104 Negotiation for Success: Effective Advocacy in ADR

Mark F. Katz
General Counsel
Michael B. Evanoff & Associates

Jerry P. Roscoe
Adjunct Professor
George Washington University Law School

Lawrence E. Susskind
Founder and Senior Advisor
Consensus Building Institute, Inc.

Mark Tatelbaum
General Counsel
Medical Faculty Associates, Inc.

Faculty Biographies

Mark F. Katz

Mark F. Katz is general counsel of Michael B. Evanoff & Associates in Belmont, California. He also conducts an active mediation practice, including serving on the mediation panel for the U.S. Display Consortium for Northern California. He has mediated over 100 business disputes, drawing upon his experience as a transactional lawyer and negotiator involved in both international and domestic mergers and acquisitions, licensing, distribution, and other agreements. His responsibilities at his current company include negotiating acquisitions in Asia.

His prior professional experience includes serving as general counsel for E*Trade International and as a senior partner at the Los Angeles law firm of Kinsella, Boesch, Fujikawa & Towle, LLP. He has also worked with a Chinese law firm in Singapore, White & Case in New York, and clerked for the Hon. James Rosen of the United States Court of Appeals for the Third Circuit. His clients have included both private and public companies in the technology, consumer products, industrial products, hospitality, and real estate fields.

Mr. Katz is a frequent lecturer and program moderator, especially on international and other business matters. He is the chair of the very active international committee of ACC's San Francisco Chapter. A mock cross-cultural negotiation program he has developed, which humorously illustrates the mistakes frequently made in these negotiations, has been one of the most popular events at recent California Annual State Bar meetings. In addition, Mr. Katz is the immediate past chair of the sub-committee on international sales of the International Bar Association.

Mr. Katz graduated from Princeton University with Special Certificates from the Woodrow Wilson School of Public and International Affairs and the Program in East Asian Studies. He was a cum laude graduate of the University of Michigan Law School.

Jerry P. Roscoe

Jerry P. Roscoe is an adjunct professor at Georgetown University Law School and George Washington University Law School, both in Washington, DC, where he teaches mediation and negotiation. He also works for JAMS in DC and has expertise mediating and arbitrating complex cases and over 20 years of experience in the resolution of disputes, including mediating complex, multi-party matters, Supreme Court cases, and international conflicts. His arbitration experience includes domestic and international matters. He also has law experience in commercial/contracts, training, employment, environment, facilitations, insurance, healthcare, public policy, securities, and torts.

Previously he was a partner at ADR Associates, LLC, and senior associate to the Center for Dispute Settlement. He has been a litigator and mediator and mediator at the District of Columbia Citizens' Complaint Center. He was also a special assistant to a United States attorney.

Mr. Roscoe is a member of the District of Columbia Bar committee on alternative dispute resolution and of the Society of Professionals in Dispute Resolution, where he was previously president of the DC chapter and on the board of directors. In addition, he is a fellow of the International Academy of Mediators. He was also the author of many ADR articles including, "Mediating Bioethical Disputes," "Mediation, Arbitration, What's the Difference," and "Advocacy Skills: Tips for Selecting a Good Mediator."

Mr. Roscoe received his B.A. from Colgate University in Hamilton, New York and a J.D. from Catholic University Columbus School of Law in Washington, DC.

Lawrence E. Susskind

Lawrence E. Susskind is Ford Professor of Urban and Environmental Planning at MIT, in Cambridge, Massachusetts.

At Harvard, he has served as visiting professor of law and as one of the founders (and currently as vice chair) of the inter-university program on negotiation. Professor Susskind is also the founder of the Consensus Building Institute a not-for-profit provider of mediation services on a world-wide basis. He is one of the most experienced public dispute mediators in America, having worked on more than 50 multi-party, multi-issue disputes ranging from the drafting of federal environmental, housing, and energy regulations to site specific disputes concerning proposed facilities and projects, to science-intensive disputes managed by the New York and Philadelphia Academies of Science. He has served as a court-appointed special master and worked in a range of labor-management, health-related, and financial management contexts. He has been tapped to provide assistance in Japan, Israel, Holland, Canada, Mexico, the Philippines, and Australia as they try to develop more complex dispute handling systems. He has served as a negotiation trainer for more than 50 major corporations in the electronics, pharmaceutical, food service, mining, oil and gas, financial management, health services, information management, publishing, and defense-related industries in the United States, Latin America, Europe, Asia, and the Middle East. Professor Susskind has presented seminars to the Supreme Courts of Ireland, Israel, and the Philippines and advised the top levels of government in more than a dozen other countries.

