I want are foundations strong and deep enough to hold up the building safely. Does the government have standard specifications for these soil conditions? How deep are the foundations of other buildings in this area? What is the earthquake risk here? Where do you suggest we look for standards to resolve this question?”

It is no easier to build a good contract than it is to build strong foundations. If relying on objective standards applies so clearly to a negotiation between the house owner and a contractor, why not to business deals, collective bargaining, legal settlements, and international negotiations? Why not insist that a negotiated price, for example, be based on some standard such as market value, replacement cost, depreciated book value, or competitive prices, instead of whatever the seller demands?

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In short, the approach is to commit yourself to reaching a solution based on principle, not pressure. Concentrate on the merits of the problem, not the mettle of the parties. Be open to reason, but closed to threats.

Principled negotiation produces wise agreements amicably and efficiently. The more you bring standards of fairness, efficiency, or scientific merit to bear on your particular problem, the more likely you are to produce a final package that is wise and fair. The more you and the other side refer to precedent and community practice, the greater your chance of benefiting from past experience. And an agreement consistent with precedent is less vulnerable to attack. If a lease contains standard terms or if a sales contract conforms to practice in the industry, there is less risk that either negotiator will feel that he was harshly treated or will later try to repudiate the agreement.

A constant battle for dominance threatens a relationship; principled negotiation protects it. It is far easier to deal with people when both of you are discussing objective standards for settling a problem instead of trying to force each other to back down.

Approaching agreement through discussion of objective criteria also reduces the number of commitments that each side must make and then unmake as they move toward agreement. In positional bargaining, negotiators spend much of the time defending their position and attacking the other side's. People using objective criteria tend to use time more efficiently talking about possible standards and solutions.

Independent standards are even more important to efficiency when more parties are involved. In such cases positional bargaining is difficult at best. It requires coalitions among parties; and the more parties who have agreed on a position, the more difficult it becomes to change that position. Similarly, if each negotiator has a constituency or has to clear a position with a higher authority, the task of adopting positions and then changing them becomes time-consuming and difficult.

An episode during the Law of the Sea negotiations illustrates the merits of using objective criteria. At one point, India, repre-

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representing the Third World bloc, proposed an initial fee for companies mining in the deep seabed of \$60 million per site. The United States rejected the proposal, suggesting there be no initial fee. Both sides dug in; the matter became a contest of will.

Then someone discovered that the Massachusetts Institute of Technology (MIT) had developed a model for the economics of deep-seabed mining. This model, gradually accepted by the parties as objective, provided a way of evaluating the impact of any fee proposal on the economics of mining. When the Indian representative asked about the effect of his proposal, he was shown how the tremendous fee he proposed—payable five years before the mine would generate any revenue—would make it virtually impossible for a company to mine. Impressed, he announced that he would reconsider his position. On the other side, the MIT model helped educate the American representatives, whose information on the subject had been mostly limited to that provided by the mining companies. The model indicated that some initial fee was economically feasible. As a result, the United States also changed its position.

No one backed down; no one appeared weak—just reasonable. After a lengthy negotiation, the parties reached a tentative agreement that was mutually satisfactory.

The MIT model increased the chance of agreement and decreased costly posturing. It led to a better solution, one that would both attract companies to do mining *and* generate considerable revenue for the nations of the world. The existence of an objective model able to forecast the consequences of any proposal helped convince the parties that the tentative agreement they reached was fair. This in turn strengthened relationships among the negotiators and made it more likely an agreement would endure.*

* For more interesting examples from the Law of the Sea negotiations, see James K. Sebenius, *Negotiating the Law of the Sea: Lessons in the Art and Science of Reaching Agreement* (Harvard University Press, 1984).

Developing objective criteria

Carrying on a principled negotiation involves two questions: How do you develop objective criteria, and how do you use them in negotiating?

Whatever method of negotiation you use, you will do better if you prepare in advance. This certainly holds true of principled negotiation. So develop some alternative standards beforehand and think through their application to your case.

Fair standards. You will usually find more than one objective criterion available as a basis for agreement. Suppose, for example, your car is demolished and you file a claim with an insurance company. In your discussion with the adjuster, you might take into account such measures of the car's value as (1) the original cost of the car less depreciation; (2) what the car could have been sold for; (3) the standard "blue book" value for a car of that year and model; (4) what it would cost to replace that car with a comparable one; and (5) what a court might award as the value of the car.

