

# WHEN COLLABORATIVE PRACTICE COLLIDES WITH THE HARDBALL NEGOTIATOR

**J. Mark Weiss, JD, CDFA**  
Collaborative Lawyer and Mediator

100 W. Harrison St., Ste. S470  
Seattle, WA 98119  
(206) 622-6707  
mweiss@mark-weiss.com  
www.mark-weiss.com

October 2018

**J. MARK WEISS** is a Collaborative lawyer and mediator, practicing law in Seattle since 1987. He frequently speaks and trains professionals in dispute resolution, including negotiation, mediation, and Collaborative Law. Mark received his first training in Collaborative Practice in 2003 and retired from litigation in January 2007 to become a full-time Collaborative lawyer and mediator. He led the successful effort in Washington State to adopt the UCLA into law. Mark was formerly a Director of IACP from 2012-17, Chairperson of the IACP Standards Committee, and co-Chair of the IACP Ethical Standards Rewrite Task Force. Mark is a Fellow of the American Academy of Matrimonial Lawyers and rated “AV” by Martindale-Hubbell. He is the 2005 recipient of the Ken Weber Attorney of the Year Award from the Washington State Bar Association Family Law Section, and the 2018 recipient of the President’s Award by Collaborative Professionals of Washington in recognition of contributions to Collaborative Practice in the State of Washington. Mark is a former chairperson of the WSBA Family Law Section, a former Trustee of the King County Bar Association, and a former Board member of King County Collaborative Law and Collaborative Professionals of Washington.

## A. INTRODUCTION

Hardball negotiation.<sup>1</sup> The term alone conjures up all kinds of imagery and feelings and can even put some people into fight-or-flight mode. In so many ways, hardball is the opposite of all that Collaborative Practice is supposed to be—participatory, respectful, welcoming of differing views, and forging agreements that consider what is important to all.

The sole purpose for Collaborative Practice is to help people reach agreements about matters of importance, such as structuring a family’s future after divorce. Instead of using a third party to dictate an outcome (often at enormous emotional and financial cost), professionals and clients work together in a respectful and participatory manner to learn about each person’s needs and priorities and arrive at an agreement that can be accepted by all. The textbook form of Collaborative Practice is the opposite of sharp or manipulative negotiation that is the *sine qua non* of hardball negotiation tactics.

Yet, we all know that many clients (and even professionals) believe it to be necessary to resort to such tactics. When we ask why, they might respond:

*“That’s how negotiation is done.”*

*“I felt I had no other choice.”*

*“I did not know what else to do.”*

*“So-and-so was not to be trusted.”*

When people hold these and similar beliefs, it should not come as any surprise that these tactics can show up in Collaborative Practice. People do not transform patterned habits simply by good motivations and choosing to utilize the Collaborative process.

Most people who engage in hardball tactics fear they will be at a disadvantage if they do not do so or believe they will achieve a better outcome if they do so. Research suggests the opposite. Sometimes hardball works. But it is likely not to work. Sharp practice often comes across as aggressive, offensive, and dishonest. The person who uses hardball tactics risks being viewed as an untrustworthy negotiation partner. An attempt to seek advantage by pushing, bluffing, or maneuvering the other into accepting an unacceptable outcome easily backfires.

If you use a hardball tactic, there’s a good chance you’re underestimating the danger that you could end up worse off. The risks include:

---

<sup>1</sup> For those not from North America, “hardball negotiation” is a term that comes from baseball and refers to negotiation tactics that are sharp or manipulative.

- Not being understood about what is important to you, so all can engage in problem-solving to address your needs.
- The likelihood that your approach will be sensed and provoke a reaction of resistance and retribution, and encourage further brinksmanship, thereby increasing the probability of an impasse.
- The prospect that you will be viewed as an untrustworthy negotiator, resulting suspicion about your motives and additional scrutiny on your proposals and ideas.
- Creating a climate that works against responsiveness and openness, creating delay, added anxiety, and fewer opportunities to explore alternative avenues for agreement.
- Greater difficulty in accurately predicting the possible responses of the other, who can be expected to be more guarded and more likely to engage in surprises to throw you off balance.
- A greater chance of reaching an agreement that is unsatisfactory and resented by one or all. This leads to a higher risk of future actions to undermine the agreement in various ways.
- A likelihood that relationships will be impaired, such as reducing the ability to co-parent or work cooperatively in the future.