He is the author or co-author of 15 books, including the award-winning *Dealing with an Angry Public* and the *Consensus Building Handbook*.

Mark Tatelbaum

Mark Tatelbaum currently serves as the general counsel for The George Washington University Medical Faculty Associates (MFA). The MFA is the 280 physician faculty practice plan affiliated with The George Washington University Medical Center. The MFA provides clinical, teaching, and research services to the Washington, DC metropolitan, national, and international communities. As general counsel, Mr. Tatelbaum is responsible for the legal services of the MFA, including compliance, insurance, and risk management. He is a member of senior management and chair of MFA's compliance committee. He also sits on the medical management committee and risk management committee and attends the meetings of the board of trustees and department chairs.

Prior to the MFA, Mr. Tatelbaum was an associate in the health care group of the Washington, DC based firm of Arent Fox. Prior to Arent Fox, Mr. Tatelbaum served on active duty in the Judge Advocate General Corp of United States Naval Reserve.

Mr. Tatelbaum received his B.A. from the University of Rochester and his J.D. from Boston College Law School.

ACC Association of Corporate Counsel

Negotiation for Success: Effective Advocacy in ADR

Mark F. Katz
Lawrence E. Susskind
Jerry P. Roscoe
Mark Tatelbaum

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott Wardman Park Hotel

Discussion Topics

- Situations for ADR – Why, When, and Effectiveness in Cross-Cultural Relationships
- Maximize Effectiveness – The Mutual Gains Approach and 5 Keys to Success
- Ethics In ADR – Conduct and Confidentiality

Why ADR Works

- Ability to overcome "Reactive Devaluation"
- Neutral's Greater Knowledge of Each Party's Interests
- Neutral's Skill in Obtaining Trust and Persuading Parties to Do What Is in Their Own Best Interests

When to Use ADR

- Types of cases
- Timing
  - When is Case "Ripe?"
  - Court Rules

Cross Cultural Mediations

- Pervasiveness of Cross-Cultural Business Dealings & Disputes
- How Cultural Differences Can Lead to Conflict
  - Protocol / Styles of Formality
  - Pace of Negotiations
  - Acceptability of Direct Confrontation and Disagreement; Need For Indirectness

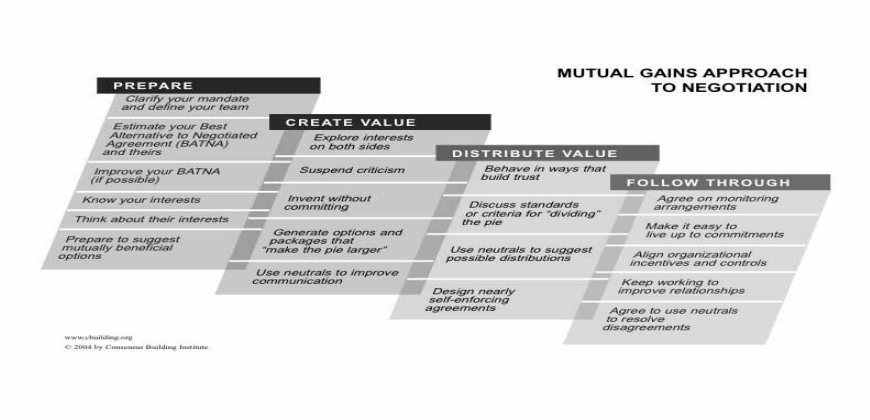
Cross-Cultural Mediations

- Role of Emotions: Silence and Shouting
- Need for Personal Trust and Relationship
- Using Mediation to Overcome Cross-Cultural Barriers to Settlement
  - Mediating Cases Before Filing Suit

