

Negotiations Goes to War

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Battle, n. A method of untying with the teeth a political knot that would not yield to the tongue.

- Ambrose Bierce, *The Devil's Dictionary* (1911)¹

In the wake of September 11th, Attorney General John Ashcroft, in a graduation address at the University of Missouri Columbia School of Law, said

Our system of justice balances contention with consensus because, in the marketplace of justice, a monopoly on litigation serves to alienate the people from the law – and distances the legal profession from those it serves. As a young lawyer, Abraham Lincoln encouraged his colleagues to seek compromise whenever possible. “As a peacemaker, the lawyer has a superior opportunity to be a good man,” said Lincoln. “There will be business enough.”²

For judge advocates (JAGs) to focus exclusively on litigation skills is akin to shooting first and asking questions later. To attorneys

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in the modern day coliseum who enjoy the heat of battle, the word “negotiation” conjures up visions of granola eating, tie-dye clad, Birkenstock wearing beatniks romping through daisy filled fields singing “kum-bay-ya.” Or worse, the word “negotiation” implies weakness – that you will have to “give in” or you have a “dog” for a case. Contrary to popular belief, negotiations skills are indispensable to us as Air Force attorneys, even in areas where you would not normally think to use them.

We know negotiations can resolve contract disputes and labor problems, and in the Air Force, these skills have been used with much success.³ However, we need to consider where attorneys can utilize negotiation skills in other areas of our practice – for example, as a deployed SJA. Everyone agrees JAGs in these billets need to be well versed in the substantive areas of the law: fiscal law, military justice, claims, the law of armed conflict, but they also need to know how to effectively interact in their environment with a variety of key players: the deployed commanders, community leaders, MAJCOM and NAF lawyers, host-nation representatives, sister service members and members of multi-national forces. One might think that any environment involving military forces would be marked by a well-defined chain of command outlining clear lines of authority. In the classic military situation, there is no “negotiation;” rather, it is merely a matter of obedience to orders.

The reality, however, can be quite different. As already indicated, in many of today’s operational situations military commanders are obliged to interact with entities over whom they exercise no legal authority. There are other players, such as allies or coalition partners over whom they may conceptually exercise authority, but with whom practical experience dictates the wisdom of a more reciprocal arrangement. Finally, there are internal audiences – to include sister services – with whom productive professional interaction is often marked by collaborative approaches. In each instance, obtaining the right end state frequently requires persuasion of the parties. Thus, JAGs can be the most valuable members of a commander’s staff because we are professionally trained in persuasion, but we can be even more valuable if we are also professionally trained in negotiation. Accordingly, negotiations skills should be a part of every JAG’s “toolkit.”

The Process

When most JAGs think of “negotiation,” what they’re probably thinking of is distributive bargaining. Distributive bargaining is what happens when the parties believe there is a “fixed pie” to divide. More for one means less for the other. The hallmark of the distributive negotiator is positional bargaining. A particular solution or position is established and argued for throughout the negotiation. To ensure the position is satisfied, the negotiator takes an extreme stance and makes few concessions. In a two-party negotiation where both are positional bargainers, the negotiation itself resembles a dance. One starts high, the other starts low and they both move back and forth towards the middle...a negotiation dance.

Interest-based negotiation on the other hand assumes mutual gain is possible. Instead of focusing on positions, the parties focus on interests. The difference between the two types of negotiation is illustrated by a story about two sisters and an orange.⁴ Each sister insisted on having all of the only orange. After some discussion, they agreed to split the orange down the middle and each take half; a distributive bargaining result. One sister took her half, threw away the fruit and used the peel to bake a cake. The other sister used her half to make juice, throwing away the peel. Had the sisters used an interest-based approach, they would have arrived at a much different result leaving them each better off.

There are seven elements in the interest-based approach to negotiating: interests, options, alternatives, relationship, communication, standards and commitment. Each of these elements is discussed in more detail below and illustrated with a real world example.

Interests. Focusing on positions in a negotiation stifles creativity. Focusing on interests builds toward expanding the resource “pie.” Positions are solutions to a problem and require justification. They are one way to satisfy interests. Interests are reasons for underlying positions or why a particular solution (or position) is preferred. As Roger Fisher and William Ury in their seminal book on this process, *Getting to Yes*, say “interests motivate people; they are the silent movers behind the hubbub of positions.”⁵ Even when positions are opposed, the interests behind those positions may reveal more common

ground between the parties than may first seem apparent.

