BEING RIGHT ABOUT THE LAW ISN'T ENOUGH, AND MAY NOT EVEN BE RELEVANT: IT'S YOUR INFLUENCING AND NEGOTIATION SKILLS THAT MAKE THE REAL DIFFERENCE

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Abstract: Whereas imparting knowledge of the law and its application remains at the heart of legal education, the emergence of Artificial Intelligence technologies is creating a shift in client needs from their lawyers, with a far grater emphasis being placed on their abilities to make best use of the information they hold, particularly in the way that they deploy influencing and negotiation skills to advance their clients' interests. All too often, however, negotiation training courses and textbooks are little more than a series of anecdotes and situational advice. This article seeks to redress the balance by outlining both a mindset and a structure upon which any negotiation might be based. It promotes the value of curiosity, rapport-building and carefully calibrated questioning, rather than tough guy hardball demands, and it provides a five-phase model that gives a structure to a negotiation that highlights the important steps in the process and provides a foundation upon which negotiator can build their practice and skills.

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INTRODUCTION

Advice to young lawyers throughout the ages has emphasised that knowledge of the law is not the only prerequisite for success in the profession, even when arguing a case in the courtroom. In their classic text of 1911, father and son lawyers from Indiana, Byron and William Elliott relate the following tale:

> *If you have a case where the law is clearly on your side, but the facts and justice seem to be against you," said an old lawyer to his son, who was about to begin the practice of the law, "urge upon the jury the vast importance of sustaining the law. On the other hand, if the law is against you, or doubtful, and the facts show that your case is founded in justice, insist that justice be done though the heavens fall." "But," said the young man, "how shall I manage a case where both the law and the facts are dead against me?" "In that case," replied the old lawyer, "talk around it," and "the worse it is, the harder you pound the table.*[2]"

This advice has often been repeated, these days in the rather more pithy aphorism attributed to high-profile lawyer Alan Dershowitz that:

> "If the facts are on your side, pound the facts into the table. If the law is on your side, pound the law into the table. If neither the facts nor the law are on your side, pound the table.[3]"

This implication of this advice goes to the heart of my thesis, not just for litigators but, in my view, for all lawyers who are representing their clients' interests. Because prevailing in trial, a debate or a negotiation is not simply a question of being right, of having the law on your side. Rather, it is about being persuasive – persuading juries to accept your arguments, persuading clients to trust you with their important issues, and persuading your counterparts to agree to your proposals in a negotiation.

NEGOTIATION: A KEY SKILL FOR LAWYERS

It is often said that the three attributes required to be successful as a physician are affability, availability and ability – in that order. The same might be said about what clients are seeking from their lawyers, and certainly there is a growing trend within legal education to teach students a broad range of so-called soft skills in addition to the traditional subjects of knowledge and application of the law.

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2 ELLIOTT B., ELLIOTT, W. **The work of an advocate: a practical treatise**, Bobbs Merrill Company (2nd edition), 1911, p. 390 ISBN 978-1-34-536197-1

3 NAVARRETTE, R., Pounding the table about border episode, **Fort Worth Star-Telegram,** Fort Worth, Texas, Page E3, Section: Weekly Review, March 4, 2007

Quite why we call them soft skills is beyond me, because so many are really quite hard to master. But it is important that we do, particularly in a changing world where the rapid emergence of Artificial Intelligence (AI) technologies is now taking over some of the traditional roles of lawyers, namely knowledge of the law, review and collation of documentary evidence, and research of precedents. As information processing and analysis becomes easier, and accessible to all, a lawyer's competitive advantage will cease to be based upon their technical knowledge and will, instead, shift towards their abilities to make best use of the information they hold.

One of the key attributes that will be increasingly important in this new legal environment is the ability to deploy information and analysis in order to advance a client's interests. Most commonly used in negotiations, a key skill for lawyers is the ability to influence others, not only by being right on a particular point but more importantly by being effective in the way that they communicate and build relationships with their clients and counterparts.

To give a brief example of the value of these softer skills, based on a case I worked on as a mediator recently. There was a contractual dispute between an asset leasing business ("Lessor") and an equipment broker ("Broker") about the terms of a contract under which a number of mid-size computers had been leased by Lessor to Broker. The problem arose about ten months into the deal when Lessor made contact with Broker with a view to arranging the return of the equipment at the end of the first year of leasing. At this point it emerged that the parties had very different views about the deal they had entered into. Lessor was very clear that they had signed up to a twelve-month deal, and they were able to point to the terms of the contract which said exactly that. However, Broker was adamant that they had a four-year deal; indeed, they had sub-let the computers on to a number of their customers on four-year terms, so they said that, even if they wanted to, they were in no position to return the equipment. Hence, lawyers were instructed. Lessor's lawyers argued that the agreement clearly said twelve months, so they demanded a return of the equipment, whilst Broker's lawyers initially argued that a four-year contract had been agreed, regardless of what they saw as an error in the written document; they also claimed that there had been fraudulent misrepresentation in the way that the deal had been sold to Broker.