Effective Advocates In ADR

- Mutual Gains Approach
- 5 Keys to Effectiveness

Mutual Gains Approach To Negotiation



5 Keys To Effectiveness

- Knowing your client's BATNA
- Clarifying your client's interests
- Looking for mutually advantageous trades
- Using contingent commitments
- Not wasting time trying to win over the neutral

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott Wardman Park Hotel

BATNA

- BATNA = Best Alternative to a Negotiated Agreement (An Estimate!)
- "Know" your client's BATNA
- Work to improve your client's BATNA
- Be prepared to raise doubts in the other side's mind about how good their BATNA is
- BATNA is at the bottom of the Zone of Possible Agreement (ZOPA)
- Never accept a deal that generates less than your client's BATNA is likely to produce

Your Client's Interests

- Interests are the kinds of things that are important to your client -- in rank order
- Make sure your client agrees with your list of their interests
- Make sure your client is prepared to present their interests directly to the other side
- Urge your client to think about the other side's interests and how they might be met at low cost.
- There are many ways to meet the same interests
- Don't confuse interests and values

Contingent Commitments

- Settlement is possible even when the parties disagree about what is likely to happen in the future
- Learn to pose “what if?” options in the face of conflicting forecasts
- Include multiple (contingent) commitments in the same agreement
- Accept the fact that more complex agreements may be required to bridge certain differences

Don’t Try to Win Over the Neutral

- Your problem is to convince the other side, not the mediator, of the reasonableness of your settlement proposals
- The mediator will not advocate for you with the other side
- Put your energy into winning over the other side (not the mediator)

Ethics In ADR

- Representations to your client
- Representations to the neutral
- Representations to opposing party
- Conduct in the mediation/arbitration

Representations to Client

- Model Rules of Professional Responsibility
- Model Code of Conduct
- Professional Liability

Representations to the Neutral

- Representation of Authority
- Representation of Bargaining Reserves
- Offers and Demands
- Knowledge of Rules and Law
- Status of Client
- Statements of Value
- Statements of Opinion

Representation to Opposing Party

- Puffing
- Threats
- Lies

ACC Association of Corporate Counsel

Conduct of Mediation/Arbitration

- Masking identity of parties
- Hidden parties
- Asking that everything be kept confidential
- Leveraging settlement

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott Wardman Park Hotel

What Did I Promise?

The Path from Confidentiality to Conspiracy

This article was originally published in *Just Resolutions*, the Newsletter of the American Bar Association Section of Dispute Resolution, Vol. 10, No. 2 (Issue No. 28). April 2005. Copyright 2005, American Bar Association. Reprinted by Permission.

By Jerry P. Roscoe

It often begins at the beginning, with the Mediator's opening statement. While mediators have learned not to blithely promise that "everything you say here is confidential," many of us still may be writing checks the parties may not be able to cash particularly in the areas of confidentiality, evidentiary exclusion, and privilege.

Following are some of the more poignant phrases of a typical opening statement. Let's parse them to see where the pitfalls lie. Do any sound familiar?

Everything said or done in this room stays in the room. Once something is said or done in front of another party, it is difficult, if not impossible to limit knowledge or use of that information. There seems to be no rule against either repeating statements heard in mediation or using them as a basis for filing discovery, such as a Request for Admissions, based upon information learned in the mediation session. Mediation agreements (as opposed to Settlement Agreements) wherein parties agree to keep everything learned "confidential" are generally too broad to be enforced.

Federal Rule of Evidence 408 protects against admission of settlement negotiations, but excludes discoverable evidence from its protection. Remember also that this rule only applies in the case being negotiated! Parties may be permitted to introduce evidence in collateral cases.

Practice tip: Tell the parties in advance that, if they wish to share anything that could possibly compromise their position, they may be best advised to discuss that information privately with the mediator prior to disclosure. Many mediators introduce this thought in pre-mediation discussions, thus providing parties an opportunity to begin to assess the impact of non-disclosure on the success of the negotiation.

