

How to Use & Defuse Hardball Tactics in Negotiating

1. There is an Egyptian saying: "Papyrus, no matter how thin, always has two sides." Similarly, "Hardball Negotiation Tactics" are Deal Makers or Deal Breakers, depending on the stage of the negotiations, the relationships of the participants and the ability to create value by more strategically exploiting co-operative behaviors and information sharing. This article is designed to identify (i) when Hardball bargaining tactics are being used, (ii) how to defuse their effect(s) when such tactics seem to be succeeding and (iii) useful ways to switch back and forth during bargaining without endangering your client's interests.

2. Define what "A Hardball Tactic" is

A dictionary definition:

"The use of any means, however ruthless, to obtain an objective."

A more pragmatic definition in the context of negotiation eliminates the quasi-moral concept of ruthless:

"The use of means which violate the reasonable expectations of one's negotiating counter-party."

This later definition acknowledges situations in which each negotiating party has an accurate measure of the counter-party's negotiation tactics. In such situations, a tactic that may be regarded as a hardball tactic with differing negotiation participants, may simply be regarded as a negotiation manipulation when the use of the tactic is not a 'surprise' to the negotiating counter-party, even though the use of the particular tactic is outright dishonest, deceitful in some meaningful aspect, insulting, inflammatory, or culturally offensive. This definition emphasizes the "expectation element" of the tactic, rather than placing an independent moral or cultural value on the negotiating tactic that is used in an effort to persuade during negotiation.

3. What are good examples of Common Hardball Tactics?

- a. Extreme Claims followed by small slow concessions to achieve Anchoring.
- b. Commitment Tactics or Locking Yourself into to an Aggressive Position just at the extreme outer edge of what is believed to be a reasonable range.
- c. Good Cop -Bad Cop and feign internal disputes to gain additional concessions
- d. Take-it-or-leave-it. The "FINAL" Offer when it is premature and at the outer edge of a possible zone of agreement.

- e. Inviting unreciprocated offers to implicitly express disdain or lack of respect to the opposing negotiator's position.
- f. Personal Insults and Feather Ruffling to make matters personal, rather than focusing on the problem.
- g. Flinch Tactic in which Demand after Demand is piled on unreasonably
- h. Offering intentionally misleading information about facts or just plain lying, whether to a 'neutral' mediator or to the negotiating counter-part or to a third party who maybe expected to communicate with the negotiating counter-party.
- i. Threats and Warnings about disclosure of essentially private or personal information that may shame the other side (a form of extortion)
- j. Game of Chicken
- k. Belittling the Other Party's Alternatives in order to create an undisciplined response
- l. False ("red herring") issues that are insisted upon and then Dropped after concessions
- m. Nibbling after Deal has been made by adding demands as it is written up
- n. Use of Agent (or counsel) without actual authority to gain concessions without risk or falsely claiming a lack of authority
- o. Use of irrational, aggressive behaviors or faux Anger that in order to create uncertainty or fear in the opposing negotiator
- p. Pre-Conditioning [continued] negotiations on unreasonable significant concessions or one-sided exchanges of information
- q. Snow job in which more information is provided than asked for so it is impossibly expensive to find out that information which is needed
- r. Reversing the direction of the Negotiating Dance by toughening demands with an explanation that you were carried away with the progress and moved to quickly, thus
- s. requiring additional concessions
- t. Disingenuously agreeing to the other sides' position with a series of conditions subsequent or contingencies that you believe can not be met

4. What may happen to make Hardball Tactics Successful?

Benefits:

- i. May (with a flourish of insincere Anger) create a desire to be Realistic in order to avoid the greater loss, embarrassment and disruption of failing at a later date and a greater cost;
- ii. Creates Fear which cause one to feel a loss of control and an unwillingness to take Risk.
- iii. Creates Disgust or Revulsion which causes one to want to push away from the conflict and get on with the rest of one's life by literally agreeing to the Hardball offer or demand to rid oneself of the related dispute/negotiation (lower selling and buying price).
- iv. Creates Sadness which cause one to be willing to pay more to get rid of it (higher buying price and lower selling price).
- v. Creates an Anger that causes party to lose track of real interests and still be Happy with what turns out to be less!
- vi. Extreme claims followed by small slow concessions (confers anchoring advantage).
- vii. Take it or leave it offers a type of commitment strategy similar to the James Dean game of Chicken. GE used it by making Reasonable offers so did Edgar Gross for Linda Evans known as Boulwarism.
- viii. Exploding offers which if credible use the scarcity factor of Cialdini's principles of salesmanship. An exploding offer that is better than your reservation price is very hard to resist.

5. What may happen that makes Hardball Tactics Counterproductive?

Dangers:

- i. Increased chance party will simply walk away and/or increase its resolve to fight
- ii. Anger creates an overconfident tendency and a greater risk taker, which often makes it more difficult to settle
- iii. Hardballers are often hung by their own petards in that the person engaging in such behaviors becomes over-confident and less perceptive about real risks and rewards of collaborative solutions (both attorney and principal)

- iv. Cuts off potentially productive brainstorming and exploration between parties
- v. Stops a learning exchange of co-operative information that assists in identifying party priority needs and satisfying the interests of the other more efficiently
- vi. Reduces the chances for an integrative solution or a collaborative solution in which the joint resources may be shared to generate value (insurance, warranties, loan relationships and loan renegotiation, potential tenants, alteration of existing leases, etc)
- vii. Reduces ability to minimize transactions costs and may increase the likelihood of increasing the transaction costs of the dispute
- viii. Creates harm to the current and future relationships between the parties
- ix. Stops open effective communication about legal opportunities and risks and factual differences that could lead to a more realistic evaluation
- x. Potentially creates an exploitive environment or relationship that will prevent a durable settlement based on a perceived view that manipulation and lack of respect and trust are a permanent part of the negotiated bargain such that the “negotiated deal” that is reached is subsequently re-negotiated or violated through pretext and strained interpretations of the agreed upon possibly ambiguous language

6. How does one Successfully Respond to Hardball Tactics and Restore Productive Engagement?

The One-Two Punch (i.e. as is said in the fight game - for the right handed fighter, some left jabs to set up the right hand uppercut) is the most effective strategy.

