

1

Getting to Yes: Traditional Theory

Any book on settlement negotiations must acknowledge the seminal work on negotiations, *Getting to YES: Negotiating Agreement Without Giving In* by Roger Fisher and William Ury.¹ In this book, the authors propounded “principled negotiation,” a method of negotiation emphasizing that the focus in negotiation should not be simply winning but rather developing an agreement that is wise, fair, and long-lasting and—most important—will satisfy the interests of both sides and the larger community (friends, family, children) surrounding the two parties.² The four principles comprising this method have applicability to divorce settlement negotiations.

Optimal Method of Negotiation

According to Fisher and Ury, “any method of negotiation may be fairly judged by three criteria: It should produce a wise agreement if agreement is possible. It should be efficient. It should improve or at least not damage the relationship between the parties.”³ Under these criteria,

1. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

2. *Id.* Principled negotiation was developed by the Harvard Negotiation Project; it is also called “negotiation on the merits.” *Id.* at 10.

3. *Id.* at 4.

“[a] wise agreement can be defined as one which meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account.”⁴

In many situations, negotiations will take the form of positional bargaining. In a positional bargaining situation, the parties begin by stating/defining their position on a particular issue. After that has been done, the parties begin to bargain from their opening position with the goal of moving closer to the center and an eventual agreement (see chapter 10, “Positional Negotiation”). Fisher and Ury argued that positional bargaining can be an inefficient means of negotiating. The agreements that are reached do not necessarily protect the interests of both parties but rather can cause the parties to become stubborn and damage their future relationship.⁵ Therefore, Fisher and Ury advanced the use of principled negotiation.

Four Principles of Principled Negotiation

In principled negotiation, there are four principles: “[s]eparate the people from the problem”; “[f]ocus on interests, not positions”; “invent options for mutual gain”; and “[i]nsist on using objective criteria.”⁶

Separate the People from the Problem

The first principle is to separate the people from the problem. This means separating “people problems” from any substantive issues (bargaining points) and dealing with them separately and outside of the negotiations.⁷ People problems are any problems that arise from “perception, emotion, and communication,”⁸ which in family law frequently overshadow the substantive issues involved.

As every divorce lawyer well knows, getting past people problems is not that easy. After all, it is people problems that led to the parties divorcing in the first place. Clients do not come from a vacuum: they come from a history that typically includes at best poor communication and cooperation at best and a history of mistrust, sometimes for good cause, at worst. These factors continue when lawyers and the legal process get involved. It is critical that family lawyers try to recognize these emotions. Many times, it is necessary to afford one or both

4. *Id.*

5. *Id.* at 6.

6. *Id.* at 10–11.

7. *Id.*

8. *Id.*

sides an opportunity to release some steam in order to reach the substantive issues. In these cases, lawyers should not react to the parties' emotional outbursts.

Fisher and Ury noted that communication problems are people problems as well.⁹ The parties in a divorce may not be talking to each other but rather are talking to another audience, perhaps "playing to the crowd," hoping to get a response. Therefore, instead of listening to the other side, they are planning a response. It is crucial to the negotiations that both parties begin to listen actively and acknowledge what the other party is saying. After all, if no one is listening, what's the point in talking?

Failing to listen is a fault not just of the clients but of lawyers as well. An experienced colleague once told me that the most important attribute for a successful negotiator is the ability to listen. However, law school does not teach listening. Law school teaches advocacy and issue resolution, both of which are active skills; listening is a passive skill.

Some years ago, I had the opportunity to sit in on some mediation sessions conducted by a brother-sister team of social workers, Mimi and Chic Nichol. My role was guardian ad litem for the children, which in Wisconsin is a lawyer appointed for the children's best interests. I was asked to sit in on mediation sessions, with the consent of both parties, but not to participate unless I was directly asked. Being forced to listen and not talk was a new experience. I realized how many times Mimi and Chic, trained as social workers, would pick up on something said by a party that I would have missed if I was planning a response. As lawyers, our training is primarily to advocate, which is an active skill. By developing the passive skill of simply listening, we can become far better negotiators.

Focus on Interests, Not Positions

The second principle is to negotiate about interests, not positions—things that you really want and that you really need.¹⁰ In many cases, these two things are often not the same. Again, this is especially true in divorce negotiations. One common example is the client whose position is to inflict damage on the other party. Another common example is the client who negotiates less about what she gets and more about what the spouse does *not* get. For better or worse, getting a client to

9. *Id.* at 22.

10. *Id.* at 40.

recognize her true interests and to negotiate for them constitutes one of the chief people problems discussed earlier.

Invent Options for Mutual Gain

When the parties involved begin to focus on their interests, it becomes easy to get to the third principle: inventing options for mutual gain. This means that the negotiating parties should begin to look for solutions that will allow both sides to win and not just continue to fight from the original position, i.e., one side must win and the other side must lose.¹¹ Again, the application to divorce negotiations is present here. In a support case, for example, the typical final result of negotiations is for the payer to feel that he paid too much and the recipient to feel that she did not receive enough. Yet, it benefits the payee if the payer feels that he “won,” whatever that means in the particular context. After all, a payer who feels that the settlement is not beneficial has no incentive to make the agreement work. Payments may be late or missed if the payer has any control; and if the payer has no control, the payer has an incentive to try to modify the payments as soon as possible to remedy the perceived injustice.