Everything prepared for the purpose of mediation is confidential. Not necessarily! Protection is generally afforded materials prepared exclusively for *and used* in mediation. Mere preparation of materials for mediation may not shield them from disclosure.

Practice tip: This may be addressed in the mediator's letter of engagement(s) scheduling letter or discussed during initial contact with the parties. Parties seem to appreciate mediators who counsel them as to the scope and use of materials prepared for mediation.

Everything prepared during the course of mediation is confidential. Under certain circumstances, disclosure of unlawful conduct during a mediation may make parties (and the mediator) witnesses to admission of a misconduct, or worse, a crime. If so, this could transform documents into evidence including a mediator's notes! Thus enters the specter of conspiracy! While this may seem Orwellian, Title 18, as amended by Sarbanes-Oxley, expands the scope of liability in areas of conspiracy, fraud, false statements, and obstruction of justice sufficiently to warrant at least familiarity with its relevant provisions.

Everything said by a party to the mediator alone will be kept in confidence if the party requests that the information be held in confidence. Many attorney mediators relate that when they are serving as mediators, they are not acting as attorneys thus the rules of professional conduct might not apply. However, the mediator who is also an attorney may face a challenge with regard to disclosures of past misconduct. The mediator is well-advised to review their local rules and decisions on the issues of prior misconduct related during the mediation.

Nothing you say in confidence may be used against you in a court of law. Once again, the attorney mediator may have an obligation to disclose either prior attorney misconduct reported during the mediation or misconduct witnessed during the course of the mediation.

No one may be quoted as to what they say in this mediation and have that quote used against them in a subsequent legal proceeding. The mediator may be required to report misconduct unless the court or statute has conferred upon mediation communications the status of legal privilege. This should not be confused with mere inadmissibility.

The mediator will not report what is said or done in mediation unless ordered by a court. Which court? The catch here is that other courts than those in the mediator's venue may obtain jurisdiction over the matter and thus be able to order disclosure.

Final Practice Tip: Refresh your understanding of the distinction between privilege and exclusion as evidence. In the mediation context, privilege does not exist unless explicitly recognized by the court. Review the Uniform Mediation Act and your applicable Code of Professional Responsibility to determine your practice, if not your obligations, regarding disclosure of prior or intra-mediation misconduct.

Those neutrals practicing in several states would be well-advised to note that there is a lack of uniformity provisions related to mediation privilege and confidentiality. Federal Rule of Evidence 408 does not afford the protection that parties commonly assume. Neither Federal Rule 501 nor the 1998 ADR Act creates a privilege for mediation. There are over 250 statutes that deal with mediation confidentiality. (See UMA Reporter's Notes to Section 2) In cases of federal jurisdiction, local rules should be checked.

JAMS mediator/arbitrator Jerry P. Roscoe is a co-chair of the Health Care and ADR Committee of the ABA DR Section. He also teaches mediation and negotiation as an adjunct professor of law at Georgetown and George Washington University Law Schools. Thanks to Prof. Marjorie Corman Aaron, University of Cincinnati School of Law; Dallas attorney Maxine Aaronson; Charles Carberry of Jones Day Reavis & Pogue; Jay Folberg of the University of San Francisco School of Law; Kathryn Keneally and Steven Salch of Fulbright and Jaworski LLP, for their work in this area for the April 2004 DR Section Annual Conference. This article is based upon their work and the presentations at that meeting.

THE TRADING ZONE

Don't Like Surprises? Hedge Your Bets with Contingent Agreements

No one can predict the future. But you can protect your accord by using contingent agreements that anticipate potential changes.

BY LAWRENCE SUSSKIND

A TOWN GOVERNMENT and a private fuel-oil company have a standing contract that they have renewed for several years in a row. The contract is again up for renewal, and the town manager is under pressure from a substantial portion of the citizenry to reduce the city's heating costs and avoid tax increases. The city's fuel-oil consumption has remained relatively stable during the past five years, yet costs have shot up almost 60%. As a longtime client, the town feels it should get some protection from the sudden price jumps.

