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EDITION



The Mind and Heart of the Negotiator

SIXTH EDITION

Leigh L. Thompson

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Authorized adaptation from the United States edition, entitled The Mind and Heart of the Negotiator, 6th edition, ISBN 978-0-13-357177-6, by Leigh L. Thompson, published by Pearson Education © 2015.

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ISBN 10: 1-292-07333-0
ISBN 13: 978-1-292-07333-0

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

14 13 12 11 10 9 8 7 6 5 4 3 2 1

Typeset in 10/12 Times LT Std. by Integra Software Services.

Printed and bound by Courier Westford in The United States of America.

revealing information about priorities, etc.), as well as several other dispute resolution strategies (indicated next). In a direct test of the effectiveness of process interventions, Ury, Brett, and Goldberg examined the success rate of various tactics:⁵⁶ Least effective was reciprocation (66%); the most effective method was process intervention (82% success rate). Other methods included the mixed-message approach (74% success rate), and simply resisting the urge to reciprocate (self-discipline; 76% success rate).

Let's Talk and Then Fight Another strategy is to agree to talk for 20 minutes or so, and then argue. By agreeing up front on a process, both parties commit to listen to one another at least temporarily.

Strategic Cooling-Off Periods It is easy to muster a rights-based response or power display in the heat of conflict. An interests-based approach requires deeper levels of cognitive processing. Thus, it often serves parties' interests to build in some cooling-off periods that allow them to better assess their own needs and interests, independent of rights and power issues. In the Bay Area Rapid Transit strike of 2013, the presiding judge took a symbolic step by ordering a 60-day cooling-off period between the BART district and the unions. This was a critical step because negotiations were so heated between the parties they could not even agree on how far apart they were in negotiating wages, health care, and pension costs.⁵⁷

Paraphrasing Many times, negotiators struggle in their attempt to transform a rights- or power-based argument into an interests-based discussion. Negotiators should not abandon their interests-based approach but rather, persist in their attempt to understand the other party's underlying needs. Stephen Covey suggests that parties to conflict should be forced to empathize with each other.⁵⁸ He has a strict ground rule: "You can't make your point until you restate the other person's point to his or her satisfaction."⁵⁹ People are often so emotionally invested that they cannot listen. According to Covey, they pretend to listen. So he asks the other party, "Do you feel understood?" The other party always says, "No, he mimicked me, but he doesn't understand me." The negotiator gets to state a point only after satisfying the other party. (For an example of this intervention, see Exhibit 5-7).

Label the Process If the counterparty uses a rights- or power-based approach after you have tried to focus on interests, it might be useful to label the strategy you see the counterparty using. Recognizing or labeling a tactic as ineffective can neutralize or refocus negotiations.⁶⁰

Structural Strategies Ury, Brett, and Goldberg suggest several methods whereby dispute resolution systems can be designed and used within organizations, some of which are described here in detail.⁶¹ Each of these strategies is designed to reduce the costs of handling disputes and to produce satisfying, durable resolutions.

Put the Focus on Interests When International Harvester introduced a new procedure for oral (rather than written) handling of grievances at the lowest possible level, the number of

⁵⁶ Ury, Brett, & Goldberg, *Getting disputes resolved*.

⁵⁷ La Ganga, M. (August 12, 2013). Bart strike averted; judge orders 60-day cooling-off period. *Los Angeles Times*. latimes.com.

⁵⁸ Covey, S. R. (1999). Resolving differences. *Executive Excellence*, 16(4), 5–6.

⁵⁹ Covey, "Resolving differences."

⁶⁰ Fisher, Ury, & Patton, *Getting to yes*.

⁶¹ Ury, Brett, & Goldberg, *Getting disputes resolved*, p. 42.

EXHIBIT 5-7

Resolving Differences

The following is a summary of an intervention led by Steven Covey between two parties who had no trust for one another:

The president of Company A asked Covey to act as a third-party facilitator in a lawsuit with Company B, the key reason being that there was no trust between the parties.

