
Perception, Reputation and Reality

An empirical study of negotiation skills

By Andrea Kupfer Schneider

A recent symposium on law and popular culture starts off with an article noting that the portrayal of lawyers in movies is appalling.¹ Moreover, this portrayal of bad lawyers coincides with a precipitous drop in the prestige of lawyers over the past two decades. At least part of the reaction against lawyers comes from public frustration with the excesses of the adversary system.

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Research**

Deborah Tannen, in her book *The Argument Culture:*

Stopping America's War of Words, states that the adversarial structure of the legal system forces lawyers and their clients to adopt extreme modes of warrior-like behavior. She points out that not just in law, but also in journalism and politics, an adversarial approach persists despite evidence that this approach is not the best for reporting, passing legislation or resolving disputes.

This article examines perceptions of negotiation behavior based on an empirical survey of lawyers who were asked about their most recent negotiation experience. The data reveals several things. First, we can examine perceptions by attorneys' peers rather than the general public. Second, by comparing this data to similar data from 20 years ago, we can see how lawyers' perceptions of their peers

have changed. Finally, we can outline the negotiation behaviors that appear to be highly valued by attorneys.

The Williams study

In 1976, law professor Gerald Williams undertook a study on lawyer negotiation styles by surveying 1,000 lawyers in the Phoenix area about their most recent negotiation experience.² The first part of the survey asked for basic demographic information about the attorney

can be criticized for several reasons. First, the adjectives and other ratings scales are subjective. Second, the determination of effectiveness is solely in the eye of the beholder as opposed to some objective measure. It is quite possible that respondents will reward negotiators like themselves with higher effectiveness ratings or punish negotiators different from themselves with lower effectiveness ratings. Finally, there could be some self-selection in

It appears that the declining public perception of lawyers is also reflected in a decline in the way lawyers view each other.

filling out the survey and the attorney being evaluated on the other side. It did not ask for either attorney's name. Then the attorney was asked to rate the other side using three sets of scales. The first scale was a list of 75 adjectives on which attorneys were rated from zero (not characteristic) to five (highly characteristic). The second scale was a list of 43 bipolar adjective pairs from which attorneys could rate the other side from one (extremely characteristic of one end of the pole) to seven (extremely characteristic of the other end of the pole). The third scale was a list of 12 potential goals or objectives of the negotiation. The other attorney was rated from one to five on this last scale. After the adjective ratings, the attorney was asked to rate the general effectiveness of the attorney on the other side on a scale of one (ineffective) to nine (highly effective).

The methodology of the Williams study (and therefore of this new study)

terms of which lawyers actually return the survey. Recognizing these limitations, we can still use the information from these surveys to measure *perceived* negotiation behavior and *perceived* effectiveness.

Williams and his co-authors concluded that there were two primary styles of negotiation which they labeled "cooperative" and "competitive." A "cooperative" negotiator was ethical, fair and personable. A "competitive" negotiator was described as tough, egotistical and likely to use negotiation tactics. Only 11 percent of the bar population studied did not fall into one of these categories. After examining negotiation styles, Williams looked at the effectiveness of each style. Table 1 shows the results by style and effectiveness in the Williams study.

Close to 60 percent of all cooperative negotiators were considered effective by their peers. Only 25 percent of competitive negotiators were considered

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effective. As Williams concluded:

“...[N]either pattern has an exclusive claim on effectiveness. Use of the cooperative pattern does not guarantee effectiveness, any more than does the use of the competitive pattern. . . . The higher proportion of cooperative attorneys who were rated effective does suggest it is more difficult to be an effective competitive negotiator than an effective cooperative.”

ness rating.

The Wisconsin State Bar gave me 1,000 randomly selected names in Milwaukee County and the two neighboring counties for a ratio of 1 out of 5 lawyers in the Milwaukee area. The response rate was 40 percent. The Chicago Bar Association (CBA) provided the names in the Chicago area. The 1,500 recipients in Chicago represented one out of every seven lawyers who belonged to the CBA. The Chicago response rate was 18 percent.

Table 1: Number of Lawyers Per Group by Perceived Effectiveness (1976)

| | Ineffective | Average | Effective |
|-------------|-------------|---------|-----------|
| Cooperative | 7 | 84 | 133 |
| Competitive | 28 | 35 | 21 |

The new study

It has been more than 20 years since Williams conducted his research. In the meantime, much has changed in the legal profession and in legal education. These changes include who is entering the law, the evolution of alternative dispute resolution and the growth of mega-law firms. This period also coincides with the decline in the reputation of the legal profession. How have these changes impacted how lawyers negotiate and how effective they are? To answer this question, I have added to Williams’ study in several ways and have rerun the new study in the Milwaukee and Chicago legal communities with twice the number of lawyers.

