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"THE ART AND SCIENCE OF NEGOTIATION"

By Stephen J. Messinger

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A. INTRODUCTION

The purpose of this paper will be to discuss what negotiation is all about; the underlying principles of negotiation; the various styles of negotiating behaviour; the reasons that it is important to develop good fundamentals of negotiation; why notwithstanding any set of given circumstances, those who have developed better negotiating skills will be able to make better use of their resources for their client or their company. (Like two coaches with the same degree of talent on their team – one provides a pennant winner and the other is fired in mid-season).

There are two basic types of negotiating styles (a) principled and co-operative, interested in achieving a settlement; (b) emotional and aggressive, positional bargaining or hard bargaining. The styles used depends on the negotiator's own personality; the nature of the opponent's personality; the nature of the problem; the progress of the particular negotiation. There are win/win situations, win/lose situations and lose/lose situations.

Those who favour the compromise style of bargaining believe that disputes can be rationally negotiated by identifying the real underlying interests of the parties and by applying even-handed, objective principles for resolving the matters and issues. The importance of being persuasive when negotiating, the value of dealing with real issues rather than simply taking positions and the leverage which can be gained in a negotiation when you have viable alternatives if a satisfactory settlement and a negotiation can not be reached are all important things to take into account. There is no better way to commit oneself to a position firmly, in the eyes of the opposite party, than by offering persuasive

reasons which address their primary concerns or by showing that you have a viable alternative in the event that they do not accept your position in the bargaining range.

Remember each negotiations is, in reality, a series of small negotiations. Negotiation involves an interplay, rather than a strict dichotomy, between hard or competitive and soft or co-operative bargaining. Studies show that a higher percentage of negotiators with co-operative personalities achieve good results than those with a competitive approach. It is easier to be an effective co-operative negotiator than an effective competitive negotiator.

Four other conclusions:

A. The best negotiation results are achieved by negotiations with high aspiration levels;

B. The best negotiation results are achieved by negotiators who start high (or low, as the case may be), and who make fewer and smaller concessions than their opponents;

C. Co-operative negotiations have a tendency to ignore a lack of co-operation from a tough competitive opponent; co-operative negotiators, when faced by a tough, competitive opponent, tend to go on a slide – to give away the shop. Co-operative negotiators must first learn to say “no”;

D. Co-operators are better able to avoid a slide if they have an externally imposed limit above, or below, which they can not go.

B. **WINNING AT ALL COSTS – SOVIET STYLE**

The competitive (win-lose) approach involves attempts to triumph over an opponent running the gamut from blatant efforts at intimidation to subtle forms of manipulation.

All Soviets whether from Moscow or from Memphis use the same six steps in their negotiation dance:

1. Extreme Initial Positions – sellers have been known to exploit the greed of prospective buyers who want instant gratification of their needs; these win-lose Soviet tactics work because we let them work; we are influenced by the extreme initial position and we are further baffled when the people we negotiate with seem to lack authority.

2. Limited Authority – never allow yourself or anyone who negotiates for you unlimited authority; if you extend authorization to others, always get them involved in setting an objective that they believe is attainable; "go out there and try to get it for that amount. If you can, that's great. If you can't, come back and we'll discuss it further"; if having too much authority is a handicap in negotiations, it follows that the worst person to negotiate for any organization is the chief executive officer.

3. Emotional Tactics – all in the interest of provoking, distracting or intimidating their opponents, Soviets may even act personally offensive; people feel uneasy when confronted by irrationality joined at the hip with strength; have you ever tried to negotiate with someone who breaks down and cries? (Not only will I give you what you originally wanted, but I will throw in compensatory damages for making you cry. Here, take my wallet, go into town and buy yourself something); if tears are effective whether spontaneous or staged, so is anger (creates embarrassment), whether real or feigned; silence, which is much easier to carry out, can be just as effective as tears, anger and aggression; when you give someone the silent treatment, you often force the other person to talk, if only out of discomfort – they inadvertently give you information you might otherwise not receive. Other emotional tactics include laughter; walking out (creates uncertainty about the future). The veiled threat is a potent weapon – it makes use of the other side's imagination because what they think might happen is always more frightening than what could happen. If an

opponent believes someone has the capacity to execute a threat, the threat perceived is more fearsome than the threat enacted; once the threat is enacted, the stress is reduced and the other side adjusts and copes; giving guilt, people use emotional manoeuvres because they work; they unconsciously revert to successful proven techniques to maintain the upper hand; some use compassion and guilt as part of their regular repertoire; you should recognize them so you won't be hood-winked; that is, we are advocating recognition not adoption. A tactic that is identified for what it is – a tactic that is seen through, is ineffective (a tactic perceived is no tactic). Three simple counters – (1) no authority; (2) legitimacy; (3) knowingly laugh. Never try to slug it out with the bully, but don't back down either. Should a child be continually rewarded for threats and temper tantrums, those tactics will become ingrained in the child's approach to controlling others.

4. Adversary Concessions Viewed as Weakness – victory at all costs; when dealing with Soviets, whatever their pedigree, should you generously concede something to them, it is unlikely that a reciprocal concession will be forthcoming.

5. Stingy in Concessions – more time and more information (time is money); by practicing forbearance, competitive negotiators strive to see that the size and number of times you concede is greater than theirs.

