

ADR Techniques/Part 3 of 3

Safety (and Power) in Numbers: Negotiation with Groups

CHRIS HONEYMAN AND ANDREA KUPFER SCHNEIDER

Last month in these pages we introduced some examples from our new book, the culmination of 15 years' work in the Canon of Negotiation Initiative which we run, and whose overall arc of discovery we discussed in the first issue in this three-part series.

"A Canon Is Revised: Has the Negotiation Field Come of Age?" 36 *Alternatives* 147 (November 2018)(available at <https://bit.ly/2zG6X1K>).

In last month's article we included some excerpts of chapters that we think address the perennial problem of how one human being relates to (and gets something accomplished with) another, in new and useful ways. See "One to One: Moving Forward While Facing Deep Differences," 36 *Alternatives* 161 (December 2018)(available at <https://bit.ly/2SKciwr>).

But businesses and other organizations don't run just on *individual* negotiations. Negotiations between individuals and groups, and those which are entirely between groups—sometimes multiple groups at a time—are everyday necessities of organizational life. The failure of these negotiations is sometimes the cause of an organization's failure as a whole. So this month we will follow up with a few excerpts of what our contributors have been teaching us about groups, firms and other organizational settings.

NEGOTIATING WHILE BLACK

BY MICHAEL Z. GREEN

Applying a Scenario:

The Salary Negotiation

Involving Samantha, Jerry, and Barry

Imagine a black female, Samantha, is being recruited away from her junior position at a prestigious accounting firm out of state to work for a major state government agency as comptroller.

She has already visited with all the top people at the government agency. They all raved about her and want to get her on board as soon as possible. They know her husband, Robert, is a well-qualified engineer and that part of the negotiation will involve providing some type of a positive landing for him.



The family also has two young children and need to find appropriate schools and housing.

The head of the agency, Jerry, a white male, makes an initial salary offer based upon a few thousand dollars more per year over what Samantha's current salary is, and has agreed to recommend Robert to the manager of the environmental arm of their state governmental body, which is hiring engineers.

Samantha does not know anyone at the agency and has no friends or mentors who have negotiated major positions with a state government agency. Samantha is concerned that the offer was based upon her prior salary, when she will definitely have major responsibilities that go well beyond her current job duties.

Also, Samantha will be moving into a larger metropolitan market where the cost of living, especially housing in a good school district, is much more than where she currently lives. Additionally, Samantha is concerned that Jerry is only going to make a recommendation for her husband, Robert. She was under the impression that the agency and especially Jerry knew that Samantha and Robert were a "package," and she doesn't understand why the offer did not guarantee a position for Robert as well.

Samantha was very excited when she inter-

viewed and obtained the offer to work for the agency until she heard the salary amount, and only received a recommendation for Robert, as part of the terms of the offer.

Samantha has no information about how the offer was constructed. Samantha is worried that Jerry thinks he can lowball her and she will just accept it without much negotiation. If Jerry had made a reasonable offer of a sizeable amount more than Samantha's current position, one that also considered her need for more income due to cost of living and removed any uncertainty about her husband's employment, she had planned to not negotiate much, as her basic needs would be met.

But now Samantha is beginning to wonder if she was lowballed because she is a woman, or black, or both. The initial offer was so low from what Samantha could imagine as reasonable. Even if she is able to negotiate with Jerry to address broader terms, Samantha is concerned that Jerry's approach may affect future evaluations of her work in continuing to lowball her on raises.

Jerry is oblivious to all of this. He assumed that there would be bargaining, and felt he could not afford to give away the farm immediately. Jerry knew that the eventual final terms would increase Samantha's salary offer to around the same amount of others at the agency at her level—and that the agency would guarantee Robert's position.

In fact, Jerry negotiated exactly the same way with a white male, Barry, hired last year as director of human resources, who is at a similar level to Samantha's position. However, unlike Samantha, Barry had a good friend at the agency who told him where to find all the salaries—which were publicly available, since it was a state government position.

Barry's friend at the agency also told Barry that the agency had consistently hired the spouse of a key candidate whenever there was a position available within the agency that fit that spouse's background.

The authors are the editors of *The Negotiator's Desk Reference*, which is described and excerpted in this three-part series. It is available at www.ndrweb.com and on Amazon and other booksellers. Honeyman is Managing Partner of Convenor Conflict Management, a Washington, D.C., consulting firm (see www.convenor.com). Schneider is a Professor of Law and Director of the Dispute Resolution Program at Marquette University Law School in Milwaukee.