From this point onwards, exchanges between the respective lawyers lapsed into endless arguments about the true nature of the contract, and of course they got nowhere, with one side arguing about the law, the other arguing about the underlying facts, and both sides increasingly pounding on the table. Both lawyers believed they were right, but nothing was achieved. Thus, it was only when a mediator

became involved that a series of additional, and very different questions, came to light: Were there in fact two contracts, a written contract for the first twelve months and an oral agreement that further arrangements would be put in place for later years? Or why could a further lease agreement not be put in place? Why was Lessor so anxious to retrieve the equipment? Was there any way that Broker could solve their own problem by doing a deal with their own client? Had they even spoken to them yet? What would happen if agreement could not be reached? Was this really a case to fight through the courts or would it make more commercial sense for the parties to agree a settlement? Is there any particular shape of a deal that might be made to work?

I would accept that these are all good questions which an experienced lawyer might well consider. However, in order to obtain answers, the lawyer needs to do far more than simply think; they need to use their soft skills first to obtain information from the other side and then to influence the course of a negotiation in order to move towards an acceptable settlement of the dispute. Thus the client's need is not only for a lawyer who can analyse their case and give then accurate legal advice but rather, and often more importantly, it is the lawyer who will be expected to take a lead in the negotiations.

Acquiring negotiation skills is, therefore, now becoming an important element within legal education. All too often, however, training courses and the many textbooks upon which they are based are little more than a series of anecdotes and situational advice. These may well be of assistance if a student should happen to come across exactly the same situation in their own career and can remember the story, but otherwise this approach seem to me to be of limited educational value. Rather, I believe that what a student of negotiation needs to be both confident and effective is a methodology, that is, a mindset and structure upon which a negotiation, on any topic, might usefully be based.

Firstly, a word about mindset. Unfortunately, popular culture has promoted the notion that the best negotiators are tough guys, the larger-than-life business moguls who play high stakes poker in their downtime when they're not involved in shoot-outs across the boardroom table. Like most stereotypes there may be some partial truths in here, especially in that difficult negotiations are, by definition, not easy. But that does not mean to say that hardball antagonism is a sensible default strategy. One of the key principles of Fisher and Ury's landmark text, Getting to Yes, is to *"separate the people from the problem*[4]*."* By all means be hard on the problem

4 FISHER, R.; URY, W.; PATTON, B. **Getting to Yes: Negotiating Agreement Without Giving In** (2nd ed**)**. New York: Penguin Books, 1981 ISBN 978-1-84-413146-4

but don't let people issues such as emotions and ego get in the way. As Chris Voss[5] gives us a lesson from an old editor of the Washington Post, Robert Estabrook *"He who has learned to disagree without being disagreeable has discovered the most valuable secret of negotiation."* This is why so much of the FBI's Crisis Negotiation Unit's Behavioral Change Stairway Model for a negotiation process includes so many key elements of relationship-building:

- **Active Listening** - Listen to their side and make them aware you're listening
- **Empathy -** Get an understanding of where they're coming from and how they feel
- **Rapport** - Empathy is what you feel; rapport is when they feel it back and start to trust you
- **Influence** - Only now have you earned the right to work on problem-solving and recommend a course of action.
- **Behavioural change** - The final step in the process only happens once all of the previous steps have been achieved.

It is not a police negotiator's task to bargain a demand for, say $5 million and a jet to Cuba down to $1 million and a helicopter. However, difficult as their job may be, a Crisis Negotiator has one particular advantage, namely that they go into every negotiation already knowing what their objective is, namely to get their hostages freed smoothly and without loss of life. Usually it's also fairly clear what the hostage takers want. But for commercial negotiators, and their legal advisers, it may not always be clear what their clients, or their counterparts, want. Or rather, you may know what everyone says they want but are all the details clear, including what they may be prepared to trade away to get what they want?

For this reason, having a proper preparation is the first phase in any important negotiation. So this is the first step in what I regard as a five-stage process for effective negotiation.

PHASE ONE - PREPARATION FIRST

I can almost guarantee that one day this will happen to every young lawyer. You'll be sitting at your desk when the telephone rings and your lawyer who is representing your client's counterpart in a negotiation comes on the line and says something like *"Why don't we see if we can settle this matter right now. How's this for an*

5 VOSS, C. **Never Split the Difference: Negotiating As If Your Life Depended On It.** New York: HarperCollins, 2016, p.150 ISBN 978-0-06-240780-1

idea?" And before you know it, you're sucked into a negotiation even though thirty seconds earlier you were thinking about an entirely different client's case. But how can you possibly do your best in such a situation?