The town manager hits on the idea of asking the company to provide a guaranteed annual price-increase cap of 10% in exchange for agreed-upon delivery dates and amounts for the life of the contract. With a price cap in place, the town would not have to increase its fuel-oil budget by more than a certain amount each year. Although the town might have to pay a slightly higher per-gallon cost over the life of the contract in exchange for the consumption guarantee, this could be a reasonable tradeoff. The fuel-oil company has never agreed to a price cap for a municipal customer, but it ultimately agrees to the manager's requests for fear of losing the city's business and facing negative publicity.

The price cap proposed by the town manager is a type of *contingent agreement,* in which a range of "If this happens, then we do this or that" promises are added to a negotiated contract to reduce risk in the face of real-life uncertainty about the future. Whenever negotiators strike a deal, both sides must make forecasts and assumptions. Will current conditions remain the same or change after the agreement is signed? Will the other side hold up its end of the bargain? By including contingent incentives or penalties in a contract, you can protect yourself from the risk that your negotiating partner will renege on a commitment as well as improve the prospects of compliance.

Some argue that contingencies unnecessarily complicate business contracts and other kinds of agreements. It's true that contingent agreements can add new complexities to negotiations; but, with a little preparation, the benefits will far outweigh the costs.

When to use contingent agreements

Negotiators can use contingent agreements for several reasons:

- To make commitments more self-enforcing.
- To manage technical disagreements.
- To avoid the need to reconvene.
- To reduce the chances of future litigation.

Make a commitment self-enforcing.

In negotiating agreements of all kinds, it's a good idea to seek protection against *predictable surprises*—broad changes that may occur through no fault or effort on the part of either side, such as fluctuations in market demand, prices, laws, policies, or technological innovations. When all the different "futures" are spelled out clearly at the time the contract is signed, contingent agreements have a useful self-enforcing quality: they can increase the durability of contracts by eliminating the need to reconvene or renegotiate whenever predictable surprises occur.

Contingencies often create incentives for compliance as well as penalties for noncompliance. Professional athletes negotiate with their team owners for contractual performance bonuses. When hiring a contractor to build an expensive addition onto your house, you might add a contingency into the deal to reward the contractor with a prenegotiated bonus if his team beats a certain deadline. Cities often ask developers to post a bond equal to the amount it would take to complete all the public services associated with an approved plan. The city doesn't liquidate the bond until the developer has met all its commitments.

Insurance also can be viewed as a type of contingent agreement because it increases the security of contractual arrangements in an ever-changing world. A company invited to build a plant in an area highly susceptible to hurricane damage might want to ask the local government to purchase an insurance policy that would protect the company against a future disaster in return for its efforts to facilitate economic development.

Contingent Agreements *(continued)*

Resolve technical disagreements.

Negotiations often get hung up on technical considerations. Suppose that an oil company seeking a permit to build a new refinery promises to keep various environmental disruptions to a minimum. Not surprisingly, local residents worry that the refinery owners won't live up to their commitments and that regulatory agencies will be lax or inefficient in tracking possible violations. What if an accident did occur? Maybe the company would prefer to pay a small fine rather than hold its facility to the highest possible standards. Meanwhile, the oil company might dispute whether the community's informal observations and measurements were valid.

Contingent provisions can reduce the risk of technical disagreements that might eventually lead to conflict.

A contingent agreement could reduce these technical disagreements. If the company is confident that its plant will operate safely and cleanly, why not agree to address the residents' concerns? A "good neighbor" agreement could include detailed monitoring and shutdown provisions beyond those required by law. The oil company might even agree to train and fund local residents in monitoring techniques, thereby avoiding future battles between independent experts. Through contingent provisions, both sides can reduce the risk of technical disagreements that might eventually lead to conflict.

Avoid the need to reconvene.

When one side suspects that the other has failed to live up to contractual promises, it might want to reconvene to discuss the possible breach. Negotiators can avoid such potentially awkward encounters in advance by setting fixed dates to meet and review progress during the life of the contract. It's easier to agree to undertake a joint investigation and sort out what needs to be done at a prescheduled session than at a time when one side is claiming violation of contract terms.

