

The Refined Art and Science of Negotiations

By John Amtsfield, 1988, edited 1992, 1998

At various times during my tenure as a senior steward both in Pennsylvania and here in New Jersey, I have written essays on the “Art of Negotiations”. I have found the need to publish these essays from time to time because negotiating is not something we are taught; but it is something many of us learn through repetitious trial and bitter error.

There is no blueprint for successful negotiations since every negotiation is different. There are, however, a number of common features for every negotiation and knowing these features will enable those involved in negotiating to successfully achieve fair and just resolutions.

This essay is entitled the Art of Negotiations because there is a very definite skill level involved in negotiating interest based issues (that is issues where the negotiator has a stake in the outcome).

There is always a great admiration for the fictional negotiator who walks into a negotiation, drops an offer on the table, says “take it or leave it” and spins around on his/her heels as if the outcome did not matter (The John Wayne, Clint Eastwood school of negotiations). The perception is that the negotiator is “tough”; that he/she is difficult to put one over on. This type of negotiator is inflexible, insensitive, ineffective and rarely successful. Although there is a time and place for that sort of ultimatum, it usually comes after marathon negotiations and the proper time and place for it is rare.

It is always important to understand the “big picture” involved in any negotiation. Any successful resolution will have to be in harmony with everything else or it will eventually unravel. Although it might feel good to obliterate an adversary in a series of negotiations, it does nothing to set up a framework for continued negotiations. Exactly how much good is the General who wins all of the battles only to lose the war (Consider George Washington who lost almost every battle in the American Revolution, but managed to win the war). Negotiations are not a macho game where the winner ends up with the highest score. Too often we all have to live with what is negotiated and we need to build on previous negotiations over and over again.

Clever but short sighted negotiators try to put one over on their opponents and to win at all costs. Smart negotiators deal with their counterparts honestly and forthrightly to achieve a solution that meets the interests of both sides and that is something both parties can be satisfied with.

Roger Fisher of the “Harvard Negotiations Project” utilizes techniques that are very similar to what I have learned is the most effective technique for negotiations. He calls it “Principled Negotiation” or negotiation based on the merits of what is at stake.

How many times have we entered into negotiations when we were not fully prepared and ended up with a result that was less than satisfactory.

FIRST RULE: It is unrealistic to expect to get everything you want. Each person involved in the negotiation is going to have a different perspective, different interests and different goals. The sooner you know your counter parts perspective, interests and goals, the better you will be able to craft a solution that encompasses your goals and your counterparts. The ideal resolution is a Win-Win situation for all parties. Which of the following is most likely to result in a resolution that will stand up to time;

- 1) Absolute and total war where each party goes after the other “hammer and tongs” until one party overwhelms the other.
- 2) Joint problem solving where both parties attempt to deal with resolutions that meet the needs of both parties.

The traditional method of haggling like fishmongers works sometimes when you are bargaining to make a purchase; but even then it is inefficient and ineffective. In this method of negotiations, both parties forcefully argue a position and one side or the other, makes concessions to reach a compromise or one side refuses to budge and the other side is faced with “take it or leave it”. These kinds of resolutions leave bad feelings and breed distrust and lack of respect for future negotiations.

SECOND RULE: Never bluff! Anytime you bluff, you set yourself up for having the bluff called. Every time you bluff, you send a message of disrespect to your counterpart. Once your bluff is called and no disastrous result occurs, your counterpart will not respect your bargaining position. Bluffing is akin to the bait and switch in marketing and is every bit as disreputable. Leave the bluffing for poker. The most important part of any negotiations is establishing the parameters or setting the boundaries of the negotiations. This is not as hard as it sounds and actually it is something that is very easily done. In grievance administration or membership representation, one of the parameters is usually already set. The Employer sets the management parameter. In cases involving discipline, the disciplinary penalty is one parameter (that is whatever penalty management assessed management wants to stand). In contract issues, whatever management is attempting to do or what they are not doing is the management parameter.

In adversarial negotiations, it is the Union's responsibility to set the other parameter. Once set, the boundaries or borders of negotiations are established. If our parameter is set too modestly, we simply narrow the range of possible negotiations before the negotiations have even begun. In effect, we have already conceded a fair amount of negotiations even before the negotiations begin. If the parameters are too expansive, the opportunities for good faith bargaining are narrowed because the other side is not convinced that you will be flexible. Establishing the Union parameter may seem like it is tricky, but it really isn't.