Negotiation is a serious business, and yet all too often I see experienced lawyers and businesspeople embark on the process with little or no forethought. As a result, even if they do get to an agreement, more often than not it is not the best agreement that could have been achieved – sometimes money or other value is "left on the table," and/or relationships are damaged as a result of a haphazard process. Clearly unexpected things happen in a negotiation, but our chances of being able to think on our feet are significantly improved if we start from a solid understanding of what is at stake, where each side is coming from.

At the start of most of my mediations, I try to have a private conversation with each side in which I'll ask about their proposed negotiation strategy for the day. But all too often all they have to tell me is that *"we're not going to settle for less than $x."* This tells me they have a goal in mind, but they don't have a plan of how to get there. Nor have they really thought about what may be important to their counterpart – perhaps because people usually see negotiation as an exercise in getting what their side wants, they tend to focus on their own perspectives. This is not a good way to start. Instead, I would encourage you to regard negotiation as an exercise in influencing – to get a good deal you need to work out how to persuade your counterpart to give it to you. So that means not only thinking about what your aide wants but also thinking about the others side's perspective.

The Program on Negotiation at Harvard Law School publishes a negotiation preparation checklist[6] that has 32 separate questions to consider, far too many to include in this article. So here is my top six:

1. What do I want from this negotiation? List short-term and long-term goals and dreams related to the negotiation.
2. What are my strengths—values, skills, and assets—in this negotiation?
3. What are my weaknesses and vulnerabilities in this negotiation?
4. What are my interests in the upcoming negotiation? How do they rank in importance?
5. What is my best alternative to a negotiated agreement, or BATNA? That is, what option would I turn to if I'm not satisfied with the deal we negotiate or if we reach an impasse? How can I strengthen my BATNA?

6 PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL. A Negotiation Preparation Checklist. https://www.pon.harvard.edu/daily/negotiation-skills-daily/negotiation-preparation-checklist/

6. Are there cultural differences, relationship issues or emotions that we should prepare for?

And once you have answered those questions about your side's views, ask yourself the same questions about what your counterpart's views might be, the classic task of putting yourself in the other person's shoes. Perhaps this process will give you some insight as to where the Zone of Possible Agreement (ZOPA) might be, that is the range of outcomes which would mean that, for both sides, a deal was better than no deal. Alternatively, perhaps you don't yet have information to work out the ZOPA with any degree of accuracy, but can you at least make a best estimate and also work out what questions you need to ask if you are to come up with a clearer view?

Then, and only then, do you start to think about your strategy. Certainly, this will involve thinking about what arguments might be advanced, what concessions offered, and what trade-offs agreed, but the one aspect which is frequently overlooked is to think about the negotiation process. Are you, for example, going to spend any time thinking about whether work needs to be done to establish either the scope or sequencing of the negotiation before detailed discussion begin. Within the diplomatic context, it is quite common for junior officials (sometimes referred to as *"the sherpas"*) to conduct early talks about agendas, timing and attendance before the main players get involved. These are sometimes referred to as *"talks about talks."* You may not always have sherpas to do this work for you, but even than a discussion about process (*"how are we going to do this")* can be good way to start as it provides an early opportunity for collaborative problem-solving

There are also many occasions on which it can be beneficial to build relationships before the main details of the negotiation get started. For example, a few years ago I facilitated a negotiation between a group of farmers and the factory which bought their crops (sugar beet). Both sides put forward sizeable teams of individuals who were very knowledgeable about their respective businesses, but they did not know each other very well. So, before any detailed negotiations stared, I arranged for three semi-social occasions to which everyone was invited. Firstly, we had a purely social lunch for everyone so they could meet outside a professional setting, and with a rule that no business was to be discussed. Then, we went on a tour of a farm and learnt about all of the challenges in growing sugar beet. And finally, we went on a tour of the factory to see how the beet was turned into sugar before sale to consumers. The resultant negotiations then went very smoothly as relationships had been formed and empathy established, particularly in relation to the business challenges faced by each side of the industry.

To summarise the various aspects to consider in preparation for a negotiation, Dr Chamoun-Nicolas[7] coined The 6 P's:

- **People** - the players
- **Process** - the negotiation process and its parts
- **Power** - the sources of power, or leverage in the negotiation
- **Product** - the items under negotiation, or the opportunity to be analysed
- **Problem** - the nature of the dispute or conflict
- **Prognosis** - the forecasted outcomes of the negotiation

Only once all of these issues have been thoroughly considered should the negotiation be opened.