In the construction world, such *partnering agreements*—in which the contractor and the client agree to meet periodically to maintain or improve their working relationship—are quite common. If no effort is made to enhance relationships before problems arise—especially once charges and countercharges have been leveled—it becomes all the more difficult to clarify misunderstandings and build greater trust.

Head off litigation.

To reduce the likelihood of going to court at the first sign of difficulty, consider carefully spelling out informal dispute-handling clauses in your contracts. Typically, such contingencies stipulate that both sides must continue to meet their contractual obligations until a neutral party has investigated any potential violations. Without such measures, contractual charges and countercharges can take on a self-fulfilling quality.

If I think you're not living up to your end of the bargain, I might unilaterally disengage from the contract. Of course, if it turns out that I was mistaken, my contract breach would be reason enough for you to shed your obligations as well.

The advantages of contingent agreements might seem to qualify them as a normal step in any serious negotiation. All too often, however, this is not the case.

Overcoming resistance

By following these steps, you can overcome internal resistance to contingent agreements fairly easily:

Raise red flags.

Don't be afraid to raise concerns during negotiations about things that might possibly go wrong in the future, and point out that such predictable surprises can be handled with contingent agreements. Resist the charge that you're being pessimistic or increasing the odds of trouble simply by looking at what might go wrong. Rather, argue that you are being optimistic: you believe it's possible to make durable agreements that can traverse all kinds of bumps in the road.

Strive for "nearly" self-enforcing agreements.

By including incentives and disincentives, you'll make it more likely that everyone involved will live up to their commitments without the need for messy, expensive enforcement proceedings. Prearranged incentives and penalties for meeting or exceeding contract terms foster not only effective negotiation but also effective implementation.

Accept disagreement.

Don't worry if you and your negotiating partner disagree on what the future may hold. Contingent agreements allow you to sidestep the need to agree on whose forecast is most accurate. First, create one possible scenario that describes what the other side assumes will happen. Next, outline your own scenario of what you think is more likely to happen. Finally, spell out expectations and requirements appropriate to each scenario. Include both scenarios in the contract. In doing so, you'll create an agreement that both sides can live with. Added complexity

is a small price to pay, as long as clear triggers and monitoring arrangements state exactly when and why one scenario or another begins.

Broadcast benefits.

To overcome organizational resistance to contingent agreements, you'll have to describe the benefits that balance the costs of complexity. The legal and financial experts who prefer less complexity are just trying to do their jobs. But if you can show them how multiple contingent scenarios can head off potential crises, you can head off their defense of simplicity for its own sake. ✧

Lawrence Susskind is Ford Professor of Urban and Environmental Planning at MIT, visiting professor of law at Harvard Law School, and president of the Consensus Building Institute. He is the lead author of *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* (Sage, 1999). He can be reached at negotiation@hbsp.harvard.edu.

Reprint # N0501C: For a reprint of this article, call 800-668-6705 or 617-783-7474.

THE TRADING ZONE

Stubborn or Irrational? How to Cope with a Difficult Negotiation Partner

Dealing with a negotiation partner who just can't—or won't—see reason is tricky. Learn how to adjust your own behavior to help reach agreement.

BY LAWRENCE SUSSKIND

SUPPOSE YOU'RE an experienced salesperson entering into negotiations for a contract renewal with a company you've successfully done business with for years. Recently, your counterpart at the other company was replaced by a new hire. You call Joe, the new guy, to set up your first meeting and immediately realize you're in for some trouble.

"Here are my rules," Joe says, cutting the pleasantries short. "First, we'll meet at my office. Second, I'll let you know what we will talk about and what we won't. Third, I'll tell you the price range we'll be working in. And we won't put anything in writing until we have a deal."

"I'm fine with meeting at your place," you say uneasily, putting off his other demands for now. "But we should probably include some of our production people and someone from your operations division. We've got to make sure we meet their interests as well."

"No," Joe says. "That's not how I do it."

"For years," you continue, "your predecessor always brought along your head of operations. I think that's why everything always went so smoothly. We need to talk about more than just price. We want to make sure that our components meet your company's unique needs."

"Let me worry about that," Joe says.

You are completely taken aback. Joe seems impossible to deal with. Is he truly irrational or just trying to drive a hard bargain? How can you find out for sure?