In disciplinary cases the Union parameter should be to return everything to the way it was before discipline was issued and you start with a presumption of innocence. The Union should routinely request that the discipline be rescinded and expunged, that no further actions are built on the discipline and that it cannot be cited as an element to support future discipline and that the grievant be made whole for all lost wages, benefits and repercussions. In contract issues, if an action is being contested the Union should request that everything be returned to the way it was before the action took place and that any injury resulting from the action be redressed.

This is no different from say buying a house. If you look at a house that is priced around \$250,000; chances are that the asking price was intentionally set higher than the expected selling price. If you decide that a fair price for the house might be \$235,000; would an opening bid of \$233,000 or an opening bid of \$200,000 be more likely to achieve a transaction price of \$235,000?

For another example, in a disciplinary case, an employee receives a fourteen days suspension. If you believe the likely result may be a three day suspension, should the Union request that the fourteen day suspension be reduced to a three day suspension? Of course not! Many times the parameters are set before the case is fully investigated and there is no reason to make concessions even before negotiations begin.

In adversarial negotiations, it is very rare that a resolution is reached that is outside the parameters of the negotiations and that is why it is important that the parameters be as broad as possible. Oftentimes a continuing investigation may establish facts that are not apparent when the parameters are set. It may turn out that an employee that looked to be guilty of gross misconduct, is in fact innocent or there are compelling mitigating factors that will impact an eventual resolution. Since strategies are rarely set when issues are drawn, the Union retains full flexibility to craft a resolution that matches the issues as they are developed.

If a case is well developed, chances are that the final resolution will be closer to the Union parameter or boundary. If the Union is unprepared or the facts do not support the Unions positions, chances are that the resolution will be closer to the Employer's parameters.

THIRD RULE: Good things come to those who are prepared for them. Preparation is the answer to everything that can happen in negotiations. It can enable you to exploit the strengths of your position and to be prepared to address and/or explain the weaknesses in your positions forthrightly. It also prevents those ghastly surprise ambushes where your entire position collapses because you've been outflanked.

In exploring “Principled Negotiation” there are a number of methods that can be used in conjunction with good preparation. Since this is straightforward negotiations, it can be used in almost any circumstance, whether personal or professional. The methods are;

- 1) Be sure to separate personalities from the substance of an issue. It is important to preserve a mutual respect and to build a working relationship. If you find it difficult to respect the individual you are dealing with, respect the position and deal with the position. Concentrate on attacking the issue or the problem, not the person. If you are personally attacked as often happens, do not let it slide! Stop all discussion and call him/her on it. Ask to return to the issue and/or problem and point out that addressing personalities will not solve the issue/problem. Negotiations can never be personal and it is imperative that both parties understand that it is okay to agree to disagree without it becoming a personal contest of wills. Injecting personalities detracts from the issues and it is diversionary and counter productive. If your counter part insists on continuously injecting personalities, it may be that the objective is to divert attention or to torpedo the negotiations (if that is the case, this effects how you approach the negotiations and whether or not you can bargain in good faith when the other party will not).
- 2) Focus on interests, not positions. All too often, negotiators spend a lot of time and effort in what amounts to posturing. In many cases the posturing becomes the shell for a negotiating position and it obscures the heart of an issue. Know what people really want! Try to determine what each side’s true interest and/or goals are, even if it is not apparent. Once true long range objectives are determined and interests identified; it is not usually too difficult to find a common ground that can serve as a foundation for resolution and a bridge for the future.
- 3) Be sure that your counterpart can resolve the issue and if they can, that they are willing to resolve the issue. If he/she does not have the authority to decide the issue at that point, any resolution will have to be crafted to meet the goals of whoever will be deciding the issue. Another concern is that oftentimes your counterpart is restricted in what ever resolution he can apply by ramifications that can impact him/her. Designing a resolution that takes into account those concerns will be one of the most important stepping stones to achieving a resolution. Anytime potential liability can be minimized for any adverse ramifications, a very real barrier is overcome in working out a resolution. Even though these elements are not directly related to the issue, they serve as an obstacle for resolving the issue and must be effectively addressed before the issues can be resolved.
- 4) Plan a range of options or generate a range of options before selecting one as the resolution. The difficulty of negotiations rises in direct proportion to how important the outcome is to the negotiators. If there is a lot at stake, the creativity portion of a negotiator’s brain tends to paralyze. If one goes into negotiations with only one single correct solution in mind; the likely result is something on the order of heartburn, heartache and heart-sickness. While in the midst of negotiating, resist the temptation to settle on a single correct solution without exploring a wide range of possibilities that could be beneficial to both sides. The best and most enduring solution is the one that pleases both sides.
- 5) Look for a legitimate standard of fairness and insist on applying it. When a recognized and objective standard is utilized, the weight of impartial and objective testimony is marshaled to your side. Neither party loses face by concession since they are merely deferring to a recognized standard. The standard can be a preponderance of regulations; clear and convincing manual citations; expert opinions by recognized authorities; clear precedents that are directly applicable; grievance/arbitration decisions where the issues are the same or very similar; court decisions or even what a court or arbitrator is most likely to decide. **ALWAYS RESIST PRESSURE, YIELD ONLY TO PRINCIPLE.**
- 6) Develop alternate plans in the event you fail to achieve a negotiated agreement. Anytime you negotiate, there is always the prospect that you will not be successful. If you haven’t thoroughly considered your alternatives if you are unable to reach an agreement and what you can do as a result of negotiations breaking down; you have been negotiating deaf, dumb and blind. If you clearly know what your alternatives are you can choose your alternatives from an informed position. If you have set your