6. Ignore Deadlines - be patient; all deadlines are the product of a negotiation; recognize these tactics so that you will not be victimized by them; for Soviet tactics to work, all three of these criteria must exist: (a) no continuing relationship; (b) no remorse afterwards; (c) no awareness by victim (regardless of the skill of the hunter, the co-operation of an unsuspecting mark is required). The answer is the ability to anticipate and recognize this style; wherever you may be, should the behavior of the other party cause your antennae to quiver "win/lose", you have three options: (1) you always have other alternatives, so pivot on your heels and walk away; since life is so short, you may even want to tell the manipulator to negotiate with himself or

herself; (2) if you have the time and inclination you can enter the fray; by your counter moves, you may well beat the devil at his own game; (3) artfully switch the relationship from a competitive win/lose contest to a collaborative encounter in which you can both meet your needs.

C. TELEPHONE NEGOTIATIONS AND MEMOS OF AGREEMENT

The telephone can cause serious misunderstandings; it can be employed as an instrument of deception; and is a powerful economic force. Yet despite its significance, few people take the time to examine the unique role the telephone plays in negotiations.

CHARACTERISTICS OF TELEPHONE NEGOTIATIONS

MORE UNDERSTANDING – not only can voice tones be misread, but innuendos and hidden meanings can be conjured up where none exist, or missed where they do exist.

1. Easier to Say No – if you are serious about getting something you want, present it yourself – in person.

2. Much Quicker – telephone negotiations are always shorter than person-to-person dealings. This is true because the length of a face-to-face meeting must justify the time, travel and expense invested.

3. More Competitive – there is often insufficient time to share information and experiences and to explore the satisfaction of mutual needs on the telephone. This reality, combined with the formal nature of telephone contacts, produces a climate in which competitive win/lose behavior flourishes. In an eyeball-to-eyeball meeting, each party will see the other not as a statistical exception to a general rule, but as a flesh and blood human being.

4. Greater Risk – in any type of negotiation, quick is always synonymous with risk. The general rule is to wait it out. More often than not, success comes to the negotiator

with greater patience and staying power. The best thing to do, when you do not know what to do is to do nothing. Power is never constant; the passage of time can cause your bargaining leverage to increase, or decrease.

5. Advantage- Caller – in any phone conversation, the person placing the call (the caller) is in a privileged position. The recipient of an unexpected incoming call (the callee) is handicapped. Anyone who tries to arrange a group picnic, maintain a relationship with family or friends, deal with telephone solicitors, or make wedding plans, knows the difficulties of arranging things by telephone. You do your preliminary manoeuvring via the phone, whether you clinch the deal on the phone or in person.

The following are some suggestions that can be effortlessly customized to help you achieve success on the phone:

A. Be the caller not the callee;
B. Plan and prepare – if you fail to plan, you are planning to fail. Always think in terms of the specific objective or goal that you want achieved by the phone call. If you don't know where you are going, any road will get you there. In the end, if you do not know where you are going when you get there, you don't even know you are there.

A few tips for phone negotiations:

- prepare a checklist;
- dry-run the negotiation;
- anticipate the other party's tactics;
- have all the relevant facts at hand;
- concentrate and avoid distractions;
- keep all reference material within arm's reach;
- summarize what was agreed on at the end and define the responsibility for follow-up action;

C. a graceful exit- you can exercise the option of hanging up on yourself, i.e., while you are talking;

D. discipline yourself to listen – effective listening requires more than hearing the words transmitted; it demands that you find meaning and understanding in what is being said (meanings are not in words, but in people); be sensitive to your own listen vs. talk ratio and consider the use of the pregnant pause;

E. write the memorandum of agreement- memo mania; most written documents are either unnecessary or unintelligible. The writing is easy, it's the occurring that is hard. Whatever you put down on paper should be written as if it will ultimately be read in a court of law. After you have finished an important telephone transaction, carefully compose this written representation of the negotiated understanding (a verbal agreement isn't worth the paper it is written on). Define the commitments of the parties involved. What is crucial is that you do the writing - the advantages to you are enormous: (1) nothing will happen until you make it happen; (2) the agreement will be expressed in your terms (who can better interpret the chicken scratches than the chicken that scratched them); (3) when you know from the outset you will be writing the memo of agreement, you will listen more effectively and take better notes; (4) your initial draft will establish the framework for any possible revisions; it will determine definitions and set the limits for discussion (selectively will be at the expense of the recipient of the memo not the writer); (5) because you've bothered to do the writing, the other party is appreciative (the pen is mightier than a pat and a promise).

D. **OPENING MOVES**

A common blunder that illustrates the negotiation axiom "stop, look and listen" is the Giveaway which is a common opening move blunder. A Giveaway is only one example of how a premature opening move can detrimentally affect a negotiation. Other common traps associated with failure to consider your opening move carefully include:

- over-reaction;
- saying too much;
- acting on insufficient information;
- failure to grasp points and procedures;
- inadequate preparation;
- revealing strategic plans;
- leverage positions;
- unwittingly tipping the opposition to your future moves.

Reflect rather than react.

THE FIVE FUNCTIONS OF THE OPENING MOVE

Generally speaking, you should try to accomplish the following five objectives when making your opening move:

a) gather information;
b) build rapport;
c) balance perceptions;
d) define negotiations parameters;
e) make initial use of leverage.