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So when Jerry initially offered a very low number and only a recommendation, Barry immediately countered with a salary more than \$20,000 per year above the last person hired at a similar level by the agency, and very close to Jerry's own salary. Barry also responded that it was a deal-breaker if the agency was not going to provide his wife with a definite job within the state agency, because he knew the agency had an opening in her field of expertise.

Jerry countered with a job offer from the state for Barry's wife and raised Barry's salary offer, but it was still \$5000 per year less than what Barry had proposed. Barry held to his position and Jerry eventually acquiesced and granted all of Barry's demands.

If Samantha accepts Jerry's offer to her as is, she will be making \$65,000 less than Barry per year. And she will not have a guarantee that her husband will have a job. Further, when Samantha starts working for the agency, she will learn that she is making \$65,000 less than Barry and that Barry's wife was actually hired, not just given a recommendation, when Barry was hired.

This scenario could represent even more of a problem if, despite Jerry's recommendation for employment, Samantha's husband is unemployed and still looking for an engineering position after Samantha's employment begins.

Assessment

In assessing this scenario, was Jerry consciously discriminating against Samantha? Were Samantha's concerns truly unwarranted when she felt Jerry's initial offer was based upon stereotypes? I think the answer to both of these questions could legitimately be no.

Now this scenario assumes that Jerry was not consciously taking into account Samantha's ability to obtain a better job offer elsewhere, an assumption that might also unconsciously be stereotypically biased on Samantha's presumed lack of information about competing job opportunities.

As a result, Jerry consciously thought he was treating Samantha the same way he had treated Barry. Unfortunately, Samantha was not operating with the same information as Barry; it was not even close. ...

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The author is a tenured faculty member at Texas A&M University School of Law in Fort Worth, Texas. His scholarship focuses on workplace disputes and the intersection of race and alternatives to the court process. Additional biographical information is available at <https://bit.ly/2QqzRNh>.

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THE ORGANIZATION AS NEGOTIATOR

BY ADRIAN BORBÉLY AND
ANDREA CAPUTO

Taking Negotiation to the Organizational Level

So how do we go from training better negotiators to ensuring that the organization as a whole negotiates more efficiently?

In other words, how do we ensure that negotiation serves its role in fulfilling the organization's strategy and reaching its objectives? Approaching the question from this angle can permit us to merge fundamental negotiation theories (as discussed in other sections of [the Negotiator's Desk Reference]) with research on sales management, dispute resolution systems design, social dialogue, happiness at work (which largely deals with "invisible" everyday negotiations), and corporate strategy.

We recommend that these efforts begin with an attempt to determine whether various companies consider negotiation as anything more than an individual skill to nurture among their employees. We need to know how companies structure their negotiation efforts. ... [See www.ndrweb.com for full citations.]

We should also carefully define "efficient negotiation processes" by identifying and mapping the different processes and settings of negotiation throughout the organization, in a systematic way, such that inter-organizational and cross-cultural comparative studies are made possible.

This also mandates the establishment of efficiency indicators, either on a longitudinal basis, or as rigorous, cross-sectional dependent variables.

Whether we follow [the] idea of "emerging strategy," or we approach strategy formulation as a top-down phenomenon, strategy needs to be diffused within and around the organization, in part through negotiation among different actors and stakeholders. [See www.ndrweb.com for full citations.]

One may therefore hypothesize that, across the board, the efficiency of such negotiations will positively impact the success of the strategy, and therefore the organization's performance. If we postulate that organizations that negotiate better perform better, can we justify this with empirical data? This will require us to use the existing performance indicators for strategy (or create new ones) and build the appropriate key performance indicators for negotiation.

It will also mandate a careful look for (possibly numerous) exogenous factors that may mediate the relationship between negotiation and strategy.

The way people negotiate within an organization may impact its strategy in terms of how well that strategy is implemented, but also in other ways. For example, one may also hypothesize whether efficient negotiation practices, consistently applied throughout the organization, lead to less conservative, more entrepreneurial strategy formulation, with more risk-taking and innovative potential.

[An example earlier in this chapter] seems to suggest this: companies that perform persistently well in negotiation may be able to set, and reach, more ambitious objectives. A structured approach to negotiation at all levels of the organization may profoundly impact its culture, for example through employee participation processes and collective feedback on negotiation practices, which may in turn lead to more creative strategy ideas.

A systematic map of different organizational practices regarding negotiation may enable us to isolate best practices. Some structuring efforts may work, others may not, and some may only work in certain circumstances. [Commentator] Ertel suggests giving more freedom to negotiators and incentivizing them to search for creative deals. [See www.ndrweb.com for full citations.] This may work for some functions of the firm or in certain industries, and prove non-productive in others.