One of the trickiest aspects of negotiation is figuring out how to deal with an individual who cannot be convinced by the merits of evidence or arguments. How can you put a stop to irrational behaviors and demands—those that don't

Difficult Negotiation Partners *(continued)*

appear to contribute at all to the effectiveness of a negotiation? How can you get someone to be reasonable? In this article, I'll use this hypothetical purchasing negotiation to help you analyze the various possibilities you face when confronting an adversary who seems stubborn, irrational, or even downright crazy.

Possibility #1: Your negotiating partner is perfectly rational; it's just that you don't understand how the world looks to him.

One of the first rules of negotiation is to assume that your partner is rational. Approach each new negotiation with an open mind. Differences in life experience may lead to what look like strange behaviors, so instead of jumping to conclusions, try to imagine how the negotiation might look to the other side. Max Bazerman's monthly *Negotiation* column "The Mind of the Negotiator" has described many of the cognitive biases that can lead people to read and react to the same situation in totally different ways.

When faced with a partner as stubborn as Joe, imagine what might be going on in his head. Perhaps he's dealing with some new corporate guidelines that govern how he is to proceed. Maybe he's been burned in the past because he wasn't able to manage the "internal" negotiation while proceeding with an "external" one. Perhaps he's nervous about having his performance judged negatively by others in his organization.

How can you address such concerns? First, try asking directly what problem your new partner is trying to solve. "I know you may be feeling some heat back at the office," you might say. "Maybe if I understand what you're up against, we can add some new issues to the equation." You might offer options to help Joe protect himself, such as promising to circulate a draft summary of any tentative agreement to both sides.

Second, you might agree to Joe's demands, while reserving the right to pause the conversation if the change turns out to be counterproductive. Sometimes you might have to try proceeding in a new way, even if it feels unproductive. At the very least, an ongoing failure to move talks forward will provide a shared basis for arguing on behalf of a better approach. As long as you don't agree to anything that fails to meet your company's interests, you won't lose anything by adopting a sympathetic stance toward what appear to be unproductive demands.

Suppose you agree to meet Joe one-on-one at his office. You start off the talks like this: "We clearly have common interests. Your company needs our components to stay competitive globally. We're prepared to keep providing them, as long as you maintain or increase your current order. As you know, we have to make continual adjustments in our production systems to get you just what you want, when you want it. If I can come back to my people with a minimum five-year deal, at stable or increasing sales volumes, we can probably remain at the current price with only modest annual adjustments for inflation. What do you think?"

"No way, no how," says Joe, crossing his arms.

"What do you mean?"

"I'm not interested in doing business if you can't give us a substantial reduction in the current unit price," Joe says. "Also, we need to be able to adjust our order up or down. We also want the right to abandon the contract at any time, with no penalty. And you'll have to guarantee on-time delivery or else pay a big penalty."

"Wait a minute, wait a minute," you say. "A penalty if delivery gets held up for reasons beyond our control? A reduction in unit price? Unpredictable sales volumes? Where is this coming from? No one is paying less than you are for our components. But sales volumes will have to remain constant at least or we can't provide customized service."

"If you want to keep our business, you'll have to find a way to cut prices and eliminate any delivery risk," says Joe. "Now, listen. I promised my guys that we'd have something signed by now. What's it gonna be?"

"Look," you say. "Our companies have been working together for almost a decade. We ought to be able to sort this out. Your predecessor and I always put all our cards on the table. What's going on? Is there some problem you're not telling me?

"I'm sure you and Sue got along great, but times have changed. Gotta get the price down. Gotta reduce the risk. Gotta maintain flexibility. Those are the rules. Do we have a deal, or not?" Joe faces you with a smug smile his face.

Possibility #2: Your partner is perfectly rational but has adopted a seemingly irrational stance as part of his hard bargaining strategy.

Joe may just be pushing to see what he can get away with. If you don't push back, he'll keep "claiming" even more. This strategy is not irrational, especially for someone who has used it successfully in the past.

