

A Primer on Successful Negotiation

By David A. Hoffman

- I. Introduction
- II. Positional Bargaining - Negotiation Tactics
 - A. Hardball Tactics
 - B. Cooperative vs. Competitive Bargainers
- III. Interest-Based Bargaining - Principled Negotiation
 - A. Getting to YES
 - B. The Critique of Getting to YES
- IV. Integrating Positional and Interest-Based Bargaining
 - A. Game Theory
 - B. Overcoming Barriers to Settlement
- V. Successful Bargaining - Lessons from the Field of Mediation
 - A. Empowerment and Recognition
 - B. Conflict as Opportunity

Bibliography

I. Introduction

Negotiation has a bad name in our culture.¹ Recall one of the opening scenes in the recent film “Air Force One,” in which the President of the United States, played by Harrison Ford, castigates himself and other foreign policy makers for their willingness to negotiate with terrorists and vows never to negotiate again. Or, recall the hero of the science fiction film “The Fifth Element,” played by Bruce Willis, who offers to negotiate with one of the villainous Mangalors who have captured the control room of the spaceship and then, when face to face with the chief Mangalor, quickly shoots him

¹ My frame of reference, for purposes of this article, is the mainstream culture of the United States, as depicted in the popular media. The culture of the United States is, of course, composed of many sub-cultures, including many that differ in significant respects from that of the mainstream.

squarely between the eyes, while an impressed colleague asks: “where did he learn to negotiate like that?”²

In these films, and in much of our culture, negotiation is treated as an activity suitable only for unprincipled wimps (“Air Force One”) or indecisive fools (“The Fifth Element”). Moral: real men and women don’t negotiate.

Yet the reality is that we negotiate all the time. If we have young children, we are engaged in negotiation from the minute they wake up -- over such weighty subjects as what they are going to eat for breakfast or wear to school. If we drive to work, we are “negotiating” the traffic to get there. If we are married or in a domestic partnership, negotiation is how we decide what videos to rent and when the refrigerator needs cleaning. Virtually every aspect of our lives involves negotiation -- even negotiations with ourselves (over what we will eat, or not eat, how we will spend our time, etc.)

In the workplace, negotiation is likewise ubiquitous. Almost every aspect of workplace activity requires coordination and teamwork, and negotiation lies at the core of those activities. A company’s relationship with its employees is the product of a series of negotiations over the terms and conditions of employment and other issues relating to the employee’s responsibilities. The satisfactory resolution of those issues depends on the ability of both management and employees to negotiate productively. Thus, effective negotiation can make the difference between a successful company and one that is not.

What is effective negotiation? Lawyers and social scientists who have studied negotiation behavior offer several answers to this question, and their answers have evolved rapidly in the last twenty-five years. Sections II - IV below briefly describe that evolution, and Section V suggests some future directions.³

II. Positional Bargaining - Negotiation Tactics

The early 1980s represent a watershed in the literature of negotiation. In 1981, Roger Fisher and William Ury published *Getting to YES: Negotiating Agreement Without Giving In*, arguably the most influential book ever written about negotiation.⁴ *Getting to YES*, which has been translated into 18 languages and has guided the

² Thanks to Robert Benjamin and Peter Adler, whose 1999 SPIDR conference workshop on negotiation and film highlighted these films, and others, as a window into our culture’s ambivalence about negotiation.

³ The following description of recent developments in the field of negotiation touches on only some of the major themes and is not intended as a comprehensive survey of the field.

⁴ An expanded second edition was published in 1991 by Fisher, Ury, and Bruce Patton. In 1982, Howard Raiffa published *The Art and Science of Negotiation*, which applied game theory and economic analysis to the study of negotiation and which was also influential.

training offered to world leaders through the Program on Negotiation at Harvard Law School, offers a vision of negotiation as a principled activity in which the participants can each be made better off.

However, prior to the publication of *Getting to YES*, negotiation was typically viewed as an activity in which two or more parties each vied for advantage at the other's expense. The best negotiators were those who succeeded in obtaining the largest slice of the pie, with little attention paid to whether the pie could be expanded in some way.

