

How to Negotiate with Subtlety, Civility and Effectiveness - Practical Tools & Essentials

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- “Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker, the lawyer has superior opportunity of being a good man. There will still be business enough.”
- *Abraham Lincoln*



Three Learning Objectives of this Session:

- 1. Catch the vision & basics for a constructive approach to conflict resolution/negotiations.
- 2. Identify some specific tools and practices for conducting your negotiations.
- 3. Learn by doing - apply the principles discussed during a short role play opportunity.



INTRODUCTION

- Background
- Henry Kissinger's secret negotiations in China
- Gas cans in the Bahamas



What does this mean?

Let's Eat Grandma.

- **What?!?** (Grandma sandwiches?! No thanks!!)
- **Let's eat, Grandma.**

(Ah. - Commas save lives!)

As with grammar, in negotiations, seemingly small things like Civility and Subtlety, Honor and Respect, can be overlooked as inconsequential and even optional.

However, (as with grandma and commas,) the lack of them in negotiations can be disastrous.

Civility and Subtlety, Honor and Respect, are important and essential to successful negotiations!



I Vision & Basics for a Constructive Approach to Conflict Resolution/Negotiations.

A. Basic Conflict Resolution Theory And Practice:

- A fundamental principle in negotiations is: Focus on the "interests" of all parties, and not just the end game "positions" of the parties.
- As articulated in their book, *Getting To Yes*, Roger Fisher and William Ury advocated the view that the essence of successful negotiations is to avoid bargaining over "positions."
- They suggested shifting the view to creative problem solving and consensus building, especially in considering interests of the parties and not just their desired final positions.



- These are good principles. If you seek only your own self-interests and your own end game position in negotiations, then you will be stunted in your methods and disappointed in your results.
- Especially if this is new to you in your negotiations, go ahead, seek and identify the interests of the other across the table, as well as your own.
- Discuss with the other parties their interests.
- Listen. Ask questions. And then listen some more.
- "You can't learn anything with your mouth open." Dad Alatis



Further Negotiation Theories get more complex...

- Zero-Sum Scenarios
- "Pareto efficiency" or "Pareto optimality" // "Pareto Improvement"
- Nash Game Theory
- Non-cooperative game theory
- Cooperative game theory
- Duality $v^*(S) = v(N) - v(N \setminus S), \forall S \subseteq N$
- Superadditivity $v(S \cup T) \geq v(S) + v(T)$
- Monotonicity $S \subseteq T \Rightarrow v(S) \leq v(T)$
- "Prisoner's Dilemma" Construct Model



- However, at this point, let's identify the shift away from just final positions to creative problem solving and consensus building, especially in considering interests of the parties, and not just their desired final positions.
- In considering those interests, generate a wide range of options for a way forward in the negotiations.
- Try to identify some objective criteria and general requirements that a potential agreement must satisfy.



These concepts are the fundamental interest based, consensus modelling for current negotiations theory.

- However, while exploring all parties' "interests" in going forward in the negotiations,
- take special effort to do so in a successful way that addresses the overarching issue that affects all actions and considerations in negotiations, including and very specifically:
- Human emotions, Relationships, and the Human personality factor.



- Fisher and Ury called this: "separating the people from the problem,"
- meaning that it is important to understand the role that emotions play in a dispute, -- but not allow those emotions to "become entangled with the objective merits of the problem."
- In negotiations, by definition, you are dealing with real people in real relationships. People are not robots or computers.
- Their emotions and heartfelt vested concerns so often overshadow,
- if not control, - if not subjectively override,
- their own beneficial self-interests.



So, how does one effectively "separate the people from the problem," and do so successfully?

- B. Go Beyond Identifying the Parties' Interests,
- And Purpose to Develop the Relationship of the Parties via Actions & an Attitude of Honor & Respect.



Again, people are not robots or computers. Their emotions & heartfelt concerns so often overshadow, if not control, - if not subjectively override their own beneficial self-interests.