Study logistics

I sent out the surveys to more than 2,500 lawyers in Milwaukee and Chicago. In order to be able to compare the results of this study to the original Williams study, I did not delete or modify any of Williams’ original questions or descriptions. I did, however, add adjectives to the list of descriptions that lawyers could use. After a review of negotiation literature and suggestions from several colleagues, I added certain adjectives that could highlight a particular style.³ This article primarily discusses the results of the adjective ratings and the effective-

Overall, 29 percent of selected attorneys responded to the survey.

Of the 690 complete responses, 30 percent were from women. Interestingly, 17.8 percent discussed female negotiators. The ethnicity of respondents was overwhelmingly Caucasian (94.6 percent). The other 5.4 percent of lawyers were divided among African-American (3.1 percent), Asian (0.1 percent), Hispanic (1.3 percent), Native American (0.1 percent), and Other (0.8 percent). Fifty-seven percent of respondents practiced in Milwaukee and 43 percent practiced in Chicago. Finally, respondents came from a wide variety of practice areas: commercial (15.7 percent), corporate (6 percent), criminal (8.3 percent), family (12.3 percent), labor and employment (12.2 percent), personal injury (15.4 percent), property and real estate (11 percent) and other (19.1 percent).

Study results

I worked with statisticians at the Institute for Survey and Policy Research at the University of Wisconsin-Milwaukee to perform cluster analyses on the results. The first step was to divide negotiators into two groups as the Williams study had originally done.⁴ The lawyers divided into two clusters of approximately 64 percent and 36 percent. Given the adjectives listed, I labeled these clusters problem-

solving and adversarial. I labeled these clusters differently from Williams’ original labels of competitive and cooperative for two reasons. First, I believe in the 20 years since the Williams study, the popular understanding of “cooperative” has changed from the positive use by Williams to a more negative definition implying “wimpiness.” Someone labeled “cooperative” is more likely to be associated with soft-bargaining (roll-over-and-play-dead) than the positive adjectives actually used by Williams. Second, “problem-solving” and “adversarial” are labels more in current use in the negotiation literature. Table 2 is the list of the top 20 adjectives for each cluster. Problem-solving adjectives encompass several different elements of behavior. First, this ne-

Table 2: Top 20 Adjectives per Cluster

| Problem-Solving Adjectives | Adversarial Adjectives |
|----------------------------|------------------------|
| Ethical | Stubborn |
| Experienced | Headstrong |
| Personable | Arrogant |
| Rational | Assertive |
| Trustworthy | Irritating |
| Self-controlled | Argumentative |
| Confident | Egotistical |
| Agreeable | Confident |
| Realistic | Demanding |
| Accommodating | Quarrelsome |
| Sociable | Ambitious |
| Fair-minded | Experienced |
| Dignified | Firm |
| Communicative | Tough |
| Perceptive | Forceful |
| Adaptable | Suspicious |
| Astute about the law | Manipulative |
| Poised | Hostile |
| Careful | Masculine |
| Helpful | Evasive |

gotiator is upstanding (ethical, trustworthy). Second, this negotiator is pleasant (personable, agreeable, sociable) and interested in the other side (fair-minded, communicative, perceptive, helpful). Third, this negotiator is flexible (accommodating, adaptable). Finally, this negotiator is prepared (experienced, rational, confident, realistic, astute, poised).

The adversarial adjectives offer a strong contrast. The adversarial negotiator is inflexible (stubborn, assertive, demanding, firm, tough, forceful) and self-centered (headstrong, arrogant, egotistical). This negotiator likes to fight (irritating, argumentative, quarrelsome, hostile)

as ineffective fell into the adversarial group. On the flip side of the analysis, 91 percent of lawyers seen as effective chose a problem-solving method of negotiation. More than 50 percent of problem-solving lawyers were perceived as effective and only 4 percent of these problem-solving lawyers were seen as ineffective. Therefore, contrary to the popular (student) view that problem-solving behavior is risky, it is instead adversarial bargaining that is risky. A lawyer is much more likely to be perceived as effective when engaging in problem-solving behavior.

solving attorneys.

Much of the list of adjectives remains the same, including the top five from the Williams study. The adjectives describe a negotiator who is both assertive (experienced, realistic, fair, astute, careful, wise)

The vast majority of lawyers perceived to be effective by their peers engaged in problem-solving, not adversarial, behavior.

and the method of fighting is questionable (suspicious, manipulative, evasive). Only two adjectives appear completely positive — confident and experienced — and these are the only two adjectives also cited for problem-solving negotiators. Thus we see very different approaches to negotiation.

The next step is a comparison of groups and effectiveness ratings. The survey asked each respondent to rate the other attorney's effectiveness as a negotiator compared to other attorneys with whom the respondent had negotiated. Lawyers were rated: ineffective, average or effective. (See Table 3.)