Define the parameters of a particular transaction, i.e., identify the issues and objectives deemed important by the opposition as well as the outside limits or settlement range relating to those issues. Conduct and demeanor is another way to read the other party's negotiating parameters. Appearing too eager or pushing for a response is usually a clear signal of deadline pressure.

The party making the offer is at a disadvantage – two solutions (a) decline to make an offer and invite the other side to make the first offer; (b) talk in terms of ranges. Negotiation has no rules except the ones you make or accept. You are always better off with no deal than with a bad deal.

Deadlines are useful in promoting action because they exert pressure on the negotiating process. Couple your deadline demand with sanctions imposed by some higher authority. If the deadline is not adhered to, remain uncompromising in your stand. An informal deadline is a pronouncement by one party that some specified action be taken within the stated time period. There are two forms of informal deadlines – the short fuse and the flexible deadline.

With respect to the short fuse deadline the objective is to spark immediate action; attach a short fuse and take the threatened action immediately if the response is not made within the given time (pressure). Using short fused deadlines brings a sense of immediacy to the informally imposed deadline. Wherever possible, support your threat with some documentation that action will be taken if the deadline is not met. The short fuse should never exceed ten days. Time releases pressure. Always be prepared to follow through with your threat immediately if the deadline is not met.

With respect to a flexible deadline this is well suited for situations where you want to pressure the opponent but are not prepared to take drastic action (in the near future; resolve this problem shortly; let me hear from you regarding this matter). Do not box in an opponent. Flexibility is promoted and exchange is solicited. The flexible deadline is especially useful in situations that require diplomacy or where you want to engage in a dialogue. Flexible deadlines are useful ploys to help you position your case without drawing a hard and fast line.

E. **NEGOTIATING DEMANDS**

Demands can range in extremes from outrageous ultimatums to fair requests to empty bluffs. Formulating and reacting to demands comprises much of a lawyer's practice. It is important to develop an appreciation and understanding of demands.

The typical response pattern to demands is "no-why? – too high."

Most lawyers either structure demands unrealistically high making substantive negotiations impossible, or unfeasible or they make the demand too low thereby seriously devaluing their case. Their demands lose impact. The trap of "shooting for the moon" is characterized

by the view that if you don't ask for it, you'll never get it; i.e. you never know 'til you ask. Therefore shooting for the moon is a frequently used tactic. Conversely, when the demand is too low, it will fail to create any uncertainty. As a result, it does not receive serious consideration.

The key is to maintain a balance between shooting for the moon and leaving money on the table; i.e., you want to make a demand that will invoke maximum credible uncertainty of the demand. By carefully considering the amount of your initial demand and formulating it on fact rather than on wishful thinking, you will put yourself in a much better position to play the game successfully.

Beware of bracketing; it can work to the benefit of both sides in that it helps narrow the issues and amount in controversy. As well, try to keep your demands flexible.

A negotiator's best ally is the cloak of limited authority. The negotiator empowered with limited authority has three distinct advantages over the negotiator empowered with full authority:

1. Limited authority gives you the option to avoid making decisions whenever it suits you. You can always defer making a decision until you have had the opportunity to confer with your principal, client, boss or whomever. The ploy of limited authority is used throughout the business world to insulate against spontaneous or reactionary decisions.

2. Limited authority also provides you with the excuse to bring in another negotiator, or a higher authority.

3. The real decision maker is insulated from the heat of the battle. It affords the person making the final decision, usually the client, to do so purely on fact, without becoming swayed by personality or emotional considerations.

While a negotiator never wants to reveal his full authority, the opposite is true for the opponent. You always want to deal with someone who has full authority – two reasons: (a) anything you say in support of your position will be filtered before it reaches the person making the final decision, that is, you must rely on your opponent to restate your position to his superior; in most cases something will be lost in the translation; (b) by dealing with someone who has limited authority you are allowing him the same back door to evade you when it comes time to make important decisions; your opponent is in a position to let the answers linger until it suits him.

F. **CONCESSION**

Demands made during negotiations are the take side of bargaining; concessions are the give side. Some negotiators refer to concession making as "designed retreat". In order to know what you can conceive, you must have a plan designating your deal points, secondary points and trade points. This last category is comprised of your concessions or throwaways. The key to using trade points depends on your success at inflating their value before offering them as concessions. The more your opponent believes they are worth, the more he will in turn concede to you.

Never make a concession unless you get something in return (quid pro quo).

You should consider the following guidelines when making concessions:

- always build in trade points in your negotiating plans;
- inflate the value of your trade points;
- confine your concessions to trade points;
- conserve concessions; delay conceding them until the eleventh hour;
- pace your concession rate;
- be aware of what you are conceding as opposed to what you are receiving;
- avoid giving away a big chuck;
- dole out concessions in little pieces;

- don’t hesitate to take back a concession;
- avoid making the first concession.

G. **NEGOTIATING ADVANTAGES**

Overcoming the deeply ingrained notion that a negotiation must produce an agreement is the key to developing an effective fall back strategy. Refusing to be constrained by having to make a deal allows you to be bolder and more confident in your conduct in a given negotiation.

The walk away position is the centre piece to any effective fall back strategy. The first step in formulating your walk away position involves an ongoing assessment of your objectives, leverage and the circumstances surrounding the negotiation. The key is to remain realistic and flexible while constantly reassessing prospects for reaching a conclusion that will coincide with your objectives.