In other cases, depending on the issue, you may wish to propose that an agreement be based upon:

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|------------------------|---------------------------|
| Market value | What a court would decide |
| Precedent | Moral standards |
| Scientific judgment | Equal treatment |
| Professional standards | Tradition |
| Efficiency | Reciprocity |
| Costs | Etc. |

At a minimum, objective criteria need to be independent of each side's will. Ideally, to assure a wise agreement, objective criteria should be not only independent of will but also both legitimate and practical. In a boundary dispute, for example, you may find it easier to agree on a physically salient feature such as a river than on a line three yards to the east of the riverbank. Objective criteria should apply, at least in theory, to both

sides. You can thus use the test of reciprocal application to tell you whether a proposed criterion is fair and independent of either party's will. If a real estate agency selling you a house offers a standard form contract, you would be wise to ask if that is the same standard form they use when *they* buy a house. In the international arena, the principle of self-determination is notorious for the number of peoples who insist on it as a fundamental right but deny its applicability to those on the other side. Consider the Middle East, Kashmir, or Cyprus as just three examples.

Fair procedures. To produce an outcome independent of will, you can use either fair standards for the substantive question or fair procedures for resolving the conflicting interests. Consider, for example, the age-old way to divide a piece of cake between two children: one cuts and the other chooses. Neither can complain about an unfair division.

This simple procedure was used in the Law of the Sea negotiations, one of the most complex negotiations ever undertaken. At one point, the issue of how to allocate mining sites in the deep seabed deadlocked the negotiation. Under the terms of the draft agreement, half the sites were to be mined by private companies, the other half by the Enterprise, a mining organization to be owned by the United Nations. Since the private mining companies from the rich nations had the technology and the expertise to choose the best sites, the poorer nations feared the less knowledgeable Enterprise would receive a bad bargain.

The solution devised was to agree that a private company seeking to mine the seabed would present the Enterprise with *two* proposed mining sites. The Enterprise would pick one site for itself and grant the company a license to mine the other. Since the company would not know which site it would get, it would have an incentive to make both sites as promising as possible. This simple procedure thus harnessed the company's superior expertise for mutual gain.

A variation on the procedure of "one cuts, the other chooses" is for the parties to negotiate what they think is a fair arrangement before they go on to decide their respective roles in it. In a divorce

negotiation, for example, before deciding which parent will get custody of the children, the parents might agree on the visiting rights (and responsibilities) of the other parent. This gives both an incentive to agree on visitation rights each will think fair.

As you consider procedural solutions, look at other basic means of settling differences: taking turns, drawing lots, letting someone else decide, and so on.

Frequently, taking turns presents the best way for heirs to divide a large number of heirlooms left to them collectively. Afterwards, they can do some trading if they want. Or they can make the selection tentative so they see how it comes out before committing themselves to accept it. Drawing lots, flipping a coin, and other forms of chance have an inherent fairness. The results may be unequal, but each side had an equal opportunity.

Letting someone else play a key role in a joint decision is a well-established procedure with almost infinite variations. The parties can agree to submit a particular question to an expert for advice or decision. They can ask a mediator to help them reach a decision. Or they can submit the matter to an arbitrator for an authoritative and binding decision.

Professional baseball, for example, uses "last-best-offer arbitration" to settle player salary disputes. The arbitrator must choose between the last offer made by one side and the last offer made by the other. The theory is that this procedure puts pressure on the parties to make their proposals more reasonable. In baseball, and in states where this form of arbitration is compulsory for certain public employee disputes, it does seem to produce more settlements than in comparable circumstances where there is a commitment to conventional arbitration; those parties who don't settle, however, sometimes give the arbitrator an unpleasant choice between two extreme offers.

Negotiating with objective criteria

Having identified some objective criteria and procedures, how do you go about discussing them with the other side?

There are three basic points to remember:

1. Frame each issue as a joint search for objective criteria.
2. Reason and be open to reason as to which standards are most appropriate and how they should be applied.
3. Never yield to pressure, only to principle.

In short, focus on objective criteria firmly but flexibly.