These dangers are often seriously underestimated by negotiators who engage in sharp practices. With all these risk and problems, a hardball tactic or a similar display of power is usually not the smartest move.

## **B. SHARP TACTICS: DISTRIBUTIVE NEGOTIATION vs. INTEGRATIVE NEGOTIATION**

Most of the literature describes two different types of negotiation: (1) distributive negotiation, and (2) integrative negotiation. Each type has its unique advantages and disadvantages. The distinction between types of negotiation can be used as a framework to better understand where hardball negotiation shows up, why it can be problematic, and how to possibly defuse it.

### **1. Distributive Negotiation**

*Distributive negotiation* is competitive. Each negotiator tries to get more at the expense of the other. An example might be haggling over a car—the seller wants to get the highest price, and the buyer wants to pay the lowest price. Each negotiator aims for a bigger slice of the pie—leaving the other with the smaller slice. The focus is on “winning,” which means that the other loses. Because each negotiator participates in the bartering, one or both eventually give in from their positions until they have an agreement.

Distributive negotiation can occur with a friendly, even playful, manner or it can be done in a mercenary manner. It can be done politely or rudely. What makes distributive negotiation distributive is the focus on “win-lose” and not whether the chosen method involves a smile or a scowl.

Distributive negotiation is most effective when there is a measurable single goal (such as getting the best price) and there is no ongoing relationship. In those situations, distributive negotiation can be an efficient way to arrive at an agreement, especially if the negotiation proceeds in a friendly manner. An example of where distributive negotiation is likely most effective is with an insurer about damages for a personal injury—there is only one goal (the amount) and no ongoing relationship between the victim and insurer.

However, distributive negotiation is least effective when there is an ongoing relationship, or when the issues are multiple, nuanced, or complex.

The friendliest, most relationship-focused, distributive negotiation cannot do as well as integrative negotiation with nuanced or complex issues, such as are common when restructuring families. Important considerations and opportunities can easily be missed, because the focus in distributive negotiations tends to be much narrower—on “winning” or achieving a specific outcome on a narrow range of issues. In complex or nuanced situations, or when goals are broad, distributive negotiation can easily become a game of whack-a-mole; as soon as a perceived agreement is reached on one issue the positions on other issues shift.

The more serious a distributive negotiation gets—the harder each negotiator pursues their objective—the higher the likelihood that the relationship will be damaged. Pressing hard and trying to win at the expense of the other, tends to hurt the relationship—after all, no one likes someone who is perceived to be out to get them.

Hardball negotiation can be described as the most manipulative form of distributive negotiation. The goal of a hardball tactic is distributive: to “win” or get more—often by trying to move the ZOPA<sup>2</sup> in the direction of the person using the tactic—and generally without much consideration about the impact on the relationship or other as a person.

If you try to redirect a hardball negotiator so the negotiation becomes a productive distributive negotiation (*i.e.*, a discussion that is “within the ballpark”), the redirection will usually be about resetting expectations and/or setting ground rules, perhaps by using humor. If the redirection is towards a civilized distributive negotiation, then the relationship may be salvaged, recognizing the inherent limitations of the distributive negotiation process.

## 2. Integrative Negotiation

*Integrative negotiation* is an approach in which the negotiators try to find value for all by working together. The focus of each negotiator is not on getting the “most” at the expense of the other, but on each getting what is important to them. In order to accomplish this, neither engages in self-sacrifice; instead, each is clear and assertive about what is important to themselves *and* tries to understand what’s important to the other to satisfy the priorities of each and thereby reach agreement. All pay attention to the impact of the negotiation on the relationship; the person is not the problem, the problem is the problem.<sup>3</sup> Instead of merely attempting to get the larger slice of the pie for themselves, the negotiators may seek to enlarge the pie so both get a larger slice. If the pie

---

<sup>2</sup> “ZOPA” is an acronym for Zone of Possible Agreement.

