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Reflections on 'tactics' in negotiation and conflict management

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The reflective ADR practitioner

Reflections on 'tactics' in negotiation and conflict management

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ADR Diary

Recent articles in the *ADR Bulletin* invited me to reflect on my personal practices, ethics and behaviour. I practice as a negotiator, negotiation consultant, mediator and trainer in the skills of negotiation and mediation. The questions that I have been asking myself are:

- What is my response when I wonder whether others are attempting to use adversarial or competitive 'tactics' to influence me in negotiation or the parties in mediation?
- To what extent are such 'tactics' effective?
- How can interest-based approaches deal with such 'tactics'?

In examining my own practices I first wondered how adversarial negotiation tactics are described and the assumptions that are made by those who support their use, and I asked whether there are methods consistent with my interest-based approach that will allow me to achieve outcomes without resort to competitive or adversarial tactics.

In his 2006 article John Spender QC[1] offers us some ideas and 'tactics' that he has used and seen others use 'successfully' during his long career as a politician, lawyer and ADR practitioner. Spender suggests that the following tactics might work in distributive negotiations:

- playing 'good cop, bad cop';
- deliberately keeping people waiting to put them off balance (especially in situations where there is discomfort about choice of venue);
- using a show of anger, a threat to walk out or irrational behaviour (all well-rehearsed) to address a power imbalance;
- making ambit claims.

Spender reflects that negotiation is like war and that we should expect, be ready for and use 'ambushes, skirmishes and frontal attacks … and propaganda' to 'win' the negotiation. He makes three useful observations:

1. 'The pursuit of success in negotiations can blunt our judgment about the means we should use'.
2. 'A sense of integrity helps most of us sleep at night'.
3. 'A reputation for integrity is important to a negotiator — you lose it only once'.

I know people use competitive and adversarial tactics. I am interested in my response to them and the extent to which such methods fit within my repertoire.

I also reflected on how 'success' is defined in negotiation, what is 'integrity' and what are my aspirations as to 'reputation'. Here are some of the questions that I think need to be answered before a decision as to the value of such tactics can be made.

- What is the interplay between my personal integrity and reputation and a 'successful' outcome?

Information contained in this newsletter is current as at December 2007

Editorial Panel

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- If I wish to have a reputation for being honest, trustworthy and reliable, and I want others to be confident that I will be fair and that processes will be accessible, safe and transparent (especially for the disadvantaged and less powerful), can I embrace the 'tactics' suggested by Mr Spender or should I reject them?
- Is it in the interests of my clients to get the 'best' immediate result no matter what approach I take?
- If an intervention risks my reputation is there another effective method that does not create such a risk?
- What are the risks of adversarial tactics such as being untruthful, staged walk-outs, playing good-cop bad-cop or well-rehearsed outbursts of fake irrational behaviour?
- Do interest-based methods of negotiation have an alternative to tactics used by others?

I agree with Mr Spender when he observes that negotiators justify the use of such tactics based on complex sets of dynamics and assumptions that include:

- the assumption that it is in the distributive group (those negotiations where the participants believe that they are seeking to divide between them a fixed resource) that 'the majority of the daily round of dispute negotiations' occurs;
- the belief that negotiation is like 'war' — 'dirty tactics' can be expected;
- the fear of leaving themselves open to exploitation;
- the assumption that others might not be interested in a civilised and constructive outcome;
- the assumption that where there is imbalance between 'cantankerous and conciliatory' such imbalance 'favours the competitive player in the short term';
- the assumption that reputation will not be damaged by the use of adversarial tactics or because they are only 'tactics' they do not challenge our integrity (and we can sleep well at night);
- that the known theories of negotiation (such as principled negotiation)[2] do not address concerns about distributive negotiation; and
- that principled negotiation is based on the thesis that 'human beings are rational' or that we all negotiate in a rational manner.

My practice relies heavily on principled negotiation. Can the theories and practices of principled or interest-based negotiation or mediation address these complex dynamics and deal with the assumptions identified by those who advocate a competitive approach to distributive negotiation? Or, are 'adversarial tactics' more useful and should I therefore learn better how to fake irrational behaviour?

Where people perceive that they are faced with a limited resource (such as the example given in *Getting to Yes* of one orange and two aspirants) they fear not getting a fair share. That fear is heightened by the perception that the other party is more powerful or not fair. Fear can blunt judgment. So there are good reasons for negotiators to be careful about the decisions that they make in regard to distributive negotiations.[3]

The aim of the negotiation conversation is to influence the

ADR Bulletin new ownership

From the beginning of 2008 the **ADR Bulletin** will be produced by the **Dispute Resolution Centre at Bond University**. The chairman of the Bulletin Board will be John Wade, the business manager, Cheryl Hensel, and the general editor, Laurence Boulle. There will continue to be an independent Editorial Panel. Further aspects of this new venture will be announced in the next issue. Please direct enquiries to <adrbulletin@bond.edu.au>

outcome of the negotiation. My concern is that if I equate influencing the outcome with 'winning' or doing better than the others I risk losing the opportunity to engage in joint problem-solving. I do not want to lose that opportunity when I am not sure that the assumptions I make and conclusions I draw are accurate.

