

Negotiating With a Road Map

The Importance of Understanding How the Other Side Thinks

by Douglas J. Witten

A surprising number of parties maintain, at some point in the mediation process, that they have their minds made up and don't care what the other side thinks. Quite the contrary, making an effort to understand how the other side approaches an issue is an important step in productive negotiations. This is true whether negotiating with a 4-year-old or mediating to settle a lawsuit for thousands (or millions) of dollars.

The Best Negotiators are Often the Smallest Ones

My wife Holly and I recently undertook the daunting task of hosting our niece and nephew—7 and 4 years old, respectively—for an overnight sleepover. We love these kids as if they were our own, and they are always fun to have around. Frankly, though, the 4-year-old boy, Max, can be a handful. He's already smarter than we are, and he negotiates better than any of the lawyers or other parties I usually face in the mediation setting.¹

Our sleepover with Max and his older sister, Hannah, took place last Halloween weekend. On Sunday morning, after the kids woke us up at the ungodly hour of 6:30 a.m., Holly and I decided to take the gang for brunch. Upon prying ourselves out of bed, we realized that the earlier we got to the restaurant, the earlier the kids would be occupied, as we found ourselves encircled by two children wildly running around our house, barefoot and in varying stages of pajama-undress. Much delay would mean facing a large brunch crowd, too.

Holly and I started to get dressed and urged the kids to follow suit.

"Okay, guys, are you ready for brunch? Let's get going, okay? The sooner you get dressed, the sooner you can eat pancakes," I pleaded from outside their bedroom.

"I don't like pancakes," Hannah pointed out. "I want toast."

"You can have toast."

"Unless the pancakes have syrup on them," Hannah added.

"You can have pancakes with syrup *or* toast, whichever you want. You just have to get dressed."

"Okay, I'll get dressed," Hannah said. "But Max has to get dressed, too, and right now he's jumping on the bed in his underwear."

At that point, I knew the challenge was on. I, the mediator, prepared to face Max.

Max was, indeed, jumping on the bed in his underwear, laughing and smiling mischievously as he

bounced up and down. I could tell by the look in his eye that he was going to be a tough customer.

"Come on, now. Don't you want to go eat? You have to get dressed if you want something to eat. We're all hungry, and we need you to help us out."

I figured that Max would understand that he was part of our "team," we were counting on his cooperation, and therefore he would be motivated to work with us. I knew he was hungry, and I assumed the hunger would prod him to listen to reason and take the necessary steps (*i.e.*, get dressed) to allow our group to eat.

I was wrong.

Max resisted my begging and pleading, which continued shamelessly for a few minutes, and he showed no signs of giving in. Therefore, I left Max in Hannah's hands, went back to huddle with Holly in our bedroom, and proceeded to get dressed.

"Max's not putting his clothes on," Hannah yelled from the kids' room. "He's still in his underwear, and now he's bothering me. Please get him away! And I'm hungry."

"Max, we're all getting ready, and we're going to have to leave you if you don't get your clothes on in a hurry. You can stay here, fix yourself some coffee and make yourself some French toast. We'll show you where the eggs, milk and bread are. Fine with me, pal."

After a roll of the eyes and a hint of a smile, Holly said quietly in my ear, "I love you, but I don't think this reverse psychology bit is working. Are you sure you're a mediator?"

"I have an idea," she whispered to me before raising her voice for the kids to hear.

"Max, I'm coming in!" Holly continued from the kids' room. "*Do you want to wear your clown wig today?*"

Max's new Halloween costume included a rainbow-colored clown wig and a red plastic, stick-on nose. He was very excited about wearing his wig, and Holly knew that the



mere mention of it would get Max's attention.

"Yeah!" he screamed. "I want to wear my wig! And you don't want me to wear it, right?" he asked, almost instinctively. Max's eyes lit up wide like saucers, twinkling with anticipation and refocused energy.

"Oh, you can wear it," Holly replied, "but only if you and Hannah are dressed before the adults are. And I don't think you can beat us!"

"Yes we can! YES we can!" Max and Hannah screeched excitedly and in unison.

From our bedroom, Holly and I listened intently to the rustling sounds of two kids dressing as quickly as possible. Hannah shouted encouraging words to Max in an effort to move him along, and it sounded like she even helped him dress. They worked as a team, in an amazing turn of events.

Lo and behold, Hannah and Max were dressed before we adults were. Holly claims that we let them win, but I maintain that I was trying to get ready quickly and that my best wasn't good enough.

"Pure genius," I whispered to Holly on our way to the car, Hannah and Max scampering ahead of us, Max proudly donning his clown wig.

To Satisfy the Other Side's Needs is First To Understand Them

This simple anecdote about Hannah and Max makes some critical points about productive negotiating.

First, Holly and I were successful in our negotiations with Max because we were able to *understand how the other side thinks*. More precisely, Holly was able to understand how Max thinks and corrected my misguided approach to negotiating with a precocious 4 year old.

