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# Ten rules of hard bargaining

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Most negotiations conclude with a period of hard bargaining — adversarial negotiation in which one dollar more for me is one less for you — and many commence with it. There are in our culture at least 10 generally applicable rules for hard bargaining. There are surely more; however, the 10 rules I have identified follow.

'In interest based bargaining the opening may well set the emotional tone of the negotiation, but it is not critical as in adversarial bargaining in which it will often set not only the tone but also the range of the entire negotiation.'

## An extreme initial offer is often advantageous

The research suggests that high opening demands lead on average to more favourable outcomes than more moderate opening demands.[1] This is the reason for hugely inflated damages claims in the United States — the attorneys do not expect to recover the extreme amount claimed but they know the higher the opening demand, the higher the final payout is likely to be.

The risk to a party of an extreme opening offer is that it puts off the other party so much they will not negotiate further. However, this risk can be reduced by framing the offer appropriately.

## The framing of the initial offer is critical

Framing refers to the context of the offer — how, and with what surrounding words, it is communicated. A party making an extreme opening offer can:

- indicate the initial offer is a 'soft' opening (that is, simply designed to kick the process off); and
- support the amount offered with references to objective criteria so as to indicate it is genuine, thus seeking to preserve the offeror's credibility.

In interest based bargaining the opening may well set the emotional tone of the negotiation, but it is not critical as in adversarial bargaining in which it will often set not only the tone but also the range of the entire negotiation.

There are three standard types of negotiation openings: soft high or low, firm reasonable, or problem solving.[2] A *soft high or low* opening is a relatively extreme position accompanied by words to indicate it is flexible. A *hard high or low* opening would be the same type of offer but with words to indicate it was pretty much a 'take it or leave it' proposition. Soft high or low openings allow the party to put on the table a very favourable figure for them while minimising the chances of derailing the entire negotiation. Hard high or low openings have a high probability of doing just that.

*Firm reasonable* openings are often favoured by people who dislike haggling or by experts who are confident they know the relatively small range within which settlement is likely. It is critical for the accompanying words to indicate there is little room to move so as to avoid the risk of a firm opening being mistaken for a soft opening. Firm reasonable openings tend to work less well in situations where the other party has a strong need to feel they have won something from the negotiation process. They can, however, offer a speedier negotiation process provided both parties are clear the opening is a firm reasonable one.

*Problem solving* openings are favoured by interest based bargainers and focus on interests and away from positions such as price. They do not fit within an adversarial framework.

## It is customary to resist concessions

Adversarial bargainers resist giving concessions, as they are seeking to send the message that there is little room to move. The aim is to make the other side work hard to earn any concession and so shape their expectations as to what can be gained from the negotiation.[3]

## Concessions should be made in ever decreasing increments

Concessions in decreasing increments

send a clear message and may indicate a potential agreement point. An increment that is larger than the preceding one sends a contradictory message and generally should not be used except for a special purpose, such as to split the difference so as to achieve a settlement.

### Never make a concession without receiving something in return

This is a common sense rule and yet it is extraordinary how often it is breached in practice. The rule is simple — if you are inclined to concede on some issue, get something for your concession.[4] For instance, assume the other party has convinced you one of your requirements is unreasonable or unnecessary. One option is to agree and drop the requirement. The other option is to agree, keep your own counsel, and seek a concession from the other side for making yours. The other party will not know you have been persuaded of the merits of their position and will likely give something of value to you in exchange.

In adversarial bargaining the expectation is that one never gives something for nothing and to do otherwise is to display naivete and weakness.

### Concessions need not be of an equivalent value

Most parties have a strong psychological need to receive something in return for making a concession.[5] Hence if a vendor reduces its asking price for a car by $1000, an appropriate response may be for the purchaser to increase its offer by $500. If the purchaser does not reciprocate, the negotiation is likely to stall — the vendor is highly unlikely to make a second concession without receiving something for its first one. However, while a reciprocal concession is essential it need not be of equivalent value.

### Bargaining through an intermediary makes adversarial bargaining much more likely

Interest based bargaining is extremely difficult without direct communication between the parties. Bargaining through an intermediary, such as a real estate agent, encourages the making of extreme offers and severely limits interest identification and option generation.

### Information is to be used as a tool

In hard bargaining the party with the best information is at a tremendous advantage. Adversarial bargainers will typically guard information closely and reveal it selectively, while pressing and trying to manipulate the other party into revealing as much information as possible.[6] Some adversarial negotiators may even give inaccurate or potentially misleading information and many will fail to correct misapprehensions under which the other party may be labouring.

On the other hand, interest based bargaining depends on an exchange of information: the discussion of their underlying needs allows both sides to work together to create an outcome that neither would have achieved alone. Disclosing information is one of the greatest difficulties experienced adversarial negotiators encounter in moving to an interest based approach, as it goes directly against instincts honed over numerous adversarial negotiations.

### A sense of urgency is often used to create pressure

Adversarial bargainers often impose a sense of urgency on the negotiation by creating real or fictitious time deadlines, by stressing that other parties are keen to do the deal, by threatening to walk away or simply by stressing that 'this must be dealt with now'.[7]

### The exploitation of weakness is legitimate

Adversarial bargaining is viewed by most of its practitioners as a game, and one of its rules is that advantage may be taken of weakness. Hazel Genn interviewed solicitors, barristers and insurance claims assessors in her study into personal injury negotiation and litigation in England. In her words, and with her emphasis:

> *Every* insurance company claims inspector and defendant barrister interviewed in the

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'Adversarial bargainers will typically guard information closely and reveal it selectively, while pressing and trying to manipulate the other party into revealing as much information as possible.'

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study admitted either readily, or after being pressed, that if a plaintiff's solicitor provided the opportunity for advantage to be taken of him, then that advantage, would, indeed, be taken.[8]

I am not recommending this behaviour, but simply observing that participants in adversarial bargaining understand that it is one of the generally accepted norms of conduct.

So those are my 10 rules. Use them well (and write to me if you know more).

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## Endnotes

1. Hawkins, Hudson and Cornall *The Legal Negotiator* Longman Professional 1991 p 135; Karrass *Negotiate to Close* Collins 1986 p 20; Fisher, Ury and Patton *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed) Penguin Books 1991 p 170; Pruitt *Negotiation Behaviour* Academic Press 1981 p 74.
2. Wade 'The Last Gap in Negotiations: Why Is It Important? How Can It Be Crossed?' (1995) *Australian Dispute Resolution Journal* 93 at 97; and Spegel, Rogers and Buckley *Negotiation: Theories and Techniques* Butterworths 1998 pp 67-69.
3. Goodpaster *A Guide to Negotiation and Mediation* Transnational Publishers Inc 1997 pp 28-29.
4. Rogers and McCafferty *Dispute Resolution for the Queensland Legal Profession* Queensland Law Society 1997 p 29.
5. Goodpaster, above note 3, p 29.
6. Inns of Court School of Law *Negotiation* Blackstone Press 1996 p 34; and Genn *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* Clarendon Press 1987 pp 46-48 and 132-33.
7. Genn, above note 6, p 34.
8. Genn, above note 6, p 132.

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