The next step is to identify your alternatives to an agreement. It is essential that you know not only what you’re walking away from, but also the alternative that you are moving toward. Know the worst possible scenario; this is always preferable to being forced to cling to a deal that will only worsen your own relative position. The walk away position is determined by such factors as the strength and value of the claim, the settlement patterns of the insurance company, the verdict expectancy in the particular jurisdiction and the willingness to accept the calculated risk of trail and appeal. It is always preferable to the alternative of having no alternative.

H. **CONCLUDING NEGOTIATIONS**

There are several techniques available to help guide negotiations to a conclusion:

1. Summary- the party ready to close simply repeats all of the elements of the deal in summary form.
2. Marathon- a final meeting is scheduled to agree on all of the remaining issues.

3. All or Nothing- the all or nothing ploy should be a technique of last resource.
4. The Multiple Choice Ploy – offer the other side four alternatives and leave the choice of the alternatives up to the other side.

Knowing when to quit is important; it makes it impossible to talk yourself out of what you spent so much time talking yourself into.

I. SOME GENERAL COMMENTS ABOUT NEGOTIATING TECHNIQUES

In every negotiation a principal responsibility of the negotiators is to find his opponent's settling point. For the Landlord this is the minimum number of dollars and cents per square foot at which he will lease.

In any negotiation, the opposing negotiators may have widely different views of the same case. One should always keep the possibility in mind that his opponent has evaluated his own case as weaker than you have evaluated it. One should not reveal his own settling point. The negotiator should be aware that he is transmitting not only verbal but also non-verbal signals. The negotiator's responsibility is to change his opponent's position. It will be the job of the negotiator not only to determine the settling point but also to convince the opponent that his case has a lower value than he has put on it.

1. Anger, Feigned and Real – a display of anger, real or feigned is a standard negotiating technique. The one using the technique may be using it to signal the seriousness of his position or merely to make the opponent believe that he is serious. A convincing expression of anger by an opponent is likely to raise doubts in an inexperienced negotiator's mind about the reasonableness of his position. In some circumstances it may intimidate the opponent, in others the expression of anger will only stimulate an equal or stronger angry response from an opponent and will strengthen his desire to resist. When one starts to re-think his position in response to an opponent's anger, he should be aware that that is exactly what the opponent wants him to do.

2. Aggressiveness- aggression that brings insignificant concessions for an opponent and embarrasses him in front of his client or his colleagues may simply strengthen his resolution to hold out. The aggressive negotiator must analyze each case and determine by the observation of his opponent whether aggressive behavior will cause significant concession or whether it will simply strengthen the resolution of the opponent.

3. Inscrutability – the capacity to disguise one's reactions (poker face) is one of the most important traits that a negotiator can have. Inscrutability equals silence – to talk is to reveal one's true reactions and opinions. A typical inexperienced negotiator has a compulsion to talk and inevitably such a person reveals more about his position than he thinks he is revealing. All negotiators can exercise some control over their reactions and considerable control over the amount of talking they do. Every negotiator should consider how he can disguise his true reactions and true judgments when he wishes to do that; i.e., restrain his natural desire to speak. Silence in the presence of other people causes considerable and rising anxiety and in response to that anxiety the inexperienced interviewer will not wait for an answer from a respondent but will offer the answer himself.

4. First Offer, Large Demand- it is desirable to cause the opposing party in a negotiation to make the first realistic offer. Causing the opponent to make the first realistic offer is most helpful in circumstances in which one regards his opponent's case as stronger than the opponent regards it. The standard defence to an opponent's demand for the first offer is to give him a large demand. The large demand rule is not widely used. It is more important in those situations that one concentrate on getting the first offer from the opponent. The challenging question is not why one wants the first offer, but how he procures that offer from his opponent.

5. False Demand- the false demand is a first cousin to the large demand. Other demands may have been thrown in simply to inflate the overall set of demands and to give them something to yield on. These false demands, like the large offer, tend to disguise

the real position of the negotiating parties. They give the negotiating party something to yield in hopes of making his opponent believe he is making gains. This technique's effectiveness will vary in direct proportion with a negotiator's ability to disguise the false demands as real demands.

6. Whipsaw – this technique is one which is particularly useful in producing change in a stronger opponent's position. For example, a Tenant who is negotiating a Lease for a piece of property in a Shopping Centre; if one prospective Tenant has examined three or four different places and has made tentative contacts with more than one Landlord, the negotiating Landlord cannot be assured of the prospect as a Tenant; rather he may be willing to make certain concessions to get the prospect as a Tenant, concessions he would not make if he had the prospect locked in (third party alternative). It is not necessary to have a real third party to play off against a strong opponent. The factor which determines whether or not the whipsaw technique works is not whether there is a third party but whether the opponent in a negotiation believes that there is such a third party who is competing with him to offer the same space, services or goods. Most of us tell the truth more convincingly than we tell lies.

7. The Brer Rabbit Approach – intended to cause an opponent's position to change and disguise one's own position (for example Lease negotiations).

8. Expose the Jugular- many human beings will not drive as hard a bargain with one who meekly surrenders, as they will with a person who fights tooth and nail.