Only with an understanding that wearing his clown wig to brunch was the most valuable commodity in play were we able to motivate

Max in a way that we would not have otherwise been able. Was Max hungry? Yes, but satisfying his hunger was clearly not his primary goal. Igniting a "competition" between the kids and the adults created additional motivation for both Max and Hannah but, again, this was not the negotiation's driving force.

Only a 4 year old would find value in having the ability to wear a novelty wig out to eat, and that is precisely why offering it as part of a negotiating strategy was such a wonderful touch. Our negotiations resulted in what is typically described as a "win-win" outcome, since both sides wound up winners; those who were hungry got to eat in a timely manner, and those who like attention and acting silly got to wear a clown wig to brunch.

Another key to our negotiation's success is a deceptively simple, yet critical, point about effective negotiation strategy: whenever possible, offer a concession that has high value to the other side but low value to the offering party. The corollary to this point is that the true value of a negotiation concession is placed upon it by the receiving party, which will not necessarily be equal to the value assessed by the offeror.

In this case, offering Max the ability to wear his clown wig had low value to us, but Max highly valued that privilege.² Therefore, we were able to "give up" something that cost us nothing—since we didn't mind Max's wearing his wig to brunch—and that was a true victory in his mind. In such a case, the negotiation result is a proverbial "win-win" that satisfies both sides.³

It may be helpful to note other simple illustrations of how an understanding of the other side's thinking can produce successful negotiations.⁴ For example, two children are around the dinner table fighting over a single potato. The children's parent hears the argument and, in Solomon-esque

fashion, decides to solve the dispute by splitting the potato down the middle and giving half to each child. The end result in the parent's mind: equal division, neither side completely happy or unhappy, producing a "fair" outcome.

As the example goes, the parent, upon subsequently learning of the children's true desires, finds that the "fair" result was not the optimum result. This is so because one child wanted to eat only the potato skin and the other wanted to eat only the potato's inside. Therefore, had the parent simply peeled the potato and given the skin to the one child and the remaining potato to the other, each child would have received exactly what he or she wanted. Because the parent did not understand the children's true desires before determining the solution, all involved lost the opportunity to reach a "win-win" result.

Recently, while dining out at a Chinese restaurant with my brother and his wife, I witnessed another simple situation in which separate preferences can create opportunities for successful "negotiation." My brother's favorite dish, cashew chicken, comes with onions and bean sprouts, neither of which he likes. My sister-in-law's favorite dish, beef with Chinese vegetables, comes with water chestnuts and carrots, neither of which she likes.

Instead of each special ordering their meals without certain ingredients, my brother and his wife order the dishes as prepared and give the unwanted ingredients to the other person. For them, this works out perfectly: my brother enjoys the otherwise unwanted water chestnuts and carrots, and my sister-in-law loves the onions and bean sprouts that my brother despises. Again, this is an example of a "win-win" situation for the group as a whole, as each person gets what he or she likes and the collective group maximizes their result.⁵ A down-the-middle split of these dishes certainly wouldn't work in this instance because, in addition to

the preferences and aversions described above, my brother doesn't like the beef of his wife's dish and she doesn't like the broccoli and peppers in his. Therefore, by selectively sharing in the described manner, neither gives up anything desired and each gains something liked.

Surely, we can all think of instances in our lives in which we arrive at successfully negotiated results that derive from our individual preferences. If we are unaware of what things others involved value highly and what things they consider low-value, *how they think* and what motivates them, how can we arrive at successfully negotiated results? How would a waitress at the Chinese restaurant have efficiently divvied up two dishes, as my brother and sister-in-law were able to, without knowing each person's unique preferences? How would we have motivated our nephew to get dressed without appreciating that he places a higher value on wearing a clown's wig than avoiding a restaurant's brunch crowd?

For the same reasons that understanding how and what the other side thinks allows for successful negotiations in the above illustrations, such an understanding can likewise lead to successful results in mediation and more formal negotiation settings.

Understanding the Other Side in More Formal Negotiation Settings: A Workers' Compensation Case Study

Understanding how and what the other side is thinking can often help savvy parties negotiate settlements in personal injury cases. A wise negotiator realizes that effective negotiation strategy is based upon an appreciation of—and even empathy towards—the other side's position. Such an understanding

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does not require a party to abandon its own position but rather allows the party to be conscious of what is driving a negotiation and best determine how to craft a mutually beneficial settlement.

Suppose an insurance company is negotiating with a workers' compensation claimant and the company representative is involved in mediation with the claimant and claimant's counsel. At the group negotiation session that convenes the formal mediation process, the claimant demands a lump-sum settlement of \$125,000, and the insurance company's initial settlement offer is \$15,000. After discussing their preliminary positions and respective views of the case, the parties adjourn to separate rooms to further the mediation process.

In a caucus, or private session with the mediator, after making significant strides towards settlement and near the end of the mediation, the insurance company representative explains the precise calculation that leads the company to conclude that between \$45,000 and \$55,000 would be a reasonable settlement range: (i) the future stream of weekly income benefits the insurance company would owe the claimant over the life of his claim, reduced to present value; plus (ii) the value of the permanent partial disability rating a doctor has assigned the claimant for his back injury; plus (iii) a reasonable estimate of future medical cost, totals between \$45,000-\$55,000.

