Navigating Your Way Through the Process of a Negotiation

Maxine Aaronson

What things do tax practitioners negotiate? The answer is broader than you may initially think. Tax professionals negotiate with the IRS to settle audits, to make payment arrangements, and when we request penalty abatements. We negotiate when we assist our clients with their transactional matters. Additionally, we negotiate with our employees about compensation. When we get home we negotiate with our spouses about where we're going on vacation and with our children about bedtime and about finishing their vegetables. When we purchase a new car, we negotiate both the price and the terms of any financing. Additionally, tax professionals have been on the leading edge of one negotiation technique -- now referred to as "negotiated rulemaking" -- a new fangled term for what we've been doing with the IRS and proposed regulations for many years. In particular, the final regulations on Section 704(b) and substantial economic effect in the mid eighties and the recently adopted check the box rules come immediately to mind as having been heavily negotiated.[1] The purpose of today's session is to give you additional tools and skills to handle all of these types of negotiations, and to equip you to better represent your clients.

I believe that tax professionals should actively assist in handling negotiations for their clients, and that these skills represent a marketable service. Tax professionals can add significant value to the process of any negotiation or deal.

CHARACTERISTICS OF A GOOD SETTLEMENT OR AGREEMENT.

MIT Professor Lawrence Susskind has described the attributes of a good settlement as four components:

1. Fairness, by which is meant that all the participants perceive it as fair;

2. Efficiency, that the process and the solution are both cost and time effective;

3. Wisdom, by which is meant that the agreement appears wise in light of our collective relevant experience (sometimes you can only determine this by hindsight); and

4. Stability, that the agreement will endure.

See Susskind, Lawrence and Cruikshank, Jeffrey, *Breaking the Impasse* at 16-32 (Basic Books 1987). Others have described these four factors slightly differently when writing for a different audience:

[1]The process of obtaining comments on proposed regulations from practitioners, both formally, and informally through the ABA, the AICPA, and local bar groups is so well established, we don't even think of it as a negotiation anymore. Interestingly, the rest of the administrative law world is just discovering the benefits of working together to craft better regulations. The EPA, for example, is slowly learning to work things out with the environmental law bar. Believe it or not, Congress did not actually specifically authorize the process until 1990 when it passed the Negotiated Rulemaking Act.

1. The agreement fits the parties' needs (it satisfies their interests);

2. The agreement is efficient;

3. The agreement is an improvement over your Best Alternative to A Negotiated Settlement (BATNA); and

4. The agreement takes advantage of any joint options for mutual gain.

See Fisher, Roger and Stone, Douglas, "Working It Out: A Handbook on Negotiation for High School Students" (Harvard Negotiation Project, 1990)

WHY A DOSE OF NEGOTIATION THEORY IS IMPORTANT TO NEGOTIATORS.

Books on negotiation abound. A veritable industry has grown up on this subject. Harvard Law School now publishes a professional journal called, appropriately enough, Negotiation Journal. Negotiation skills are now routinely taught in business and law schools. Negotiation, always a part of life, has now become a science. In the hands of a skillful practitioner, negotiation can also become an art.

On a personal note, the formal training and theoretical discussion has provided me with a way to organize, sharpen, and enhance my skills. The theoretical construct learned in class became the organizational framework which allowed me to categorize my experience and to assimilate the lessons learned during negotiations in a much more effective manner. (By the way, there are lessons to be learned from every negotiation, whether successful or not.)

This paper draws heavily on the work of Professor Roger Fisher and Professor William Ury at Harvard Law School and the work of their colleagues at the Harvard Program on Negotiation. The assistance and cooperation of the Program on Negotiation in the preparation of this paper and training session are gratefully acknowledged. Their numerous publications are highly recommended for anyone wishing to delve further into this fascinating subject.

NEGOTIATION THEORY

In general, there are two main schools of negotiation theory. The first school is the one we learned as children, bargaining based on our position on a matter. Using this school of negotiation, we decide what our position is and dig our heels in. Negotiations take on the flavor of a stubborn contest. Perhaps in the end we reach a compromise somewhere in the middle. All too frequently, the parties end up at an impasse. Even if an agreement is reached, the agreement may be far from optimal for either party. This theory of negotiation has been dubbed "positional bargaining" by Fisher and Ury. It is sometimes also referred to as "competitive bargaining."