To what extent are the majority of dispute negotiations distributive?

When an insurance company is in litigation with an injured plaintiff, or a partnership has broken down so irreconcilably that the receivers are called in to 'divide up' the remaining assets, or when unions and management, having resolved all other issues, are arguing over the amount of pay increment for the next agreement, it may appear that the negotiation is distributive, that is more for one is less for the other. How much of these negotiations are really only about dividing up the resource?

For the insurer and the injured person there is much at stake apart from money, including:

- the reputation of both parties for fairness and integrity (or whatever other reputation they aspire to);
- the cost of an ongoing dispute both in dollars (paid to the lawyers, witnesses and experts) and in human terms of the stress and management time of ongoing disagreement;
- a sense of justice or fairness;
- the human desire to acknowledge and minimise suffering;
- the appropriate balance between immediate needs (eg a fast settlement or quick medical treatment) as opposed to long-term aspirations for such things as wealth and security;
- the impact of any settlement on the financial capacity of both parties;
- the health of the insurance industry overall;
- precedent; and
- due process and transparency.

For the partners squabbling over the carcass of a failed business there is a shared interest in minimising the cost of the transaction (the disagreement) so as to maximise the return. Are there issues of vindication and reputation? There is a balance somewhere between getting what is fair and getting on with life. How much of the behaviour is aimed at hurting the other in retaliation for an earlier perceived injustice? While I do not do family mediation I assume that similar issues arise in those negotiations.

If there is a focus on the 'distributive' aspect of labour relations (the salary dispute) does that inhibit the ability to address the many other issues such as:

- working conditions;
- the relationships within the business between the people who work there, and relationships within and between departments and stakeholders;
- the reputation of the negotiators and the participants;
- the productivity of the business;
- the cost of the dispute in money and lost productivity;
- the risk of the short-term and long-term impacts of industrial disputes such as strikes and lock outs; and
- the message that the negotiation sends to stakeholders about 'the way we do business' in this organisation.

The challenge is to ask questions or explore other ways to find out if the negotiation is entirely distributive or if there are other issues at stake.

There are distributive pieces to almost all negotiations. My reflection leads me to conclude that issues are usually more complex than simple distribution if we delve beneath distributive positions to explore interests. And if all that is addressed is the distributive part we may be making assumptions that are damaging to relationships and the negotiations.

What are the similarities between negotiation and war?

Some people see negotiation as similar to war. They see others are out to hurt them and some worthy struggles, such as the struggle to end slavery or for fairness for indigenous peoples, could not have advanced without bitter and sometimes dangerous conflict. I wonder about the benefit in carrying on conflict indefinitely. My concern is that in carrying on the war there can be damage to a just cause. When the focus is on the war (eg Iraq), rather than on what needs to be put right, resolution may not be easily achieved, the best decisions may not be made.

As a practitioner who sees the value in peace and not war, the challenge is whether I can consistently behave in ways that minimise casualties and demonstrate to others that war may not be necessary or desirable. I would like to think that ADR practitioners can do this without endangering the opportunity for worthwhile outcomes.

My reflection caused me to remember that when I see someone waging war on me in negotiation I have choices — it is not necessary to join in, and risk injury to myself and innocents. My choices include:

- seeking understanding of the underlying emotional or other needs that have lead to hostility — trying to find ways of addressing insecurity without diminishing myself or my needs;
- avoiding the war by either giving in or running away;
- demonstrating, like Ghandi, that even when oppressed and with little or no apparent political, physical or economic power, people can be models for change — by the very act of being such a model it is possible to be a powerful and effective negotiator and influencer;
- using reason and persuasion, rational argument and debate rather than deceit or weapons to achieve my goals;
- appealing to the 'the third side' as William Ury calls it, the politics of the 'majority' that wants to avoid hostility and the impact of 'war';[4]
- seeking protection from the institutions of government such as the courts and politics to address abuse and violence — as a negotiator I have not failed if I appeal to these institutions, if such an appeal is better than the outcomes or consequences of an abusive negotiation 'tactic'; and
- going to war and taking the risks that war entails.

If one of the aspirations of dispute management professionals is to lower the risk of the negative impact of conflict, then care is warranted before there is advocacy or even acceptance that war is inevitable, even if that war is 'declared' by 'the other side'. My reflection has reminded me of the many alternatives to war!