<sup>3</sup> Thanks for this phrase to John Winslade and Gerald Monk, pioneers in narrative mediation.

can't be enlarged, they seek to address the shortfall by figuring out how they can deal with that jointly. Taking the time to continuously understand what is important to each negotiator, and how those priorities shift as the discussion unfolds, is important in this style of negotiation.

Integrative negotiation is most effective when working together and understanding what is important to the other can result in mutual gain, such as when preserving a co-parenting or other relationship, or when planning can help each party. Complex, nuanced, and interrelated issues can be handled because it is often possible to discuss and balance a range of priorities and preferences within a cohesive whole.

However, Integrative negotiation may be inefficient or intrusive if there is no ongoing relationship and the transaction is simple. The time and effort needed for integrative negotiation can be excessive when the only question is the sales price of a car.

Integrative negotiation is well suited for the typical family law matter, which involves restructuring then finances and relationships of families.<sup>4</sup> Accordingly, it is a negotiation approach that is often used in Collaborative Law and facilitative mediation. It is also used in many business negotiations. Research supports the conclusion that integrative negotiation results in better substantive outcomes than distributive negotiations, so long as all negotiators do not readily yield on what's important to them.<sup>5</sup>

Key differences between the two approaches can be summarized as:

	<b>DISTRIBUTIVE NEGOTIATION</b>	<b>INTEGRATIVE NEGOTIATION</b>
<b>CONTENT</b>	Win-lose	Win-win
<b>TONE</b>	Friendly, unfriendly, or businesslike	Friendly or businesslike
<b>PRESERVING RELATIONSHIPS</b>	Less important than the deal	As important as the deal
<b>PROCESS</b>	Take opposite positions and slowly compromise	Create solutions that address concerns and goals of each
<b>STANCE</b>	Rigid/confrontational	Flexible/supportive

If trying to redirect a hardball negotiator towards a more integrative negotiation approach, the redirection will often be about identifying what needs to be addressed, the concerns of each, and then refocusing the conversation on those topics. Doing so takes an investment of time and persistence; it will not always be successful.

---

<sup>4</sup> The most common method of integrative negotiation is interest-based negotiation, varieties of which have been popularized by Ury and Fisher's classic *Getting to Yes: Negotiating Agreement without Giving In* and by Marshall Rosenberg's *Nonviolent Communication*.

<sup>5</sup> De Dreu, Weingart, and Kwon: *Influence of Social Motives on Integrative Negotiation: A Meta-Analytic Review and Test of Two Theories*, *J. of Personality and Social Psych.*, Vol. 78, No. 5, p. 889 (2000).

### **C. PREPARATION IS ESSENTIAL TO LIMIT HARDBALL NEGOTIATION**

Once discussions are derailed by hardball negotiation tactics, it may be difficult (and sometimes impossible) to get the process back on track. If possible, the quality of the process will likely be impaired, take longer, and cost more in professional fees. Careful and thorough preparation (by both professionals and clients) can reduce the likelihood of being faced with such tactics and inform a good response when they arise.

It's essential that all professionals and clients have similar expectations of the ground rules, process and the steps in the negotiation. Clients need to learn how the negotiations will ensure that what's important to them will be addressed, and why it's in their own self-interest to work cooperatively and avoid hardball tactics even if tempting. I have found that, when explained and reinforced, most clients understand these concepts. As part of our preparation, each of my clients receives my handout entitled "Divorce Negotiation Basics," which is also included with these materials.<sup>6</sup>

In doing so, it is particularly important to ensure that what is important to each negotiator is continuously part of the conversation. This involves inserting known interests *for all negotiators* into the conversation as anchors, and check-ins to verify that interests have not changed. It is also important to continuously monitor the tone of the conversation to ensure that each participant is participatory and engaged.