The second school of negotiation theory is "interest based bargaining", sometimes also called "cooperative bargaining." The core tenet of this school is the determination of the interests of the parties on all sides of the negotiation. One of the side benefits of this type of negotiation is that it tends to produce more creative and innovative results. Because the results are perceived as win-win, compliance with the agreement is somewhat better in cooperatively bargained agreements. This method of negotiation is also called "principled negotiation" in many articles and treatises, including Fisher and Ury. This paper and

presentation will attempt to improve your efforts at interest based negotiation.

It is not necessary that both parties to a negotiation be familiar with interest based negotiation for it to be effectively used, although it does help. Even if your opponent is a hard positional bargainer, you can still produce an effective agreement with an interest based approach. This paper will address some specific techniques for dealing with negotiator who digs in their heels and negotiates by drawing lines in the sand.

PREPARE TO NEGOTIATE BY ANALYZING THE SITUATION.

Because interest based bargaining is dependent on a thorough understanding of both your needs and desires and the needs and desires of your negotiation partner/opponent, it is essential to properly prepare for the negotiation. Fisher and Ury have articulated a four step process for preparation. See *Getting to Yes* (Penguin 2d ed. 1991). This process is as follows:

1. Separate the people from the problem.

2. Focus on interests, not positions.

3. Generate options.

4. Determine your BATNA (Best Alternative to A Negotiated Agreement) and consider your opponent's BATNA.

STEP ONE: SEPARATING THE PEOPLE FROM THE PROBLEM.

The relationship between the parties (or lack thereof) is an important factor in any negotiation, but it is important to remember that it is just one factor. If the relationship is good, the negotiation process will the easier. If the relationship is bad, the process may be more complicated, but successful negotiations are still possible. By making an intentional effort to separate the personalities from the issues, you greatly improve your chances of reaching agreement.

One excellent technique that I frequently use is role reversal. I imagine myself on the other side of the table. What are my goals now? How do I feel about the problem? Notice that I ask the questions of myself in the present, active tense. I ask "how do I feel" not "how would I feel?" This seemingly minor difference is very important. Remember the old saying that you never truly understand a man until you have walked a mile in his shoes. Remember also that who you are determines what you perceive, and that perception is reality. Don't underestimate the power of role reversal, even if it seems silly to you. Try it. It frequently leads to great awareness regarding the true motivations (as opposed to the stated motivations) of your opponent, and can be the key to unlocking a stalled negotiation.

DEALING WITH EMOTIONS

Don't be afraid of any emotional reaction you may get from the other side. Explore the emotion and see if you can find the cause. I expect that this will be particularly difficult for Certified Public Accountants to do, but it is absolutely critical. Until you have dealt with the emotional issues, you will never be able to deal with the issue that you want to negotiate. Frequently, when you dig down, you find out that the source of the Princess's massive bruises is a single pea under the mattress. Once the irritant has been dealt with and removed, your negotiation will progress. Until then, you will remain stalled in an unpleasant place. Professor

Charles Craver at George Washington University, author of *Effective Legal Negotiation and Settlement*, (Michie, 2d ed.1993) likes to emphasize the simple power of an apology. By apology, we mean an acknowledgment of the feelings of the other party and an articulation of our empathy with their situation. An apology is not necessarily an admission of liability. For example, if things were badly handled, it is generally helpful to express regret over the insensitivity that has already occurred. Admitting that any error was made has a remarkable way of taking the fury out of most people. After all, they too are simply human. No one in the history of the world has ever satisfactorily resolved anything by playing the blame game. Although venting is important, the important part is the acknowledgment of the feelings. Once the feelings are acknowledged, focus on moving forward and finding solutions. Not even the most omnipotent of us can change the past.

Even if you don't believe that the feelings are justified, you should still respect the opposing party's point of view. You don't have to agree with them; you just need to accept that it is their point of view. The world would be a very boring place if everyone thought the same way. Remember that reasonable minds frequently differ (and thank goodness for that, or there would be a lot of unemployed lawyers).