- Thus, you must both address the parties' respective interests
- AND build up the relationship with the one across the table from you in the negotiation.
- In negotiations, we may faithfully explore, document, and catalogue all our respective best "interests" per the current negotiating theory.
- But if we antiseptically address only your logical best interests, and my logical best interests, we can miss the human component that may well be affecting, if not subverting, our success in the negotiation.



Thus, we need a more fully encompassing approach that seeks to accomplish all three goals at the same time:

- 1. Obtain benefit for my interests, AND.
- 2. Also, Obtain benefit for the other's interests, AND
- 3. Also, promote and build up the Relationship with the other in the negotiations.
- Yes, I seek to obtain benefit for my own interests, and yes, I am also looking for ways to address your interests; but at the same time, I am concurrently looking to be very cognizant of the human/emotional factor, and apply the oil in our relationship that keeps the negotiations moving forward and being productive.



So I purpose in my heart to "do you good," to respect you, to honor you, and to build up our relationship by showing you that good will, both in word and actions within the substance of our negotiations.

- In my doing so, this will allow you to relax,
- begin to trust me more,
- promote a willingness for you to partner with me in seeking to attain our mutual interests;
- and it will help grease the wheels when compromise is inevitably required.



We should view the disagreement and conflict as the enemy to be vanquished, not the person across the table.

- We can call this the "Intrinsic Civility Premise" or the "Intrinsic Civility Approach."
- "Gas cans in the Bahamas..."
- Seeking my interests, and also seeking to recognize the other's interests & strong points, and also purposing to maintain and promote the relationship with honor and respect, should be an essential aspect to our negotiations,
- as it addresses the human factor that goes beyond just positions and respective interests of the parties.



So how do we build up and develop the Relationship and do so effectively?

- In negotiations, we foster the Relationship of the parties by recognizing
- the "human/emotions factor"
- AND the value of each person involved.
- We thus purpose in our hearts and minds to extend honor and respect to those across the table, and
- not just seek to identify and address detached "interests" of the parties.



Recognizing the human factor includes acknowledging the following principles:

- "No man is an island – Each is a piece of the continent..."
- If a piece is washed away by the sea, Europe is the less...
- Each man's death diminishes me,..."
- *John Donne 1624*
- [Extra credit: From what poem or piece was this taken? What book used a famous phrase from this piece, & who was the famous author?]



- **People have value.**
- "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,..." *Declaration of Independence*
- Abraham Lincoln commented further:
- "The assertion that 'all men are created equal' was of no practical use in effecting our separation from Great Britain, and it was placed in the Declaration not for that, but for future use."



- The "future use" and the continued applicability of those hallowed principles Lincoln extolled extended not only 'four score & seven years' into the future, but also extend 'two hundred & forty years' into today.
- Lincoln's referenced "future use" is seen in our interactions with each other in civil life, particularly in our context here,
- in purposing to seek resolution of conflicts with civility, and in honoring those perceived to be on the other side of the disagreement or conflict.
- Keep that maxim/goal in view as you negotiate: "People have value..."
- Act in that way & you will maximize yr negotiating potential to the fullest.



- "Those who give up Liberty, to purchase Safety, often get neither."
Benjamin Franklin
- On the converse:
- "Give, and it will be given to you..."
Ancient Saying
- Game Theory Matrix paths often show best outcomes with cooperation.
- Image of "12 foot spoons..."
- People have value... → Maximize your negotiating potential.



Accordingly, building up the relationship and valuing the other person in the negotiation includes the following principles:

- **Don't take yourself so seriously.** (Be secure enough, and humble enough, to proceed effectively and without personal hindrances.)
- **Be a good listener.** One of the greatest signs of respect and honor is listening to the other side and acknowledging their valid and strong points, as well as why their concerns are important to them. ("A person should be quick to listen, slow to speak, and slow to become angry." *Ancient Proverb*)



- **Be patient and do not get offended easily. Overlook an offense.** ("A person with good sense is patient, and it is to his credit that he overlooks an offense." *Ancient Proverb*)
- "Forgiveness is not an occasional act, it is a constant attitude." *Martin Luther King Jr.*)
- While you can be discrete, and though it can be tricky in negotiations, **always, always be honest.**
- (Similar to your reputation before the court: "Candor Is Critical. Before an appellate court, your credibility is your stock-in-trade; your honesty, critical." *Justice Judy French, Supreme Court of Ohio*)