PHASE TWO - OPENING THE NEGOTIATION

Negotiation is a process of human interaction, and like all interactions you only get one chance to make a good impression. Furthermore, it all happens very quickly. Research[8] has shown that human beings take just one-tenth of a second to judge someone and make a first impression, and that the more time individuals are afforded to form the impression, the more confidence they have in those impressions. Hence, at the outset of a negotiation even in the first split second we will be assessed, and an initial impression formed. Hence, it is vital that we make a positive impact on our counterpart right from the outset of the negotiation (and even before that if there are pre-meeting first interactions about logistics or other practical matters or, of course, the ritual exchanges of robust correspondence between lawyers).

So, with that caution in mind, what needs to go into an effective opening to a negotiation? Again, as with the Preparation phase, don't just think about what you want to say. Instead, think more of the Opening phase as being an opportunity both to gather information and to influence rather than just being about advocating.

Professor Brian Mandell[9] of the Harvard Program on Negotiation talks about the importance of *"The First 180"*, the initial 180 seconds of a negotiation. All too often we experience relationships which *"get off on the wrong foot"* and become

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7 CHAMOUN-NICOLAS, H; LINZOAIN, P. **Deal – Guidelines for a flawless negotiation**. Kingwood, Texas: Keynegotiations LLC, 2004. ISBN 978-0-97-283172-7

8 WILLIS, J.; TODOROV, A. First impressions: Making up your mind after a 10-Ms exposure to a face. **Psychological Science** 17(7) p. *592-598,* 2006

9 PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL. The First 180 – Prof. Brian Mandell. https://www.youtube.com/watch?v=2tC8VTc7pps

problematic as a result of a slight or misstatement right at the outset. But that early time in a negotiation can be very valuable to set the stage for what is to come. Nothing in the first five minutes of a negotiation should be dismissed as *"small talk"* and there is no difference between soft and hard issues.

Here's some things you might look to achieve in the early exchanges:

- **Set the tone** - is your tone more collaborative than competitive? what about theirs? can you influence the other side to mirror your collaborative approach?
- **Frame expectations** – send signals as to what might be possible even before your first offer and also signal a readiness to make the first offer
- **Start to build rapport and trust** – are you seeking their language? identify low-cost opportunities for trust-building and value creation

Listen, for example, to what former FBI crisis negotiator, Frederick Lanceley[10], suggests might be the first words spoken by the first officer to arrive at an incident: *"Hello in there. My name is _____ with the _____ Police (or Sheriff's) Department. Everything is under control here. Is everything all right in there?"* That simple statement conveys friendliness, concern and, above all, it sends a calming message - *"we're under control here, so you be too."*

That introductory statement was devised by the instructors at the FBI Academy and is a good illustration of the point that we can all learn simple phrases that we can use again and again in our negotiations. This is not to say that everything should be scripted. The idea that much of an opening statement can be scripted can be dangerous for, as Mike Tyson famously said, *"everybody has a plan until they get punched in the mouth."* In other words, it is very hard to think straight, remember your plan, and fight effectively when you're surprised, angry, or under pressure. But that is not an argument against any preparation at all. Because, although the quotation is usually credited to the US SEALs, it was the Greek lyric poet, Archilochus, who first came up with the aphorism that *"We don't rise to the level of our expectations, we fall to the level of our training."* For it really is far easier to come up with the right words to say in a given situation if you have encountered that situation before and/or have thought about what works and what does not. Like all experienced negotiators, I have my list of stock phrases which get used on a regular basis – my favourite list has ten different ways not to give a direct answer to an apparent *"yes or no"* question. In addition, before going into a negotiation I will not only complete the prepara-

10 LANCELEY, F. **On-Scene Guide for Crisis Negotiators**. Boca Raton: Florida. CRC Press LLC, 2003. ISBN 978-0-84-931441-4

tion exercises described in the earlier section above, but I will also think about how I am going to frame my language to achieve the maximum influencing impact on my counterparts. For example, if I have a counterpart who clearly wants to push hard for what I would regard as an unacceptable outcome, I will do my best to appear very reasonable but, at the same time, very firm. Whereas if I perceive my counterpart as sensitive, defensive or guarded, I will emphasise my genuine curiosity, openness and transparency. That's not to say that I am ever pretending to be someone that I am not as one of the other golden rules of negotiation is never to lie, not least because there is probably no way back to trust if/when you are found out. There is, however, an element of the chameleon in most effective negotiators. Or, more to the point, whilst we will each have a default style as to how we respond in conflict situations (the Thomas-Kilmann Conflict Mode Instrument[11] identifies five major styles: collaborating, competing, avoiding, accommodating, and compromising), the effective negotiator needs to have the facility not only to respond to individuals displaying differing styles but also to move seamlessly from one style to another according to the situation.

To summarise, too many negotiators see the opening as simply being about setting out their stall and putting their own demands on the table. But the more effective strategy starts from a mindset that your early objectives are both to gently influence and to gather information and understanding. This mindset then continues into the vital Exploration phase of the negotiation.