Comparing the studies

After looking at the general results for the study, it is important to compare the behavioral traits of those negotiators perceived as effective. Have the characteristics of "effective" lawyers changed over the years? And since the two styles are so clearly different, what are the characteristics of effective problem-solvers and effective adversarial? Recognizing that the problem-solvers are generally perceived as more effective, nevertheless it is useful to un-

Table 3: Number of Lawyers per Group by Perceived Effectiveness (2000)

| | Ineffective | Average | Effective |
|-----------------|-------------|---------|-----------|
| Problem-Solving | 14 | 166 | 213 |
| Adversarial | 120 | 84 | 21 |

Several items should stand out from these results. Respondents rated only 9 percent of their adversarial peers as effective. And only 9 percent of all effective lawyers were described as adversarial. Furthermore, 90 percent of lawyers seen

understand what makes those attorneys in each style effective.

Table 4 shows adjectives selected in this study versus the adjectives selected in the Williams study for effective problem-

Table 4: Effective Problem-Solving — Top 20 Adjectives

| Schneider Ranking | Adjective | Williams Ranking |
|-------------------|----------------------|---------------------|
| 1 | Ethical | 3 |
| 2 | Experienced | 1 |
| 3 | Personable | 13 |
| 4 | Rational | 4 |
| 5 | Trustworthy | 6 |
| 6 | Realistic | 2 |
| 7 | Confident | New Item Added |
| 8 | Perceptive | 5 |
| 9 | Communicative | New Item Added |
| 10 | Fair-Minded | 9 |
| 11 | Dignified | Did Not Make Top 20 |
| 12 | Self-Controlled | 11 |
| 13 | Accommodating | New Item Added |
| 14 | Astute About the Law | 20 |
| 15 | Agreeable | New Item Added |
| 16 | Sociable | Did Not Make Top 20 |
| 17 | Adaptable | 14 |
| 18 | Poised | 17 |
| 19 | Careful | 18 |
| 20 | Wise | 15 |

and empathetic (perceptive, communicative, accommodating, agreeable, adaptable). This mirrors what Professor Robert Mnookin and his co-authors have described as effective negotiation behavior.⁵ Furthermore, the effective problem-solver is also good (ethical, trustworthy) and offers enjoyable company (personable, sociable, poised). It should be no surprise this negotiator is seen as effective.

The lack of change in the description of effective problem-solving offers some interesting insights. For example, despite the public perception of lawyers, it appears that close to two-thirds of lawyers continue to engage in non-adversarial modes of communication and that these same lawyers are perceived as highly effective compared to their peers.

Table 5 shows the top 20 adjectives for those minority of attorneys who were perceived as both adversarial and effective.

While the problem-solving adjectives have changed slightly, far greater change appears in the adjectives describing the effective competitive or adversarial negotiator. Ten adjectives did not make the top 20 in the Williams study and another five adjectives were completely new adjectives. The difference between how adversarial bargainers, even those who are effective, are described now and how they were described 24 years ago is striking. The new adjectives are, by and large, negative.

As adversarial negotiators have gotten more extreme over the past 25 years, they also have become both nastier and less effective.

The competitive negotiator described by Williams was not nearly so unpleasant and negative. The top five adjectives describing the effective competitive negotiator in the Williams study were: (1) convincing, (2) experienced, (3) perceptive, (4) rational and (5) analytical. None of these adjectives have particularly negative connotations. In fact, perceptive even demonstrates some interest in the other side. Now the top five adjectives describing an effective adversarial

negotiator are: (1) egotistical, (2) demanding, (3) ambitious, (4) experienced and (5) confident. Clearly things have changed for the worse when the most important description given to a lawyer is egotistical. The rest of the top 20 list is even more damning. Out of the entire list of adjectives, over half have negative connotations. Even their peers view these adversarial lawyers poorly as people despite their negotiation effectiveness.

Another interesting note is the lack of overlap between adjectives describing effective problem-solving behavior and adjectives describing effective adversarial behavior. In the Williams study, fully 14 of the top 20 adjectives for the cooperative and competitive groups overlapped.⁶ This, of course, provided helpful advice to students that, regardless of which style they chose, these were the adjectives that were found to be effective. In this study only two adjectives overlap: experienced and confident. This lack of overlap suggests that the two negotiation styles have clearly diverged even more from one another in the last 24 years and that it has become more unlikely that a negotiator would move between these antithetical types of

negotiation styles.