A. Hardball Tactics

Typical of the literature of the pre-*Getting to YES* era is the advice given to legal services lawyers by Michael Meltsner and P.G. Schrag in their book *Public Interest Advocacy: Materials for Clinical Legal Education*.⁵ Their suggestions for negotiators combine such common sense advice as thorough preparation with a set of techniques designed to manipulate, deceive, or intimidate the opponent. The unspoken assumption in these suggestions is that the opponent is willing to take advantage of the negotiator -- fairly or unfairly -- and therefore success requires using competitive negotiation techniques, and using them more effectively than the opponent. The following is a short list of the techniques Meltsner and Schrag recommend:

- Arrange to negotiate on your own turf.
- Balance or slightly outnumber the other side.
- Time the negotiations to advantage.
- Lock yourself in.
- Designate one of your demands a “precondition.”
- When it is in your interest, make the other side tender the first offer.
- Make your first demand very high.
- Place your major demands at the beginning of the agenda.
- Make the other side make the first compromise.
- Use two negotiators who play different roles.
- Be tough — especially against a patsy.
- Appear irrational where it seems helpful.
- Raise some of your demands as the negotiations progress.

⁵ A similar orientation can be found in G. Bellow & B. Moulton, *The Lawyering Process: Negotiation* (1981), which focuses on the skills needed for successful negotiation.

- Claim that you do not have authority to compromise.

Many of these techniques are as repugnant as they are common. Like the behavior all too many of us experience when we buy a car in an auto showroom, negotiation tactics of this kind involve treating the other party in a negotiation as a de-personalized enemy. They reflect an individualistic world view in which negotiation is merely the more civilized version of an otherwise vicious competitive struggle for advantage.

One of the hallmarks of this style of negotiation is the manipulation of the other party's point of view. For example, lecturers on the subject of negotiation like to tell the story of a mistake made by organizers of the presidential campaign of Theodore Roosevelt who printed up thousands of copies of a campaign flyer with a photograph of Roosevelt lifted from the popular press. Unfortunately, no one had asked the photographer for permission to use the photo. The campaigners anticipated having to pay the photographer a fortune because reprinting the flyers would be costly. Instead of negotiating the price, however, they sent him a telegram informing him that his photograph had been selected from among several others, but that he would have to pay a modest fee in order for his photograph to be used. He forwarded the money, and the flyers were distributed.

Obviously, there are disadvantages to negotiating in this way with employees, who would resent being deceived or treated like the enemy. Behavior which is the norm in the commercial marketplace or the auto showroom, where buyer and seller are unlikely to meet again, is unsuitable for workplace settings, where the employer and employee maintain an ongoing relationship. Clearly, a more collaborative mode of negotiation is needed in that setting.

B. Cooperative vs. Competitive Bargainers

In the late 1970s and early 1980s, Prof. Gerald R. Williams began a series of experiments to determine whether cooperative styles of negotiation could be as successful as competitive styles.⁶ He videotaped mock negotiations involving experienced lawyers from across the United States, and he polled the lawyers about the characteristics and effectiveness of the attorneys with whom they routinely negotiate. His findings showed that 65% of the lawyers were viewed as cooperative, while only 24% were considered competitive. Williams also found that the perceived effectiveness of negotiators did not correlate with their competitive or cooperative orientation. In other words, there were effective cooperative negotiators, just as there were ineffective competitive negotiators, and vice versa.

One of the goals of this exercise was to identify the characteristics of effective negotiators -- regardless of whether they were cooperative or competitive in style. Williams found the following characteristics (among others) were common to both

⁶ See G. Williams, *Legal Negotiation and Settlement* (1983).

types of effective negotiators: rational, experienced, perceptive, creative, analytical, self-controlled, intelligent, honest. The import of Williams' research was to counteract the view that the most successful negotiators are those that use competitive techniques, such as those recommended by Meltsner and Schrag. The meaning of these studies for the employment field was that managers could adopt more cooperative styles of negotiation without necessarily giving up any advantage to the employees.⁷

III. Interest-Based Bargaining - Principled Negotiation

As noted above, with the publication of *Getting to YES*, Roger Fisher and William Ury introduced a fundamentally different approach to negotiation. Instead of examining the personal characteristics of negotiators, or even the specific techniques they used (i.e., competitive vs. cooperative), Fisher and Ury argued that the most successful negotiators will focus on interests rather than positions.

