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Why Don't You Just Meet Me in "The Middle"? Effective Negotiation Techniques

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Negotiation Guideposts

Now decades ago, authors William Ury and Roger Fisher published their revolutionary book, *Getting to Yes: Negotiating Agreement Without Giving In*.ⁱ The book provides effective negotiation techniques and strategies based on the fact that nearly *everything* is a negotiation. Formal or not, people are always negotiating. The principles of *Getting to Yes* create a framework for successfully navigating complex negotiations and overcoming barriers to a successful resolution. Though negotiation strategies may widely vary, *Getting to Yes* recommends the following overarching principles:

Separate the People from the Problem.

In all circumstances, it is crucial to try to understand and respect each party's unique position. Zealous and competent advocacy should not result in damaged relationships. Negotiations become unnecessarily personal when parties fail to consider the other side's perspective.

Focus on Interests, Rather than Positions.

Avoid hardline positions that do not lend themselves to compromise. Rather, work to express your interests in terms of the goals of the negotiation. Similarly, seek to fully understand the interests of the other side; ask questions to identify common or compromising interests rather than rigid positions.

Generate Options that Benefit Both Parties.

Be creative! Negotiations do not result in zero-sum, unilaterally favorable results. Rather, strive to develop a solution that could satisfy some interests of the other side, while not compromising on your own ultimate objectives.

Demand Objectivity by Managing Emotions.

Find ways to maintain neutrality and objectivity for all parties. This could include the use of a neutral third party or by establishing neutral guidelines to evaluate negotiation progress. In all aspects, strive not to measure success emotionally, but rationally.

Know Your Audience.

Know what motivates your audience. This will certainly inform your negotiation strategy and help get the negotiation over the finish line. Further, and in the context of labor negotiations, you may have more than one audience; you need to know what motivates each of them.

The Ethical Considerations of Negotiation

With the backdrop of the *Getting to Yes* negotiation principles, there are a wide variety of potential techniques and tactics to put these steps into practice. However, advocates should first consider whether the contemplated negotiation strategy fits within an attorney's ethical requirements.

Advocates must remain aware of their professional and ethical obligations, even during the course of negotiations. For example, the ABA Professional Model Code (the "Model Rules") suggests standards for maintaining truthfulness in statements to others: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . ." ⁱⁱ The Model Rules are further clarified to include statements of fact, but certain negotiation tactics are not considered statements of material fact. ⁱⁱⁱ Specifically, the Model Rules view misrepresentations of a walkaway point during a negotiation as mere puffery, rather than a prohibited false

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statement of material fact.^{iv} Other likely permissible tactics include exaggerating proposals of price; representing a distorted bottom line; selectively disclosing information (short of making an impermissible false statement); threatening to terminate further negotiations; overstating demand importance or making unimportant concessions to urge the other side to make a concession.^v The common thread connecting these strategies is that each falls short of a knowing false statement, and could more appropriately be described as skillfully representing the position of a client. Advocates should be aware of these tactics to successfully identify when such a tactic is being employed by the other side in a negotiation.

Effective Negotiation Strategies

Within the course of a negotiation, there are numerous approaches to consider in order to reach a favorable outcome. Negotiations are not, however, a one-size-fits-all exercise. Rather, an effective negotiator evaluates the situation and adapts to best maximize the possibility of success. The following are only examples of common strategies to consider during the value-claiming portion of a negotiation.

Good Cop / Bad Cop

One of the most tried-and-true negotiation strategies is the “good cop / bad cop” routine. In this approach, a more seemingly reasonable negotiator eases resistance of a tougher counterpart.^{vi} When the other side believes an acceptable agreement is imminent, the “bad cop” creates division and indicates that an offer is entirely insufficient.^{vii} “Just as those persons are preparing to explode at the unreasonable participant, the reasonable partner assuages their feelings and suggests that if some additional concessions were made, she could probably induce her seemingly irrational partner to accept the new terms.”^{viii}

When encountering this routine, negotiators should be mindful not to allow the “bad cop” to dictate the course of negotiations. Rather, seek to involve the “good cop,” the reasonable negotiator, and seek her acquiescence to the sought terms.^{ix} Alternatively, a negotiator could target the “bad cop” with probing question to seek reasoned justifications for his positions.^x If the “bad cop” is performing simply for the sake of his tactic, the tactic could unravel with the “bad cop” struggling to defend his position.

