

A Good Negotiator

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I am a somewhat hesitant speaker about negotiating, because it is a topic on which absolutely everyone is an expert. Many have written entire books about the subject. Others make their living by giving professional motivational seminars. But more than that, it is something each of us experiences daily with our contractor, mechanic, spouse and children. Whatever is said is sure to elicit the conclusion “That is only common sense,” or “I knew that all along and we could have saved the cost of this guy’s lunch.”

I rush to emphasize that I do not consider that I myself am a terrific negotiator. I know my own flaws in bargaining better than anyone else does. Or, at least, I hope that I am close to first place in that category.

What I *can* offer you today that might be useful is thirty-five years of paid exposure to negotiating. During that time I have worked with and across the table from a wide variety of bargainers, with a wide variety of skills and styles, who achieved a wide variety of outcomes. While the observations I draw from that experience may be mundane, at least no one here will be overly stimulated and have trouble getting back to work or to sleep.

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There are in my view five characteristics of a good negotiator.

1. A good negotiator knows what the objective is, and keeps that objective always in focus.
2. A good negotiator prepares and knows, going into the negotiation, the relevant facts, issues, options, people and background.
3. A good negotiator is perceptive – aware of her own personality and character; aware of what is going on in the bargaining process; and aware of which negotiation tools are best suited for a particular bargain.
4. A good negotiator is patient, and appreciates the uses of silence and inaction.
5. A good negotiator knows the “BATNA” – the best alternative to a negotiated agreement – and knows when to stop negotiating.

A good negotiator knows the objective

The principle that the good negotiator knows the objective he wants to accomplish is one of those self-evident, obvious truths that I mentioned each of you knows. Do not be overly stimulated. Yet it is one of the most frequently occurring shortcomings that I have seen. It is not satisfactory to have as an objective the attainment of a “good deal” or “as much as I can get.” A good negotiator should know not only *what* constitutes a good deal, but also what, beyond doing *some* deal, is the ultimate objective.

Some time ago, in discussing a large design and construction contract, a client told me he was going to commence negotiations with a very large, very experienced, very sophisticated international contractor, and in doing so seek a low fee and high contractor responsibility – somewhat interesting if not unrealistic and conflicting goals. When asked what he had in mind as to the fee and the responsibility, he responded vaguely. Had he started talking at that point, he would have been ripe for picking by a party that did know what it wanted. More than that, even if the “good deal” he sought were offered it would have possibly passed him by

unrecognized, because he would not have known enough to spot a “good deal” if it ran over him.

It is not an uncommon situation, indeed it is a very human trait, not to know what you want. It shows itself in our everyday life. Several years ago, I went out to buy a new car – my objective, a “good deal.” The first place I went to gave me a number, but after haggling it stayed the same. I left. Several dealers and a car broker later, I knew that the first price was indeed a good deal. I had started negotiations without knowing what I really wanted. Good negotiators know what they want.

A good negotiator keeps that objective in mind at all times. The problems in this area are called a lot of different things – most of which boil down to “the game being more important than the result,” or “the deal taking on a life of its own.” Each of you has dealt with counterparties with these problems. People who want to engage in negotiating, even though it doesn’t or shouldn’t count. People who want to convince you how smart they are, even after you concede the point.

Some years ago, I participated in the negotiation of a joint venture agreement. One of the sides conceded its position on an intellectual property issue as part of a broader compromise. The patent counsel for the other side felt cheated. He wanted to demonstrate his expertise, and proceeded to carry on at some length about the risks. In doing so, he sufficiently scared the conceding party as to the true importance of the issue that the compromise fell apart.

The prime example of losing track of your ultimate objective is the deal that indeed takes on a life of its own. Often in prolonged, complex negotiations, the parties have invested so much time and effort in the deal that they proceed even when circumstances change and the deal no longer makes sense. This happens especially in acquisitions. A party will approach the target, start to negotiate, and discover something undesirable – or more likely several things that by themselves are not too bad, but in the aggregate raise or should raise significant questions about the wisdom of the purchase. By then, the original objective has long been forgotten and the only objective is to put a transaction together. The bad

news is not fully evaluated and is shoved aside. The acquisition is made, whether wise or not.