9. Boulwareism- referred to as the take it or leave it approach; the other side on the basis of its own research and evaluation of the demands, determines what is right and then makes a fair and firm offer without holding anything back for later trading or compromising. It has the benefit of convincing an opponent that one's offer is his last position. In an area where the alternatives are not catastrophic and the expense of

engaging in many protracted negotiations would be high, is when they wish to use this technique.

10. Negotiator Without Authority – I would be willing to go along with that proposal, but I will have to get the approval of my client and I am sure he won't approve unless you change your proposal as follows. If the decision in fact rests in the hands of someone with whom the negotiator is not engaged in face to face discussion, no amount of argument in favour of the negotiator's position and no amount of persuasiveness can affect that third party's position. It conflicts the reactions of the opponent. Because of this it is probably not as easy for a negotiator to refuse the final increment as would otherwise be the case. There are at least two defences used to combat this technique – retain some water in his last offer so that there is still something to be given; and refuse to deal with one who does not have authority or challenge the assertion of no authority.

11. Splitting the Difference – the rationalization often bares no logical relationship to the underlying case or to the appropriateness of the settlement.

12. Draftsman- in the typical commercial transaction which is concluded with a Lease or a contract, the draftsman has the distinct upper hand; in the first place he can include a variety of boiler plate to turn non-negotiated items his own way. By drafting the document he acquires those items free without having to concede their importance and without giving something up in return for them. If one negotiator can start with a printed as opposed to a typed form, he has even a stronger position because his opponent may feel inhibited by the form and may not propose as many or as extensive changes as he would otherwise.

J. **THE PROS AND CONS OF GETTING TO YES**

The thesis of the book written by Roger Fisher and William Ury entitled "Getting To Yes" is summarized as follows:

”Behind opposed positions lie shared and compatible interests as well as conflicting ones. We tend to assume that because the other sides positions are opposed to ours then their interests must also be opposed. If we have an interest in defending ourselves, then they must want to attack us. If we have an interest in minimizing the rent, then their interest must be to maximize it. In many negotiations, however, a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed.”

The importance of negotiation on issues where the parties are diametrically opposed is exaggerated and those situations where the parties interests are compatible is ignored. By making a clear articulation of the importance of co-operation, imagination and the search for alternative solutions, we are taught helpful lessons (problem solving vs. distributional bargaining; exploring for mutual profitable adjustments; the efficiency aspect of bargaining). A typical negotiation is one in which the parties initially begin by co-operative or efficiency bargaining, in which each gains something with each new adjustment without the other losing any significant benefit. Eventually, however, one comes to bargaining in which added benefits to one impose corresponding significant costs on the other. The most demanding aspect of nearly every negotiation is in the distributional one in which one seeks more at the expense of the other. There is a start contrast between an negotiator who simply takes a position without explanation and sticks to it as a matter of will and the negotiator who is reasonable and insists upon objective criteria.

Good negotiators rarely resort to threats. Less than full disclosure is not the same deception. The negotiator’s role is at least passively to mislead his opponent about his settling point while at the same time to engage in ethical behavior.

A party’s aspiration level is an important factor in determining the outcome of a negotiation other things being equal. There is evidence that the level of the first offer, and the pace and form of concessions all affect the outcome of negotiation.

There are three prominent images of lawyers – hero, helper and trickster. A lawyer can be a good negotiator without deviating at all from his role as helper.

K. **NEGOTIATING POWER**

In the real world people don't behave wisely, efficiently and amicably; results are determined by power – by who is holding the cards, by who has more clout.

DEFINITION OF NEGOTIATING POWER

Negotiation includes all cases in which two or more parties are communicating, each for the purpose of influencing the other's decision – sending a message to affect decisions of the other side. If I have negotiating power, I have the ability to affect favourably someone else's decision; my power depends upon someone else's perception of my strength so it is what they think that matters not what I actually have; that is, negotiating power is all a matter of perception. A false impression of power is extremely vulnerable, capable of being destroyed by a word. Real negotiating power is the ability to influence the decision of others assuming they know the truth rather through deception by creating an illusion of power.

The statement that power plays an important role in negotiation is true – but irrelevant. A lively interplay exists between descriptive and prescriptive theory. Those of us who are primarily concerned with change (for the better) are searching for descriptive categories that have prescriptive significance. There are two key questions with respect to negotiating power – how to enhance the negotiating power and how to use such power as one may have.

MISTAKEN VIEWS OF NEGOTIATING POWER

1. Physical force = negotiating power.

   Negotiating power is the ability to influence others. The pain that is threatened is simply one factor among many. Total negotiating power depends upon many factors. Enhancing negotiating power means building up the combined potential of

them all. Exercising negotiating power effectively means orchestrating them in a way that maximizes their cumulative impact.

2. Start tough, you can always get softer later.

   Conventional wisdom insists that it is easier to soften one's position than to harden it. A negotiator is encouraged to start off flexing his muscles. If these two propositions are wrong, how should someone enhance and exercise negotiating power?

CATEGORIES OF POWER

The following six kinds of power appear to provide useful categories for generating prescriptive advice:

1. THE POWER OF SKILL AND KNOWLEDGE

   All things being equal, a skilled negotiator is better able to influence the decision of others than is an unskilled negotiator. Negotiating skills can be both learned and taught. Being a skillful negotiator means knowing how to deal with people; the ability to listen, to become aware of the emotions and psychological concerns of others, to empathize, to be sensitive to their feelings and one's own, to speak different languages, to communicate clearly and effectively, to become integrated so that one's words and non-verbal behavior are congruent and reinforce each other. Other skills are those of analysis, logic, quantitative assessment and the organization of ideas. The more skill one acquires, the more power one will have as a negotiator.