A. Getting to YES

One of the important insights of *Getting to YES* is that successful negotiation often requires separating the people from the problem. In other words, reactions to proposals (particularly critical reactions) should be couched in such a way that the criticism is not taken personally by the other party. Fisher and Ury also advocate the use of principled benchmarks for resolving contested issues -- e.g., the fair market value of a car or house. By seeking out objective criteria for the resolution of disputes, the parties can be spared to some degree from the intense struggle over whose view shall prevail. A third vital insight offered by Fisher and Ury is that effective preparation for negotiation requires careful consideration of each party's BATNA -- their best alternative to a negotiated agreement. Unless and until each party knows their respective BATNA's, they will lack a principled basis for determining whether they should accept any given proposal or set of proposals. Finally, Fisher and Ury emphasize the importance of using negotiation to communicate about underlying interests so that mutually advantageous exchanges can occur. Using this technique, negotiating parties can expand the pie and thus create "win-win" results in which each of the parties is made better off than either could be in positional non-interest-based bargaining.⁸

⁷ In addition to the important perspective added by Williams' research on personality characteristics, a wealth of other descriptive studies of negotiation explore the ways in which race, culture, and gender (among other traits) affect bargaining. See, e.g., D. Tannen, *You Just Don't Understand: Women and Men in Conversation* (1988).

⁸ Fisher and Ury use the example of two children negotiating over an orange. They decide to cut the orange in half, which leaves each of them dissatisfied, but at least equally so. If they had employed interest-based negotiation, they would have learned that one of them wanted the orange rind for baking, while the other wanted only the pulp of the orange for juice. In other words, had they communicated about their interests, each could have had the equivalent of a whole orange.

Example: In a negotiation with a prospective sales manager, the company offers a salary and bonus package that is similar to that available in other firms of comparable size. The company says its goal is rapid expansion of its market. The prospective employee says that she does not need much of a guaranteed salary but wants to participate in the growth of the company and therefore offers to take a much lower salary in exchange for a bonus based on a fixed percentage of sales beyond the company's currently projected targets. Each side assesses its BATNA -- for the prospect, going to another firm; for the employer, looking for another sales manager -- and concludes this deal is better than the available alternatives. They sign an employment agreement incorporating these terms.

B. The Critique of Getting to YES

Critics of *Getting to YES*⁹ have assailed its optimistic assumption that negotiators will be candid about their true interests. Critics also pointed out that, with their emphasis on expanding the pie, Fisher and Ury had paid insufficient attention to the techniques bargainers use to maximize their share of the pie. Some critics questioned whether using Fisher and Ury's value-creating techniques might leave a negotiator vulnerable to the value-claiming techniques of the competitive bargainer. Moreover, while the Fisher-Ury approach may hold promise in settings where the parties have an ongoing relationship, its value seemed less obvious in settings (such as tort litigation) where the parties have no relationship, there are few if any opportunities for joint gains, and the goal is simply welfare maximization.

The Fisher-Ury techniques do not appear to have not been widely adopted in the workplace. Indeed, except in the area of compensation (where bonuses and commissions create opportunities for joint gains), it is unusual to see true "win-win" bargaining between management and employees; most decision-making is done hierarchically.

⁹ See, e.g., J. White, "The Pros and Cons of "Getting to YES," 34 J. Legal Ed. 114 (1984).

IV. Integrating Positional and Interest-Based Bargaining

The arrival of *Getting to YES* and its critique of positional negotiation turned the attention of negotiation scholars, researchers, and practitioners from the refinements of technique to the question of which fundamental orientation to negotiation is best. The Fisher-Ury analysis suggested an irreducible tension between integrative and distributive approaches to bargaining:

- | <u>Interest-Based/Integrative</u> | <u>Positional/Distributive</u> |
|-----------------------------------|--------------------------------|
| • Creating value | • Claiming value |
| • Cooperative | • Competitive |
| • Win-win solutions | • Win-lose outcomes |
| • Joint gains | • Zero sum |
| • Expand the pie | • Claim the biggest piece |

The next challenge, then, for those seeking to find the most promising methods of negotiation, was to reconcile, or at least develop strategies for managing, the tension between these two fundamentally different orientations to negotiation.

A. Game Theory

An experiment with computer programs, described in Robert Axelrod's book, *The Evolution of Cooperation*, in 1984, sought to determine the best method of handling a type of negotiation called the Prisoner's Dilemma. In the Prisoner's Dilemma, the negotiators communicate with each other only through their behavior.¹⁰ They are rewarded or punished for their behavior according to the following matrix, which is used to score each round of either cooperative or competitive moves:

		A's Behavior	
		A Cooperates	A Competes
B's Behavior	B Cooperates	A and B win	A wins big; B loses big
	B Competes	B wins big; A loses big	A and B lose

¹⁰ For a description of the Prisoner's Dilemma, see R. Fisher & S. Brown, *Getting Together: Building Relationships as We Negotiate* 198 (1988).