A good negotiator prepares

As demonstrated clearly by this lecture, there is no free lunch – I have to work to speak, and you have to work to listen. A good negotiator does indeed work. No matter what your experience or capability may be, you simply must prepare.

A good negotiator knows the issues likely to arise. She puts herself in the other party's position and asks what types of concerns it might have. The negotiator looks for possible options and responses. She investigates the facts: what type of insurance is available to cover the liability in question; what is the going rate for a typical overhead burden; what is the market for a termination fee.

A good negotiator investigates beyond the issues, and gets a feel for the people involved, their level of authority, and their backgrounds. He should be aware of the very diverse things that can influence a negotiation. Personal emotion, values, and culture have an impact, and it is important to have some understanding of those currents.

Some negotiators try to operate at a high level of intensity at all times. When their volume and emotions are set at 11 out of 10, it is difficult to distinguish between issues that are important and issues that are not. This produces fatigue all around and cannot be sustained over a long period. In contrast, my mentor was an imposing physical presence in any conference room, but he generally spoke barely above a whisper. Everyone on both sides of the table leaned forward with rapt attention to glean whatever he had to say. When he raised his voice merely to a normal decibel level, it had the psychological effect of a full-out tirade.

Understanding how much authority those at the table possess for their respective parties is essential. The good negotiator understands when dealing through one or more trusted and skilled agents is useful, and when it is instead better to deal directly, as one principal with another principal. You should consider whether, and when, to suggest escalating

the discussion of issues to higher decision-makers. Just as important, you will want to educate your own bosses to stay out of the fray, no matter how tempting or flattering the other side's offer to become engaged may be, so that the other negotiator does not escalate over your own head and thereby diminish your ability to speak for your side and conduct the bargain.

The cultural issues can be quite significant. I recently represented a large, foreign company in a large energy project acquisition from another large, foreign company. I was the only American in the room. Our side caucused internally and decided to offer to absorb twenty percent of a particular liability exposure, in order to settle an outstanding issue in the purchase and sale agreement. To my surprise, when we re-entered the conference room, my own client's senior executive offered to bear thirty percent of that exposure. The rest of our side was silent and impassive. I frowned and started to chalk this up to the type of rogue executive who changes his mind and acts on his own. Perhaps he saw my frown because, after an excruciatingly long pause, he asked his own side whether he had properly stated our proposal. At that point, the *next* most senior executive quickly said, "No, we wish to offer twenty percent!" We all laughed and resolved the issue without prejudice. (I would not be telling this story otherwise.)

In this corporate or social culture, only after the senior person asked for help would anyone in his organization venture to correct him. It later occurred to me that, as the outsider and an American to boot, I probably could and should have immediately called him on the point. Millions of dollars of exposure could have been staked on the mere willingness to speak up, or at least to frown.

A good negotiator is perceptive

A good negotiator is actively aware of what is going on at all times during the negotiating process. There are many forms of communication – emotion and body language, among others – and many forms of relations between people, tactics and approaches to problem solving. A good negotiator perceives and reads these forms.

A good negotiator is aware first and foremost of her own character and style. Your style should be authentic, in the sense that it should be consistent with your character. If you are at heart governed by reason and logic, or if you are subject to strict constraints within your organization to do a deal or to not stray from a party line, then portraying yourself as a blustering hothead with free rein will soon be unconvincing. The other side does not have to be Holden Caulfield in order to spot and to resent a phony.

The good negotiator should preserve credibility – at all times, not just when an important issue arises. When he does say that a particular issue is a deal-breaker, everything that the negotiator has done or said up to that very point should make the other side's representatives feel that they face significant deal risk if they do not accommodate his position.

A good negotiator has a feel for the patterns that emerge in or are imposed upon a negotiation. There are two basic sets of patterns: position bargaining and principled negotiation, the latter being a technique long advocated by Harvard Law School's Negotiation Project.

Position bargaining is the form of negotiation we are most familiar with in our daily life. The seller tells us her position – her price – and we react to it by stating our position – sale, no sale or counteroffer. Position bargaining focuses on the demand, not on the concern or interest behind the demand. It is the form of bargaining associated with power and leverage, with hard and soft tactics, and with aggressive and cooperative approaches.