PHASE THREE - EXPLORING FOR GOLD

People are involved in negotiations almost every day of their life. As a young child, we negotiate with our parents to get what we want, using the only tactic we know at that time, screaming and shouting. Most of us learn to moderate that behaviour (sometimes) as we grow up, but the underlying approach generally remains the same, namely that human beings negotiate by moving very quickly to the substance of the matter, the price, and focussing on what they want. Even after we learn to trade, usually starting out with *"I'll be your best friend"* as the currency of many deals in the playground, our natural approach is linear and straightforward. Thus, in a market or souk where it is known that goods do not have a fixed price and that haggling is the norm, most people's approach is simply to say *"hello, how much is that urn?"* or, occasionally, *"hello, I'll give you $10 for that urn"*. Now maybe for

11 KILMANN DIAGNOSTICS. An Overview of the TKI Assessment Tool. www.kilmanndiagnostics.com/overview-thomas-kilmann-conflict-mode-instrument-tki.

a $10 urn that's all the effort you really want to put into the negotiation, but in my experience that's how many people approach discussions about more important matters as well. They attempt to go straight to the answer.

Even with a $10 urn there are a lot of questions that you might ask before making a bid. For example, where did it come from, what is it made of, how old is it, are there many of these around? Getting the answers to just those few questions would put you in a better position to haggle for the urn as then you would have information with which to assess, and possibly refute, what the trader was asking for.

How much more powerful would that approach be if we extended the idea to far larger commercial negotiations, asking a lot of questions rather than rushing into haggling? This is what the Exploration phase in negotiation is all about, gathering information and building relationships.

One of the core tenets of current negotiation theory, again explained very clearly in Fisher and Ury's *Getting to Yes*, is the idea of looking beyond what your counterpart says they want (their position), and instead try to learn about why they are saying what they are saying, and what is really important to them (their needs and interests). The Exploration phase addresses this objective, but clearly to find out this sort of information you have to persuade your counterpart to open up to you as they're not going to give you a complete answer if you just ask, *"so what are your needs and interests?"* I don't think a police crisis negotiator would get very far if they put that question to a hostage-taker. The policing metaphor is, however, very apt as Malhotra and Bazerman describe a process of investigative negotiation:

> *"Investigative negotiation is both a mindset and a methodology. Investigative negotiators approach negotiations the same way a detective might approach a crime scene: the goal is to learn as much as possible about the situation and the people involved.* [12]*"*

To be clear, however, the objective has to be far more than simply finding out what your counterpart says they want. Chris Voss gives a list of what he calls *"calibrated questions"* that he frequently uses in negotiations:

- *What about this is important to you?*
- *How can I help to make this better for us?*
- *How would you like me to proceed?*
- *What is it that brought us into this situation?*
- *How can we solve this problem?*

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12 MALHOTRA, D,; Bazerman, M. **Negotiation genius: How to overcome obstacles and achieve brilliant results at the bargaining table and beyond** New York: BantamDell. 2007, pp. 83-102. ISBN 978-0-55-380488-1

- *What's the objective? / What are we trying to accomplish here?*
- *How am I supposed to do that?*"

You may notice that none of these questions begin with the usual word used to seek understanding: *"why."* Voss suggests that this is because *"why"* can be taken as accusatory. This is about the language you use rather than the intent behind your questioning – *"why did you do it?"* may come across as harsh, but *"what caused you to do it?"* takes away the emotion and makes the question less accusatory. And if you say *"yes"* when your counterpart asks for something, does that mean *"yes, I understand"* or *"yes, I agree"*? For me, this are examples of how just the simplest word can make a big difference. Furthermore, quite often in difficult negotiations, a key factor is not just what you say or ask, but how you do it. It may or may not be true, but Albert Einstein[13] is oft quoted as having said that *"If I had an hour to solve a problem and my life depended on it, I would use the first 55 minutes determining the proper question to ask, for once I know the proper question, I could solve the problem in less than five minutes."* This speaks to the importance of preparation, but it also raises the notion of asking the right question at the right time and, in particular, not asking it too early. For the right question at the wrong time, for example if it is premature because trust has not been established yet, may trigger a set-back in the negotiation process. Ultimately, it is not what I say but what you hear that matters in sensitive communications, and quite often the subtle or indirect questions are more effective than being those which are too direct.

