ADR Bulletin
ADR Bulletin

Volume 10
Number 1 *Persuasion Part II*

Article 4

10-1-2007

Persuasion in negotiation and mediation

John Wade
Bond University, john_wade@bond.edu.au

ADR Bulletin

Persuasion in negotiation

Persuasion in negotiation and mediation

John Wade

This article provides a framework for common patterns of behaviour and persuasion observed anecdotally in high conflict negotiations in civil and family disputes, often including legal representatives. It sets out:

- the patterns of creating doubt about rights, goals and power;
- persuasion and pause;
- a glimpse at *deception* of *others* during negotiation;
- a glimpse at *deception* of *self* and 'decision traps'; and
- persuasion wrapped in 'intangibles' — *procedural skill* and *emotional awareness*.

Creating doubt

After creating a single or multiple possible solutions, negotiators universally attempt to create doubt for their counterparts (or fellow team members). Creating doubt or lowering expectations consists of a series of predictable and sometimes ritualistic behaviours, which attempt to persuade other parties that their stated preferred solution is unlikely to be achieved at negotiations or elsewhere.

The to and fro delivery of these routine attempts to create doubt take place with many complex variations such as — who, when, where, aggressively or diplomatically, straight to the point or by nuance, by metaphor or story, with graphs and charts, in writing, with speeches or chatter, with humour or solemnity, with total honesty, or degrees of deception.

This process of doubt-creation attempts to challenge the beliefs, behaviours and emotions which are attached to each party's preferred solution(s).

Creating doubt about rights, goals and power

Negotiators use rights, power and goals talk interchangeably as they attempt to create doubt. These three categories of rights, power and goals overlap. Nevertheless, it is very useful to attempt to categorise key allegedly persuasive propositions — for example, rights talk may be more persuasive for lawyers, and goals and risk talk more persuasive for business people.

All three categories can be helpfully considered asking the questions repetitively — 'If this negotiation does not result in an agreement, what are the best to worst possible/probable outcomes on our current understanding of respective rights, goals and power?' This question is reflected in the well-known acronyms WATNA, BATNA and PATNA (What are the predicted Worst, Best and Probable Alternatives to a Negotiated Agreement?).

Rights talk

Rights can be described as a series of guesses about the range of benefits and losses which may result from legal process and decision-making. As such guesses require considerable legal knowledge and expertise, they should ideally come from the minds and mouths of experienced and reputable lawyers in order to have a degree of persuasiveness. Clients who talk about justice, rights, entitlements or fairness are usually very unpersuasive, even though such concepts may have high personal importance.

Rights talk is sometimes called 'bargaining in the shadow of the law

(and its legal procedures)'. It is routinely subdivided into elements or pre-conditions as to how a decision-maker might behave in the future. Chart 1 is a sample.

Goals talk

A goal is a known or presumed commercial or personal interest of

Chart 1: Sample elements of rights talk

1	**Facts (about intent, history, causation, future predictions)**	'We seem to be working on different facts to each other…'
2	**Evidence**	'How will you try to prove that we caused those losses…?'
3	**Credibility**	'Who is more likely to be believed?'
4	**Rules**	'You are applying the wrong rules.'
5	**Rules-insider knowledge**	'That is not how the system works here.' 'You are a stranger to this jurisdiction…'
6	**Publicity/reputation**	'The courts are public places, and how will you feel if this is sensationalised in the press.'
7	**Costs (direct)**	'The predicted range of costs for lawyers and accountants are…'
8	**Costs (indirect)**	'How much time can you afford to be away from your business/family?'
9	**Court and judicial unpredictability and error proneness**	'Litigation is a lottery.' 'No-one can predict what a judge will do.'

Chart 2: How goal and risk language may be swapped

	GOAL		RISK
1	To avoid an awkward precedent	↔	A judge creates an awkward precedent
2	To sustain good business and personal relationships	↔	Required blame and counter-blame language will cause alienation
3	To spend time on productive business activities	↔	Time diverted to manage litigation
4	To stop paying lawyers	↔	To pay lawyers and experts between X-Y thousand dollars
5	To keep decision-making in hands of industry experts	↔	Decisions made by judges who have no understanding of the industry (or family, or culture)
6	To avoid inconvenience to others	↔	Third parties and their documents are subpoenaed
7	To act consistently with my own articulated principles	↔	To be labelled 'stupid' or an 'hypocrite' for failing to act consistently with my declared love of efficiency, control, planning, generosity
8	To stay healthy	↔	Ongoing stress will cause illness

all or some of the parties to the negotiation. Skillful negotiators are adept at switching between rights talk and goals talk. Business people seem to be more comfortable with (and more persuaded by) goals and risks talk. These concepts reflect their training and expertise, and they do not lose control to the insider knowledge and jargon attached to discussions of legal rights.