When considering interests, Fisher and Ury stress that negotiators must remember that basic human needs like security, recognition and self-worth, motivate all people. They contend that “if you take care of such basic needs, you increase the chance of reaching an agreement and, if an agreement is reached, of the other side’s keeping to it.”⁶ In the book *Thirteen Days*, Robert Kennedy says of the Cuban missile crisis, “I believe the course that we ultimately would have taken would have been quite different and filled with far greater risks. The fact that we were able to talk, debate, argue, disagree, and then debate some more was essential in choosing our ultimate course.”⁷ He refers to the discussions that occurred between the members of the “Ex Comm,”⁸ but that statement applies with equal force to the session he had with Soviet Ambassador Anatoly Dobrynin on the eve of military action between the United States and the Soviet Union. At that meeting, the Soviet ambassador raised the question of removing U.S. missiles from Turkey, ostensibly in exchange for the Soviet removal of missiles from Cuba. The attorney general responded:

There could be no quid pro quo or any arrangement made under this kind of threat or pressure, and that in the last analysis this was a decision that would have to be made by NATO. However, I said, President Kennedy had been anxious to remove those missiles from Turkey and Italy for a long period of time. He had ordered their removal some time ago, and it was our judgment that, within a short time after this crisis was over, those missiles would be gone.⁹

The next day, Khrushchev agreed to dismantle and withdraw the missiles in Cuba. This example illustrates how “saving face” can be one of the basic human needs Fisher and Ury highlight. It was politically important for Khrushchev at the time to be able to show other members of his government that he “got something” in return for removing the missiles from Cuba.

Obviously, you need to understand your own interests, but to reach an agreement, you must also consider the interests of the other

party. One way to do this is to ask yourself “if I were in their shoes, what would I care about?” For every position they take, ask “why?” If you suggest an option and they dismiss it, ask “why won’t that work?”¹⁰ The answers to these questions reveal interests that underlie positions.

To illustrate, during Operation Provide Relief (the airlift of food and medical supplies into Somalia during the famine and discord of the early 1990s), an allied air force joined the effort. The allied commander made repeated requests for an agreement with the U.S. commander putting his aircraft under U.S. control. However, U.S. law and regulation did not allow the American commander to enter into such agreements.¹¹ In the discussions that followed, it became apparent that the ally, who was conducting its first out-of-country military operation since World War II, wanted to assure domestic and international audiences that it was acting not unilaterally but rather in complete cooperation with an established U.S. humanitarian enterprise. Once the real interest was understood, a solution was achieved by simply arranging for a much-reported “photo op” featuring the U.S. and allied staffs.

Once you understand the interests, you need to prioritize them — yours and theirs. This is important for two reasons. First, it will help achieve the optimal result.¹² Second, prioritizing interests helps brainstorm and evaluate options, the next element.

Options. Options are ways to resolve a dispute. *Creative* options satisfy mutual interests and make up the expanded “pie.” Once you know the parties’ interests and priorities, you can brainstorm options. It’s important to separate the act of inventing options from the act of deciding between them.¹³ Get the options on the table and then identify which best satisfy the parties’ interests. Look for ways to create value. For instance, anything you value highly and which the other party does not, presents an opportunity to create value. Other value creating opportunities involve differences in risk aversion, time preferences and resources. Can one party bear more risk than the other? Are there different assets to trade? Do you have different needs concerning when things happen?¹⁴

Creative options were used with much success during a deployment to a major base in the Middle East in support of Joint Task Force Southwest Asia (JTF-SWA). The problem arose because U.S. law limited the funding of the construction of a dining hall facility such

that a new parking lot could not be part of the project. After exploring many possibilities, the U.S. team realized that allies used the facility, and that the parking lot would benefit all concerned. Once this was brought to the attention of coalition partners, they offered to build the parking lot as a cooperative endeavor. There was not actually a formal, negotiated international agreement reached with the coalition partners, as there was a realization that such would require complicated arrangements and approvals of their respective governments. Instead, the option that emerged was something within the authority of the respective groups. In this instance, the allied forces came to their own conclusion that the construction of the parking lot was in their best interest (given the dust-suppression qualities, it wasn't surprising!), and actually less costly than building facilities for each force.