Covey stated that the disputants did not actually need a third party because they possessed the power to handle the conflict themselves. Covey suggested putting all the issues on the table and asking if they would be willing to search for a solution. Covey called the president of Company B and made the invitation. The president of Company B declined the offer and said he wanted the legal process to handle it.

The president of Company A suggested that he send his material and documents to Company B and meet face-to-face. He promised not to bring an attorney and told Company B president that he could bring his attorney if he wished. He further said it was not even necessary that Company B president speak. They could just have lunch. In short, there was nothing to lose and possibly everything to gain.

The presidents met for lunch and Company A president said, "Let me see if I can make your case for you since you are not going to speak." Company A president tried to show genuine empathy and took pains to describe Company B president's position in depth. He then asked if his understanding was correct or not.

At this point, the silence was broken. The president of Company B spoke up and said that the summary was 50% accurate but he wanted to correct some inaccuracies. At that point, the attorney advised Company B president to not say another word. At this juncture Company B president told the attorney to shut up because he could feel the power of the dialogue that was happening.

The lunch meeting progressed with both parties standing shoulder-to-shoulder making notes, using flip charts, and brainstorming alternatives. At the close of the lunch, the disagreement was resolved.

Source: Based on Covey, S. R. (1999). Resolving differences. *Executive Excellence*, 16(4), 5–6.

written grievances plummeted to almost zero.⁶² Some organizations stay focused on interests via use of a **multistep negotiation procedure**, in which a dispute that is not resolved at one level of the organizational hierarchy moves to progressively higher levels. Another strategy is the **wise counselor**, in which senior executives are selected to consider disputes. By creating **multiple points of entry**, negotiators have several points of access for resolving disputes. In some instances, **mandatory negotiations** provide a way for reluctant negotiators to come to the table. By providing **skills and training** in negotiation, people are better prepared to negotiate in an interests-based fashion. Finally, by providing opportunities for **mediation** in which a third party intervenes, negotiators can often focus on interests.

Build in "Loop-Backs" to Negotiation Rights or power contests can be costly and risky, and therefore negotiators need to be able to loop back to interests.

⁶² Ury, Brett, & Goldberg, *Getting disputes resolved*, p. 42.

- **Looping back from rights.** Some loop-back procedures provide information about a negotiator's rights, as well as the likely outcome of a rights contest. Consider **information procedures** in which databases are created that can be accessed by negotiators who want to research the validity and outcome of their claims. **Advisory arbitration** is a method whereby managers are provided with information that would likely result if arbitration were to be carried out or the dispute were to go to court. **Minitrials** are procedures whereby "lawyers" (high-level executives in the organization who have not been involved previously) represent each side and present evidence and arguments that are heard by a neutral judge or advisor. Minitrials put negotiation in the hands of people who are not emotionally involved in the dispute and who have the perspective to view it in the context of the organization's broad interests.
- **Looping back from a power conflict.** A variety of strategies can be used to move parties away from power contests back to interests. **Crisis procedures**, or guidelines for emergency communication written in advance, establish communication mechanisms between disputants. For example, in disputes between the United States and the Soviet Union, a hotline served a crisis procedure purpose; in addition, U.S. and Soviet officials established nuclear risk reduction centers staffed 24 hours in Washington and Moscow for emergency communications.⁶³ Finally, **intervention by third parties** can halt power contests. For example, after negotiations failed between the Minnesota Orchestra musicians and orchestra management, musicians were locked out of the performance hall and their 2013 summer season was canceled. Musicians rejected a "play and talk" contract, in which musicians continue performing under their old agreement while a new one is worked out because they claimed it gave the management no incentive to come to the table. The parties agreed to a confidential mediation process, with U.S. Senator George Mitchell acting as a third-party mediator.⁶⁴