Upon returning to the claimant's private caucus, the mediator learns that the employee's view of a reasonable value of his claim is based upon entirely different calculations. In this case, the claimant explains that what he really wants from the negotiation is: (i) \$5,000 for estimated future medical bills; (ii) \$20,000 to buy a new Toyota truck; and, most importantly, (iii) \$30,000—\$5,000 of which he needs by the end of the month in order to avoid having to file for bankruptcy—to pay off a mountain

of personal debt he has incurred since sustaining his job-related injury. Therefore, the claimant indicates that he would accept \$55,000 as a reasonable value to settle his claim, provided that he could get \$5,000 of that amount on an expedited basis.

With the skillful assistance of the mediator, the parties are eventually able to settle the claim for \$50,000, including provision for the insurance company to advance the claimant \$5,000 of those funds within a week of the settlement agreement. Upon learning, through the mediator and with permission of the other side, what the claimant's true interests were, the insurance company representative was able to offer assistance regarding the injured party's underlying needs. The insurance rep's brother-in-law owns a car dealership, we come to learn, and he sells certified, low-mileage used cars and trucks. A quick personal phone call confirms that the claimant can buy a certified, used Toyota truck for around \$15,000.

In this way, by settling the claim for \$50,000 (with \$5,000 advance payment), each party gets what it needs: (i) the claimant gets enough money to cover his medical bills, truck payment, and personal debts, thereby avoiding bankruptcy, and (ii) the insurance company pays less than the maximum of what they would have been willing to pay based upon their internal calculations, and advancing \$5,000 is not particularly costly. Even the insurance company representative's brother-in-law makes money on the transaction despite giving the claimant a fair price on the certified truck.

Therefore, both sides to the mediation are able to win through the negotiation process. Note, however, that each party arrived at its numbers in completely different ways and each party was influenced by very distinct preferences and desires. They wanted and needed vastly different things, yet through the magic of negotia-

tion—and by understanding the other's thinking and needs—the parties arrived at a mediated compromise.

Understanding as a Road Map To Negotiation Success

Of course, it is quite possible for parties to reach a negotiated agreement without a mutual appreciation of concerns. The number of parties who insist that they don't care what the other side thinks continually surprises me. Sometimes, these parties are even able to bully their way towards agreements. The odds of success are much greater, however, when two parties take the time and effort to gain a better understanding of the other side's true needs, motivations and desires. It is only with such an understanding that negotiating parties can arrive at uniquely creative solutions that could not have been achieved in a one-sided, non-collaborative manner.

Making an effort to understand how the other side approaches an issue is a crucial step towards productive negotiation and mediation sessions. Most people seem to appreciate that "there are two sides to every coin," but they do not always recognize that, when dealing with human beings, the proverbial "other side" is multi-dimensional. A failure to delve deeper into the mind of the opposing side will often lead to a failed negotiation.

Thus, to negotiate without caring what the other side thinks—much less truly understanding the other side's views and motivations—is like taking a trip without a road map. Although you might reach your destination without it, having a clear picture of how to reach your endpoint greatly enhances your odds of getting there successfully. At times, one party will be able to impose its will on another and practically force the other party to "agree" to the mandated terms, typically as a result of the one party having significantly

greater bargaining power than the other. However, successful agreements will most often result when each party has negotiated to satisfy, at least to some extent, its respective needs and interests.

Sometimes, to your amazement, success might just be as simple as letting the other party wear his clown wig to brunch. ^(CB)



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Endnotes

1. Holly would add that Max is as cute as a button but I, the professional mediator, refuse to let that color my judgment when it comes to negotiation.
2. Recall that, when faced with the possibility of gaining permission to don his wig, Max immediately sought confirmation that we didn't want him to wear it. Max questioned us to make sure that we were prepared to give up something valuable and, in fact, the value he allocated to gaining our permission was directly proportional to our opposition to the wig. We, of course, nimbly dodged his line of questioning, so Max naturally assumed that any reasonable person would highly value the wig-wearing privilege.
3. For simplicity's sake, I'm speaking here of a two-party negotiation, the two parties being (1) Max and (2) the rest of our group. Of course, Holly's and my interests are always perfectly aligned, and because Hannah's interests were not exactly equal

to Max's or the adults, she could conceivably be considered a third party in our illustrative example. Suffice it to say, however, that between "winning" and being ready before the adults, witnessing the spectacle of Max wearing a clown wig in a restaurant, and getting to eat brunch, Hannah was a satisfied party to our negotiations, and the two-party model here does not separately address her interests.

4. See, e.g., Herb Cohen, *You Can Negotiate Anything* 198-99 (Bantam Books 1982) (1980).
5. Of course, it would have been simple enough for my brother and his wife each to order a dish without the unwanted ingredients. In that case, however, there are potential and actual downsides, such as: (1) neither would have the benefit of enjoying the other's unwanted items; (2) a dish could take longer to prepare if specially ordered; and (3) a dish's overall composition and balance could be compromised with ingredients omitted.



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