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The Psychology of Negotiation

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How many times has your adversary made or responded to a proposal in a way that simply made no sense? We've all been confronted with an extreme opening demand that is sure to be rejected, and we've all seen the opposing side entrench itself in a position that's difficult to justify. What's the best way to respond to seemingly irrational bargaining positions?

At its basic level, all litigation is merely a bargaining process. Anyone who manages litigation negotiates in one way or another on a daily basis. Of course, the ultimate goal of any negotiation is to influence your adversary. Psychological influence tactics are designed to increase the likelihood of your adversary finding a proposal more appealing based on how it is framed without creating incentives or changing the underlying facts or value of the thing being negotiated.

The fact is that human nature can interfere with rational decision-making. This is illustrated by two of game theory's most well-known games, "The Prisoner's Dilemma" and "Ultimatum." Those games introduce troublesome human qualities – greed, pride, arrogance, anger and revenge – into an otherwise rational bargaining process. However, even the early game theorists such as John Nash (portrayed by Russell Crowe in the film *A Beautiful Mind*) assumed an unrealistic degree of negotiator rationality. Those with even modest experience negotiating in a litigation context know that litigants are rarely rational. The influence tactics discussed below can assist the negotiator to make use of human nature.

Diminishing Marginal Losses and Gains

Studies show that an "additional" gain is not as pleasurable as an initial gain and an additional loss is not as painful as an initial loss. Consider this:

Which of these two situations would make you happier?

You are walking down the street and find a \$20 bill.

You are walking down the street and find a \$10 bill. The next day, as you are walking on a different street, you find another \$10 bill.

Which of these two situations would make you unhappier?

You open your wallet and discover you have lost a \$20 bill.

You open your wallet and discovered you have lost a \$10 bill. The following day you lose another \$10 bill.

In the first scenario, most people state they would be happier with the second option, while in the second scenario, most people would be unhappier with the second option. People therefore seem to prefer receiving money in installments but losing money in one lump sum. Similarly, relaying good news a little at a time makes people happier than receiving it at all once, whereas relaying bad news all at once makes people less depressed than receiving bad news a little at a time.

Applied to the litigation context, your opponent is more likely to accept an offer that includes two small gains than an offer of a single gain equal to the two smaller gains. Conversely, your opponent is more likely to accept an offer that results in a single loss rather than an offer requiring two smaller losses equal to the larger loss. Negotiators should therefore give concessions in increments to secure the highest benefit and make demands or difficult deal points together rather than separately. For example, if the negotiator has good news to deliver - "we agree to your proposed bracket and your demand for confidentiality" – it is probably best to deliver the two bits of good news at different points in the negotiation. The opposite is true with bad news or a demand for concessions.

Loss Aversion

People are more motivated to avoid losses than to achieve gains – even when the gains and losses are of equal size. A study described by *R.B. Cialdini* in 1993 involved a local power company that offered free energy audits to homeowners. During the audit, the homeowner would be offered products that could help insulate the home and reduce energy costs. Half of the homeowners were told "If you insulate your home, you will save X cents per day," and the other half were told "If you *fail* to insulate your home, you will *lose* X cents per day." Although the information in both statements is identical, the latter pitch resulted in a significantly higher number of homeowners who agreed to purchase the insulation. In a negotiation, your offer is therefore more likely to be accepted if stated in terms of what your opponent stands to lose if rejected than stated in terms of what your opponent stands to gain by accepting.

Escalation of Commitment

People tend to escalate their commitment to a previous course of action. This is often caused by the human tendency for self-justification. Consider a study conducted at a bar in which the bartender asked half of a set of regular patrons to sign a petition against drunk driving. The other half was not approached with this request. Subsequently, when the bartender identified an intoxicated patron, he would ask whether he could call a taxi to drive the patron home. Only 10% of the patrons who had not been asked to sign a petition agreed to wait for the taxi, whereas 58% of those who signed the petition were willing to wait.

Expert negotiators leverage this human tendency to escalate commitment and it even has a name – the "*Foot in the Door*" technique. Once you allow that annoying salesperson inside your home, you have allowed him the leverage he needs to make you agree to the next request, ultimately leading to the sale. The car dealer also makes good use of this influence tactic – he knows that the more time you spend in his dealership, the more likely he is to make the sale. Effective mediators also use this tactic by drawing out difficult negotiations, thereby forcing the litigants to invest lots of time and energy that will be "wasted" if settlement isn't reached.