In this matrix, it is possible for one party to take advantage of the other party's cooperative moves, but not for long. Once it becomes apparent that one party is going to make competitive moves, the other party will do so as well. The winning computer program employed a simple tit-for-tat strategy: the program always began with a cooperative move but then mimicked the competing program's move on the previous round.

In the context of a real-life negotiation, this strategy suggests the value of disaggregating any negotiation into a series of moves so that the bargainer can determine whether the other party is willing to make a cooperative, value-creating move, or a competitive value-claiming move.

Example: In a negotiation over a severance package, the Human Resources manager refrains from making an initial offer; instead, she begins by asking the former employee what he is looking for. The employee responds by asking what the company's typical severance packages have been in recent years. They agree to exchange information about these two subjects before making any offers or counter-offers. They also agree on a time to do so. They then discuss arrangements for giving the ex-employee access to his personnel file. By the time they begin discussing the severance terms, each feels more trusting of the other because they have been able to cooperate on the preliminary steps in the negotiation.

The bottom line is that every negotiation has not only the potential for integrative and distributive moves, but also a need for such moves. At least in theory, the most successful negotiations would involve efforts by the parties to expand the pie to the greatest extent possible and then divide it without mutually destructive conflict. Accomplishing such an objective, however, requires overcoming a number of barriers.

B. Overcoming Barriers to Settlement

One of the barriers to optimal results in bargaining concerns communication. The Prisoner's Dilemma game, which radically oversimplifies real-life bargaining, does not permit communication. In ordinary, day-to-day settings, negotiators can communicate with each other between rounds of bargaining and thus attempt to secure agreements on bargaining behavior. Even so, negotiators will often fail to make optimal deals because of flawed communication, or barriers to effective communication.¹¹ One example is the phenomenon of reactive devaluation, a process in which our perceptions are influenced by the source of the information.

¹¹ For a fuller discussion of this phenomenon, see R. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 Ohio State Journal of Dispute Resolution 235 (1993).

Example: A manager looks at the strong resume and excellent salary history of a prospective employee and concludes that she will probably have to offer him a salary of \$50,000/year. The company could afford to do so but wants to pay as little as possible. The employee asks for \$45,000/year. The manager is puzzled, mentally devalues the prospect, and concludes there must be something about him or the market that she does not know. Under these circumstances, the manager offers the employee \$42,000, and he decides to go elsewhere. In this situation, the employee and the company could have struck a deal at a salary of \$45,000 - \$50,000 and both would have been better off.

Negotiation theorists have identified other barriers to successful negotiation, such as cognitive dissonance, loss aversion, and strategic bargaining. According to Robert Mnookin, each of these barriers can, in theory, be overcome by improved communication and more rational methods of option assessment. He points, in particular, to the use of mediation as one method of overcoming such barriers to successful negotiation.

V. Successful Bargaining - Lessons from the Field of Mediation

The process of mediation -- in which a neutral third party facilitates negotiation -- provides a useful lens through which to assess the effectiveness of negotiation. An intermediary can often provide a useful buffer for communications which might otherwise be devalued or go unheard. (For example, in the salary negotiation described above, an intermediary could have communicated separately with the company and prospective employee and made a proposal that would have been accepted by both sides.) There are other lessons, however, that the practice of mediation teaches.

A. Empowerment and Recognition

In their recent book, *The Promise of Mediation*, Robert Baruch Bush and Joseph Folger articulate a new rationale for the practice of mediation. Previous discussions of the subject had taken as their premise that the settlement of disputes was the primary reason for employing mediation. According to Bush and Folger, however, the primary value of the process is its ability to (a) empower participants to identify and articulate their needs and perspectives; and (b) provide opportunities for mutual recognition. Bush and Folger describe their model as based on a “relational,” as opposed to an individualistic, world view. From their perspective personal transformation is a more valuable goal than solving problems. Within the world of mediation, this hypothesis is considered controversial.¹² However, it is instructive as a perspective on the meaning of “effective” negotiation.

¹² For a critique of *The Promise of Mediation*, see C. Menkel-Meadow, “The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices,” 11 *Negotiation Journal* 217 (1995). For a critique of the concept of empowerment as a feature of

For purposes of negotiation in the workplace, for example, this perspective suggests that even in those settings where management is unable (for one reason or another) to approve a particular request from an employee, the manner in which the employee is treated may satisfy certain needs for empowerment and recognition that are at least as important as the substantive issue under discussion.¹³

The study of mediation and communication theory provides a set of tools for such empowerment and recognition, such as active listening and reframing. However, these tools cannot be employed in a mechanical way. Empathetic listening is as much a discipline of heart as of mind, just as thoughtful reframing requires intuition as much as intellect.