Active listening is a skill that every individual could improve. Remember that what you say is less important than what they hear. A trick that many mediators, including myself, often use is to repeat and reframe what I've been told. That way, I verify what I'm hearing and I let the other side know that I am listening. Even if I strongly disagree with what I've heard, I try to check what I've heard by reframing the comment before I respond. Consider the difference between pounding the table and screaming "That's ridiculous, I can't believe that you said that!!!!" with "Let me see if I got all that. You believe that ...." This reframing technique is very helpful in breaking a spiral of hard positions.

Ignoring Interests:

Last month, I went to my local Exxon for a 25¢ Coke as advertised in that morning's paper. The clerk tried to charge me 89¢. I told him that the Cokes were on special but he took a hard bargaining position, asserting first that only it was only coffee, not Cokes, on sale. Then he argued that the sale on Coke did not begin for a week at his particular Exxon. As a student of Fisher and Ury, I knew the persuasive power of tying my arguments to external standards, so I pulled out the ad. (Unfortunately, I had destroyed part of my BATNA by opening the Coke and drinking part of it already). Eventually, the clerk decided to give in and said he would give me the sale price. The clerk believes that he achieved a good settlement because he gave me the sale price. However, he totally ignored my interests -- doing business with people that honor their ads and hassle free Cokes. It was never about the money. The clerk never considered my BATNA: that I would shop someplace else in the future. What should have been his overriding interest--preserving a customer--got lost in his competitive desire to get the upper hand and collect an extra 40¢ that day. One would think he might have noticed the Mobil station across the street..

STEP TWO: FOCUS ON INTERESTS, NOT POSITIONS. What is it that you really

need from the negotiation? Additionally, what things would you like to have as a result of your negotiation? These are your interests. Figuring out your own interests is an essential part of preparing for any negotiation. If you don't know what you need from the negotiation process, how are you ever going to get it? Likewise, you must know your BATNA (your **B**est **A**lternative **T**o a **N**egotiated **A**greement) before the negotiation begins. Your objective is to improve your BATNA, not to give away the store. To accomplish this, you must have a realistic idea of what your BATNA is, since it is your ultimate measuring stick.

Interests are what underlie our positions. They are the things that really matter to us; the reason that we entered into a negotiation in the first place. Interests come in three basic varieties: our interests, the other side's interests, and our joint interests.

After you have ascertained your own interests, your preparation should then focus on the other side's interests. Some of them will be apparent to you. Others can be determined by asking the other side open-ended questions. Listen carefully to what they tell you and even more carefully for what they don't tell you. Gentle probing of their interests in a conversational manner may be the most productive thing you do. Not only will you find out to what their interests are, but your questioning will demonstrate your concern and sincerity in finding a mutually agreeable solution. Ask who, why, what, when, where, and how questions. Frequently, in the course of this conversation, the other side will reveal to you a strong interest that is unrelated to the subject matter of the negotiation. A desire to impress a client (grand standing) is example of this type of interest. Recently, in a mediation that I was conducting, I discovered that one of the attorneys had a strong interest in collecting his contingent fee within the next three weeks. Needless to say, I helped the parties craft an agreement that provided for an immediate payday.

Another example of a tangentially related interest is a need for sudden liquidity in order to pursue a different business deal. Likewise, a net operating loss that expires at the end of the year is another important tangential interest. It is from these types of interests that great deals (as compared to merely good deals) are made.

STEP THREE: INVENT OPTIONS FOR MUTUAL GAIN

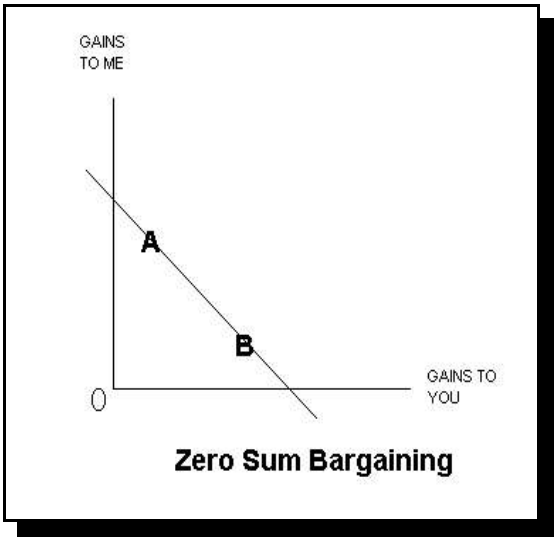
Before options can be explored, interests must be developed. Do not attempt to shortcut the process and jump right in to option generation! If you do, you will drastically reduce the number of options that you will come up with and greatly diminish the number of creative solutions. Professor Fisher tells the following parable which is the best illustration of why interests must be addressed prior to options. Two children are fighting over a single orange. They each have taken the position that they want the orange for themselves. Finally, an adult enters the room and cuts the orange in half and gives half to each child. The first child eats the fruit and throws away the peel. The second child separates the peel, throws away the fruit and plays with the peel. The adult's actions typifies the way most people negotiate. These negotiators offer solutions without determining interests first. What would have happened if the adult had asked the children why they were interested in the orange rather than just relying on their articulated positions? Both children might have had their interests completely satisfied.