Hardball tactics work best with those who are complacent, who can be bluffed, or who can be shaken. If you understand what is being discussed, the human motivations, and the dynamics, you will better be able to identify and respond to such tactics.

For lawyers, good preparation includes more than understanding the facts and the law. For financial professionals, it includes more than understanding the finances. For coaches, it includes more than understanding the emotions and systems. For all professionals, it is important to learn about the motivations of each client—what is important, what may be at stake, what are his/her concerns and hopes, and what are the real-world implications of possible decisions. Good preparation will also provide you with a better assessment of what every negotiator should know—your BATNA (Best Alternative to a Negotiated Agreement), WATNA (Worst Alternative to a Negotiated Agreement), MLATNA (Most Likely Alternative to a Negotiated Agreement), and ZOPA (Zone of Possible Agreement.)

### **D. 8 STEPS TO PREVENT, IDENTIFY AND RESPOND TO HARDBALL TACTICS**

Consistently following these 8 steps will help prevent hardball tactics and help identify and respond effectively to them.

Step 1: GROUND RULES. Establish clear expectations about the ground rules for negotiation. Be certain each professional and client knows what is expected of the other.

---

<sup>6</sup> You are welcome to use this handout for your own clients or use it as inspiration to create your own equivalent handout. I would be grateful for your willingness to share your suggestions to improve it.

- Step 2: PREPARATION. There is no substitute for good preparation. Good preparation (of both the professionals and the clients) allow everyone to participate in the process more efficiently and effectively. As a bonus, preparation makes it much easier to detect hardball tactics and to be able to formulate effective responses.
- Step 3: CRITICAL THINKING AND EARLY INTERVENTIONS. Consider the behaviors you see, and the statements made, in context of the ground rules that were established. What is consistent, and what is inconsistent? Intervene early by asking questions when things seem amiss.
- Step 4: DO NOT REINFORCE A SUSPECTED TACTIC. There are many ways tactics can be reinforced intentionally or unintentionally. If you suspect a hardball tactic, be sure to not choose an intervention that may reinforce it. And whatever you do:
- Do not take the tactic personally. No matter how personal it sounds, it's not about you. Period. If you make it be about you, you impair your ability to analyze the situation, and you'll be less likely to be able to respond effectively.
  - Do not confuse the tactic with the person. They are just trying to be strategic, albeit in a misguided way. Remember, their participation is needed if you are to succeed in getting the negotiations back on track.
  - Do not let the tactic impair your own integrity. Do not resort to dishonest, manipulative, or improper tactics.
- Step 5: INTERVENE APPROPRIATELY. The most appropriate intervention will depend on the situation. Options to consider include:
- Ignore the tactic (if not serious and not likely to repeat).
  - Call for a break--go to the balcony.
  - Focus on the content and ignore the behavior. (This is effectively a reframe to get back on track).
  - Bring up and discuss the tactic.
  - "Touch and go" – issue a brief counter-threat (as a boundary) and immediately redirect towards needs and interests.
  - Walk away. End the interaction, and possibly terminate the matter if the tactic has made it impossible to operate with integrity.
- Step 6: REDIRECT. Redirect the conversation towards the interests and needs of both parties. Ask questions about their interests and ways to address them. Express understanding of what's important to them. Make everyone's interests part of the discussion.
- Step 7: CONSIDER WHETHER TO REASSESS YOUR BATNA. The tactic may be an unskilled way of informing you that your original assessment was mistaken. Be curious about new information that may cause you to reassess your BATNA. Remember your BATNA and consider any proposals against it. Remember that certain interests and needs might not be addressed if you resort to your BATNA, so be sure to prioritize.
- Step 8: If the other cannot or will not consider negotiating with integrity (after you have used all tools you have to steer things back), strongly consider immediately terminating the process. Staying in the process any longer with such a person will likely only prolong the pain for everyone.