Frame each issue as a joint search for objective criteria. If you are negotiating to buy a house, you might start off by saying: "Look, you want a high price and I want a low one. Let's figure out what a *fair* price would be. What objective standards might be most relevant?" You and the other side may have conflicting interests, but the two of you now have a shared goal: to determine a fair price. You might begin by suggesting one or more criteria yourself—the cost of the house adjusted for depreciation and inflation, recent sale prices of similar houses in the neighborhood, or an independent appraisal—and then invite the seller's suggestions.

Ask "What's your theory?" If the seller starts by giving you a position, such as "The price is \$255,000," ask for the theory behind that price: "How did you arrive at that figure?" Treat the problem as though the seller too is looking for a fair price based on objective criteria.

Agree first on principles. Before even considering possible terms, you may want to agree on the standard or standards to apply.

Each standard the other side proposes becomes a lever you can then use to persuade them. Your case will have more impact if it is presented in terms of their criteria, and they will find it difficult to resist applying their criteria to the problem. "You say Mr. Jones sold the house next door for \$260,000. Your theory is that this house should be sold for what comparable houses in the neighborhood are going for, am I right? In that case, let's look at what the house on the corner of Ellsworth and Oxford and the one at Broadway and Dana were sold for." What makes

conceding particularly difficult is having to accept someone else's proposal. If they suggested the standard, their deferring to it is not an act of weakness but an act of strength, of carrying out their word.

Reason and be open to reason. What makes the negotiation a *joint* search is that, however much you may have prepared various objective criteria, you come to the table with an open mind. In most negotiations, people use precedent and other objective standards simply as arguments in support of a position. A police union might, for example, insist upon a raise of a certain amount and then justify their position with arguments about what police in other cities make. This use of standards usually only digs people even deeper into their position.

Going one step further, some people begin by announcing that their position is an issue of principle and refuse even to consider the other side's case. "It's a matter of principle" becomes a battle cry in a holy war over ideology. Practical differences escalate into principled ones, further locking in the negotiators rather than freeing them.

This is emphatically *not* what is meant by principled negotiation. Insisting that an agreement be based on objective criteria does not mean insisting that it be based solely on the criterion *you* advance. One standard of legitimacy does not preclude the existence of others. What the other side believes to be fair may not be what you believe to be fair. You should behave like a judge; although you may be predisposed to one side (in this case, your own), you should be willing to respond to reasons for applying another standard or for applying a standard differently. When each party is advancing a different standard, look for an objective basis for deciding between them, such as which standard has been used by the parties in the past or which standard is more widely applied. Just as the substantive issue itself should not be settled on the basis of will, neither should the question of which standard applies.

In a given case, there may be two standards (such as market

value and depreciated cost) that produce different results but that both parties agree seem equally legitimate. In that case, splitting the difference or otherwise compromising between the results suggested by the two objective standards is perfectly legitimate. The outcome is still independent of the will of the parties.

If, however, after a thorough discussion of the merits of an issue you still cannot accept their proposed criteria as the most appropriate, you might suggest putting them to a test. Agree on someone you both regard as fair and give him or her a list of the proposed criteria. Ask the person to decide which are the fairest or most appropriate for your situation. Since objective criteria are supposed to be legitimate and because legitimacy implies acceptance by a great many people, this is a fair thing to ask. You are not asking the third party to settle your substantive dispute—just to give you advice on what standard to use in settling it.

The difference between seeking agreement on the appropriate principles for deciding a matter and using principles simply as arguments to support positions is sometimes subtle, but always significant. A principled negotiator is open to reasoned persuasion on the merits; a positional bargainer is not. It is the combination of openness to reason with insistence on a solution based on objective criteria that makes principled negotiation so persuasive and so effective at getting the other side to play.

Never yield to pressure. Consider once again the example of negotiating with the contractor. What if he offers to hire your brother-in-law on the condition that you give in on the depth of the foundations? You would probably answer, "A job for my brother-in-law has nothing to do with whether the house will be safely supported on a foundation of that depth." What if the contractor then threatens to charge you a higher price? You would answer the same way: "We'll settle that question on the merits too. Let's see what other contractors charge for this kind of work," or "Bring me your cost figures and we'll work out a fair profit margin." If the contractor replies, "Come on, you trust me, don't you?" you would respond: "Trust is an entirely sepa-

rate matter. The issue is how deep the foundations have to be to make the house safe.”