THE NEGOTIATOR'S DILEMMA.

David Lax and James Sebenius have described what they call the "negotiator's dilemma." See *The Manager as Negotiator*, (Free Press 1986). As described by them, the negotiator's dilemma involves the tension between cooperative efforts to create value jointly (enlarging the pie) and the desire to gain individual advantage (obtaining the biggest slice possible). In simple terms, the problem can be stated as the inevitable conflict between the need for openness, trust, and information sharing in order to generate options and the concern that unilateral disclosures will lead to the party ending up with a smaller share of the pie. Lax and Sebenius believe that creating value (enlarging the pie) and value claiming (getting a big piece for yourself) are inextricably linked. As they correctly point out, once a pie has been expanded, it still must be divided. The negotiator's dilemma is not which method to use; rather it revolves around the timing issue -- which method do you use at what point in the process.

While there are no simple solutions to the negotiator's dilemma, there are some specific approaches that may be helpful. Remember that interest based bargaining does not require you to be a push over or to make concessions. It is a careful exploring of your interests, your opponent's interests and your mutual interests. Start small, and offer information that is helpful but will not cause damage if disclosed. Encourage your opposing negotiator to do likewise. Building trust by reciprocal small disclosures is a time honored and fairly reliable tactic. Repetition of agreement, even if the agreements are small, builds confidence and fosters a climate where creativity can flourish. Work on the easy issues first; agreement tends to breed agreement. This can be especially useful if the parties have a continuing relationship. Even the simple act of ordering lunch can be an opportunity to seek commonality of interests.

If you prefer, start by exploring your opponent's interests. People like to be asked about what concerns them. Many times they will welcome the opportunity to tell you what's bothering them or what concerns them. The mere fact that you have asked demonstrates your concern and the value that you place on achieving a mutually beneficial agreement. As your opponent explains his interests, be sure to ask open-ended but non-threatening questions. As you come across joint interests, be sure to point them out. For example, a typical joint interest frequently encountered by attorneys is an interest in resolving a dispute without the necessity and expense of a full-blown trial. It is a joint interest in an efficient process, and it is another opportunity to agree.



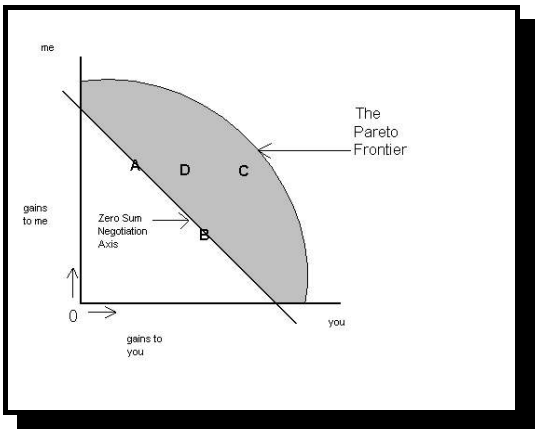
EFFECT OF POSITIONAL AND INTEREST BASED NEGOTIATION ON THE RANGE OF POSSIBLE SOLUTIONS

Positional bargaining is zero sum (sometimes also called "fixed sum") bargaining. Many negotiators approach a problem convinced that for every "gain" on their side, there is a "loss" on your side. This type of negotiation is referred to as "zero sum" or "fixed sum" because it assumes that there is an equal and opposite reaction to every action, much like double entry bookkeeping. It can be graphically described as shown at right.

Note that all of the points of agreement lie on one axis. As the solutions move across that axis from point to point, you can see the inverse relationship of one party's gains to his opponent's losses.