The biggest criticism of position bargaining is that it can become a test of wills, giving a short-term and short-sighted advantage to the more powerful negotiator. Position bargaining often leads to a solution divorced from the merits, whether the decision results from the terms of the bargain or from the needs of the party who concedes in order to buy the deal. It can be either efficient or inefficient, depending on the simplicity of issues and the experience and candor of the parties. If the issues and related reasoning behind positions are clear and both parties are experienced and straightforward, position bargaining can be prudent. If the issues are complex, or if one or more of the parties is inexperienced

and the positions asserted are severe, then position bargaining can be counter-productive, because it tends to hide fair solutions and give a temporary advantage to the more assertive and experienced.

Position bargaining is not conducive to long-term relationships. A skilled negotiator will be reluctant to position bargain when the goal is to keep the customer, build the joint venture, or embark on an agreement that will take several years to perform and require each side's ongoing good will and cooperation. It is one thing to have a test of wills and power in a one-time sale of the business when you will never see the other side again. It is another thing entirely when the negotiation is designed to create a business premised on a connection lasting into the future.

Finally, position bargaining is generally a calamity in complex, multi-party negotiations. In such situations demands only polarize parties, and because of the complexity and the impact of having not two positions on one issue, but many positions on many issues, solutions become hidden and discussions often languish.

Decades ago, our law firm was sent by a client to Australia into stagnant talks involving a multibillion-dollar construction project. The joint venture involved two Japanese companies, two British companies, an Australian company, and our client, an American company. Cultural differences were significant; the parties were also competitors in many businesses that were related to that of the joint venture.

For a year, the companies had tried to display and acquire leverage and use it on each other, and had yet to reach enough of an agreement to decide what the arguments were about. Not a thing was down on paper. As outsiders, we were asked to see if we could do something to get the negotiations started. We inadvertently did. After interviewing the six parties about most of the items addressed in such joint ventures, we went off by ourselves to prepare a draft contract. Feeling proud that we had brilliantly solved everyone's problems, we distributed the draft. We were almost run out of town.

Everyone hated our contract because it satisfied fully no one, and because as outsiders we had the gall to tell them what to do. Inadvertently,

though, we started the negotiations, because we broke the pattern of position bargaining. First, we provided a common enemy – namely, us – and thereby produced the parties' first agreement: *we were not desirable*. Second, by reacting to a document that focused necessarily by its terms on issues, the companies started a successful search for acceptable solutions.

It was the search for solutions to issues that was the important focus in that Australian project, and that search is the essential element of the second basic pattern. Principled negotiation focuses on the issues to be solved and the parties' concerns, not on each party's demands. Principled negotiation utilizes four tools to achieve successful results:

1. People are separated from the problem – relationships and perceptions are untangled from issues, and substance is emphasized.
2. The focus in negotiation is on interests and concerns, not positions, to determine the real problems.
3. There is an attempt to discover and invent options and solutions for mutual benefit.
4. There is an attempt to use objective criteria to determine if a solution is in some sense fair.

A good negotiator knows that one of the benefits of the principled pattern is to counteract undesirable posturing and abuse of leverage. When facing a powerful opponent or one whose tactics are disruptive to an equitable deal, a consistent and firm application of principles will help bring the discussion under reasonable control.

Not all bargains proceed on a principled basis. The dialogues suggested in the principled bargaining literature will resemble some of your real negotiations only in the way that dialogues in foreign-language textbooks resemble real conversations. When I first traveled to Paris, I was disappointed that nobody asked me whether the pen of my aunt is on the table of my uncle. Similarly, in real negotiations, the twin specters of competition and leverage hover over the discussions and often limit the

degree to which the more motivated party's needs and concerns are given attention.

A good negotiator will select from the various techniques of position bargaining and principled bargaining over the course of a deal or a career. In some deals, the principled result will present itself early on; in others, there will need to be a minuet of positional offers and counteroffers, each signaling how much further the maker intends to go. (But do not let either the other side's first offer, or your own first offer, frame or constrain your ultimate objective.) Sometimes issues are resolved one by one on their merits, while at other times, particularly toward the end of discussions, issues are gathered together in large bunches without any particular connecting logic, or indeed any logic at all.