Provide Low-Cost Rights and Power Backups Should interests-based negotiation fail, it is useful to have low-cost rights and power backup systems. **Conventional arbitration** is less costly than court or private adjudication. Ury, Brett, and Goldberg note that 95% of all collective bargaining contracts provide for arbitration of disputes.⁶⁵ **Med-arb** is a hybrid model in which, if mediation fails, the mediator serves as an arbitrator. With the threat of arbitration in the air, parties are often encouraged to reach a negotiated solution. In **final-offer arbitration**, the arbitrator does not have authority to compromise between parties' positions but must accept one of the final offers made. Thus, each party has an incentive to make a final offer appear the most reasonable in the eyes of the neutral third party. **Arb-med** is also a hybrid model traced to South Africa in which an arbitrator makes a decision and places it in a sealed envelope. The threat of the arbitrator's decision sits on a table and is destined to be opened unless the parties reach mutual agreement. Arb-med is more effective than conventional arbitration.⁶⁶

Build in Consultation Beforehand and Feedback Afterward **Notification and consultation** between parties prior to taking action can prevent disputes that arise through

⁶³ Ury, Brett, & Goldberg, *Getting disputes resolved*, p. 42.

⁶⁴ Orchestra musicians' rep says mediation is the way to end lockout. (2013, September 6). *MPR News*. minnesota.publicradio.org; Tsioulcas, A. (2013, August 22). Behind the latest round of bruised feelings at the Minnesota Orchestra. *National Public Radio*. npr.org.

⁶⁵ Ury, Brett, & Goldberg, *Getting disputes resolved*, p. 56.

⁶⁶ Conlon, D. E., Moon, H., & Ng, K. Y. (2002). Putting the cart before the horse: The benefits of arbitrating before mediating. *Journal of Applied Psychology*, 87(5), 978–984.

sheer misunderstanding. They can also reduce the anger and hostility that often result when decisions are made unilaterally and abruptly. **Postdispute analysis and feedback** is a method whereby parties learn from their disputes to prevent similar problems in the future. Similarly, by establishing a **forum**, consultation and postdispute analysis can be institutionalized to create an opportunity for discussion.

Provide Skills and Resources People who lack the skills to resolve disputes often resort to rights- and power-based actions (i.e., lawsuits or firings).

HIGH COSTS ASSOCIATED WITH POWER AND RIGHTS Focusing on who is right or who is more powerful usually leaves at least one person feeling like a loser. Losers often do not give up but instead appeal to higher courts or plot revenge. Rights are less costly than power. Generally, power costs more in resources consumed and opportunities lost. For example, strikes cost more than arbitration, and violence costs more than litigation. Costs are incurred not only in efforts invested but also from the destruction of each side's resources. Power contests often create new injuries and a desire for revenge. Interests are less costly than rights. In summary, focusing on interests, compared to rights and power, produces higher satisfaction with outcomes, better working relationships, and less recurrence; it may also mean lower transaction costs.

KNOW WHEN TO USE RIGHTS AND POWER Resolving all disputes by reconciling interests is neither possible nor desirable.⁶⁷ Rights and power procedures are often used when they are not necessary; a procedure that should be the last resort too often becomes the first move. Rights and power may be appropriate to use in the following situations:⁶⁸

- ***The other party refuses to come to the table.*** In this case, no negotiation is taking place, and rights and power are necessary for engagement.
- ***Negotiations have broken down and parties are at an impasse.*** A credible threat, especially if combined with an interests-based proposal, may restart negotiations. A potential strike by union pressmen and other production employees at New Jersey's largest newspaper, *The Star-Ledger*, was averted after the newspaper's management indicated that without concessions the paper would be shut down at the end of the year. The threat led to talks that ultimately led to concessions on both sides.⁶⁹
- ***The other party needs to know you have power.*** Sometimes, people need to wield power simply to demonstrate they have it.⁷⁰ However, threats must be backed up with actions to be credible. Furthermore, the weaker party may fail to fully comply with a resolution based on power, thus requiring the more powerful party to engage in expensive policing.
- ***Someone violates a rule or breaks the law.*** In this situation, it is appropriate to use rights or power.
- ***Interests are so opposed that agreement is not possible.*** Sometimes, parties' interests are so disparate that agreement is not possible. For example, when fundamental values are at odds (e.g., abortion beliefs), resolution can occur only through a rights contest (a trial) or power contest (a demonstration or legislative battle).