Pressure can take many forms: a bribe, a threat, a manipulative appeal to trust, or a simple refusal to budge. In all these cases, the principled response is the same: invite them to state their reasoning, suggest objective criteria you think apply, and refuse to budge except on this basis. Never yield to pressure, only to principle.

Who will prevail? In any given case it is impossible to say, but in general you will have an edge. For in addition to your willpower, you also have the power of legitimacy and the persuasiveness of remaining open to reason. It will be easier for you to resist making an arbitrary concession than it will be for them to resist advancing some objective standards. A refusal to yield except in response to sound reasons is an easier position to defend—publicly and privately—than is a refusal to yield combined with a refusal to advance sound reasons.

At the least, you will usually prevail on the question of process; you can usually shift the process from positional bargaining to a search for objective criteria. In this sense principled negotiation is a dominant strategy over positional bargaining. One who insists that negotiation be based on the merits can bring others around to playing that game, since that becomes the only way to advance their substantive interests.

On substance, too, you are likely to do well. Particularly for those who might otherwise be browbeaten by a positional bargainer, principled negotiation allows you to hold your own and still be fair. Principle serves as your hardhearted partner who will not let you yield to pressure. It is a form of “right makes might.”

If the other side truly will not budge and will not advance a persuasive basis for their position, then there is no further negotiation. You now have a choice like the one you face when you walk into a store that has a fixed, nonnegotiable price on what you want to buy. You can take it or leave it. Before leaving it you should see if you have overlooked some objective standard that makes their offer a fair one. If you find such a standard and if you

would rather reach agreement on that basis than have no agreement, do so. The availability of that relevant standard avoids the cost of giving in to an arbitrary position.

If there is no give in their position and you find no principled basis for accepting it, you should assess what you might gain by accepting their unjustified position rather than going to your best alternative. You should weigh that substantive benefit against the benefit to your reputation as a principled negotiator that could come from walking away.

Shifting discussion in a negotiation from the question of what the other side is willing to do to the question of how the matter ought to be decided does not end argument, nor does it guarantee a favorable result. It does, however, provide a strategy you can vigorously pursue without the high costs of positional bargaining.

"It's company policy"

Let's look at a real case where one party used positional bargaining and the other principled negotiation. Tom, one of our colleagues, had his parked car totally destroyed by a dump truck. The car was covered by insurance, but the exact amount Tom could recover remained for him to work out with the insurance adjuster.

Tom

Insurance Adjuster

We have studied your case and we have decided the policy applies. That means you're entitled to a settlement of \$13,600.

That's how much we decided the car was worth.

I see. How did you reach that figure?

I understand, but what standard did you use to determine that amount? Do you know where I can buy a comparable car for that much?

Insurance Adjuster

How much are you asking for?

\$19,000! That's too much!

OK, I'll offer you \$15,000. That's the highest I can go. Company policy.

Look, \$15,000 is all you'll get. Take it or leave it.

OK, Mr. Griffith, I've got an ad here in today's paper offering a car exactly the same make, model, and year as yours for \$14,800.

49,000. Why?

Tom

Whatever I'm entitled to under the policy. I found a secondhand car just about like it for \$17,700. Adding the sales and excise tax, it would come to about \$19,000.

I'm not asking for \$19,000 or \$18,000 or \$20,000, but for fair compensation. Do you agree that it's only fair I get enough to replace the car?

How does the company figure that?

\$15,000 may be fair. I don't know. I certainly understand your position if you're bound by company policy. But unless you can state objectively why that amount is what I'm *entitled* to, I think I'll do better in court. Why don't we study the matter and talk again? Is Wednesday at eleven a good time to talk?

. . .

I see. What does it say about the mileage?

Because mine only had 25,000 miles. How many dollars does that increase the worth in your book?

Insurance Adjuster

Let me see . . . \$1,650.

No.

\$1,100.

Tom

Assuming the \$14,800 as one possible base, that brings the figure to \$16,450. Does the ad specify the technology package?

How much extra for that in your book?

How about an autodimming mirror?

. . .

A half hour later Tom walked out with a check for \$18,024.