Keeping an eye open for creative solutions is one of the best ways a negotiator can add value. I was counsel for a museum participating in a nationwide exhibition of rare foreign objects. At the first American venue the moving van was blocked on both ends by limousines from the other country's embassy, while a rival group claimed ownership of the objects and demanded compensation or the objects' return. None of the American museums wanted to reward this behavior, yet the timetable of the tour made a fast resolution imperative. Working together, the museums quickly developed a supplemental exhibition including additional objects from that country, yielding its own incremental profits to be shared, and obtained the rival group's cooperation with the original tour. Perhaps this solution was superficial, but it allowed each party to state that it had not compromised any of its highest principles.

It is not important to know the buzzwords associated with patterns of negotiation – only that such patterns exist and how they operate. What a perceptive negotiator does, by recognizing and using the patterns, is to bring about the best chance for a successful agreement, if one in fact is at all possible.

A good negotiator is patient

Another characteristic of a good negotiator is patience. It is difficult for Americans in particular to be patient. We tend to want to keep things

moving and get on with it. This sometimes causes the amazing spectacle of a person negotiating with himself. A party will table a number, a position, an argument or a contract – and before the other side meaningfully responds, the party making the offer will revise it. In those situations, patience by the other side brings about a long toboggan ride before the real negotiations even commence. A good negotiator knows that, and will have the patience to wait for a meaningful response. After all, she can always disagree or recalculate after she hears the reaction.

A good negotiator will be patient both in communicating his own position, and in listening to the position of the other side. He will listen much more than he speaks. And when he does speak, he will ask much more than he tells.

We have for many years been involved in extensive negotiations with representatives of various agencies of the government first of the U.S.S.R. and later of the independent states in that region, including Russia and Kazakhstan. These have proven very difficult long-term relationships. But whatever success has been achieved to date is testimony to the patience of our business colleagues.

They painstakingly educated their counterparts in all aspects of private investment, including the need for stability of returns on investments. They painstakingly listened to their counterparts about the difficulties of partially privatizing what had previously been a completely controlled socialist economy. Each side described and listened to basic, fundamental principles that had been taken for granted in other negotiations. Being patient can unlock reasoned solutions to the issues that keep us apart.

Another form of patience is manifested in silence or inaction. One of the best negotiators I have witnessed was a French executive who used the tool of silence very effectively. When the other side made an offer he deemed unconstructive, he would test their resolve by just staring back at them and seeing if they would get so nervous that they would start to negotiate with themselves.

A good negotiator knows when to stop

Finally, a good negotiator, not unlike a law school speaker, knows when to stop. It is hard and takes courage to cease negotiating. Often, a great amount of effort, time and money has been invested, and nobody wants to give that up. Yet the good negotiator knows that there are indeed times when further dialogue will not produce desirable results, and that it is better to go no further than to achieve an agreement that is not wanted.

The chief executive officer of a large company told his deal-maker, one of his vice presidents, “Don’t be afraid to come home without a deal.” I have thought about that a number of times since then, and concluded that the CEO really knew an important principle of negotiating – knowing when enough is enough.

One of the keys to that knowledge is what is known in the bargaining literature as “BATNA” – the “best alternative to a negotiated agreement.” A good negotiator early on identifies the alternatives to a negotiated solution and realistically evaluates them. She tries to identify and evaluate the other side’s BATNA. The BATNA is not your objective; when you defined your goal, you set higher standards for yourself than that. Keep your objective foremost in your mind. But by also keeping the best available alternative in mind, a good negotiator knows when negotiation is no longer worthwhile and talks should cease.

The discussions may stop only for a while, so that alternatives in the marketplace can be tested, facts can be confirmed, risks can be eliminated or priced, or the appetites of other decision-makers can be assessed. The bargaining process is sometimes like the swings of two acrobats on the flying trapeze; if we do not connect this time, you and I may need to swing apart and regroup before another attempt is possible. But at other times, the talks do end forever.

And end I must. But not before I have briefly drawn sketches of those characteristics I have observed in the best of bargainers. A good negotiator knows the objective; prepares; is perceptive; is patient; and knows when to –

Stop.



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Life 101 and 102. Especially 102.