Finally, we can compare the effectiveness rating of Williams' two groups to this study. Compared to the Williams study, the percentage of problem-solving negotiators who were effective has dropped from 59 percent to 54 percent. The changes in the percentage of adversarial bargainers, however, is much more striking. In the Williams

study, 25 percent of competitive negotiators were seen as effective, compared to 9 percent in this study. Alternatively, 33 percent of competitive negotiators were seen as ineffective in the Williams study while 53 percent were in this study.

Table 5: Effective Adversarial — Top 20 Adjectives

| Schneider Ranking | Adjective | Williams Ranking |
|-------------------|---------------|---------------------|
| 1 | Egotistical | Did Not Make Top 20 |
| 2 | Demanding | Did Not Make Top 20 |
| 3 | Ambitious | 7 |
| 4 | Experienced | 2 |
| 5 | Confident | New Item Added |
| 6 | Assertive | New Item Added |
| 7 | Forceful | 9 |
| 8 | Arrogant | New Item Added |
| 9 | Headstrong | Did Not Make Top 20 |
| 10 | Tough | 11 |
| 11 | Firm | New Item Added |
| 12 | Irritating | Did Not Make Top 20 |
| 13 | Stubborn | New Item Added |
| 14 | Argumentative | Did Not Make Top 20 |
| 15 | Dominant | 8 |
| 16 | Manipulative | Did Not Make Top 20 |
| 17 | Masculine | Did Not Make Top 20 |
| 18 | Quarrelsome | Did Not Make Top 20 |
| 19 | Suspicious | Did Not Make Top 20 |
| 20 | Bluffer | Did Not Make Top 20 |

In comparing general effectiveness of the lawyer population, the Williams study stated that 49 percent of the attorneys were considered effective, 38 percent were rated as average and 12 percent were rated as ineffective. In contrast, only 38 percent of attorneys in this study were rated effective, 40 percent were rated as average and 22 percent were rated ineffective. As the vast majority of those attorneys who were considered ineffective were also adversarial negotiators (90 percent of ineffective lawyers were adversarial), we can hypothesize that the increase in ineffective lawyers (to 22 percent from 12 percent) comes from the increase in adversarial bargainers (to 36 percent from 27 percent).

If our goal is to raise the level of behavior among attorneys, and hopefully improve the public's perception of our profession as well, it makes sense to begin by asking which dispute resolution strategies create the perception of effective lawyering.

Lessons to be drawn

We can draw a few different lessons from this development in negotiation behavior. First, it looks as if the two predominant styles are growing further apart. While the problem-solving or cooperative group has remained much the same, the adversarial or competitive group is seen as growing more extreme and more negative. Second, as adversarial bargaining has become more extreme, it has also become far less effective. This is a key lesson for those hoping to become effective "Rambo" negotiators.

It appears that the declining public perception of lawyers is mirrored in how lawyers view each other. Fewer lawyers are viewed as effective by their peers and more lawyers are viewed negatively. Lawyers and popular culture are in accord in their perceptions and those perceptions are poor all around, at least as regards a significant minority of attorneys.

Future analysis and research

In examining the study results, it is important to recognize that the new study is based on the respondents' perceptions

of the other side rather than on some objective standard. How these adjectives are interpreted and how each responding attorney defines "effectiveness" clearly leaves room for subjectivity and even confusion. In the end, this study measures what makes one *perceived* to be an effective negotiator.

What we can see in the preliminary results of this study is some interesting trends in terms of behavior and perceptions. A problem-solving approach to negotiation continues to be seen as effective by the legal community. The importance of developing this kind of reputation, particularly in smaller markets and within a practice area, has already been discussed.⁷ Furthermore, contrary to pub-

tions of the growing number and increased nastiness of adversarial lawyers. The good news is that the bar also increasingly views these adversarial lawyers as ineffective.

Endnotes

¹ Michael Asimow, *Bad Lawyers in the Movies*, 24 *Nova L.Rev.* 533 (2000).

² GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT*, 15-46 (1983).

³ The Williams study had 75 adjectives. I added accommodating, angry, arrogant, assertive, avoider, caring, compassionate, confident, empathetic, flexible, listener, sensitive and stubborn. The new study also includes adjectives added by Williams and his colleagues in a 1986 study. Other items added that are not discussed here include bipolar pairs, goals, questions about negotiation training and ADR experience, as well as a self-evaluation.

⁴ The adjectives were grouped into two categories by a computer using cluster analysis, not by the author.

⁵ Robert Mnookin et al., *The Tension Between Assertiveness and Empathy*, 12 *NEGOTIATION J.* 217 (1996).

⁶ The adjectives that overlapped were experienced, realistic, ethical, rational, perceptive, trustworthy, convincing, analytical, creative, self-controlled, versatile, adaptable, poised and legally astute. WILLIAMS *supra* note 2, at 26.

⁷ Ronald J. Gilson and Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUM. L. REV.* 509 (1994).