goals too high going in and are therefore too optimistic and inflexible, negotiations will not be in your favor. On the other hand if you are too anxious to reach a resolution you may concede negotiating position without any demonstrable return. Sometimes you end up taking what you can get, other times this is the right and proper time to make a “take it or leave it” offer and walk away. In either case, knowing your options strengthens your bargaining position or at least gives you a firm grasp of what is possible.

7) Consider the ramifications of your position and the commitments you are making and what it is you want. Not every negotiation is going to result in an agreement and nor should it. Sometimes it is better to approach a meeting from the perspective that the purpose of the meeting is exploratory. It is advisable to draw out the interests and motivations of the other side, explore potential promises without nailing anything down and in general surveying all of the available options. This will give you the opportunity to mull ideas over and to consult with others. If the other side comes back with new ideas, new demands and/or new issues, you have the right to negotiate as well. This is the essence of the give and take, the back and forth of negotiation. Also where the issues fit into the big picture are important in designing agreements that will last. An agreement that is in conflict with other similar agreements is likely to require modifications and/or voiding the agreement at a later date. If agreements made have to be changed or voided, it does not facilitate enduring future agreements.

8) An open line of communications. If there is no communication, there is not negotiation. It is absolutely impossible to have good faith bargaining when one party refuses to talk or to listen. Be advised that whatever you say, you should expect that your counterpart will hear something totally different. Be prepared to be misunderstood. I’ve often been utterly amazed to hear what I said or what I agreed to repeated back to me later. Believe that everything you say passes through a filter or a prism before it reaches the other side. That filter or prism is your counterpart’s different expectations, biases and intuitions. Listen very closely to what is being said and pay scrupulous attention. Do not make any assumptions or read anything into what is being said. Now is not the time to be thinking of what your response will be. Listen, absorb, understand! Do not interrupt to make a point, if necessary take notes. If you do not understand something, feel free to interrupt to ask for clarification. Make every effort to be sure that you understand what is being said. On another plain, observe body language and voice inflections, not to read something into what is being said but to gauge your counterparts commitment, credibility and sincerity. Ask that ideas be repeated if there is any ambiguity or uncertainty and that everything is nailed down. Take the time to be sure that your counterpart understands what you have said and did not say. Make every effort to clear up any ambiguity or uncertainty and that if necessary you restate your positions, rationales and arguments so they are clearly understood. It is critical that you determine what the negotiating needs are, what the perceptions are that affect the negotiations and what ever constraints may impact the negotiations. These are not details that will likely be volunteered or even candidly disclosed if you ask.

Body language, tells and other tricks of poker players, fortune tellers and lawyers. Observe everything when you are negotiating. If it is someone you have negotiated with before, nearly every person in the world has physical tells (poker tells for determining when and if someone is bluffing) that are dead giveaways that you need only sort through to recognize. Most people's body language, voice inflections, facial expressions, or some other physical or observable sign give emotional clues more accurate than a lie detector. Very observant people are very good at discerning these barely noticeable giveaways and they are very skilled in employing triggers that can be used to make determinations or simply to catalog and calibrate sensitivity to very subtle changes and observant people are able to employ those triggers very effectively. Assume that the person you are negotiating with is one of these extraordinary people; if you are truthful and do not bluff and deal in good faith; they are disarmed and have no advantage.

The important and, perhaps, critical part of negotiating is to understand the other side’s complete position. While a full understanding of your counterpart’s position does not guarantee an agreement, it

facilitates the path to agreement. The better you understand your counterpart's position, the more persuasively you can address opposing positions and refute opposing points. You will have a better idea when you will not be able to reach an agreement, and you can agree to disagree in a professional manner. If you clearly see what the other side wants; you see what options they have, what strategies they can employ and how they are going about trying to achieve their objectives (like seeing their mind work through chess moves before they are made).