In a negotiation, these techniques may be valuable in and of themselves, because they demonstrate genuine concern, and that may be one of the other party's underlying objectives. However, they may also provide a broader window on the parties' respective interests -- i.e., as part of a conversation in which each negotiator understands more fully the wide range of interests that the other party brings to the table.

B. Conflict as Opportunity

Mediators are trained to think of conflict not as a social evil to be eradicated but rather as an inevitable part of life in any society. Conflict, from this standpoint, may often be a healthy expression of disagreement -- the soil from which a democratic and pluralistic society gains its strength. Indeed, mediators often invoke the image, first popularized in an inaugural address by President John F. Kennedy, of the Chinese character for "crisis" which contains within it the character meaning "danger" and the character for "opportunity."

The opportunity that exists in crisis also exists in every negotiation: the opportunity to maximize joint gains and distribute those gains fairly, to overcome barriers to communication, to develop a deeper understanding of the other person's needs and interests, and to create a setting in which people feel empowered rather than stifled.

mediation, see S. Cobb, "Empowerment and Mediation: A Narrative Perspective," 9 *Negotiation Journal* 245 (1993).

¹³ Another important and useful perspective on the psycho-social dimensions of negotiation comes from the recently published book by Doug Stone, Bruce Patton & Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (1999), in which the authors explore (among other things) the ways in which an individual's self-image and self-esteem are impacted by the process of negotiation.

VI. Conclusion

Learning how to negotiate successfully depends on how one defines success. Twenty years ago, successful negotiation was defined primarily as the effective deployment of techniques designed to accomplish the negotiator's objectives by persuasion or manipulation. Success was measured solely by the extent to which the negotiator's objectives were met.

With the advent of principled, interest-based negotiation came a broader focus on welfare maximization: the successful negotiator looks for opportunities to make both sides better off, instead of seeing negotiation as a competitive, zero-sum exercise. Because of the risk that cooperative, interest-based negotiators would be vulnerable to negotiators who sought only to claim value (rather than participate in creating it), negotiation theorists developed the technique of tit-for-tat bargaining. To make effective use of this technique, however, negotiators must communicate their intentions and perspectives. Mediation offers an opportunity to do that more effectively, especially in those settings where cognitive or other barriers to effective communication exist. Mediation also shows, by example, the ways in which the deeper underlying interests of negotiators -- for empowerment and recognition -- may be met in the process of negotiation. Meeting those needs, while at the same time pursuing the welfare maximization goals attainable through principled, interest-based negotiation, may be seen as a worthwhile definition of successful negotiation.

Selected Bibliography

- G. Bellow & B. Moulton, *The Lawyering Process: Negotiation* (1981)
- R. Baruch Bush & J. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994).
- S. Cobb, "Empowerment and Mediation: A Narrative Perspective," *Negotiation Journal* 245 (July 1993).
- R. Fisher & W. Ury, *Getting to YES* (1981)
- R. Fisher & S. Brown, *Getting Together: Building Relationships as We Negotiate* 198 (1988).
- D. Lax & J. Sebenius, "The Negotiator's Dilemma: Creating and Claiming Value," in *The Manager as Negotiator* (1986)
- M. Meltsner & P.G. Schrag, "Negotiating Tactics for Legal Services Lawyers," in *Public Interest Advocacy: Materials for Clinical Legal Education* (1974).
- R. Mnookin, S. Peppet & A. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000)

R. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 Ohio State Journal of Dispute Resolution 235 (1993).

H. Raiffa, *The Art and Science of Negotiation* (1982)

D. Stone, B. Patton & S. Heen, *Difficult Conversations: How to Discuss What Matters Most* (1999).

J. White, The Pros and Cons of "Getting to YES," 34 J. Legal Ed. 115 (1984)

G. Williams, *Legal Negotiation and Settlement* (1983).

David A. Hoffman is an attorney, mediator, and arbitrator at the Boston Law Collaborative, LLC, a multi-disciplinary firm devoted to conflict resolution and the practice of collaborative law. He is chair-elect of the American Bar Association Section of Dispute Resolution and has taught mediation, negotiation, and family law at Northeastern University Law School and Harvard Law School. He is a certified divorce mediator with the Massachusetts Council on Family Mediation.