Of course, what is even more effective in the Exploration phase is if you can encourage your counterpart to open up to you without your even having to ask many questions. This is where Active Listening is so often mentioned. Unfortunately, the term has sometimes been categorised simply as a list of things to say or do when someone is speaking to you but there is actually far more to it than that as the overall objective is for the listener to fully concentrate in order to understand, respond and remember what is being said. This goes way beyond simply hearing the words that another person speaks as it also requires also seeking to understand the meaning and intent those words. It requires being an active participant in the communication process, and that means:

- **Being fully present in the conversation** – listening with all of your senses (sight, sound, etc.) and giving your full attention to the speaker
- **Paying attention to non-verbal cues** – are they talking fast or slow? What is your own body language conveying – are you using open, non-threaten-

13 Original source unknown – may be apocryphal

ing body language, smiling while listening, leaning in, and nodding at key junctures?

- **Keeping good eye contact** – but without staring as that can be creepy
- **Asking open-ended questions** – see the previous list of questions from Chris Voss; they all invitations to give thoughtful and expensive responses rather than simple yes or no answers
- **Reflecting what you hear** - after the person has spoken, tell them what you heard, as this ensures that you have understood their thoughts, ideas, and/or emotions accurately.
- **Being patient** – give people the time to say what they are thinking without having you try to finish their sentences for them, and don't jump in with your own ideas, opinions and solutions
- **Withholding judgment** – do all of the above whilst remaining neutral and non-judgmental in what you say and, what is even harder, managing your own mindset so that you remain just as interested, engaged and empathetic regardless of whether or not you agree with anything the other person is saying.

In summary, the goal of the Exploration phase is to gain insights in your counterpart's underlying interests so that you can then assess whether there may be ways of meeting those needs without becoming blocked by what appear to be irreconcilable demands.

The term *"win-win"* is often used to describe the desired outcome but, again, this term has become devalued and misunderstood through over-use. As Ronald Shapiro puts it:

> *"The trouble is, it's unrealistic. The expression win-win has become more of a pop cliché than a negotiating philosophy. It's either a winner's rationalisation for lopsided triumph, a loser's excuse for surrender, or both sides' phrase for when everybody is equally happy. There's rarely such thing as both parties winning identically, that is, both getting all of what they want. One party is bound to get more and one less, even if both sides are content with the outcome."*[14]

So, having worked through all of the above stages, your task is to make sure that, whilst it would be good if both parties could be content with the outcome, if someone is going to come out ahead, it would be great if it was you.

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14 SHAPIRO, R. **The Power of Nice – How to negotiate so that everyone wins – especially you.** Hoboken, New Jersey: John Wiley & Sons, 2015. p. 47. ISBN 978-1-11-896962-5.

PHASE FOUR - BARGAINING FOR ADVANTAGE

This is what the Bargaining phase of the negotiation is all about – the best way to get most of what you want is to help the other side get some of what they want. Conventionally this happens by way of a process in which one party puts forward a proposal and then the other responds by saying yes, no or by making a counter-proposal. And often, after a series of proposals and counter-proposals, the parties gradually edge towards each other until a deal is agreed.

This ritual is so well established in our behaviour that anyone who tries to break away from *"the negotiation dance"* is likely to be regarded as a fool. After all, when you make an offer in a bargaining situation, do you really expect people to accept that first offer, and what would you think of them if they did? In my experience, we're so accustomed to doing the dance that, if anyone did accept a first offer our natural reaction would be to conclude that a mistake had been made. If I've offered an amount to buy something and that offer is immediately accepted, I'll be thinking that I've clearly over-pitched my offer; and conversely the seller is thinking that, if only he'd waited longer he could have got a higher offer out of me.

So, there is an expectation that we will do the negotiation dance and going too quickly rarely results in the best outcomes. However, that doesn't mean that we have to abide by all of the traditional rules. For example, just because or counterpart makes you an offer, you aren't obligated to say either *"yes"* or *"no."* There is a third way which is to say, *"thank you for the offer; can you please just explain how you got to that number?"* In other words, you've stepped out of Bargaining and gone back in to the Exploration phase to ask another question – and, hopefully, you will be rewarded with a response which gives you more insight as to your counterpart's thinking. This is a standard piece of negotiation advice wherever you are in the process – if you are ever stuck, go back to Exploration and ask more questions.

However, if we are going to do the negotiation dance as everyone expects, the question arises as to what is the point of making an offer which we know, or at least expect, is not going to be accepted. Are we not just wasting time?

My response to this is that we are not wasting time by making offers that are unlikely to be accepted but, instead, we are engaged in a process of signalling and influencing. So when I make an offer in a negotiation, I'm not necessarily expecting it to be accepted but, instead, I am sending a message as to where I believe a deal might be done. Using the cliché of a negotiation ballpark, my initial offer and any subsequent moves will be designed to shine a spotlight on the ballpark in which the

deal should fall, and ideally on my side of that ballpark. There are two components to this approach, the initial offer and the subsequent movements.