In addition to the 8 steps above, here are some other things to consider when faced hardball tactics:

**Remember to focus on the future.** Oftentimes, hardball tactics can trigger backward-looking thinking. Remember that forging a divorce agreement is never about the past. It is about creating something that will work in the future, Keep your focus there.

**Keep your eyes on the prize.** Hardball tactics can easily cause anger and, consequently, it can be easy to change focus from the goal of negotiating to seeking revenge. Keep your focus on what matters: the content of the agreement rather than the behavior of your negotiation counterpart.

**Stay positive.** Sometimes it's useful to pretend it never happened and stay positive. This can be disarming if done well. By doing so, you are really saying, "What you are doing has no effect on me."

**Use humor.** Use humor to change the dynamic of the interaction. Getting people to laugh is disarming and can often turn around a bad situation.

**Ask that person for advice.** Ask what they would do if faced with the same behavior. You might say, "I am really at a loss on how to proceed forward. We both seem frustrated. How might we deal this so we're both okay with the outcome?"

**Come back to the issue.** "John, I need time to think about your proposal. Can we discuss it at the next meeting?" Or, simply wait until the next meeting, when you have had time to calm down, before raising your concern. Try saying, "John, in the last meeting you said something that puzzled me. Can you explain what you meant by...?"



**E. COMMON HARDBALL TACTICS**

<b>TACTIC</b>	<b>DESCRIPTION</b>
<p><b>HIGHBALL - LOWBALL</b></p>	<p><i>WHAT IT IS:</i> Open w/ an extremely high or low offer, in the hope the other will reconsider the ZOPA and anchor expectations. It often looks like extreme demands followed by small, slow concessions.</p> <p><i>WHEN IT WORKS:</i> If you do not know your BATNA or are easily intimidated.</p> <p><i>BE CURIOUS ABOUT WHAT IS DRIVING THE EXTREME OFFER:</i> Try to learn whether you need to reassess your BATNA. Did you make a mistake or miss something?</p> <p><i>COUNTER-MEASURES:</i> Once confirmed, do not let a highball or lowball offer define the negotiation. Name the tactic if it's obvious.</p> <p><i>DO NOT COUNTER-OFFER!</i> Instead, insist on a more reasonable offer as a starting point. Walk away from the negotiation if they refuse—this tactic is basically a variety of trench warfare. There's nothing to be gained by playing along hoping they will blink.</p>
<p><b>THE NIBBLE</b></p>	<p><i>WHAT IT IS:</i> The Nibble is presented towards the end of a negotiation, often after lots of time spent. Suddenly, your counterpart will agree to the deal provided you agree to a concession not previously discussed. The theory is that you'll be more likely to agree after being worn down and wanting the deal done.</p> <p><i>PREVENT BY:</i> Begin negotiations by laying out each issue you want to discuss and ask your counterpart to do the same. Throughout, ask if there is anything else to discuss. This makes it more difficult to bring up a nibble and makes it easier for you to turn it down, because you gave them every opportunity.</p> <p><i>COUNTER-MEASURE:</i> Have a set of small issues ready to counter with. They will either accept or back down and agree to the original deal as discussed.</p>
<p><b>GOOD COP, BAD COP</b></p>	<p><i>WHAT IT IS:</i> As a negotiating tactic, one of the other team members is reasonable, the other is tough.</p> <p><i>ASSESSMENT:</i> Can be difficult. Different people may simply be more aggressive than others. Sometimes these patterns are subconscious.</p> <p><i>COUNTER-MEASURE:</i> Realize that they are working together and don't lose sight of that. Get your own bad cop if you need one.</p>
<p><b>THE VISE</b></p>	<p><i>WHAT IT IS:</i> Asking you to bid against yourself. An example: "You'll have to do better than that."</p> <p><i>COUNTER-MEASURE:</i> Do not bid against yourself. To the example, consider responding: "Exactly how much better do I have to do?"</p> <p><i>EXCEPTION:</i> If you truly made an error (for example, if you accidentally made a lowball or highball offer), then it's appropriate to correct by bidding against yourself.</p>