How can we manage the fear of exploitation?

Being alert to the risk of exploitation is a necessary survival skill. What is also important is to make sound decisions as to whether any benefit we gain from an exploitative interaction exceeds the loss we suffer from being exploited or exploiting.

If the fear of exploitation is a justification for using deception, or to bully or use power to coerce, then surely exploitation becomes the norm and everyone will be searching for the biggest gun, the best lie and the most powerful weapon.

Negotiators can seek out ways of behaving that protect them from being exploited and do not support the same exploitative behaviour.

'The other party' — what if they are not interested in a constructive and civilised outcome?

It is dangerous to assume motives in others. And if every time this assumption is made it justifies not seeking constructive and civilised outcomes then I see the result like this:

- Every act of the other party is seen as destructive, confirming that they have no interest in behaving in a civilised way or seeking a civilised outcome.
- Every problem becomes distributive, where we assume motives, in so far as joint problem-solving becomes more difficult and impossible if we see the motives of others as evil.
- There is a risk that we react rather than think and plan.
- Our assumptions can give us a justification for behaving in a manner that is considered to be destructive and uncivilised in others.
- Others are justified in making the same assumptions about us.
- Everyone will be seeking a destructive and uncivilised outcome.

I am very alert to others who behave in ways that are destructive and uncivilised. I do not want to be coerced by that behaviour, to give in to it, and yet there is something inside me that does not wish to justify such behaviour by modelling it!

How often does the cantankerous and competitive party get the best results in the short term or the long term?

If the answer is 'mostly' or 'always' we should all be cantankerous and competitive!

Are there alternatives to this inevitability? I hope so, because I dislike being cantankerous and competitive. Such behaviour is tiring and carries the risk of not getting me what I want (ie if I am always competitive I must accept that sometimes I lose).

To what extent is my reputation and integrity supported by results, not the way that I get them?

This question is part of the age-old philosophical debate of whether 'the ends justify the means'.

I do not feel a need to argue about what behaviours are good or not good, fair or unfair, right or wrong.

The job of deciding what behaviour is OK in our society is that of government, legislative and judicial. I make the assumption that clients and other negotiators act lawfully until they demonstrate otherwise.

More importantly negotiators and 'dispute resolvers' can consider the impact of their behaviour on the prospect of getting what they want in the short term and in the long term the impact of the behaviour on relationships, reputation and sense of integrity.

Whenever tempted to engage in 'hard nosed' tactics or resort to a trick or deception the exercise in logic can be:

- Is what is proposed legal?
- Does it have a risk that it will hurt others — innocents or enemies?
- To what extent will using this tactic enhance my chances of meeting my own or my clients' interests?
- How will using this tactic risk the chances of meeting interests?
- What other impacts might using this tactics have on considerations such as:
  - — reputation, integrity;
  - — ability to sleep at night;
  - — health and happiness;

— present and future relationships;
— the relationships between others;
— the sovereignty, rights, interests and dignity of others;
— the integrity of dispute resolution processes that deserve support?

In the end there is an ethical AND practical issue to decide. How those decisions are made is personal.

What I want for my own practice is a better ability to ask and answer these questions, not a ready-made answer that I bring out whenever there appears to be a particular environment, for example when I feel less powerful or others are rude or dishonest.

To assume that any means is justified by a good result seems dangerous and perhaps irresponsible.

How well do interest-based negotiation tools address distributive dispute negotiations? Is there a need to look to other methods?

No theory of negotiation answers the call of those who want the answer to, 'What do I do if the other person — because of power, stubbornness, pigheadedness, nastiness, stupidity, irrationality or for some other reason — will not move or offer me what I want or need from this negotiation?' Only coercive power can address that problem.

Why? Because no one can guarantee that people will behave in ways considered as rational. Fisher and Ury do not argue that everyone will behave rationally, nor do they say that in *Getting to Yes*.

Negotiation is not about finding a guaranteed way of getting what we want from others. It is about how we can best behave to meet our interests and to give us a better result than the alternative of not negotiating or rejecting the final offer made by the other party.

I accept that collaborative problem-solving does not always come up with a solution that is better than the BATNA (say going to court). Does that mean that we should not try? And because the 'other party' is difficult or even dishonest, does that prevent us from seeking out truly inventive solutions to the negotiation issue? To me it makes sense to first try before we resort to behaviours that may cause damage.

Negotiation is not about finding a guaranteed way of getting what we want from others. It is about how we can best behave to meet our interests and to give us a better result than the alternative of not negotiating or rejecting the final offer made by the other party.