In their book *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books, 1991), Roger Fisher, William Ury, and Bruce Patton advise you to treat your partner the way you'd like to be treated yourself. Negotiation theory suggests you focus on interests, not positions; separate inventing from committing; invest heavily in "What if?" questions; insist on objective criteria; and try to build nearly self-enforcing agreements.

Never make unilateral concessions just to appease your partner. You'll only encourage more of the same unproductive behavior.

This advice does not preclude making it clear that there are limits beyond which you will not be pushed. "If you can't be more flexible, we're done," you might tell Joe. "No one is going to give you a better product and better service at a lower price. But if you want to look around, go ahead; then get back to me."

If modeling effective behavior doesn't cause your difficult partner to act reasonably, don't despair. There are several other tactics you can try. First, to test your interpretation of events, insist on bringing others from your organization into the negotiation, and press your partner to bring in colleagues as well. In addition, be sure to summarize what's said in writing and distribute memos after each exchange. By doing so, you'll put your difficult partner on notice that others will be aware of what he's up to. Next, put forward multiple proposals that meet your interests very well and that seem to meet the other side's interests at least reasonably well. Even if you don't reach a deal, your offers will be on record. Finally, never make unilateral concessions just to appease your partner. You'll only encourage more of the same unproductive claiming behavior.

Once Joe realizes that there are, indeed, limits to how far he can push you, he may very well temper his demands: "I know you guys do a pretty good job, but there's always room for improvement, right? How are you going to get me a better deal?"

Possibility #3: Your partner really *is* irrational. All rules of normal discourse go out the window.

Suppose you've tried all of the strategies outlined above, but they've failed. Joe refuses to listen to your mutually beneficial proposals and won't be convinced by arguments on their merits. Now you're convinced that you are dealing with a truly irrational negotiating partner, someone willing to risk everything to make sure you get nothing. What can you do?

First, prepare a written memorandum laying out several possible deals, and then set a very explicit deadline for ending negotiations. Make sure to enumerate all of the evidence and arguments, and to spell out why these proposals meet both sides' interests. Though it can be difficult, try to get the memo into the hands of your partner's higher-ups.

If your counterpart refuses to make progress in your one-on-one exchange, fails to respond to a reasonable set of proposals, and remains unwilling to allow others to attend the negotiations, there's not much reason to go forward. Through his statements, Joe has signaled a commitment to hard bargaining for its own sake. You've made a number of mutually advantageous proposals, and you're still getting nowhere. It's time to call off the game, break off talks, and wait to see whether Joe will suddenly back down, as hard bargainers sometimes do.

Personally, I don't believe that what we assume to be irrational behavior truly is irrational most of the time. Rather, experience tells me it's more likely that people behave according to Possibility #2: they're trying to advance their interests by shutting down the other side through hard bargaining. They may be simply bad negotiators, not irrational ones. In the final analysis, negotiating with a seemingly irrational partner isn't so different from negotiating with anyone else you hope to lead into the trading zone, where great deals emerge. ✧

SEVEN STEPS FOR COPING WITH IRRATIONALITY

Whether your negotiating partner is truly irrational or simply pretending to be, your behavior should stay the same. By following these guidelines, you can save yourself from negotiation nightmares and perhaps even get a good deal:

1. **Don't respond to irrational behavior in kind.** You'll only make things worse.
2. **Don't make unilateral concessions to win over the other side.** You'll just encourage more of the same bad behavior.
3. **Don't lose your cool out of frustration.** Walk away before you lose your temper.
4. **Focus on meeting your own interests—even if you don't like the way the other side is behaving.**
5. **Prepare for each exchange carefully.** Talk with others in your organization and rehearse as often as possible.
6. **Summarize each negotiation exchange in writing.** Try to keep others on both sides in the loop.
7. **Know when it's time to walk away—then do it.**

Lawrence Susskind is Ford Professor of Urban and Environmental Planning at MIT, a visiting professor of law at Harvard Law School, and president of the Consensus Building Institute. He has worked as a mediator and negotiation trainer in more than a dozen countries. He can be reached at negotiation@hbsp.harvard.edu.

Reprint # N0412D: For a reprint of this article, call 800-668-6705 or 617-783-7474.