Alternatives. Options are contrasted with alternatives. Since not every negotiation ends in an agreement, you need to think about alternatives. Whereas options require both parties to agree, alternatives are actions one party can take alone, or at least without the involvement of the party now sitting on the other side. In a legal dispute, one alternative available to both parties is usually to file a lawsuit. Whether that is the best alternative, is another story. When approaching a negotiation, you need to know your *best* alternative to a negotiated agreement, commonly referred to as BATNA. What is the most beneficial thing you can do for yourself if you can't reach an agreement? What are the negative consequences from walking away from the table? Knowing your BATNA allows you to determine whether the outcome of your negotiation is a success. If the deal isn't better than your BATNA, then you should walk away. If you haven't thought about your BATNA ahead of time, you won't know whether you should stay at the table or walk. Likewise, you should consider what the other side will do if an agreement can't be reached. If you don't consider the other side's BATNA, you won't have any idea of when they will stay at the table.

In the example above, not building a parking area was one alternative. Another would have been to relocate the dining hall to another facility that already had a paved lot.

Relationship. One of the most common mistakes in a negotiation is not "separating the people from the problem."¹⁵ During the negotiation, you need to sever your personal feelings about the person on the other side of the table from the problem you are trying to solve.

Consider what your relationship is now and what you want it to be in the future. Even in negotiations where you may be inclined to dismiss this element, don't give in to this temptation. For example, we have all probably at one time bought a car. Of course, a car dealer isn't the most sympathetic party and when you're in the process of dealing with a salesperson, you may be tempted to tell them to take a long walk off a short pier. But what if you need your car serviced and they are the only place in town that works on the type of car you own? If you weren't concerned about the nature of the relationship when you bought the car, you may be later.

Consider that judge advocates are often tasked with serving as the liaison with host nation officials. It is quite possible that the customs and culture of certain nations are not only inconsistent with those of the U.S., but offensive to American sensibilities. Nevertheless, judge advocates must work through these issues, finding common ground and demonstrating respect when possible and appropriate. Educating yourself in advance about the host nation and its history and mores is vital. The bottom-line is to avoid being distracted from your negotiating goal; remember, it's not about you.

Communication. Communication is the "mother" of negotiation. You need to be aware of how the type of communication you are using can impact the process (e.g., e-mail, letter, face-to-face). Good communication reduces misunderstandings and makes the process more efficient. Efficiency is particularly important in a deployed setting where short timelines mean you can't resort to "traditional" dispute resolution systems. Good negotiators listen actively and acknowledge what the other side is saying. If there are cultural differences between the parties, the good negotiator researches the other party's culture to learn things that are important to communication in that culture.

Consider this example, during an exercise in the Middle East an issue involving the Ottawa Convention¹⁶ arose with a major ally. The Ottawa Convention contains various prohibitions involving the use of anti-personnel mines. The U.S. is not a party to this treaty, and continues to employ munitions that contain them. The allied commander represented a nation that had ratified the convention and thus believed he was precluded completely from participating with U.S. forces if such weapons' system was used.

Effective communication was the solution. With the help of the allied nation's deployed judge advocate, an Air Force lawyer located the text of the allied nation's implementing legislation via a web search. The statutory language revealed the circumstances under which the allied nation's forces could provide limited, indirect support to non-party nations such as the U.S. This information was furnished to the allied commander via his own judge advocate. This underlines the importance of not just what is communicated, but how.

Standards. This is also called "legitimacy" or "objective criteria." These are things independent of the parties or external to the negotiation used to evaluate options. What method can you and the other party use to judge the fairness of your deal? Industry standards? Precedent? Policy? A contract? The law? *Kelly's Blue Book*? Standards are important because they give the parties a way to evaluate options to determine whether the proposed agreement is a "good deal." Standards are especially important when trust between the parties is shaky, or one or both sides need to show to a third party that the deal is "fair" or "reasonable."

In deployed situations, the "standards" may often be treaties and other international agreements. What is surprising to many JAGs in deployed situations is to learn that some host nation officials and even coalition partners may not, at the proverbial "worker bee" level, be aware of what agreements their countries have made with the U.S., or what treaties their nation has ratified.

Another aspect of this issue in the deployed environment relates to the limitations of U.S. law.¹⁷ Many – if not most – countries do not have, for example, the same kinds of restrictions in the fiscal law arena as does the U.S. Thus, the legal difficulties faced by U.S. commanders in providing logistical support, loaning equipment, constructing or repairing facilities, etc., often is not well understood. The perceived failure to provide such support might be misinterpreted. Accordingly, it may be useful to provide your counterpart with copies of the law or policy which sets the parameters.