So what does principled negotiation, or interest-based dispute resolution, offer to protect negotiators from competitive others and allow the exploration of innovative solutions, even when addressing a distributive negotiation? Here is how I see what principled negotiation offers, even when there is just one piece of pie to share:

- Decision-making comes at the end of the process. Only when we have decided what is the best possible outcome that the negotiation can offer do we need to decide if we say 'yes' to the offer.
- If an offer is refused it is refused in the knowledge that the BATNA is better than the proposal. If a negotiator is truly well-prepared, clearly understands their BATNA, can accurately compare its value to the best proposal in the negotiation, it matters not one bit that the other party has more power, money or how they behave. The negotiator will not accept any proposal if it is worse than the BATNA. This takes away the pressure to 'do a deal' and allows us to focus on the communication needed to get a good deal without the worry of what it will be!
- Proposals are evaluated against objective measures, standards or benchmarks (an important area of preparation) and those same objective measures can be used in the negotiation to be persuasive.
- An honest understanding of my interests (as opposed to a focus on my stated position) makes sure that I know what I really want. Understanding the interests of others is an essential tool to influence, even if in the negotiation those interests are not able to be met or even if they may not be legitimate.
- When the last four points are understood there is the prospect of engaging in option generation through brainstorming or collaborative problem-solving, even with our enemies, because there is no fear of doing a bad deal.
- There is a place in the negotiation to address issues of relationship. Relationship is not mixed up with the substantive issue being discussed. There is no need to give in to bullying tactics or even inappropriate use of power. Neither is there a need to do bad deals with our friends to maintain a relationship.
- In freeing up the decision-making process there is the opportunity to explore and apply the very best communication methods. Here is the promise of interest-based approaches. If we can free negotiators from the fear of doing a bad deal (use of BATNA, Interests and Objective Criteria) then the possibility is that we can use communication tools that lead to the options for gain, and maintain good relationships. In this way the communication skill overrides negotiation practice.

I recall watching a most skilled (and successful) negotiator do just this when faced with a negotiation relating to the compulsory acquisition of her home. She had every right to feel 'aggrieved'

and the negotiators sent by the government to talk to her used every intimidating tactic you can imagine (including being rude, patronising, walking out, banging the table and making an offer expressed as 'not negotiable' that was 30 per cent below the market value of her home). What did she do? She did not yell back or feign an emotional outburst. She looked at her BATNA. The court process for compulsory acquisition was long and perhaps expensive but she was advised that her costs would probably be paid by the government. She did her research on market value and had the assistance of valuers, all of this information she gave to the other negotiators with good grace and a request that they advise if any of the data was inaccurate or not relevant.

Did this negotiator threaten, yell, bully or cry to get what she wanted? No. She was respectful, polite and interested to hear why the government thought her home was worth 30 per cent less than the others in the street. They could not give a reason so she said she would not accept the offer. She did say that she was willing to discuss a fair price based on valuations that were accurate and current. In the meantime she suggested that both parties took the risk of changes in the market and litigation costs if the government wanted to go that way.

My colleague kept open the lines of communication and tried to understand the operating environment of the acquiring authority. And then they came back to the table, interestingly with a new valuation that was very close to that obtained by my colleague. The negotiations were concluded with a hand shake and no one lost face.

If communication is so important to the negotiation process I wonder for myself if I want or need to communicate in ways that are deceptive, aggressive, submissive, soft or hard. The promise is that I can communicate in ways that are authentic and still do a good deal! The challenge is to do it and not be distracted by the behaviour of others, or let my own discomfort lead me from this goal.

My experience is that the use of strongarm tactics is often a smokescreen for a lack of credibility and legitimacy.

And if communication skills do not lead to a negotiated outcome that I can live with, I can resort to my BATNA, be that war, litigation or worse.

The outcome of my reflection then is not to reject competitive or adversarial tactics but to make sure that if I use them I know the consequences and that their use does not exclude the possibilities of other positive methods of negotiation and dispute resolution. ●

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Endnotes

1. See Spender J QC 'Negotiations: hard and soft and the value a mediator can add' (2006) 9(1) ADR 14; Kay Lauchland 'Secrets, half truths and deceit in mediation and negotiation — Lawyers beware!' (2007) 9(6) ADR 101 and Avnita Lakhani 'The truth about lying as a negotiation tactic: Where business ethics and law collide … or do they?' (2006) 9(1) ADR 14.

2. (2006) 9(1) ADR 14.

3. The most consistent criticisms of *Getting to Yes* are:

(1) It assumes the other parties to negotiation are rational, willing to engage in interest-based negotiations, are of equal power and will not use 'dirty tricks'. These issues are addressed specifically in Chapters 6 to 8 and in the second edition in the 'Ten questions people ask', Questions 4 to 6.

(2) It does not address the distributive part of the negotiation. Chapter 5, which deals with Objective Criteria, addresses this issue in some detail.

4. Ury W *Must we fight?* (2002) Jossey Bass.