

How to Decide How to Divide - A Short Overview of Norms and Criteria

William DeVane Logue

You are in a negotiation or a mediation and there are some ideas on the table. Maybe you are trying to decide if an idea is worth agreeing to. Or maybe you are trying to persuade the person you are negotiating with that they should accept something you have suggested. How can you make deciding easier and more rational in these situations without resorting to coercive leverage?

A quick answer is to ask: does it meet the interests (the needs, desires and concerns) of the parties? If the answer is yes don't stop there. There are still some other things to consider.

The concept of distributive justice refers to how benefits and burdens are allocated within a society or group. Each person wants to do what is fair. Yet people's sense of distributive justice will be reflected in how they *feel* about the fairness of that allocation. Sound slightly odd? Well in the context of negotiation or mediation people's sense of fairness may depend on the *process* used for deciding who gets what. Now it gets a little more complex because there are a number of norms – what is usual, typical or standard – that people can invoke to support their preferred allocation that will support their sense of being treated fairly. The types of norms that are usually invoked include equality, equity and need. (For this discussion we are ignoring power as a norm.)

Equality is relatively easy to apply – just do the math. In this situation you simply divide whatever is being allocated by the number of people, parties or some other agreed upon aspect. Negotiators often resort to this at the end when they split the difference between the offer and demand. If there is \$1,000,000 in dispute and two plaintiffs, each gets \$500,000. Simple? Maybe. One problem is that you can't always be certain that where you start when splitting the difference between offers is reasonable and one party might have shaded the perception of the bargaining zone greatly in their favor. Two partners in a dissolving business might find this fair equality fair – and we often resort to it as a default. What if the plaintiff are families or estates and one estate has one survivor and the other has two? What if one person died in one family and two in the other? Do you divide by the number of survivors or number of decedents?

With **equity** you look to the level of contribution of each and use that to allocate proportionally. One partner in the dissolving business might argue that they had generated 65% of all income over the last five years so they should receive 65% of the assets on dissolution. In the estate

example above should damages be allocated based on future earning potential or pain and suffering.

Need is another norm that can help with the math. In this situation those in greater need of whatever is being allocated receive more.

Confused yet? They are still other ways to be persuasive.

People think they are unique, yet they want to feel comfortable they aren't making a mistake. They look to **convention** or reference transactions to assure themselves that their choice is good. They ask themselves what do other people do? What did they pay in the past, what is the market price, standard language in a contract, industry custom, depreciation rate, etc. In other words what can they point to that is external or objective.

In this situation they might look to a fair process to resolve final differences. This might mean finding a scientific, legal or other substantive expert to offer advice or opinion. People will often defer to authority. Or it might mean submitting an issue or the entire dispute to a neutral arbitrator for a final decision.

Lastly, social science research indicates that we use **reciprocity** to engage in the back and forth of negotiation. One party makes a move and the other feels obligated to respond in kind.