TACTIC	DESCRIPTION
<b>BOGEY</b>	<p><i>WHAT IT IS:</i> Pretending an issue is vitally important, when it's not. The hope is that by conceding the "important" issue, you will concede something important.</p> <p><i>ASSESSMENT:</i> Put yourself in their shoes. Be curious about why they would consider something important. Immediately ask why something is important if it's not making sense.</p> <p><i>COUNTER-MEASURE:</i> Understand their needs and interests. Create options that satisfy their needs and interests <u>and</u> yours, so no one must give up what's important. If they balk, you may have identified a Bogey.</p>
<b>SNOW JOB</b>	<p><i>WHAT IT IS:</i> Overwhelming you with facts, figures, and documents. The idea is to get you to agree to something you do not understand.</p> <p><i>COUNTER-MEASURE:</i> The biggest challenge is determining what information is important, and what information is there to distract. Do not agree to anything you do not understand—and let them know you will not agree until you understand it. Ask them to help you understand what is important in the pile of information. Bring in expertise if needed to help interpret or make sense of the information.</p>
<b>THE BRINK</b>	<p><i>WHAT IT IS:</i> A "take it or leave it" ultimatum.</p> <p><i>ASSESSMENT:</i> Be curious to learn if you are running into their BATNA or if it's just a tactic. Ask questions to learn what's important to them, what the proposal gets them, and what alternatives might exist.</p> <p><i>COUNTER-MEASURES:</i> (1) Offers are never non-negotiable, so continue negotiating being sure to focus on how to address their needs and interests. Be very explicit about addressing their needs. Provide new information that may help them reassess. (2) Call for a break. It may simply be that you or they are not yet ready. (3) Impasse is a normal part of the negotiation process; it may be just a way to signal having power and assessing the other's sense of power. Don't consider the negotiations over if you or they decide to walk. Take some time and maybe come back later.</p>
<b>FAKE DEADLINE</b>	<p><i>WHAT IT IS:</i> Establishing a deadline to pressure a decision.</p> <p><i>COUNTER-MEASURE:</i> Respond that you need more time and take it. They do not need to assent to your timeline—they too need the deal. Be sure to be explicit about taking time, so the person setting the fake deadline is not confused into believing they need to ramp up the pressure on you.</p>
<b>LYING</b>	<p><i>WHAT IT IS:</i> An exaggeration or minimization, or a simple falsehood, presented to gain perceived advantage.</p> <p><i>COUNTER-MEASURE:</i> Be well prepared. Understand the facts, understand the law, understand the implications of different decisions, and understand the circumstances. Verify what's being stated. Negotiate in person—it's more difficult to lie to another's face.</p>

TACTIC	DESCRIPTION
<p style="text-align: center;"><b>THREAT</b></p>	<p><i>WHAT IT IS:</i> Making a threat of any kind (including personal, about reputation, etc.) as a means of coercing a decision.</p> <p><i>ASSESSMENT:</i> A threat may or may not reflect a hardball tactic. Here are 3 possible motives for a threat: (1) The “Bluffer” is using a threat as a ruse to dominate. The Bluffer is using a hardball tactic. (2) The “Victim” was feeling threatened or offended, and the threat reflects only a desire to be acknowledged or a point considered, (3) the “Pragmatist” is using a threat to inform you of his/her real boundary or BATNA.</p> <p><i>COUNTER-MEASURES:</i> (1) Stay calm and pretend you did not hear it, (2) Ask them calmly to repeat what they just said, (3) Call out the tactic and insist on ground-rules, (4) Issue a very quick counter-threat and redirect the negotiations towards interests. For example: “My assessment is different, and that my client would win in court. Rather than debating that, we’d rather focus on reaching an agreement where they both have good housing and a good relationship with their daughter. Which would you prefer?”</p> <p><i>CAUTION:</i> Take a break first to re-center yourself if needed.</p>