A structured approach to negotiation practices does not have to follow the organization chart. Often, the cases showcased by the different sources talk about purchasing, sales, human resources, or strategy formulation.

Beyond helping specific functions of the firm negotiate better, can a structured approach to negotiation help all functions of the firm to achieve better results? We conclude that the coherence of negotiation practices across the various functions of the firm (one is tempted to use

here the phrase “negotiation culture”) may have a significant impact on overall performance. ...

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MAKING DEALS ABOUT POWER SHARING

BY JOHN H. WADE

Gradations of Legal Decision Making Power

What follows is a gradation or scale which gradually moves future decision-making power from total power for one person, to a solution of total power in the hands of the other negotiating party.

A negotiator or mediator who has ready access to such a gradation or range adds normalcy, structure, visibility and predictability to the negotiation. As with a “numbers” negotiation (dollars, acres, steak knives), each party can prepare on a confidential chart its preferred starting solutions about future power, what moves to make and how quickly to make them, and where resistance will probably occur based on current “facts” and emotions.

Moreover, guesses can be made about the same concepts for the other negotiating parties, who may be moving from somewhere near to the opposite end of the range. Of course, a “loss” of decision-making power “down” the gradation scale will often be, and can be reframed as, a potential “gain.”

For example, negotiating some degree of power sharing with another may:

- Placate a disruptive dissident and tribal supporters.
- Add new expertise for future decisions.
- Test abilities of and educate potential future leaders.
- Enable blame shifting for future decisions.
- Create an obligation to return favors later.
- Distribute exhausting workloads.
- Create mutually shared “agreement” language.
- Encourage commitment to an organization.

In summary, a gradation from *total* “legal” power via 13 incremental losses to *no* “legal” power is as follows:

- Total Power
- Time-Limited Total Power
- Rotation of Power
- Duty to Report
- Criteria as Guidance to the Exercise of Power

Business Talk

The excerpts: In a concluding Part 3 of adaptations from the new Negotiator’s Desk Reference book, four segments look at the ways organizations approach the science of bargaining.

It’s not just one to one? No. It’s about organizational strategy. A company that presents an efficient and effective approach to negotiating may be more entrepreneurial, be willing to take more risks, and potentially be more open to innovation.

Hot topic: ‘[T]he time is now ripe for industrial, commercial and other relationships to benefit from demonstrated successful experience with these tools.’

- Division of Topics and Categories of Power
- Mandatory Consultation Processes—Secret or Publicized
- Entrenchment of Restrictions on Future Decision Making
- Deadlock: Agreed Mandatory Negotiation or Mediation Process
- Deadlock: Agreed Mechanisms to Trigger Resolution: automatic formulae; an independent arbitrator or judge;
- Qualified Veto Power by Other
- Veto Power by Other
- Total Power to the Other Party

Three of these gradations will be expanded briefly in what follows [with analysis of each of the 13 in the Negotiator’s Desk Reference]:

Total Power

One party has or claims complete power to decide in the future—what repairs to the apartment complex, by whom and at what cost; how much will be spent on marketing; who will be appointed as employee or judge; who decides about children’s medical treatment.

Where one party trusts another, they may be willing to grant total power to that trusted other in certain areas of decision-making. Conversely, a claim (and inherent threat) of absolute power may be disguised by veneers of nominal consultation, rigged elections, a history of benign dictatorship, the smile of a crocodile, or reassurances of wisdom and expertise. Some long-term bosses, rulers, spouses and chiefs are experts at recycling smiling veneers during negotiations.

Time-Limited Total Power

One gradation less than total decision-making power is where that capacity is limited in time. The president/boss/spouse/business partner/parent/tribe agrees to be “in charge” for X years, whereupon power will shift to another named person automatically, or an unnamed person via an election process.

Of course, this model of time-limited total power has been negotiated into many national constitutions by the founding parents of those nations.

Rotation of Power

A further diminution of decision-making power can be agreed upon whereby that power mandatorily rotates every X years between tribes, factions, university departments or individuals. Today’s boss will be tomorrow’s servant until his/her turn comes around again. So be kind today, in order to avoid payback tomorrow.

This solution is adopted in some families where children or separated parents feud over holiday destinations. Therefore the parents agree that child one decides in year one; child two decides in year two; child three decides in year three; and then start again.

This solution has also been adopted in some tribal societies, where automatic leadership rotation between tribes provides an attempt to modify nepotism. It also operates in academic departments where the chair position might regularly rotate. ...