Commitment. The last element is closing the deal – commitment. How will the agreement be implemented? Do the parties at the table have the authority to do the deal? How are you going to memorialize your agreement? A contract? A handshake? Who is going to do

what? It is vitally important to the longevity of your agreement that everyone is clear on what they are going to do and when. Failure to do so can result in another trip to the negotiating table, or worse, a trip to the courthouse.

Once again it is important to consider culture when dealing with international counterparts. For some, a handshake may be all that is needed; others expect and require a formal document, as would be the norm in most Western countries. That said, one impact of globalization is that even in areas which traditionally did not rely upon formal documents, there is a greater realization that such is the expected international norm. Obviously, in many instances there may be a language challenges, so be sure that everyone has the right understanding.

Now that you have an understanding of the process,¹⁸ how do these skills translate into a deployed setting? First, appreciate that Status of Forces Agreements, regulations, etc. may simply be starting points for discussion. Second, understand the official and unofficial ground rules of your environment. Third, there is no substitute for substantive knowledge – preparation is vital. Fourth, there is no replacement for a “target study” of your counterpart in dispute resolution. Fifth, build relationships before the crisis. Sixth, accept that someone else may have a better idea. And finally, it’s usually best not to celebrate a “victory.”

You must prepare, prepare, prepare. Litigators would never dream (we hope) of walking into a courtroom unprepared. The same holds true for negotiators. The seven elements should be evaluated prior to your negotiation not only from your own perspective, but also from the other side’s point of view. Practice, practice, practice. This is a skill. Your effectiveness increases the more you use it. Use it at home, when you buy your next car, or even the next time you talk about a pre-trial agreement.

Conclusion

Now, if you still think these skills are for non-gladiators or the weak of heart, consider this: even one of Attila the Hun’s alleged “leadership secrets” was the “art of negotiation.” He reportedly said “it is never wise to gain by battle what may be gained through bloodless

negotiations.”¹⁹ In this regard, he had several “pointers”:

- Never trust negotiation to luck. Enter every session with knowledge of the enemy’s strengths and weaknesses;
- Time is your ally when you’re negotiating. It calms temperaments and gives rise to less spirited perspectives;
- Never arbitrate. Arbitration allows a third party to determine your destiny;
- Never make negotiations difficult on immediate, lesser points, at the cost of a greater outcome. Acquiescence on lesser issues softens the spirit of your adversary;
- In negotiation you must take well-studied risks. Try to foresee all possible outcomes to determine those that will yield favorable results;
- Honor all commitments you make during negotiations lest your enemy fail to trust your word in the future;
- Be bold in facing the inevitable. Acquiesce when resistance would be pointless or when your victory can be gained only at too high a cost. Of this you may not approve, but it is your duty to do so for the good of all Huns;
- Be keenly aware of time. Present appealing alternatives that are appropriate to your opponent’s situation at the moment of your negotiations. Otherwise, he will dismiss your propositions.²⁰

In fact, there are striking similarities between these pointers and the approach we have discussed here. But, don’t just take it from us. Attorneys in the trenches also recommend conflict resolution training for those deploying to parts unknown. In one after action report from a recent deployment, a perceptive deployed Staff Judge Advocate, said this:

Because I was somewhat “above the fray” when it came to balancing competing interests, and because personnel turned over so quickly, I often found myself acting as a

mediator. In a similar vein, because commanders and agency chiefs come from a broad range of backgrounds (different MAJCOMs, different airframes, active-duty versus AFRES versus ANG), issues sometimes became stalled because of uncertainty or a lack of familiarity. As a judge advocate, I could sometimes break a logjam by providing a “working text” or at least a neutral viewpoint from which parties could build.²¹

We couldn’t have said it better ourselves.

Notes

¹ AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 15 (1999).

² Attorney General John Ashcroft, Commencement Address for The University of Missouri Columbia School of Law (May 18, 2002) (transcript available at www.usdoj.gov/ag/speeches/2002/051802commencement_columbia.htm) (visited May 29, 2002).