Irrational Reciprocity (Responding to the Extreme Demand)

How many times have you received an absurdly high opening demand, or an insultingly low opening offer, and thought "What are they thinking? We'll never agree to that!" This approach, which has been called the "*Door in the Face*" technique, often works when used correctly.

Numerous studies show that people often reciprocate the acts of others even when it goes against their self interest. One study, for example, involved a research assistant holding herself out as the representative of a youth counseling program. The research assistant would ask strangers on the street to volunteer as a chaperone for a group of juvenile delinquents on a two hour trip to the local zoo. As you might expect, only a small number – 16.7% – agreed to this request. The research assistant then approached another group of strangers and made an extremely burdensome request – to sign up as a counselor for juvenile delinquents for two years. Of course, no one agreed to this extreme request. However, at the point of rejection, the research assistant then moderated her request by asking the stranger whether he or she would agree to chaperone the juvenile delinquents on a two hour trip to the zoo. Under this scenario, 50% of the strangers agreed to this moderated request.

The take-away here is that when one makes an extreme opening demand that is sure to be rejected, followed by a more reasonable demand, the opponent is psychologically triggered to make concessions and "meet half-way." This is true even when the party making the extreme opening demand isn't really making any real concession by moving away from the outrageous first position. Plaintiffs in civil litigation use this *Door in the Face* technique to good effect by opening with a fantasy "pie in the sky" demand in the realization that when it is rejected, a moderated offer, though still high, will be evaluated more positively by the defense.

Reference Point Effects

The way people value their own interest is subject to psychological influence. People typically do not objectively assess the value of something – they use relevant reference points. An appraisal of value without a reference point is difficult. Consider the question "Is \$100 a lot of money?" The most likely response is "It depends – compared to what?"

A study published in the *Journal Science* in 1981 asked a group of executives to respond to the following scenario:

You are about to purchase a calculator for \$50. The calculator salesperson informed you that this calculator is on sale at the store's other branch located 20 minutes away. What is the minimum discount you would need at the other location to make it worth the 20 minute trip?

The executives responded that they would need on average a \$20 discount to make it worth driving across town. A different group of executives was then presented with an identical scenario except that the \$50 calculator was now a \$2,000 computer. Although both groups of executives were being asked to place a value on 20 minutes of their time – the executives presented with the second scenario needed an average discount of almost \$200 to make the same trip across town.

You can use the reference point effect during negotiation by recognizing that your adversary is more likely to agree to a concession when it is framed against the larger deal as a whole than when it is framed against some smaller aspect of the deal.

Status Quo Bias

People don't like change. In fact, studies show that people oppose change even in situations where the consequences of the change are an improvement over the status quo. The power of this innate status quo bias is demonstrated by the participation rates of organ donors when presented with an "opt-in" system versus an "opt-out" system. A study described in the *Journal Science* from 2003 shows that for opt-in systems, where the default option is not to donate, the rate of donation is only 4%–28 %. When the "status quo" option is to donate, however, the rate jumps to 86%–99%. In a litigation context, a similar effect is seen in certifying class-actions. It is not surprising that the parties battle so vigorously over whether prospective class members must opt-in or opt-out of a proposed class because this has a potentially enormous effect on the ultimate size of the class. The use of a "Boilerplate" contract is another example of how status quo bias can be used to good effect because terms that are pre-written into a contract are harder to negotiate than "new" terms that are explicitly open to negotiation. Status quo bias therefore teaches us that a strategic advantage is given to the party who creates the first draft of an agreement.

Defense to Influence Tactics

Preparation is important. You are most susceptible to influence tactics when you lack objective information on the value of what is being negotiated. It is also important to become familiar with common influence tactics so you can recognize when they are being employed against you. You should also try to repress your desire to comply with apparent manipulation by your adversary. A helpful question is to ask whether your desire to comply with your adversary's request is easily justified to others. Making use of a "devil's advocate" can also be a helpful defensive technique. Finally, slowing down the pace of the negotiation may allow you to more deliberately evaluate your response to a demand without psychological reactions influencing your response.

For a fascinating discussion of the research that has been performed in this area, please see the 2008 paper authored by D. Malhotra and M. Bazerman of the Harvard Business School entitled “*Psychological Influence in Negotiation: An Introduction Long-Overdue*”