- **Control your temper and practice self-control.** ("Better a patient person than a warrior, one with self-control than one who captures a city." Also, "Like a city whose walls are broken through is a person who lacks self-control." *Ancient Proverbs*.)
- **Treat others in the negotiations as you would like to be treated.** ("Whenever I hear any one arguing for slavery, I feel a strong impulse to see it tried on him personally." *Abraham Lincoln*.)
- **Keep your eye on the goal.** ("Without a vision, people cast off restraint." *Ancient Proverb*)



• **In negotiations, do not be afraid to do what is right toward the other person, even if it is costly to you.**

("Cowardice asks the question, 'Is it safe?' Expediency asks the question, 'Is it politic?' Vanity asks the question, 'Is it popular?' But, conscience asks the question, 'Is it right?' *Martin Luther King Jr.*)

• **Check your ego at the door. Doing so may save you from disaster.**

("Before a downfall the heart is haughty, but humility comes before honor." *Ancient Proverb*)



• Promote the Relationship with other person in the negotiation.

• Accordingly, view the conflict or disagreement as the enemy, not the other person.

("I destroy my enemies when I make them my friends." *Abraham Lincoln*)



The "Intrinsic Civility Approach" allows me to say to you at the negotiating table:

- In "promoting the Relationship" as an essential goal and element of this negotiation, I am not weak, passive, or soft toward my client's interests.
- I am not afraid of being stepped on by wanting your good as well as mine.
- I have done my work. I know the value of the case.
- I know my strengths and I know my weaknesses, as I know yours.



- I am open and desirous to learn more and hear more from you on anything I may have missed.
- But I have a stake in the ground, having done my work, research, and competent case evaluation.
- I choose to approach you with good will, to build up our relationship in sincerely respecting and honoring you, to maximize your interests as best I can, as I maximize my interests.
- I am confident, prepared, and ready to engage in negotiations, committed to these goals and this positive attitude toward you, so that we can come to mutually agreeable & successful resolution.



II. Specific Tools and Useful Practices in Conducting Negotiations.

- Having reviewed some of the important conceptual approaches to negotiations, we turn now to some specific tools and useful practices. The following points may seem more like aggressive, hard core (and practical) "nuts & bolts" of negotiation practice. However, they should be utilized in the context of the previously discussed comprehensive mind and heart attitude that promotes the relationship and allows the negotiations to flow and progress.



1. Be prepared well in advance of the negotiations.

- Specifically, know the issues, as best as you can,
- identify the interests of all parties,
- list out the strengths & weaknesses of all parties, especially yours.
- Identify the goals and the potential ending places each party would like to reach.
- As noted earlier, in your preparation, purpose to maximize both your and the other's interest as much as practicable, all in the context of an attitude of good will and relationship building.
 - You can be a skillful and effective negotiator for your client,
 - as well as a competent and caring adversary. Prepare to be both.

"There is nothing like preparation." Dr. Charles Kao.



2. Have your highpoint summary page (on the tip of your tongue as well as written out) of your strongest facts and legal arguments.

3. Identify your "3 figures."

1. The very Top Dollar beyond which you try the case;
2. The Best/Goal/Just/Proper/Target settlement figure;
3. The starting offer to begin negotiations.

4. Pre-plan and write out each successive offer amount – before negotiations begin. That way you can provide an immediate, pre-planned, counter-offer to each counter-demand. This frees you during the negotiation to consider ongoing discussions and also shows your confident and competent appreciation of the case as well. (Of course, those figures are not set in stone.)



5. Remember to keep listening. And then be able to listen some more.

6. Having prepared and mapped out your offer plan (with your top strong points at the ready), still remember to be flexible, which includes being willing to make concessions on your weak points.

7. Communicate with subtlety. Make successive offers in decreasing increments to communicate where you are going with the negotiation.