Interest based negotiation on the other hand, expands the range of possible agreement, sometimes called "expanding the pie." Interest based negotiators actively look for synergistic relationships – joint interests that lead to the creation of options for mutual gain. It is this kind of creative approach that adds value to the process, and produces better (as opposed to merely adequate) agreements. The challenge for a skilled interest based negotiator is to see if they can approach what is known in negotiation theory as "the Pareto frontier." The Pareto frontier is named for the Italian economist Vilfredo Pareto (1848-1923) upon whose theories it is based. Pareto's theory is that there were solutions to problems that exploited the complimentary nature of certain needs to produce better results than could be achieved in a traditional zero sum game. By fitting the pieces together carefully, both sides would benefit. Pareto described the range of solutions that we now call "Pareto optimal solutions" in the parlance of negotiation theorists, as those possible solutions to a problem wherein one party could improve his outcome without hurting the other party. Separating the fruit from the peel before dividing the orange between the children in Professor Fisher's now classic example is a Pareto optimal solution. It exploits the complimentary desires of each child. In fact, that particular solution actually is on what the theorists refer to as the Pareto frontier – the "frontier" being the point at which any option cannot improve for one party without worsening for the other party.

The following diagram illustrates graphically Pareto's theory:



Note that points A and B which are on the zero sum axis, are not as beneficial to the parties as C or D, or any point in the grey shaded area, which is the Pareto Optimal zone.

RECOGNIZING OBSTACLES TO CREATIVITY

The single biggest obstacle to the generation of creative options is the desire to put the cart before the horse, by rushing to this step of the process without adequate time spent investigating interests. Cutting right to the chase can be very seductive, but you should strongly resist the urge to cut short the exploration of

interests. It is virtually impossible to spend too much time discussing interests. A related obstacle is a failure to actively listen to what your opponent is telling you. Sometimes, you have to also listen for what you're not being told. Unfortunately, most lawyers (and many other people) are better at arguing than we are at information gathering. Successful negotiators listen more than they talk. As one of my teachers used to say, "when your mouth is moving, your ears aren't working."

Another common obstacle to creating options is to think that you only have to solve your half of the problem. In any negotiation, the other side's problems are by definition your problems too. If your goal is to craft an agreement, you cannot do it by yourself. It's kind of like the sound of one hand clapping. Any agreement is a joint undertaking. To the extent that the other side encounters an impediment to agreement, you also have the same impediment.

GIVE UP THE IDEA THAT THERE IS ONLY ONE BEST SOLUTION

There are always multiple solutions to any problem. All problems have a range of settlement options. Some options are better than others. Some options are better in some respects and worse in other respects. Some options are great solutions but are impracticable. Other options take more time than the parties have.... and so on. Traditionally, negotiators have tended to fixate on one solution–the one that they are currently putting forth – as the only solution. Recognizing that there are multiple acceptable solutions to any problem is a threshold event. It allows you to broaden your horizons and to see the otherwise hidden solutions.

DON'T EVALUATE THE OPTIONS -- YET

It is very important to exclude the exercise of any judgment while generating options. Even options that appear ridiculous should be written down and treated as legitimate options. There are two major reasons for doing this. First, absurd options often lead to the development of viable options. Second, the best brainstorming occurs in an atmosphere of complete acceptance. By not rejecting any proposals, you create an environment in which is safe to make suggestions about which you yourself may be uncertain. Many of the most creative solutions I have seen were put forth tentatively by their proponents. By treating every suggestion with respect, you will produce a varied and diverse list of options. There'll be plenty of time to winnow out the best choices later. Susskind and Cruikshank suggest that the parties go so far as to set a formal period for "inventing without committing" in order too create the comfortable environment necessary for creative option generation. See *Breaking the Impasse (*Basic Books 1987) at 118.

RECOGNIZE THE STRUCTURAL MODEL YOU ARE USING

Different negotiations call for different strategies. The most effective negotiators have a repertory of skills and techniques. There is no one "right" or "wrong" way to approach any negotiation.

BUILDING BLOCKS

This technique involves dividing the problem into smaller parts. (Fisher & Ury refer to this process as "fractionalization") Tax practitioners use this technique everyday when they separate out the issues in a Revenue

Agent's Report. Likewise, many complex deals are negotiated piece by piece. The RAR example is one that illustrates a situation where partial settlement is frequently acceptable, although perhaps not optimal. In the case of a complex deal, by comparison, each interim agreement is conditioned on ultimately achieving a comprehensive agreement covering each component piece.