The key to this principle is to “generate a variety of possibilities before deciding” on a course of action in order to “respond to the difficulty of designing optimal solutions while under pressure.”¹² Fisher and Ury suggested that such pressure constraints can be alleviated by “setting aside a designated time within which to think up a wide range of possible solutions that advance shared interests and creatively reconcile differing interests.”¹³ As all lawyers know, some cases can only be settled on the courthouse steps (sometimes literally). It is in those instances that advance preparation is essential. In criminal cases, it’s called the “footsteps of the jury” syndrome: the imminence of trial suddenly makes a plea bargain begin to sound more appealing. Planning for such a possibility before getting to court and discussing it with the client is of critical importance.

A divorce lawyer should never assume that there is one “fixed pie” with only one way to divide it; it is necessary to “[i]dentify shared interests” so that either the pie can be made larger or it can be divided in a way that both sides get the piece they want.¹⁴ In order to do so, it is necessary to take the other side’s needs into account when making

11. *Id.* at 57.

12. *Id.* at 10–11.

13. *Id.*

14. *Id.* at 70.

a proposal. It takes no skill whatsoever to ask for everything—and it will take no skill whatsoever for the other side to simply reject the proposal. The skill in negotiating is to make a proposal that causes the other side, at a minimum, to make a counterproposal. Therefore, when making a proposal, the lawyer must place himself in the shoes of the opposing counsel and imagine what response is likely.

Insist on Using Objective Criteria

The fourth principle is to always insist on using objective criteria when making decisions.¹⁵ If some outside, objective criteria can be found, it can make the negotiation process a lot simpler. For example, in labor negotiations, management and union representatives will look at what similar businesses and unions have agreed to. This will give both sides more information on what is fair, and it makes it a little harder to oppose offers.

The application to legal proceedings, including family court cases, is obvious. The objective criterion is what a court would likely do at the conclusion of a contested trial. After all, if the parties knew the eventual results, they might as well just agree and avoid the costs of trial. This is why evaluative mediation is often so successful. (Later in this book [see chapter 21, “Creative Settlement Techniques”], I will discuss the “nontrial trial,” which is another means of determining the objective criterion.) This is also why the best negotiators have at least a certain amount of trial experience. Yes, there are excellent negotiators who have never tried a case, and negotiators can learn what courts are likely to do by talking to judges and other lawyers. But experience is the greatest teacher, and being able to share from personal experience such objective criteria with a client—or with the opposing counsel—makes a lawyer a better negotiator.

BATNAs

Negotiators need to know the best alternatives in order to optimize principled negotiation. Fisher and Ury created the concept of and strongly suggest the development of a “BATNA,” an acronym for Best Alternative To a Negotiated Agreement.¹⁶ Brad Spangler, in an article about BATNAs, wrote that BATNAs are important to negotiations because a person cannot decide whether to accept a proposed

15. *Id.* at 81.

16. *Id.* at 97.

agreement without knowing the available alternatives.¹⁷ A BATNA, according to Fisher and Ury, can protect a person from accepting something that is not favorable and from rejecting something that is favorable.¹⁸ As summarized by Spangler, “if the proposed agreement is better than your BATNA, then you should accept it. If [it] is not better,” then you should either continue negotiating or prepare for trial.¹⁹

In the process of figuring out a BATNA—which can be developed “for any negotiation situation,” from a “simple task” to a “complex problem”—a person should “consider the alternatives available to the other side.”²⁰ People tend to become “overly optimistic about . . . their options. . . . The more you can learn about [your opponent’s] options, the better prepared you will be for negotiations.”²¹

Perceptions and realities impact the success of BATNAs in negotiations, according to Spangler. If the parties have different views or “dissimilar images” about the BATNAs, there could be a hold in the negotiations or even a retraction of an offer.²² And, added Spangler,

If both sides’ BATNAs tell them they can pursue the conflict [in court] and win, the likely result is a power contest. If one side’s BATNA is indeed much better than the other’s, the side with the better BATNA is likely to prevail. If the BATNAs are about equal, however, the parties may reach a stalemate.²³

Summary

These concepts, and many more advanced ones, form a core of negotiating theory that extends far beyond the scope of this book. As suggested in chapter 27, “Becoming a Better Negotiator,” doing further research and learning advanced theory can only be beneficial to the divorce negotiator, as it would be to any negotiator. For the limited scope of this book, however, we pay homage to the seminal work of Fisher and Ury and attempt to apply their theories to the field of divorce law.

17. Brad Spangler, *Best Alternative to a Negotiated Agreement (BATNA)*, BEYOND INTRACTABILITY (June 2012), <http://www.beyondintractability.org/bi-essay/batna>.

18. FISHER & URY, *supra* note 1, at 103.

19. Spangler, *supra* note 17.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*