(Conversely, offers of inconsistent increments indicate you do not know the case value or know where you are going.)

Remember the Henry Kissinger negotiations, where the Chinese subtlety indicated where they were going.



8. Continue with subtlety. Communicate, if not guide the negotiations, by moving from round numbers to specific uneven numbers.

Use general, round numbers at the beginning (ie \$20k, \$50k,) to uneven, smaller numbers toward the end of your offers, (ie. \$25k, \$27k, \$28,500, etc.). Again, this communicates where you are going and that you know where you are going and where you have to end.

9. Continue with subtlety. Be consistent. Avoid large, precipitous jumps, concessions, or departures from your offer plan;

But be sensitive and astute enough to know when to make such large changes, such as, when the other side has made large concessions, drops precipitously in their demands, or states it will cut to the chase & resolve the matter at the proper/just outcome that you had already targeted.



10. Avoid the word "between" in your offer. (unless you are using it for tactical purposes). For example, offering "\$20 - \$25k" means you have just offered \$25k.

11. Do not bid against yourself. Wait for/require that the other party make a responsive move before you increase your offer.

12. Avoid being pressured. Conduct negotiations well in advance of discovery or trial deadlines. This gives you time to break off (cool down) if there is an impasse or for tactical reasons. You are then able to walk away, and if needed, let the other side stew on your last offer.



13. Make the first offer, which often sets the stage, establishes expectations, and frequently determines the negotiations ballpark.

14. Be the one to make the last/most recent offer, unless there is a tactical reason to do otherwise.

Not only does this keep the negotiations moving, it also leaves the burden and obligation on the other side to get back to you and to the negotiations (and puts you in good stead when the court asks the status of negotiations).



15. Do not take it personally.

- Do not obsess over the other side's personality, rudeness or slights to you, or over issues that are not directly pertinent to the negotiation.
- Again, be strong enough to overlook an offense. ("It is to a person's credit to overlook an offense...")
- Apply the previously discussed principles,
- seek your and the other's interests as much as practicable,
- AND concurrently, continue to build up the relationship in showing the other honor and respect – no matter what comes back to you in return.
- [Remember: People have intrinsic value -- no matter how much of a jerk they are to you.]



- 16. Continue to build Trust and Relationship.
- Foster the relationship at the beginning with sincerity and competence. Approach the other side with a confident firmness, but with a smile and a good heart attitude.
- Even unconsciously, the other person will tend to relax and warm to your interests if they sense you are not the "heartless enemy" and do care about, and understand, their interests .
- Also, you may well deal with this person in the future; so let this negotiation be a positive one in building trust, relationship, and respect for you and your abilities.
- And when you finish the deal, say "Thank you" - and mean it.



Remember:

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(Commas save lives!...)
- As with grammar, in negotiations, seemingly small things like Civility and Subtlety, Honor and Respect, can be overlooked as inconsequential and even optional.
- However, (as with grandma and commas,) the lack of them in negotiations can be disastrous.
- Remember: People have value. Civility and Subtlety, Honor and Respect, are important and essential to successful negotiations!



III. Role Play

- Remembering the above principles and tools, prepare your high point summary, identify your "3 numbers" for your negotiations; write out your proposed successive offers - with decreasing increments, and practice communicating subtly via your successive offers.



C'est Fini.

Thank You.



FN1. Regarding Henry Kissinger's secret negotiations with the Chinese. As a candidate and in press conferences as president, Richard Nixon argued that the United States and the world would benefit from engaging China. He felt this was intrinsically important because of China's size and inevitable importance. Nixon also saw China as a useful counterbalance to the Soviet Union. From the first days of his presidency he sought to signal China's leaders that he was willing to talk. The Americans sent private signals through Paris, Warsaw, and via the leaders of Romania and Pakistan. Those efforts ultimately produced Henry Kissinger's secret trip to Beijing July 9-11, 1971. Kissinger, Nixon's National Security Advisor, flew to Beijing from Pakistan. His meetings there produced an agreement that President Nixon would visit China. Nixon went in February 1972.



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