   Knowledge is also power – general knowledge and knowledge relevant to a particular negotiation about which one is to engage in. The following categories of knowledge for example are likely to strengthen one's ability to exert influence:

a) knowledge about the people involved;
b) knowledge about the interests involved;
c) knowledge about the facts – the more one knows about a problem as well as its implications, the more likely it is that one can invent creative solutions; it takes time and resources to acquire skill and knowledge, it also takes initiative and hard work.

The first way to enhance one's negotiating power is to acquire in advance all the skill and knowledge that one reasonably can.

2. THE POWER OF A GOOD RELATIONSHIP

Mutual respect and mutual affection work. The two most critical elements of a working relationship are first, trust, and second, the ability to communicate easily and effectively.

My power depends upon whether I can be trusted. If over time, I have been able to establish a well deserved reputation for candour, honesty, integrity and commitment to any promise I make, my capacity to exert influence is significantly enhanced. The negotiation process is one of communication. I want to know where the other person's mind is; if my messages are going to have their intended impact, they need to be understood as I would have understood them. When the parties see each other as adversaries, the risk of miscommunication and misunderstanding is greatly increased. The longer two people have known each other, and the more broadly and deeply each understands the point of view and context from which the other is operating, the more likely they can communicate with each other easily and without a minimum of misunderstanding.

We may have interests that conflict, but our ability to deal with those conflicting interests at minimum risk and minimum costs is enhanced by a good working

relationship. More power for one is consistent with more power for the other. A relationship which provides a means for happily resolving one transaction after another, becomes and end in itself. Particular substantive negotiations become opportunities for co-operative activity that builds the relationship.

3. THE POWER OF A GOOD ALTERNATIVE TO NEGOTIATION

Consider the alternatives to reaching an agreement with this particular negotiating partner, to select the most promising and to improve it to the extent possible. In some cases a third party offer from a competitor is the best position. In other cases my best alternative may be self-help. The less attractive the other side's position is to them the stronger my negotiating position. The better alternative one can develop outside the negotiation, the greater one's power to affect favourably a negotiated outcome.

4. THE POWER OF AN ELEGANT SOLUTION

Each side advances arguments for a result that would take care of its interests but would do nothing for the other side. The power of a mediator often comes from working out an ingenious solution that reconciles reasonably well the legitimate interests of both sides.

A wise negotiator includes in his or her preparatory work the generation of many options designed to meet as well as possible the legitimate interests of both sides. In any negotiation, generating a range of options in advance, some of which may later be put on the table is another way to increase the chance that I will affect the outcome favourably.

5. THE POWER OF LEGITIMACY

Each of us is subject to being persuaded, by becoming convinced that a particular result ought to be accepted because it is fair; because the law requires it; because it is consistent with precedent, industry practice, or sound policy considerations; or because it is legitimate as measured by some other objective standard. I can substantially enhance my negotiating power by searching for and developing various objective criteria and potential standards of legitimacy and by shaping proposed solutions so that they are legitimate in the eyes of the other side.

To be persuasive a good negotiator should speak like an advocate who is seeking to convince an able and honest arbitrator, and should listen like such an arbitrator, always open to being persuaded by reason.

There is a range within which reasonable people could differ. To retain his power, a wise negotiator avoids advancing a proposition that is so extreme that it damages his credibility. He also avoids so locking himself into the first principle he advances that he will lose face in disentangling himself from that principle and moving on to one that has a greater chance of persuading the other side. A negotiator will want to have worked on various theories of what ought to be done so as to harness the power of legitimacy.

6. <u>THE POWER OF COMMITMENT</u>

The five kinds of power previously mentioned can each be enhanced by work undertaking in advance of formal negotiations. There are two quite different kinds of commitments – affirmative (what I am willing to agree to and what failing agreement, I am willing to do under certain conditions) and negative (what I am unwilling to do and a threat that, failing agreement, I will engage in certain negative conduct). The one who makes the offer takes a risk. But in exchange for taking that risk, he has increased his chance of affecting the outcome. A wise negotiator will formulate an offer in ways that maximize the cumulative impact of the different

categories of negotiating power. No other form of negotiating power may be needed. But as a last resort, the negotiator has one other form of power, that of a negative commitment, or threat.

For almost every potential agreement, there is a range within which each of us is better off having an agreement than walking away. Logic suggests that victory goes to the one who first and most convincingly ties his own hands at an appropriate figure. Other things being equal, an early and rigid negative commitment at the right point should prove persuasive.

The earlier I make a negative commitment- the earlier I announce a take it or leave it position – the less likely I am to have maximized the cumulative total of the various elements of my negotiating power.

The power of knowledge- the longer I postpone making a negative commitment, the more likely I am to know the best proposition to which to commit myself.

The power of a good relationship – being quick to advance a take it or leave it position is likely to prejudice a good working relationship.

The power of a good alternative- there is subtle but significant difference between communicating a warning of the course of action that I believe it will be in my interest to take should we fail to reach agreement and locking myself into precise terms that you must accept in order to avoid my taking that course of action. Extending a warning is not the same as making a negative commitment; we are simply trying to influence the outcome with objective realty.