⁶⁷ Ury, Brett, & Goldberg, *Getting disputes resolved*, p. 15.

⁶⁸ Ury, Brett, & Goldberg, *Getting disputes resolved*, p. 15.

⁶⁹ Sherman, T., & Heyboer, K. (2013, September 25). *Star-Ledger* nears deal with unions to avoid newspaper shutdown. *Star-Ledger*. nj.com/starledger.

⁷⁰ Ury, Brett, & Goldberg, *Getting disputes resolved*, p. 16.

- ***Social change is necessary.*** To create social impact, a rights battle may be necessary. For example, consider the case of *Brown v. Board of Education*, which laid important groundwork for the elimination of racial segregation.
- ***Negotiators are moving toward agreement and parties are “positioning” themselves.*** In other words, parties are committed to reaching a deal, and now they are dancing in the bargaining zone.

KNOW HOW TO USE RIGHTS AND POWER Consider the following when making a threat:⁷¹

Threaten the Other Party’s Interests To effectively make a threat, a negotiator needs to attack the other party’s underlying interests. Otherwise, the other party will feel little incentive to comply with your threat. Consider the threat CBS made to Time Warner Cable (TWC) in their negotiations regarding fees. TWC threatened to block popular TV shows such as *The Big Bang Theory*, *NCIS*, and *60-Minutes* from being rebroadcast on TWC stations unless CBS agreed to the terms of a new retransmission contract. The retransmission contract spelled out the amount of money that TWC pays CBS for the rights to carry the CBS-owned TV stations. When the two companies failed to reach mutual agreement, TWC responded by dropping CBS’s stations from their offering, creating a programming blackout for CBS stations in several major markets. The blackout lasted longer than TWC anticipated and was strategically positioned at the start of the lucrative NFL season. TWC stood to lose current and prospective customers to its subscription-based service during the blackout, not to mention advertising dollars. Under the pressure, TWC came to the bargaining table with CBS, and an agreement was reached a day before the start of the NFL’s season-opening game.⁷²

Clarity Negotiators need to be clear about what actions are needed by the other party. For example, nine days after al-Qaeda’s terrorist attacks on the United States in 2001, President George W. Bush issued a clear threat: He demanded that the Taliban turn over Osama bin Laden and the leaders of his terrorist network and shut down terrorist training camps in Afghanistan; otherwise, the United States would “direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence and every necessary weapon of war—to the destruction and to the defeat of the global terror network.”⁷³

Credibility Power-based approaches typically focus on the future (e.g., “If you do not do such-and-such, I will withdraw your funding”). To be effective, the other party must believe that you have the ability to carry out the threat. If you are not seen as credible, people will call your bluff.

Do Not Burn Bridges It is important to leave a pathway back to interests-based discussion. Ury, Brett, and Goldberg call it the “loop-back to interests.”⁷⁴ Threats are expensive to carry out; thus, it is critical that you are able to turn off a threat, allowing the other party to save face and reopen negotiations. If you do not provide yourself with a loop back to interests, you

⁷¹ Brett, J. M. (2007). *Negotiating globally: How to negotiate deals, resolve disputes, and make decisions across cultural boundaries* (2nd ed.). San Francisco, CA: Jossey-Bass.

⁷² Lobosco, K. (2013, July 23). CBS blackout looms for Time Warner Cable customers. *CNN. money.cnn.com*; Yu, R. (2013, September 3). CBS, Time Warner Cable reach agreement, end blackout. *USA Today. usatoday.com*.

⁷³ Espo, D. (2001, September 20). Bush says U.S. will use ‘every resource’ to defeat global terrorism. *Associated Press Newswires*.

⁷⁴ Ury, Brett, & Goldberg, *Getting disputes resolved*, p. 52.