On the question of where an initial offer should be pitched, and who should make it, negotiation literature still reveals some differences of opinion but, in my view, the evidence is gradually coming out in favour of the advice that you should endeavour to make the first offer if at all possible, provided that you know what you are doing (in other words, that your Preparation and Exploration work has gone well). Proponents of this advice point to the effectiveness of Anchoring, the heuristic whereby people rely too heavily on the first piece of information they receive. When we are setting plans or making estimates about something, we interpret newer information from the reference point of our anchor, instead of seeing it objectively. Within a negotiation context, this might mean that a counterpart would focus their attention on our proposal and how that number might need to move in order for it to be acceptable to them, rather than thinking directly about their own target number.

There is substantial experimental evidence that confirms the power of anchoring. However, there is a contrary view, namely that you should endeavour to let the other side go first as you might be surprised by the generosity of their offer. This might particularly be the case if you are negotiating about something on which you have only limited information. So the argument is that you may get lucky by not going first, though of course you have to be very alert to the risk that it will then be you that is at risk of being anchored.

As for the question of how subsequent negotiation moves should be structured, there is an approach called Ackerman Bargaining[15]. Personally, I wouldn't follow it explicitly as I find it too rigid, but it is worth analysing as its underlying theory makes a number of important points.

In essence, Ackerman Bargaining is a process in which, having worked out your target price (in this case, let us assume that you are the prospective purchaser), you first offer 65% of that price then, at later stages, increase it in decreasing increments to 85%, then 95% and finally 100%[16]. At each round of the negotiation dance, use a lot of empathy and different ways of saying "no" to get the other side

15 Voss (ibid pp205-206) credits the creation of this approach to a former CIA officer, Mike Ackerman, who went on to found a kidnap-for-ransom consulting company. Perhaps unsurprising given the nature of this work, there does not appear to be any other public document to corroborate this attribution

16 Conversely, if you are the seller, start at 135% and then go down to 115%, 105% and then 100%

to counter-offer before you make another move and, finally, when you get to your final number, give them a precise non-round number. Also, throw in a non-monetary item (that the other side probably don't want) to show that you've reached your limit.

For me, this all sounds a little too formulaic. However, Chris Voss relates that it worked well for him, and I can see that there are a number of important psychological factors at work in the model:

- An aggressive opening offer that, if played well, could have a strong anchoring effect (However, to achieve that, you will most likely have to put a strong explanation around your figure. There is a general rule here – if you are going to make an aggressive proposal, wrap it up with a very strong explanation).
- A series of moves from the opening bid but with each move by a smaller amount, thereby sending a signal that you are getting close to your limit.
- A system designed to encouraged reciprocal movement from your counterpart; since you have moved your offer you might suggest that they now ought to do the same.
- The non-round number conveys a very strong message that the figure has been very carefully worked out, thus giving it additional credibility. For example, the current starting list price of a 2022 Ferrari 296GTB is $322,986[17], a figure which makes little objective sense as surely anyone in the market for such a car could just as well afford $323,000, or even a little more with rounding up. The point, borne out by research such as that of Matti Keloharju[18], a visiting scholar at Harvard Business School, is that this apparent accuracy adds credibility to the bid and increases the likelihood that it will be accepted.
- The final gesture of the trivial non-monetary amount sends a signal that you have nothing left to offer.

The above approach is clearly simplest in the context of a single-issue negotiation such as the sale and purchase of an asset. However, many commercial negotiations have more complexity in that there are multiple issues to be agreed. As previously discussed, it is commonplace to agree an agenda of topics to be dis-

17 CAR AND DRIVER. 2022 Ferrari 296GTB. https://www.caranddriver.com/ferrari/296-gtb

18 KELOHARJU, M.; HUKKANEN, P. Initial offer precision and M&A outcomes. **Harvard Business School Working Paper**. No 16-058, 2015.

cussed as part of the planning or opening of a negotiation. However, there is a trap in a written agenda in that it encourages a linear approach in which the first issue is discussed and agreed and only then does the discussion move onto the second topic.

This approach presents particular disadvantages for the negotiator. If issues are dealt with and agreed one by one in as linear fashion, there are no opportunities for logrolling, that is the trading of a concession on one topic for progress on another. As an economist would tell us, any scenario in which one of us places a high value on one thing and the other places a higher value on something else, there is scope for a mutually beneficial trade under which we both get what we most value. However, to achieve that end, firstly, we have to go through a thorough Exploration phase so that our respective priorities can be surfaced and, secondly, we have to agree a bargaining process in which everything is agreed in the round, as a package deal, rather than issue by issue.