³ In response to federal legislation and executive orders, the Secretary of the Air Force implemented AIR FORCE POLICY DIRECTIVE 51-12, *Alternative Dispute Resolution* to “promote voluntary informal and consensual dispute resolution, promote creative, efficient, and sensible outcomes in dispute resolution and reduce the tangible and intangible costs, in time and resources, associated with dispute resolution.” AIR FORCE POLICY DIRECTIVE 51-12, *Alternative Dispute Resolution*, para. 2.1, 2.2, 2.3 (April 1, 1999). See, e.g., Administrative Dispute Resolution Act (“ADRA”) of 1990, 5 U.S.C. §§571-584 (1994 & Supp.IV 1998), Exec. Order No. 12,778, 56 Fed. Reg. 55, 195 (1991). Alternative dispute resolution (ADR) is defined as “any procedures in which parties agree to use a third-party neutral to resolve issues in controversy, including but not limited to, facilitation, mediation, fact-finding, mini-trials, arbitration or use of ombuds, or any combination thereof.” Between 1999 and 2000, ADR was used in more than 12,500 workplace disputes with a 75% resolution rate. Department of the Air Force Nomination for OPM Director’s Award for Outstanding Alternative Dispute Resolution Programs (June 2001). Available at www.adr.af.mil/awards/OPM/part06.htm (visited August 22, 2002). In light of this success rate, General Lester Lyles, commander of Air Force Material Command, issued a memorandum affirming his “commitment...to promote maximum use of ADR techniques for workplace disputes...” 21 May 01 Memorandum from AFMC/CC, “Alternative Dispute Resolution (ADR) for Workplace Disputes” (May

21, 2001) (on file with authors). ADR has also been used to resolve contract disputes involving major weapons systems, including the B-2, the AC-130U Gunship and JSTARS. Nomination for the Office of Federal Procurement Policy ADR Award (June 2001). Available at <http://www.adr.af.mil/awards/OFFP/part1.htm> (visited August 22, 2002). In 2000, 38 contract appeals and pre-appeals involving over \$37 million and individually ranging from \$30,000 to \$6.6 million were resolved in 30 ADR proceedings. In that time, the Air Force saved nearly \$2 million in costs. Nomination for the Office of Federal Procurement Policy ADR Award (June 2001). Available at <http://www.adr.af.mil/awards/OFFP/part4.htm> (visited August 22, 2002). The Justice Department's use of ADR increased from 509 cases in 1995 to 1800 cases in 1999. Jeffrey M. Senger, *Turning the Ship of State*, 2000 JOURNAL OF DISPUTE RESOLUTION 79, 97 (2000). Attorney General Ashcroft stated the Justice Department's use of ADR increased to 3000 cases per year in 2002. Ashcroft, *supra*, note 4 at 3. The skills used in these conflicts and those that underpin the majority of the processes referred to in AFPD 51-12 are those explained here.

⁴ ROGER FISHER & DANNY ERTEL, GETTING READY TO NEGOTIATE 21 (1995).

⁵ ROGER FISHER & WILLIAM URY, GETTING TO YES 41 (1981).

⁶ *Id.* at 48.

⁷ ROBERT F. KENNEDY, THIRTEEN DAYS 111 (1999).

⁸ The "Ex Comm" refers to the Executive Committee of the National Security Council. The members included: Secretary of State Dean Rusk, Secretary of Defense Robert McNamara, Director of the CIA John McCone, Secretary of the Treasury Douglas Dillon, Vice-President Lyndon B. Johnson and Chairman of the Joint Chiefs of Staff General Maxwell Taylor. *Id.* at 30.

⁹ *Id.* at 109.

¹⁰ *Id.* at 44.

¹¹ See generally, AIR FORCE INSTRUCTION 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements* (May 1994).

¹² FISHER & ERTEL, *supra* note 4 at 23.

¹³ FISHER & URY, *supra* note 5 at 60.

¹⁴ FISHER & ERTEL, *supra* note 4 at 36. See also ROBERT H. MNOOKIN, BEYOND WINNING 11-17 (2000).

¹⁵ FISHER & URY, *supra* note 5 at 17-39.

¹⁶ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 [hereinafter Ottawa Treaty].

¹⁷ See generally, Charles J. Dunlap, Jr., *US Legal Issues in Coalition Operations*, PEACEKEEPING & INTERNATIONAL RELATIONS, 3 (September/October 1996).

¹⁸ See also WILLIAM URY, GETTING PAST NO (1991) and MNOOKIN, *supra* note 14.

¹⁹ WESS ROBERTS, LEADERSHIP SECRETS OF ATTILA THE HUN 85 (1985).

²⁰ *Id.* at 83-84.

²¹ Memorandum from 379 AEW/JA to 9 AF – UNCENAF/JA (August 16, 2002) (on file with authors). To put it in the language of negotiations skills, the various actors had competing interests that were able to be satisfied with the assistance of an attorney familiar with this method.