NEGOTIATING STRATEGIES

- 1) Negotiating with family, friends or close associates entails greater risks. The important thing is to learn to disagree without being disagreeable. In these negotiations that penalty for "unsportsmanlike conduct" is generally more terrible than the issue itself. You can disapprove of a person's behavior and still care about the person. You can dislike what a person said or did without disliking the person. Be sure to communicate this in a non judgmental fashion. Do not use words like "You are!", You always or any other accusatory gauntlets. Discuss issues and problems only with a heightened sensitivity for the ramifications. Make a list or agenda jointly of issues that need to be addressed. Be firm, but be courteous and reasonable. Explore multiple options and accumulate points for creativity. Don't try to resolve everything right away.,but give everything a few days before any final decisions are made.
 - 2) Negotiating when a substantial personal gain is at stake. It is critically important that meticulous preparation be done beforehand. Extensive research should be undertaken to identify comparable situations involving other uninvolved parties as an issue of comparable fairness. Make a strong case that your position is solid including listing all collateral benefits if your position is sustained and implemented. Give the other side a compelling rationale that they can use to justify accepting your position to their superiors or their constituency. Be sure that you detail what you interest is and make a strong case for deserving same. Give the other side more and better reasons for agreeing with you than they would have for disagreeing.
 - 3) Negotiating large issues. It is important that a range of options be considered. Concentrate on providing maximum advantage and satisfaction for the other side if an agreement is reached. Sometimes real "off the wall" creativity, the wild and crazy idea is enough to swing an agreement. The clincher might be something relatively minor that is loosely related to the negotiations or maybe somethin g totally unrelated that provides sufficient flexibility to facilitate an agreement.
 - 4) Negotiating when you do not fully trust the other side. If the negotiations are proceeding in good faith, but you are reluctant to finalize an agreement because you fear that while the other side maintains they will abide by the agreement, you have reason to fear that they will not; feel free to seek a contingency agreement. If the other side lapses, the remedy is spelled out and agreed upon be forehand. Be sure that any agreement anticipates bad faith and addresses appropriate conditions.
 - 5) Heading off disaster. When you are faced with draconian circumstances, negotiations are one way of modifying and/or mitigating against the worst possible scenario. This is where creativity is extremely important to develop solutions and/or rationales for an alternative. It is also important to determine the interests and motivations behind what the other side is attempting. Is the interest perm anent or temporary? Sometimes just buying time is sufficient until new solutions present themselves or the problem dissipates. Is the other side posturing or are they reacting out of desperation? If they are posturing, then they are just playing good old fashioned "country, hardball" and a careful, measured response is necessary. If they are forced by circumstances beyond their control, you need to determine the circumstances so that you can tailor an appropriate remedy and explore all alternatives.
 - 6) Avoid lazy or misleading resolutiuons. It is easy to divert attention from the issue of the negotiations by not addressing any of the relevant issues and simply mutually agreeing to a resolution that quotes specific language that may or may not be directly relevant. It is the easy and lazy way to get "a win" and it satisfies no one and solves nothing. Be sure that the issues are directly addressed.
- FOURTH RULE. Whenever you negotiate you are trading on your credibility. At all costs preserve your credibility. If what you say can be backed up and your counterpart believes that what you say is

gospel, he/she will trust what you say. You build trust a little at a time and it takes a long time to build the kind of trust so that people will accept what you say is what you will live up to. Do not lie or evade the truth. The short term gain you may achieve is not worth the long term repercussions when your counterpart discovers the treachery. It is also important not to take advantage of a situation if your counterpart is unaware of consequences. If you agree to something knowing full well that your counterpart will face dire consequences for the agreement, the person will never again trust you or be willing to negotiate in good faith.

Lastly, whatever we negotiate, we must live with and live up to. When we negotiate agreements we build a foundation for future negotiations. If the foundation is flawed whatever we attempt to build on top of that foundation, will be unstable. It is better to live with a bad deal, then to violate the agreement. It is also better to have an agreement that is not going to require modification or re-negotiation, because your credibility suffers if you should have been aware of the ramifications. If the result of negotiations proves to be unsatisfactory, learn from the experience!

The most successful negotiations are those that result in agreements that work for all parties and that all parties have a stake in fully implementing. Agreements that solve problems for both sides create an atmosphere of trust and allow for future good faith bargaining and they invest each of the parties with as stakeholders in living up to the resolution. You cannot effectively negotiate without credibility and especially where you are attempting to bury your opponent. Effective negotiations deal with the issues and not personalities.

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