AGREEMENT IN PRINCIPLE

This is another technique that is very familiar to tax practitioners. It involves starting with the big picture and working back to each detail. We are using this technique when we prepare a letter of intent on a purchase transaction, for example. It is procedurally the opposite of the building blocks approach.

SPECIFIC TECHNIQUES FOR GENERATING OPTIONS

Christopher Moore, in his book, *The Mediation Process*, (2d ed. Jossey-Bass 1996) catalogs the following strategies for developing a list of options that may be useful to tax practitioners:

RATIFICATION OF THE STATUS QUO

It is always helpful to begin any negotiation, particularly if the parties have an ongoing relationship, to sort out what issues and parts of the relationship should be preserved as they already are. This has two benefits: first, the process identifies the disputes in a positive context, rather than in a negative one, and second, sometimes patterns will emerge of things that are working well for the parties. The pattern may lead to insights as to how the dispute can be addressed.

DEVELOP OBJECTIVE STANDARDS FOR AGREEMENT

This technique is a very "macro" approach and can be very effective in the right situation although it generally involves more structure and preparation work than most people are used to. The largest negotiation that I have personally been involved in was handled this way and resulted in an agreement for the application of new zoning classifications for every piece of property in the City of Dallas, approximately 400,000 parcels, approximately a 3 billion dollar deal. The city staff, council members, property owners and community leaders began drafting what as known as the Planning Policies Issue Paper in 1983. Broad policies were adopted by the Council in 1985, and reflected a negotiated solution that encompassed all of the players except the city staff (whose real interest was not economic, but was self perpetuation, which interest was satisfied). Because the policies were depersonalized-- not applied to any specific property-- agreement could be reached on terms that seemed fair to all involved. The group then developed a set of rules to apply the policies to an individual piece of property. In effect, the rules said if the property was already zoned "A" and it had characteristics "B" and "C", the options for reclassification were 1, 2 or 3. On a quadrant by quadrant basis, on four successive Wednesdays in 1987, the Dallas City Council applied a new zoning category to every property in the city, without substantial debate or controversy.

Opportunities to use this approach as an exclusive one on a large scale process are going to be limited by the sheer volume of work involved. However, think about using a variation of it to obtain an agreed structure to unwieldy negotiations. As tax professionals,

we use a variation of this when we look at a transaction and determine that we want to maximize capital gain over ordinary income, or increase the number of currently deductible dollars in a deal.

OPEN DISCUSSION

This technique is a simple as the previous one is complex. It requires some measure of trust and respect between the parties. While it is obvious that the technique will not work if the parties are openly hostile; the parties also must be free of the mindset that they will be committed to any suggestion they might make in such a discussion. Third party mediators can be helpful here.

BRAINSTORMING

Brainstorming may be done by each side or it may be done by all parties together. If possible, I find it helpful to gather the parties together for a brainstorming session, if the parties trust each other enough to do this. A major advantage of group brainstorming is that it gets everyone invested in the process and thus facilitates the ultimate solution.

HYPOTHETICAL SCENARIOS

In the deal making context, hypothetical scenarios may be useful. A facilitator (who may or may not be a negotiation team member) poses a hypothetical problem to a subgroup composed of representatives from each negotiations team. When the facilitator presents the problem, the group attempts to develop a scenario in which the problem is overcome. No one is asked to commit to any particular scenario; all are developed "without prejudice." All of the scenarios are eventually presented to the entire group and any useful information is extracted.

By way of example, imagine that the problem is speeding on a residential street near a school. Hypothetical scenarios might include asking the city to add a number of stop signs, building speed humps, posting a crossing guard (official or volunteer), getting radar enforcement and leafleting the neighborhood asking folks to slow down. Ultimately the group may decide to use a combination of several of these ideas.

LOOK FOR VARIATIONS IN RELATIVE VALUE

This is a classic approach for tax practitioners. It exploits the fact that each party values items differently. A proposal to increase the total price paid if a substantial part of the price is paid as a currently deductible covenant not to compete, is a common example of exploiting this difference. Timing adjustments are another good example, as we can sometimes concede a disallowed deduction in year one if it is allowed in year two.