Take one or two from Column A and one or two from Column B and you should be fine.

COLUMN “A:” The Initial Flurry of Left Jabs include:	COLUMN “B:” The Uppercut(s)
(a) Strike Back with a comparable hardball Tactic. Sometimes a "response in kind" is just what the doctor needs to wake up the patient and change attitudes and behavior.	(a) Play their Hardball Game, but Better. For example, if a hardball negotiator makes a Final Offer that is a bit too high or low for your client to accept, respond with your own Final Offer that will be a little too high or low for the hard ball negotiator to accept, with a statement that your offer is Final only so long as theirs is Final.
(b) Ignore the hardball tactic and continue negotiating as if the hardball tactic never	(b) Stay With A Strategy of Engagement based on Interest Based Negotiations

<p>occurred, even if that means countering to a "non-negotiable offer."</p>	<p>(i) Remain focused on interests, not positions. To do so reframe the hardballer's "position" into a statement of the hardballer's interests and get confirmation that your restatement is accurate and complete.</p> <p>(ii) If not, continue to reframe until you have restated each of the likely underlying interests of the hardballer. Then, explore options that may satisfy as well or better the hardballer's position and which are more consistent with your interests.</p>
<p>(c) Name the hardball tactic for what it is (e.g. You are being a Hard Ball negotiator; and you are using Good Cop – Bad Cop). Then, discuss why you will not continue to negotiate unless one negotiator is chosen to speak for the two of them; and further that negotiator must represent that he or she is fully authorized to make all concessions and final decisions.</p>	<p>(c) Switch to reaching agreement on every other issue except the hardball demand, including writing each up. You may be able to gain a sufficient number of concessions that you are able to accept some elements of the hardballer's extreme demand.</p>
<p>(d) Courteously acknowledge the Firmness of the Hardballer's Beliefs and Opinion and then choose the appropriate response from Column B.</p>	<p>(d) Negotiate a New Process to get to desired results. So, if the hardball negotiator is making personal attacks on your character or that of your client, simply state that progress or an agreement is very likely to occur, but only on the condition that all personal attacks cease. Otherwise, advise the offensive negotiator that you and your client are leaving and you will not return until the hardball negotiator and client are ready to communicate without the name calling.</p> <p>Or, invite the other side to a negotiation on another date, when a neutral mediator will be present and the parties do not need to communicate directly. Give the other side privacy and a few minutes to decide what process would be preferred. Then, if the other side after consultation with each other does not agree to cease the offensive conduct, just leave. It will improve the productivity of future negotiations.</p>
<p>(e) Co-Opt the Other Party with charm and an</p>	<p>(e) Add or Change Players - either you or them</p>

<p>offer of potential future dealings that can only occur when the hardball negotiator ceases the offensive tactic(s) being used.</p>	<p>or both. This is a wonderfully effective response when you have the time for multiple sessions. If the other side says, for example that the key decision maker must leave, then have your key decision maker leave, too and stay away until meaningful progress is made. If no meaningful progress is made, then do not come back to the bargaining table until the key decision maker for the hardball negotiator is actually present and makes a specific minimum time commitment that is satisfactory to you.</p>
<p>(f) Use Humor to defuse the offensive tactic. A humorous metaphor may allow you to ridicule the hardball tactic with relative impunity and permit negotiations to continue productively with one of Column B's options.</p>	
<p>(g) Take a Negotiator's Time Out and return with an option or two from column B in the event the negotiator has not agreed to cease the offensive hardball tactic.</p>	
<p>Or (h) if the Hard Ball negotiator is playing Nibble by requesting an additional concession when a deal has been reached and is in the process of being written up, come up with an additional demand of your own that is somewhat greater in value than the Nibble so that the Hard Ball Nibbler realizes that your client will not throw in an additional concession for "free," but will happily recommence negotiations to gain greater advantage.</p>	

7. Conclusion: Recognizing Hardball Tactics and knowing how to use them and defuse them is essential knowledge that every effective negotiator must integrate into his or her tool set. In the event one refuses to defend shrewdly against hardball tactics or also fails to utilize hardball tactics as part of one's negotiation portfolio, then one will be at a competitive disadvantage in many negotiating situations – to the professional detriment of oneself and one's client. So, do not let the desire to avoid hostility keep you from using and defusing some of the more effective negotiating tools that may be available to you as a responsible negotiator for your client. And yet, do not minimize the dangers of the implicit disdain and disrespect that "hardball tactics" are likely to have upon one's negotiating counter-parties.

Sources: “Beyond Winning: Negotiating to Create Value in Deals and Disputes,” by Robert Mnookin, Chair, Harvard Program on Negotiations, with Scott Peppet ’96 and Andrew Tulumello ’96 (2000); “Negotiation” by Roy Lewicki, David Saunders and Bruce Barry (2009) , *Mastering Business Negotiation: A Working Guide to Making Deals and Resolving Conflict* [Paperback] by Roy J. Lewicki and Alexander Hiam (2006) ; “The Fast Forward MBA in Negotiating and Deal Making” by Roy J. Lewicki, Alexander Hiam, Paperback - 288 pages, (October 1998) John Wiley & Sons; “Legal Negotiation and Settlement” by Gerald Williams (1983), as well as subsequent journal articles comparing competitive and cooperative negotiating styles of legal counsel.

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