In multiple issue negotiations, there is also an advanced version of logrolling known as Multiple Equivalent Simultaneous Offers (MESOs). This technique involves advancing at least three different package deals at the same time on the basis that you will not mind which option your counterpart selects as they are all of equal value in your own mind. For example, in a salary negotiation you might realise that you would be willing to accept any of the following employment packages: $80,000 per year with two weeks' vacation and 30% travel; $75,000 with three weeks' vacation and 25% travel; or $65,000 per year with four weeks' vacation and 5% travel. Research[19] has shown that negotiators who offered MESOs were able to secure more economic and relational value. That is, the presentation of options yielded stronger outcomes because they were more likely to include an economically attractive starting point for recipients. Furthermore, they were perceived as showing a more sincere attempt at reaching agreement, leading to a more co-operative negotiation climate. The only cost of the strategy is that it requires thorough preparation prior to entering into a negotiation.

PHASE FIVE - CONCLUDING THE DEAL

The example I gave earlier about the problems that Lessor and Broker found even after they thought they had reached a deal is a useful reminder that negotia-

19 LEONARDELLI, G.J.; GU, Jun.; et al. Multiple equivalent simultaneous offers (MESOs) reduce the negotiator dilemma: How a choice of first offers increases economic and relational outcomes. **Organizational Behavior and Human Decision Processes**. Vol. 152. pp. 64-83, 2019.

tions can easily go wrong even at this late stage. Sometimes individuals are tired, mistakes are made, and misunderstandings occur which will only be discovered at a later date. There can also be a tendency, when the euphoria of getting to an apparent agreement is high, that we relax and drop our vigilance.

This phase of the negotiation is, therefore, a key moment when the professionalism and thoroughness of legal advisers is required. Do not, however, assume that the negotiation is over and that all that is required is some accurate drafting to record what has been agreed. It is quite common for additional issues to emerge at this stage, whether because a point of detail has been overlooked or because there has been some misunderstanding. And when this happens, the appropriate response is to cycle back to the Exploration phase of the process and ask more questions before arguing about a point.

More positively, just because it appears that agreement has been reached, there is no reason why a discussion cannot be held along the lines of *"how can we make this deal even better?"* Sometimes everyone will be too exhausted to have this further conversation but, in my experience, when it does happen it is quite common for some additional matters to surface – these may not have been mentioned before because they were immaterial in the context of the wider negotiation but, now that the pressure is off and (ideally) there is a spirit of co-operation in the air, additional agreements on these smaller items might become possible.

Finally, a reminder that different cultures place different degrees of emphasis on the importance of a formal written agreement. In the West, a contract is likely to be regarded as an agreement between parties which binds them, and which each can rely upon to police the other's activity in the future. Here, the contract is viewed as the full-stop at the end of the negotiation sentence. However, in many other cultures, a contract is no more than a statement of the best agreement at a moment in time and if circumstances were to change it would be unreasonable for reasonable people with good relationships to expect anybody to abide by the original terms of the contract. Negotiating across a cultural border creates a considerable number of additional challenges, too many to over here, so I will just make one important point, namely to ensure that these aspects are thoroughly researched and planned for as part of your Preparation phase.

CONCLUDING REMARKS

It is often said that the law has a life of its own; it adapts with the needs of society, repairs itself and defines its own persistent identity. Clearly a strong knowledge of the law and its application is a key foundational skill for lawyers but so-

called soft skills such as resilience, communication, commerciality, critical thinking, problem-solving and collaboration as equally essential. Negotiation ability plays an important part of this skillset, but lawyers and other professionals often overlook the need for proper training in this area, perhaps because it is one of those things that we instinctively believe that we are good at. An article in London's Financial Times[20], headlined "Negotiation is tough and should be left to professionals" quotes an experienced negotiator as commenting that *"Everyone thinks they're a negotiator and they think they should be wheeled in to save the day…but the more senior the person that does the deal, the worse the deal."* That same article reports that a survey nearly of 5,000 untrained negotiators in 31 countries revealed that less than a quarter of their business negotiations ended in stronger relationships and higher long-term value. Among other weaknesses, inexperienced dealmakers admitted to a lack of preparation and ethical lapses. For instance, 38 per cent of sellers said they thought it was acceptable to lie to their counterparts.

The skills of an effective negotiator are drawn from disciplines as varied as economics, law, psychology, mathematics, game theory, conflict management, organisational development, international relations and law enforcement. Negotiation itself may be as old as the ages, but it is still evolving. Furthermore, effective negotiation is still an art, to be developed through practice and experience, rather than through formal learning from the numerous textbooks and academic papers on the topic. Nevertheless, there are clear foundational blocks which a lawyer should build upon as part of their formal training. As detailed in this article, these include having an enquiring mindset, having a structure upon which to base your practice, and having a clear understanding of the importance of relationships and process rather than merely focussing on your target outcome.

For, as I suggested earlier, negotiation is not a process about fighting for want you want; rather, it is a process of persuading your counterparts to agree to let you have it.

20 HILL, A. Negotiation is tough and should be left to professionals: Haggling over detail requires experience, humility and boundless patience. **Financial Times.** 20 January 2020.

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