STEP FOUR: DETERMINE YOUR BATNA

One of the most important things to determine prior to beginning a negotiation is your BATNA (Best Alternative To A Negotiated Agreement) and opponent's BATNA. Since the object of your negotiation is to improve your position over what you would achieve without the negotiation, it is useful -- -- in fact, it is essential -- -- to know your walk away alternative. Likewise, it is essential that you know your opponent's walk away alternative as well. Note that your BATNA is different from your aspiration level. Your aspirations are what you would like to achieve if you could have

everything you could possibly hope for in the negotiation. They are sometimes referred to as goals or targets. Your BATNA is what you'll get if you don't negotiate. In a sense, they are two ends of the same continuum. A successful negotiation will result in an agreement that lies somewhere between the two. Knowing your BATNA helps you avoid being seduced by the idea of a deal for the sake of a deal.

Good BATNAs, like movie stars, are made and not born. One does not all of a sudden find a good BATNA lying around. You have to work on them. Remember that if you have several alternatives, each one should be considered separately. If you don't get the raise you want, for example, you could look for another job, or you could go out on your own, or you could get out of tax practice into something else, or you could stay put and grumble. Each of these are separate options, and should be evaluated separately. Maybe you really like tax, so becoming an auditor isn't much of an option. If you dread the administrative and business generation side of private practice, you should probably not go out on your own. If the market for tax professional in your community is glutted, and no one is hiring, you should consider whether you really want to move to, say, Fort Worth. Each of these is an Alternative To A Negotiated Agreement, your job is to focus on the best of these -- your BATNA. To determine your BATNA, you must first identify and evaluate your alternatives. Improve them if you can – for example, if moving to Fort Worth is an alternative, that alternative would improve if you had a job offer there. It would improve further if your spouse were also able to find a good job there. The obvious way to improve that alternative then is for both you and your spouse to start active job searches in the Forth Worth area. In *Getting to Yes,* Fisher and Ury suggest a three stage process to develop your BATNA: create a list of actions you could take if there is no agreement; improve some of the better ones; and select the one that seems best (but don't be afraid to change your selection as things develop).

Whether or not you disclose your BATNA to the other side during negotiations is really a function of how good it is. If you have a truly great BATNA, you might find it advisable to tell the other side. Be prepared, if you do disclose it, to be able to answer the question as to why you are still in the room negotiating. The answer to that question may lie in your interests – you may have a terrific job offer in Fort Worth but also have a child that is about to finish high school who is heavily involved in school activities.

Some negotiators also like to look for their WATNA – the Worst Alternative To A Negotiated Agreement. In the hypothetical above, maybe your WATNA is that your boss gets aggravated that you asked for a raise, or that you are stuck there for a few more years at a pittance of a salary.

Always consider the other side's BATNA. It is important to know where they are coming from. Some times you can improve your own BATNA and weaken your opponent's at the same time. An example of that might be, in the option to go out on your own, securing the firm's biggest client to go with you where ever you end up.

OVERCOMING IMPEDIMENTS TO SETTLEMENT

Any negotiation is a process. It is continuous, fluid and a living, breathing thing. A skillful negotiator stays aware of the ongoing dynamics of the negotiation. As they say, getting there is

half the fun. A negotiator who ignores the process – the procedural aspects, if you will– and focuses solely on the substantive issues will experience substantially more failures than a negotiator who manages to keep his eye on both balls. Professor Mnookin describes some of the more interesting dynamics in his article, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 Ohio St. J. on Disp. Resol. 235 (1993). The most commonly encountered barriers experienced by tax professionals are:

CONFLICTING INTERESTS BETWEEN PRINCIPAL AND AGENT

The best example of this is when a negotiator is being paid by the hour and so supposedly there is a disincentive to close the deal quickly. Lawyers are accused of this conflict a lot (e.g., running the bill) although my personal experience is that it rarely actually occurs, despite what the general public thinks. The best solution is to get access to the principal (the agent may be present, or not) and try to address your joint interest in a quick resolution. Frequently you will find that there are legitimate business reasons favoring quick settlement that are unrelated to your dispute.