Chart 2 gives examples of how common goal and risk language can be swapped by skilled persuaders.

Power talk

Power can be described as the actual or perceived ability to influence the emotions, beliefs and behaviours of another person. Although actual or perceived power as a persuasive force often overlaps with rights and goal/risk talk, it is important to consider examples of power as separate categories of persuasion. There are two important features of power as a potential persuasive force:

- first, power is multi-layered and has many forms;

Chart 3: Perceived and actual sources of power

TYPE OF POWER	EXAMPLE
Emotional	'You are depressed and easily rattled: I am calm'
Risk-taking	'I am willing to take chances — with litigation, or finding an alternative supplier'
Status-quo	'I have the status quo (possession of the business, children, job); you have the burden of changing that status quo'
Scorched earth	'I don't care what happens; I have nothing to lose; my fall-back position is to burn everything'
Information	'I have vital information about (bank accounts; manufacturing process; customer lists; judicial hobby-horses etc) — you don't'
Expert	'My experts have more credibility; more experience in answering difficult questions etc. than yours'
Resource	'I can spend more time and money. I will drown you in paper.'
Rights	'The law, company policy, patterns of precedent, common behaviours of decision-makings, give me a stronger fall-back position'
Structural	'This dispute will be decided or enforced in X jurisdiction where the bosses/judges are accessible/cheap/honest/ vigilant/independent *or* vice versa.'
Humiliation	'I have the moral high ground and the approval of our cultural peers. You will be ridiculed.'
Time rich	'I have nothing else to do, but to continue this dispute for the rest of my/your life. You do.'
Preparation	'I am organised, logical, equipped with graphs and summaries. You are a disorganised babbler.'
Association	'I have powerful allies/tribes (with whom you will have to trade).'
Publicity	'You fear publicity; I love any kind of publicity.'
Skeletons-in-closets	'I have not told them, but what if the police, customs, tax office, your spouse, social security etc. find out about X.'
Alternative fall-back	'If you do not agree, then I have several alternative (suppliers, subcontractors).'
Future relationship	'If you are helpful now, I will be considerate, polite, generous in future dealings. If not (vice versa)'

- second, power shifts with time and circumstance. For example, a person who threatens to use publicity may be strongest before the actual disclosure to the media. Thereafter (s)he may have no more cards to play.

Some people assert that a discussion of power is somehow ignoble, unethical and/or illegal. No doubt that is true in some circumstances. Threats of violence or market isolation may amount to assault and extortion. Nevertheless complex layers of power are normally present as bargaining chips in all negotiations. For smart negotiators they are key persuaders.

Chart 3 sets out some samples of the multiple layers and many shifting forms of power, which are used subtlety or bluntly during negotiations.

This anecdotal reflection undoubtedly reflects the narrow context of the writer's profession as a mediator predominantly in high conflict, lawyer-involved mediations and negotiations in the shadow of the legal system.

The writer has observed that, if presented diplomatically by and to the 'right' team members at the time when the hearers have ears to hear (important preconditions!), the power propositions that are most persuasive are — scorched earth, skeletons-in-closets, alternative fall-back and future relationship. I have seen frequent mutual disasters when these powerful levers have been perceived as bluffs, or spoken with cathartic and inflammatory clumsiness, at the wrong time.

Persuasion and pause

One of the standard responses to the doubt creation dance is *adjournment* or *pause*. One or more of the disappointed parties declares:

- 'I will get further instructions from my clients.'
- 'We cannot make a decision until we have more clarity about (the value of a business, cash flow, what a witness will say) …'

The motives for adjournment are many — laziness, disorganisation, fear of regrets, fear of armchair critics, need for more facts; confusion or ambush due to new information received; need to sign up one's own client for self-protection; attractive status quo to retreat to during adjournment; hope that adjournment will escalate pressure; hope against hope that something will change during the pause.

Routine persuasion becomes more effective as easy fall-back options such as adjournment diminish.

(Conscious) Deception of others in negotiation and its shifting boundaries

Attempts to create doubt via rights, goals and power talk between parties are often muted by mutual suspicion and deception. Anecdote and research show clearly that negotiators, including the majority of lawyers, lie — 'This is my bottom line'; 'If you don't accept this offer, I have advised my client to go to court'; or make negligent statements — 'the accounts support what I'm saying'; 'there are no more relevant documents'.

