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Negotiation: Strategy and Communication

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Negotiation is a form of interaction that involves both strategy and communication. Negotiation without strategy may lead to capitulation. Without communication, negotiation often results in stalemate. Strategy requires parties to keep their ultimate goals secret whereas communication requires that parties understand each other. In this article the author offers a simple framework within which to address both goals.

The basis of negotiation strategy is that each party wishes to maximize its benefits while minimizing its risks. The value of those benefits and risks can be differently perceived by each side. But resolution of the dispute can be achieved if the parties agree on a common set of terms or the same amount of money, even if they agree about nothing else.

Resolution cannot occur without communication; but how should that communication take place? I suggest that there are some basic principles that can be applied where, as often is the case, a monetary settlement is at the heart of the negotiation.

The first step in any negotiation should be for each side to eliminate from its own thinking, false values on both the upside and downside. The dispute resolution process naturally engenders exaggerated claims, counterclaims and defences. Unless such false positives and negatives are eliminated from the negotiation process at the outset, they have the potential to shut down communication and scupper any hope of resolution.

The main purpose of a first offer is to communicate a willingness to settle. Of course, a party may wish to strategically conceal a willingness to settle. However, unless there is a significant power imbalance in favour of that party, this is more likely to end any resolution process rather than to begin it. Also, such a stance can substantially weaken the subsequent negotiating posture of a party whose bluff is called. Therefore, it is important that a first offer communicate a willingness to settle while preserving the offeror's ability to achieve a settlement within an acceptable range.

A first offer should almost never be a best offer or a final offer. A final resolution almost always requires that all parties feel that they have had an impact on the terms of settlement and have made the other side go beyond what it initially proposed. It may take the exchange of many offers for both sides to feel that they received the most favourable terms that the other side was willing to offer. One should generally resist the temptation to make "take it or leave it offers", particularly early in the process.

A first offer should not be based upon any elements of the false values that were eliminated in the first step mentioned above. It should offer some discount on the position of the party making the offer in relation to amounts realistically in issue. As a rule of thumb, the first offer should rarely, if ever, be more than half of what the offering party will eventually be prepared to discount its position for, although it can be for less than that amount. A responding first offer should follow the same rules.

Once reasonable first offers have been exchanged, the negotiation is underway. There is no guarantee that it will lead to a settlement. However, two principles can be of assistance in helping the parties find out whether they do have perceptions of settlement value within an overlapping range. They are "mirroring" and the "rule of halves".

In the early stages of the negotiation, when the parties are giving up value outside the ranges within which they need to settle, “mirror” offers by one or both sides can move the process along even though the parties may seem to be far apart. A mirror offer simply discounts the offering party’s position by the same discount that was last offered by the other side to its position, e.g. if the defendant offered to pay 10% of the claim, the plaintiff offers to take 10% off the claim (using realistic exposure numbers in both cases). Usually the offers should be made in sequence, until resistance is met by one side or the other.

Once resistance is met, the rule of halves comes into play. It requires that the party using the rule have set a firm objective for its settlement target. That goal is then signaled repeatedly and persistently to the other side by making an offer that is half way between the last offer made by the offering party and the target amount, until the other side makes an offer at or beyond the target amount or refuses to move. In either of those instances, the negotiation session is over. Using this approach, the increments get smaller with each offer, although the offers can be accompanied by non-monetary terms that make the offers more appealing and give the other side a face saving way of accepting the amount that is being targeted by the rule of halves approach. Non-monetary terms may include such elements as time to pay, security for payment, access to business opportunities or transfer of an asset valued more highly by the offeree than by the offeror.

The foregoing is a basic “language of negotiation”. As with any language, knowing the normal usage is valuable even when the rules are being broken in a given instance. Departures from the norm, precisely because they are departures, carry an added significance and emotional weight that should be understood before they are adopted.

Disputes and dispute resolution are a complex aspect of the human experience and no one approach can fit all situations. However, I have found these basic principles, with adjustments for each case, to be of repeated assistance in settling cases that are primarily monetary. It does not seem to matter whether they are put into effect by one side only or by both sides, nor whether one side knows that this is what the other side is doing.

If there is a settlement to be made, these principles can be of assistance in making it happen.

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