Intentional Silence

When a negotiator has something to say, he should say it succinctly and then employ silence.^{xi} In this strategy, a negotiator must resist the temptation of talking or monologuing, which may terminate further negotiations.^{xii} Silence may keep the possibility of further discussions open, while further argument, in some circumstances, could cause participants to reach impasse.^{xiii} Further, by speaking for an extended period of time without interruption, negotiators risk making unintentional or ill-timed concessions. By allowing the negotiation to move forward slowly and intentionally, offers may be perceived as more intentional and attractive.^{xiv}

False Demands or Insufficient Client Authority

As discussed above, negotiators employ various forms of puffery in order to better their position in the negotiation. This could include overrepresenting the value of a particular item to obtain valuable concessions from the other side. “If they can convince their counterparts that these issues are of major value to their own clients, they may be able to obtain relatively significant concessions in exchange for terms they do not really value.”^{xv}

Similarly, some may maintain that they possess only limited authority from the client regarding crucial topics.^{xvi} This permits a negotiator the opportunity to pause and reassess tentatively agreed upon terms before they are finalized.^{xvii} Further, this approach could create the impression to the other side that an offer is more generous or

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favorable than it really is.

A "Problem-Solving" Style

Some negotiators struggle with the decision of whether to appear cooperative or adversarial at the negotiation table. While an adversarial approach could be most appropriate in certain circumstances, research suggests it often leads to a failed negotiation outcome: "90% of lawyers perceived as ineffective were also adversarial. In contrast, 91% of lawyers seen as effective took a problem-solving approach to negotiation . . ." ^{xviii}

Problem-solving negotiators are perceived as ethical, trustworthy, fair-minded, and understanding of the other side's needs. ^{xix} By seeking to genuinely understand and resolve the issue at hand, problem-solvers build their own credibility and achieve higher rates of success. Research indicates that adversarial approaches have become more extreme and less effective, while problem-solving advocates who balance assertive and empathy receive more effective results for their clients. ^{xx} A problem-solving strategy involves intentionality on behalf of the negotiator to immediately build rapport with all parties.

Limited Time Offers

This strategy is often considered in modestly valued situations. Here, a negotiator makes a seemingly reasonable offer, and conveys that it must be accepted by a particular date, or the offer will no longer be valid. ^{xxi} Some take this approach a step further by threatening a decreased offer or increased demands if the offer is not accepted within the specified timeframe. ^{xxii} Negotiators should be mindful that such a hardline approach could prematurely end negotiations and be perceived by other parties as adversarial, rather than problem-solving.

Conclusion

Negotiation results are not accidents. Rather, they are the result of extensive strategy and planning to align on the most effective strategies. While there are overarching best practices to apply to all negotiations, there are virtually unlimited approaches to negotiations. Negotiators should work diligently with their clients to strategize on the most appropriate approach to negotiations.

ⁱ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991).

ⁱⁱ MODEL RULES OF PROF'L CONDUCT r. 4.1.

ⁱⁱⁱ MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2.

^{iv} *Id.*; see also Hal Abramson, *Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks*, 23 Harv. Negotiation L. Rev. 319 (2018). Available at: <https://journals.law.harvard.edu/hnlr/wp-content/uploads/sites/91/Fashioning-an-Effective-Negotiation.pdf>.

^v *Id.*

^{vi} Charles B. Craver, *Classic Negotiation Techniques*, 52 Idaho L. Rev. 425 (2019).

Available at: <https://digitalcommons.law.uidaho.edu/idaho-law-review/vol52/iss2/1>.

^{vii} *Id.*

^{viii} *Id.*

^{ix} *Id.*

^x Abeer Sharma, *A PRIMER ON THE GOOD COP/BAD COP ROUTINE IN NEGOTIATIONS*, NUJS Journal on Dispute Resolution, 2(1) (2022). Available at: <https://journals.nujs.edu/index.php/jodr/article/view/97>.

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^{xi} Charles B. Craver, *Classic Negotiation Techniques*, 52 Idaho L. Rev. 425 (2019).

^{xii} Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 Or. L. Rev. 199 (2001). Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/253.

^{xiii} *Id.*

^{xiv} Charles B. Craver, *Classic Negotiation Techniques*, 52 Idaho L. Rev. 425 (2019).

^{xv} *Id.*

^{xvi} *Id.*

^{xvii} *Id.*

^{xviii} Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002). Available at:

<https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1270&context=facpub>

^{xix} *Id.*

^{xx} *Id.*; see also Hal Abramson, *Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks*, 23 Harv. Negotiation L. Rev. 319 (2018).

^{xxi} Charles B. Craver, *Classic Negotiation Techniques*, 52 Idaho L. Rev. 425 (2019).

^{xxii} *Id.*