Such negative commitments invite the other side to engage in a contest of will by making commitments that are even more negative and even more difficult to get out

of. A premature negative commitment weakens rather than strengthens our negotiating power.

The power of an elegant solution – it is possible to make a proposal that makes it more attractive to the other side without in any way making it less attractive to your side.

Premature closure on an option is almost certain to reduce our ability to exert the influence that comes from having an option well crafted to reconcile, to the extent possible, the conflicting interests of the two sides.

The power of legitimacy- legitimacy depends on both process and substance. The persuasive power of my decision depends in part of my having fully heard your views, your suggestions and your notions of what is fair before committing myself.

The power of an affirmative commitment- once an affirmative commitment is on the table, the negotiator must make sure that the varied elements of the communication are consistent with each other. No matter what the magnitude of a threat, it will have little effect unless it is constructed so that the sum total of the consequences of acceptance are more beneficial to the other side than is the sum total of the consequences of rejection. While negotiators frequently try to increase power by increasing the magnitude of a threat, they often overlook the fact that increasing the favourable consequences of acceptance can be equally important.

An offer may not be enough, but a threat is almost certainly not enough unless there is a "yesable" proposition on the table – a clear statement of the action desired and a commitment as to the favourable consequences which would follow.

This analysis of negotiating power suggests that in most cases it is a mistake to attempt to influence the other side by making a negative commitment of any kind at the outset of the negotiations, and that it is a mistake to do so until one has first made

the most of every other element of negotiating power. This analysis also suggests that when as a last resort threats or other negative commitments are used, they should be so formulated as to complement and reinforce other elements of negotiating power, not undercut them.

I remain unconvinced that the best advice for a negotiator would include suggestions of how to create a false impression in the mind of the other side, any more than I advise young lawyers on how best to create a false impression in the mind of a judge or arbitrator.

Note: One kind of negative commitment that could be made at the outset of negotiations without damage to the relationship, to legitimacy, or to other elements of one's total power is an early commitment never to yield to unprincipled threats. Such a negative commitment is consistent with legitimacy. An early commitment not to respond to threats might, if conceivably made, preemptively foreclose threats from the other side.

L. GAMES WHERE THE WINNER DOESN'T TAKE ALL

Life is not a zero – sum game at all. The winner does best by sharing and never attempting to put one over on his opponent. Life is a mixed motive game in which the interests of people party coincide and partly conflict. To get what they want, they have to co-operate. They must trust each other consistently and be prepared to share the rewards available (the meek shall inherit the earth). You do not have to deprive others in order to succeed yourself. (The golden rule "Do unto others as you would have them do unto you"). People seem to learn at the beginning not to co-operate but to try to beat their opponents or to defend themselves. Then they both start losing. About half start out co-operating and after an initial decline of co-operation, 70% of the men have fixed on co-operation, but there is not the same recovery for women, of whom only about 35% end up co-operating.

M. NEGOTIATION (Playing Softball)

INTRODUCTION

Certain negotiators are described as aggressive, tough, uncompromising, oppressive, insensitive, hardhearted, unpleasant or belligerent – they play hardball. Their demands are high, their concessions little. Studies have shown that such negotiators can be extremely effective especially against opponents who adopt a more sensitive, accommodating and co-operative negotiating philosophy.

When an individual is confronted with an aggressive negotiator, five general kinds of responses are possible – (a) the individual may give up and forego any bargain: (b) the individual may give in or succumb to the aggressive tactics and make a bad deal; (c) the individual may respond by playing hardball too and attempt to beat the negotiator at his own game; (d) the individual may respond by putting up a good defence to the other's aggression (the best offense is a good defence); (e) the individual has the response of advancing an alternative negotiation technique. While an alternative provides protection and an element of self-defence, it also generates bargaining power. The effect of an alternative begins as defensive but becomes assertive. It is in fact the power of competition. The better your alternative, the greater your negotiating power. Prior to the commencement of the negotiation some real effort should be dedicated to determining what are the alternatives of the parties and the values of those alternatives and how to use this information in the course of negotiation.

THE POWER OF UNCERTAINTY

The reality of the inherent uncertainty of negotiation introduces refinement to the concept of reservation price. (The cost of negotiating). Unless the negotiator stays in control, risk aversion and the avoidance of decision regret may prompt movement in the reservation price and make an offer too tantalizing to resist.

The aggressive negotiator will point out dangers or even make threats outlining the dire consequences of a failure to reach agreement. This goal of maintaining uncertainty provides

one reason why the aggressive negotiator is careful about providing information and is one reason why the most unscrupulous negotiators will lie.

The uncertainties inherent in negotiation are a source of power to negotiators of whatever stripe. Simply keeping silent or appearing oblivious to the dire predictions of the opponent may produce considerable negotiating power. Negotiating power may be generated by the negotiator who manifests a willingness to take a risk.

THE POWER OF EFFORT AND THE POWER OF A SOLUTION

Lack of preparation makes the negotiator more vulnerable to the aggressive negotiator. The opportunity to shape the wording (drafting) is important (use of standard form contracts). Allowing one side to prepare the negotiating agenda is allowing that side to orchestrate the process of negotiation.