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THINKING AHEAD

BY JAMES P. GROTON,
CHRIS HONEYMAN &
ANDREA KUPFER SCHNEIDER

In 2007, two of the authors of this chapter, with three other colleagues, wrote an article that attempted to analyze a puzzling phenomenon: a pattern of large organizations, with predictable conflict in the offing, nevertheless routinely—or even deliberately—failing to think ahead.

That article reviewed the consequences of recent failures to anticipate or prepare for events, analyzed causes and explanations of these failures, reviewed the resources that make it possible to do strategic anticipatory planning, and outlined possible ways in which appropriate skills can be brought to bear to advance the field of conflict anticipation and management. Chris Honeyman, Julie Macfarlane, Bernard Mayer, Andrea Schneider & Jeff Seul, “The Next Frontier Is Anticipation: Thinking Ahead about Conflict to Help Clients Find Constructive Ways to Engage Issues in Advance,” 25 *Alternatives* 99 (June 2007).

The article also argued that it was time that our field developed a new professional specialty, of assistance to companies and other organizations to encourage them to take the proactive steps necessary in their organization’s medium- and longer-term interest.

Even at that time there were already in existence some well-established examples of parties doing exactly what we were suggesting: successful uses of proactive steps to anticipate and manage conflict. A prime example was the

construction industry, which had, during the past 40 years, developed a sophisticated suite of tools for preventing, solving, de-escalating, and achieving almost instantaneous resolution of problems and potential disputes.

Other examples of similar tools existed in the fields of labor relations and international relations. And use of these tools had spread to many segments of business.

The value of such tools should have been widely appreciated, for they exemplify time-honored “best practices” that have become legend:

- “An ounce of prevention is worth a pound of cure.”
- “A stitch in time saves nine.”
- “Fortune favors the prepared mind.”
- “Blessed are the peacemakers.”

Yet it must be admitted that in the decade since that original article, there has been less to show as new development in this area than we would have liked. There has also been recent evidence, particularly in the financial industry in its conduct before and since the 2008 financial crisis, that some elements in business and government—and even in the dispute resolution professions—see it as antithetical to their interests for conflict to be handled, as we might put it simply, better and less expensively.

We believe the time is now ripe for industrial, commercial and other relationships to benefit from demonstrated successful experience with these tools. This chapter illustrates how existing tools for conflict anticipation and management can be used in a wider variety of business and public service contexts, and then advocates how dispute professionals can adjust their thinking and practices to advance a new “anticipation and prevention movement.”

There are three principal classes of tools that are being used to anticipate and prevent conflict: tools for Problem Prevention, Problem Solving, and Dispute De-escalation and “Real Time” Resolution. They are most effective if they are mutually agreed upon by contracting parties before any conflicts or disputes have arisen. ...

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Groton is a retired partner in the Atlanta law firm of Sutherland, Asbill and Brennan (since 2016, part of Eversheds Sutherland), where he headed its Construction and Dispute Prevention and Resolution practice groups. Groton

has conducted research and written extensively on—and advocated for broader use of—processes used in the construction industry and other relationship-based businesses to prevent and de-escalate disputes (see www.jimgroton.com). Honeyman and Schneider are co-editors of the Negotiator’s Desk Reference, the volume in which these excerpts appear. See <https://www.ndrweb.com/about-the-editors.html>.

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Most *Alternatives* readers are practitioners, and invariably time-pressed. We think that what is most likely to work for a practitioner reader is the particular chapter that deals with a problem anticipated to arise in tomorrow’s meeting, or the particular concept needed to review promptly for other reasons: In other words, a classic reference-book approach.

We’ve therefore put some effort into linking outwards in the Editor’s Note for each chapter to other chapters that may be the best next thing to look at even if they are not contiguous. At the same time, for those who prefer to read in a linear fashion, we hope that each section will bring enough complexity and internal debate to serve as a mini-course on that precise set of negotiation concepts. Knowing that the need for bite-size chapters has been served, we also remind the reader that a full dinner menu is often offered by our authors in their reference pages.

We should also note here that our process of discovery continues, with explicit provision in the Web edition made for a third volume of the NDR. The new volume will be added to gradually as we find exciting new research, and fill gaps.

In fact, at the time of this writing, and with the cooperation of the American Bar Association, we have just posted the first 12 chapters of that volume—these represent some chapters from our original Negotiator’s Fieldbook which we continue to see as cutting-edge even though their authors were unable to update them for the NDR.

We hope you find the excerpts in this article series and the entire Negotiator’s Desk Reference helpful, informative and engrossing to read—as we have felt throughout its long gestation period. The entire Canon of Negotiation process has been one of discovery; we think the newest result may stand as a demonstration that our field has finally come of age.

