

LAW MEMO

Negotiating Power

In the arts community, the very thought of negotiating often sounds intimidating. Yet we are all experienced negotiators.

You have negotiated all your life — with your parents, spouse, children, neighbors, landlord, colleagues, and, yes, your car mechanic.

We tend to develop assumptions about how we should negotiate in order to get what we want. Too often those assumptions are based on positional bargaining, which encourages stubbornness and forces the parties to either yield or compete. The result is an agreement that may not really address the needs of both parties.

Another mistaken belief is that the outcome is automatically determined by power. But seldom does one side have all the power, and power relationships can change.

For example, because the unemployment rate among professional

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actors is so high, producers are usually considered the more powerful party when it comes to casting. But what happens when the producer is forced to find a last minute replacement? Suddenly, urgency reverses the dynamic, giving the new actor the stronger bargaining position.

This issue of *Arts Law Memo* examines the illusive subject of power in negotiation. It also summarizes the four major elements of “principled negotiation” contained in *Getting to Yes*, the most influential book on the subject of negotiation to be published during the last few decades.

THE WIN-WIN APPROACH

Negotiation, the give and take process of bargaining to reach an agreement, is a collection of behaviors combining communication skills, psychology, sociology, and conflict management.

Generally, negotiations are not one-time events. They establish or foster ongoing relationships.

Negotiations need not be adversarial; ideally, you and your counterpart (a better term than opponent) will seek win-win outcomes designed to meet the basic needs of the parties.

The win-win approach focuses on building relationships by satisfying the underlying needs of both parties. Instead of each side trying to get the best deal through demands and force, the parties listen to each other, discuss their interests, develop options for mutual gain, and select outcomes that are fair to both sides.

BATNA

Another concept in *Getting to Yes* is known as BATNA. Instead of establishing a rigid bottom line or worst acceptable outcome, Fisher and Ury advise negotiators to concentrate on identifying their best alternative to a negotiated agreement (BATNA).

“The reason you negotiate,” they say, “is to produce something better than the results you can obtain without negotiating.”

Weaker parties, therefore, should attempt to make the most out of existing assets and reject agreements that would leave them worse off than their BATNA.

DIFFERENCES IN POWER

Principled negotiation works when both sides exercise good faith. But in the real world, people don’t necessarily behave amicably; they bluff, bully, and worse. Might becomes right.

As Fisher noted in “Negotiating Power,” a 1983 essay published in *American Behavioral Scientist*, “It is easy to conclude that negotiators who are more powerful fare better in negotiations. By and

Published by the St. Louis Volunteer Lawyers and Accountants for the Arts (VLAA), *Arts Law Memo* is mailed, free of charge, to more than 850 Missouri and Southwestern Illinois arts organizations, VLAA volunteers and corporate sponsors.

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This issue was written by Sue Greenberg, VLAA’s executive director.

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Getting to Yes

Four Principles for Effective Negotiation

In their classic text, *Getting to Yes: Negotiating Agreement Without Giving In* (1981), Roger Fisher and William Ury describe four principles for effective negotiation:

SEPARATE THE PEOPLE FROM THE PROBLEM

Negotiators tend to become so involved with the issues at hand and often take the other party's responses as personal attacks, so Fisher and Ury's first principle is to separate the people from the problem. People problems include differences of perceptions among the parties, intense emotions, and poor communication. All can be overcome by avoiding grandstanding, listening, and thinking of each other as partners in negotiation instead of as adversaries.

FOCUS ON INTERESTS

One of the greatest contributions made by Fisher and Ury is the notion of exploring interests. As they explain, "Your position is something you have decided upon. Your interests are what caused you to decide." The key to identifying interests is to ask open-ended questions — lots of questions. Then the discussion should look forward to desired solutions, not on past events.

GENERATE OPTIONS FOR MUTUAL GAIN

The parties should identify a variety of possible solutions before deciding what to do. Fisher and Ury encourage negotiators to separate the invention process from the evaluation stage. Evaluation should begin with the most promising proposals — proposals that appeal to both sides. Threats are less effective at motivating agreement than mutually beneficial offers.