There is the power that comes from using effort to produce a solution which solves the negotiation problems of both parties to the negotiation. A negotiator exercises the most control when he or she is working for a solution that is aimed at satisfying the needs of the opponent.

This weds the power of a solution with the emotional power of pride. Or, the negotiator may use the arts of persuasion or salesmanship to induce or seduce the other side into a new understanding or what is in its best interests. Thus, the hardball is matched by the hard or soft sell.

THE POWER OF A POSITIVE COMMITMENT

It is a classic example of the motivation of the carrot (the offer) and the stick (the costs sanction).

The offer will be strongest when supported by authority; when it provides a solution to the bargaining problem of the other side and when it appears motivated by a positive attitude rather than a fear of failure.

THE POWER OF SKILL AND KNOWLEDGE

Underlying all of the powers discussed above and the best offence or defence against the aggressive negotiator (or indeed against any type of negotiator) is the power of skill and knowledge.

The negotiator who eschews aggressive techniques must never the less be a student of them. Thus, the skilled negotiator has to be alert to the multitude of negotiation gambits and tactics. The dangers of negotiating with someone who gets binding concessions without reciprocating. The skilled negotiator will be able to deal with the negotiation problems of setting an agenda, communication, emotions, concessions and deadlines.

CO-OPERATIVE AND COLLABORATIVE NEGOTIATION

Through co-operation and collaboration, the parties can develop a solution which is mutually satisfying. At the operative level, co-operative negotiation works best when the needs or interests of the parties are different or not in conflict. Successful collaborative negotiation lies in finding out what the other side really wants and showing them a way to get it, while you get what you want.

Positional bargaining is a process where the parties begin the negotiation by making demands for precise settlement terms. It is important to remember that we should try to negotiate problems rather than demands. Our demands are only a one solution approach to the problems. There may be other solutions.

The alternative to positional bargaining is to focus on interest and not on positions. Once the interests are identified, the co-operative approach then relies on creativity to develop a variety of solutions which may be evaluated to find an elegant solution which best meets the true needs and interests of the parties. Accordingly, if the environment for negotiations is competitive, you see me as an adversary, and in order to achieve a collaborative result, I will have to play the competitive game.

There may be no mutually satisfying solution. There are ways to change an apparent pure distribution problem into one amenable to co-operative bargaining. It is possible to develop ways to enlarge the pie before dividing it. The problem can be stated as how to change an opposer’s win/lose into a creative alternative attitude.

An effort must be made to create an atmosphere of trust and co-operation to separate the people from the problem but deal with both. Sensitivity and communication skills are given high priority in the effort to find out the true needs of the parties. Once the underlying needs are identified, a variety of options should be generated. It is from these options and without ever adopting positions, that the parties will be able to find a mutually satisfying solution to the negotiation problem.

You need not intimidate or be intimidated to win. And sometimes the other side can win too.

N. **THE STRATEGY OF CONFLICT**

Distributional bargaining deals with situations in which a better bargain for one means less for the other. Bargaining in which each party is guided mainly by his expectations of what the other will accept.

Power to constrain an adversary may depend on the power to bind oneself (sacrifice a freedom of choice) that, in bargaining, weakness is often strength, freedom may be freedom to capitulate, and to burn bridges behind one may suffice to undo an opponent. Bargaining power is the ability to set the best price for yourself and fool the other person into thinking that this was your maximum offer. There are two kinds of fooling– one is deceiving about facts; the other is purely tactical.

It is easier to prove the truth of something that is true than of something false.

This example demonstrates that if a buyer can accept an irrevocable commitment, in a way that is ambiguously visible to the seller, he can squeeze the range of indeterminacy down to the point most favourable to him.

For example, if a union was going to insist on two dollars and management was expected to cover with a dollar sixty, an effort should be made to persuade the membership not only that the management could pay two dollars but even perhaps that the negotiators themselves are incompetent if they fail to obtain two dollars. The purpose is to make clear to the management that the negotiators could not accept less than two dollars even if they wish to because they no longer control the members or because they would lose their own positions if they tried. In other words, the negotiators reduce the scope of their authority and confront the manager with a threat

of a strike that the union itself cannot avert, even though it was the union's own action that eliminated its power to prevent the strike.

The frequency with which final agreement is precipitated by an offer to split the difference (the concept of co-ordination) illustrates the same point and the difference that a split is by no means always trivial.

Precedents seem to exercise an influence that greatly exceeds its logical importance or legal force. It seems that there simply is not heart left in the bargaining when it takes place under the shadow of some dramatic and conspicuous precedent. Without much regard to the merits of the case, the arguments to be made or the pressures to be applied during the bargaining, the concept of co-ordination takes place. The obvious place to compromise frequently seems to win by some lack of default as though there is simply no rationale for settling anywhere else. The outcome may not be so much consciously fair or conspicuously in balance with estimated bargaining powers as just plain conspicuous.

The answer may be that explicit bargaining requires, for an ultimate agreement, some co-ordination of the participants' expectations. Each party's strategy is guided mainly by what he expects the other to accept or pass on; yet each knows that the other is guided by reciprocal thoughts. These infinitely reflexive expectations must some how converge on a single point, at which each expects the other not to expect to be expected to retreat.

If one is about to make a concession, he needs to control his adversary's expectations; he needs a recognizable limit to his own retreat. He needs an obvious place to stop.