RISK AVERSION

Human nature being what it is, most people will choose a smaller, definite result over the possibility of a larger, but uncertain payoff. However, as Mnookin points out, the situation is reversed if there is no expectation of gain, only an expectation of loss. Most people are willing to gamble in this circumstance, a phenomenon he calls "loss aversion" In other words, if loss is certain, most people would be substantially more likely to gamble to reduce the size of the loss. A good example in the tax practice is to compare the level of risk (aggressiveness) that is tolerable on the return of your average citizen who does not want to trigger an audit, and the level of risk (aggressiveness) that is tolerable on the return of a taxpayer who knows he will be audited every year. What has this to do with the process of removing barriers to negotiated agreements? Mnookin suggests that the way the issue is framed may substantially affect the outcome. In other words, is your glass half empty or is it half full? Are you trying to gain ground or do damage control? Try reframing the issue. It can't hurt.

REACTIVE DEVALUATION

Although I had experienced this all of my life, I did not have a label for it until I began to study negotiation strategy and theory. Reactive valuation is that phenomenon that makes us instinctively value things less that are easy to come by, and freely offered by our opponents. The reaction is "what's wrong with it that they gave up so quickly?" (My mother, for example, didn't realize it but she was talking about reactive devaluation when she explained to me that boys respect girls more who are not "easy"). In a negotiation, if we quickly achieve our aspiration level (the opening offer is for every thing we hoped to get), human nature makes us revise our goal upwards. This is a psychological barrier to settlement, and it is ever present. A mediator's solution, as a neutral third party, is to adopt the suggestion as their own and avoid to some extent the effect of this phenomenon. Another tactic, useful if there is no third party neutral, is simply to hold back and make the other side work a little for the solution. This takes advantage of the fact that folks tend to value that which they fight hard for.

POWER IMBALANCES

Not infrequently, parties perceive themselves to have unequal power in negotiations. It is my personal experience that many parties underestimate their own power, particularly when dealing with a governmental agency such as the IRS. My advice is not to fall into what I call the "power trap" – which is really just thinking that you have more power or less power than your opponent. How can thinking that you have more power be harmful to you? There are several ways: first, you may be over confident and fail to properly prepare for the negotiations. This is the same mistake that you make when you fail to prepare for a hearing. Second, you will probably listen less carefully to the other side. It doing so, you may miss tremendous opportunities for mutual gain (remember the Pareto frontier). Third, difficult as it is to accept, you may actually be wrong about who is more powerful. There may be factors that come out in the process of the negotiation that you were previously unaware of.

If you think you are the weaker party, I recommend that act as if you were at least equal. People will give you the treatment that you expect (it's a real self fulfilling prophecy) so you might as well expect the best. Second, there is real negotiating power in a good BATNA, so I further recommend that you strengthen your BATNA to the extent possible. Third, take what action you can to weaken their BATNA. File that motion, set the deposition, shift the burden of proof. There is also power in understanding interests, as the party who best understands the interests of both is in the best position to structure a creative elegant solution. Fisher and Ury, in the second edition of *Getting to Yes,* have an excellent discussion solutions to power imbalances in their supplement "Answers to Ten Questions People Ask." I highly recommend it.

Another common mistake is to mistake resources for power and assume that you have a power imbalance when you may not actually have one. The government as a whole has gargantuan resources, yet most of them are not assigned to any one case, or even to the Internal Revenue Service. On a case by case basis, practitioners have substantially better research facilities, smaller workloads, better pay, and better support staff. All of these factors contribute to increasing your negotiating power.

Finally, think creatively. You have more power than you think. Look at both sides of the equation. In *The Manager as Negotiator*, Lax and Sebenius use the example of a cash strapped borrower trying to renegotiate a loan with his lender, a situation all of us have assisted in during the last decade. At first glance, it appears that the banker has all of the obvious power. The banker's BATNA however is foreclosure, and that takes considerable time and expense. After foreclosure the bank owns a piece of property that was not its primary choice of investment vehicle and which it will have to spend more time and money liquidating. Upon examination, the borrower has substantially more power than was originally assumed. Many borrowers have enhanced their BATNAs and weakened the bank's BATNA by filing bankruptcy... and so on.

CONCLUSION

The concepts espoused in this paper are best assimilated by practice. And more practice. And more practice. Successful negotiators are constantly evolving, and polishing their techniques. Hopefully, today's presentation will have helped you polish your own techniques.