Such inconvenient truths often lead to the response that these lies are merely harmless ritualistic puffery. It is arguable that these intentionally or negligently false statements are both illegal for all negotiators in Australia and unethical for lawyers.

Self-deception — an underlying theme

The previous framework and analysis of this article implies that we as human negotiators are a rational and organised species, carefully articulating and weighing lists of visible rights, goals and power. This may be true sometimes. More frequently we appear to be the victims (or beneficiaries) of our own self-delusions and tricks of mind and emotion.

Most of these decision traps profoundly influence negotiation decisions. In other words, all the parties to the decision-making of negotiation, including a mediator, are prone to *delusion* and self-deception.

The stereotype of the persuasive negotiator is of a person who has not studied psychology. However the school of hard knocks has taught him/her about the constant fallibility of human decision-making. This wisdom is then reflected in the ubiquitous phrases:

- 'On my understanding.'
- 'What assumptions are we making here?'
- 'I've been wrong many times before, so …'
- 'On what evidence do you base that statement …'

Procedural and emotional awareness and skills

When a negotiator talks, or writes about perceived *substantive* rights, goals and power, this occurs amidst behaviour and language relating to *procedure* and *emotions*.

This behaviour, or the absence of this behaviour, relating to intangibles, has a persuasive effect on the majority of negotiators. Here are a few conceptual and linguistic illustrations of a vast topic. Each of these illustrations varies in effect from one culture to another.

These illustrated behaviours provide the persuasive context in which the substantive messages are wrapped.

- Listening respectfully: 'uh-huh'; 'yes'; appropriate eye contact.
- Acknowledging emotion: 'I can see that you felt 'strongly'; 'frustrated'; 'angry'; 'disappointed'; 'concerned'.
- Reframing: 'The only solution you can see at present is creating distance between you'; 'You are hoping for a big financial payout'.
- Summarising: 'Have I understood correctly, there are three reasons?'. 'So you believe we have four major risks'.
- Questions: Especially —
  - — *Open questions*: 'Can you elaborate upon that?'; 'Could you tell me more about …?'
  - — *Checking questions*: 'Am I correct?' 'Have I understood you correctly?'
  - — *Hypothetical questions*: 'Assuming that we are able to pay that amount, what security?'
  - — *Probing questions*: 'How do you reconcile those bank statements?'; 'Why do four other witnesses say the opposite?'

Procedural awareness

A persuasive negotiator often appears to rise above the immediate substantive and emotional discussions occurring in person or by mail, and open a reflective discussion about procedure. This procedural awareness, or role as a quasi-mediator, is attractive as negotiators often experience intense frustration and loss — 'we are going nowhere'; 'tell us something new'; 'they are just stonewalling us'.

The expert negotiator rises above the fray either preventively or reactively with an array of standard colloquial pauses, expressed via bumbling Columbo or articulate diplomat.

- 'Before we look at our differences, could I suggest that we have some things in common.'
- 'We have been swapping threats for a while; could we now brainstorm some solutions and we can return to the threats later.'
- 'Can you suggest how I could sell that offer to my client? I know it is late, but at the moment I cannot think of one persuasive reason.'
- 'I don't know about you, but I need some coffee …'

It is easy to acknowledge the importance of *concepts* such as procedural skill and emotional awareness. However, this is like reading a book about golf. Much supervised practice occurs before these persuasive concepts are reflected in a repertoire of language and negotiation instincts while negotiating under pressure.

Conclusion

The anecdotal and more systematic study of persuasion methods used in negotiation is both helpful and daunting.

It is helpful to know what range of tactics and language to practise, and what is probably being attempted by your counterparts. Competence is demystified to some extent. However this study is also daunting. There are so many unknown variables in the persuasion soup, and diagnostically it is a challenge to use even the known and practised persuasive methods at the right time, in the right quantities, tone and context. This is not a counsel of despair. There are a number of excellent negotiators around us, ready to be analysed and thereby to expand our toolbox. ●

John Wade is a Professor of Law, Bond University, and solicitor and consultant, Hopgood Ganim, Brisbane. He served on the Family Law Council on Mediation and the Australian Law Reform Commission on the Adversary System. His mediation experience since 1990 comprises more than 6000 hours of mediations in private practice relating to intra-organisational, family property, insurance, de facto couple's property, parenting, commercial, state cabinet, and indigenous community disputes.

This article is a shortened version of the paper presented at the Persuasion Conference. The full version is available in the Bond University Dispute Resolution Newsletter, August 2007 at <www.bond.edu.au/study-areas/law/centres/drc/drc.html>.