USE OBJECTIVE CRITERIA

When interests are not compatible, the parties should insist that the result be based on some reasonable objective criteria, such as professional standards or precedent. Alternatively, the parties may want to create a fair procedure for resolving their differences. Whether the criteria is substantive or procedural, it is important to keep an open mind and explain the reasoning behind the suggestions.

large, negotiators who have more wealth, more friends and connections, good jobs, and more time will fare better in negotiations than those who are penniless, friendless, unemployed, and in a hurry."

While that diagnostic statement is true, Fisher notes, it is of little help to those who want to understand power so they can take prescriptive action.

GETTING & USING INFLUENCE

Fisher offers several suggestions for enhancing negotiating power. At the top of his list are the power of skill, the power of knowledge, and the power of a good relationship.

The Power of Skill. A skilled negotiator is better able to exert influence than an unskilled negotiator. Skills, which can be acquired, include the ability to listen, to become aware of emotions, to empathize, and to become fully integrated so your words and nonverbal behavior reinforce each other.

The Power of Knowledge. The more information negotiators gather about their counterparts and the issues at hand, the more powerful they'll be at the table. Preparation is crucial — a repertoire of examples and precedents enhances a negotiator's persuasive abilities.

Likewise, familiarity with non-verbal communication, cultural differences, and negotiating styles can have a significant impact on the final result.

The Power of a Good Relationship. Negotiations usually do not have a definite beginning and end, and the relationship exists before the parties sit down at the table.

As Fisher notes, "a good working relationship does not necessarily imply approval of each other's conduct, though mutual respect and mutual affection — when it exists — may help."

Trust and the ability to communicate are the two most critical elements in a working relationship.

If, over time, you have established a well-deserved reputation for candor, honesty, integrity, and commitment to

promises made, your ability to exert influence will be greatly enhanced.

Communicate. Communicate. Communicate. Understanding the other party's point of view is the most effective way to reach agreement and avoid misunderstandings. Ask lots of open-ended questions — questions that cannot be answered with a simple “yes” or “no.”

Remember, fair and sustainable agreements are based on the ability to listen and the willingness to deal with conflicting interests.

Finally, the working relationship developed during negotiations is often more important than any particular outcome. In other words, it becomes an end in itself.

THE IMPORTANCE OF TIME

While power comes in many forms, there are other critical elements in negotiation. Among them is time, which is addressed in *The Only Negotiation Guide You'll Ever Need* by Peter B. Stark and Jane Flaherty. Published this year, the book is a useful companion to *Getting to Yes*.

According to Stark and Flaherty, most negotiations conclude in the final 20 percent of the time allowed. This observation is consistent with the 80/20 rule, also known as Pareto's Law. It states, “Twenty percent of what you do produced 80 percent of the results; conversely, 80 percent of what you do produced 20 percent of the results.”

Being aware of time and deadlines can increase a negotiator's influence. Having patience pays off. Similarly, remembering that deadlines often can be changed or eliminated may decrease your stress level.

If both sides will benefit when negotiations are resolved quickly, then be sure to remind your counterpart of the merits of a speedy resolution.

A FINAL NOTE

When the other party refuses to budge, makes personal attacks, abuses power, or uses unethical tricks, be willing to walk away. If the “dating” is not going well, you can be certain that the “marriage” won't work either.

Ten Types of Power

1. Position. Some measure of power is conferred on the basis of one's formal position in an organization.

2. Knowledge or expertise. People who have knowledge or expertise can wield tremendous power. Of course, knowledge in itself is not powerful. It is the use of the knowledge and expertise that confers power.

3. Character or ethics. The more trustworthy individuals are, the more power they have in negotiations. Do they do what they say they are going to do — even when they no longer feel like doing it?

4. Rewards. People who are able to bestow rewards or perceived rewards hold power.

5. Punishment. Those who have the ability to create a negative outcome for a counterpart have the power of punishment. Think highway patrol officer.

6. Gender. Dealing with someone of the opposite sex can confer power.

7. Powerlessness. In some instances, giving up all power can be very powerful. If kidnappers threaten hostages with death enough times, the hostages may just challenge the kidnappers to go ahead and kill them.

8. Charisma or personal power. Passion and confidence go a long way.

9. Lack of interest or desire. The side with the least interest in what is being negotiated holds the most power.

10. Crazy. Bizarre or irrational behavior can confer a tremendous amount of power.

Source: *The Only Negotiating Guide You'll Ever Need* by Peter B. Stark and Jane Flaherty (2003)