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Book Review

BOOK REVIEW

HOW TO NEGOTIATE WITH A JERK WITHOUT BEING ONE

GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE[1]

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I. INTRODUCTION

Getting Past No is an important companion to a previous book co-authored by William Ury. In 1981, Ury collaborated with Roger Fisher on a book entitled *Getting to Yes*,[3] which has sold more than two million copies and has become one of the most influential works on the subject of negotiation. *Getting to Yes* is a lucid, step-by-step guide for negotiating mutually satisfactory agreements. The authors labeled their approach "principled negotiation" and boiled it down to the following points: separate the people from the problem; focus on interests, not positions; generate a variety of possibilities before deciding what to do; and insist that the result be based on some objective standard.[4] Principled negotiation is one of the most influential approaches developed as an alternative to traditional negotiating behavior, which has been described as competitive[5] or adversarial.[6] Fisher and Ury refer to the traditional approach as positional bargaining.

The importance of a book can be measured in part by the number and quality of its critics. *Getting to Yes* has been questioned and criticized by heavyweights.[7]

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1. WILLIAM URY, GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE (1991).

2. B.A. Hendrix College, J.D. Duke University, LL.M. Georgetown University, Earl F. Nelson and James S. Rollins Professor of Law, University of Missouri-Columbia School of Law.

3. ROGER FISHER & WILLIAM URY, GETTING TO YES (1981). The second edition was written by Fisher, Ury, and Bruce Patton, and it was published in 1991. The second edition contains an appendix by Patton that responds to important questions about the first edition.

4. *Id.* at 11, 12.

5. Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 11 (1992).

6. *See* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 46-47 (1987) (describing the adversarial orientation).

7. *See, e.g.*, Condlin, *supra* note 5, at 26-34; William McCarthy, *The Role of Power and Principle in Getting to Yes*, *in* NEGOTIATION THEORY AND PRACTICE 115, 117-22 (J. William Breslin & Jeffrey Z. Rubin eds., 1991); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation:*

One of the most persistent questions has been whether the principled negotiation approach will work if the other side takes an adversarial approach. Will the proponent of principled negotiation have to change to an adversarial approach? If she doesn't, will an impasse result? Will a negotiator using the adversarial approach take advantage of a negotiator who tries to engage in principled negotiations?

Ury wrote *Getting Past No* to respond to questions such as these. Of course, not everyone who takes an adversarial approach to negotiation is a jerk. *Getting Past No* deals with a much broader range of issues than negotiating with a jerk. I used the word "jerk" in my title to get your attention and because I believe it sums up a fear by many persons who are called upon to negotiate but who want to do so in a way that is consistent with their notion of appropriate conduct. Approaches such as principled negotiation appeal to these persons, but they fear that they or their client will be taken advantage of if they take such an approach. I suspect that one of their greatest concerns is that they may have to act like a jerk in order to deal effectively with a bully, a liar, or someone who is both astute and obnoxious. *Getting Past No* asserts that there is an effective alternative to relying on techniques such as deception, stonewalling, or threatening.

II. AN OVERVIEW OF THE BREAKTHROUGH STRATEGY

Ury recommends what he calls a "breakthrough strategy" for overcoming barriers to cooperation. He concedes that this strategy is counterintuitive: You are called upon to do the opposite of what you might naturally do; you go around your opponent's resistance instead of meeting it head on.[8]

The first step in the breakthrough strategy is to "go to the balcony."[9] Instead of reacting to your opponent's tactics without thinking, you find a way to buy time. Use the time to recognize your opponent's tactics, figure out your interests, and identify your best alternative to a negotiated agreement. Much of the discussion in the chapter on going to the balcony is about the danger of making important decisions without adequate reflection and about ways of buying time for this reflection.

Second, you "step to their side"[10] in order to create a more favorable negotiating climate. You disarm your opponent before discussing substantive issues. Ury provides a variety of ways to do this, such as asking for more information and reflecting back what your hear, acknowledging points without agreeing with them, focusing on issues on which you agree, and speaking about yourself rather than your opponent by describing the impact of the problem on

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The Structure of Problem Solving, 31 UCLA L. REV. 754, 758 n.9 (1984); James J. White, *The Pros and Cons of "Getting to Yes,"* 34 J. LEGAL EDUC. 115 (1984) (book review).

8. URY, *supra* note 1, at 9.

9. *Id.* at 11-33.

10. *Id.* at 35-57.

yourself or your client. The chapter includes an interesting discussion of the value of an apology.[11]

Third, reframe whatever your opponent has said as an attempt to deal with the problem.[12] Since rejecting your opponent's position will usually reinforce it, recast what she says in a way that directs attention to satisfying interests. Ask her for advice, ask why she wants something, bring up what you think her interests are and ask her to correct you if you are wrong, ask "what if" questions, reframe your opponent's position as one possible option among many, and ask why she thinks her position is fair. Throughout, ask questions that cannot be answered by "no" by prefacing them with "how," "why," "what," and "who." Not only do you reframe positions, but you reframe tactics. For example, if your opponent lays down a rigid deadline, reinterpret it as a target to strive for. If this cannot be done, you turn from negotiating substance to negotiating how the negotiations are to proceed. The goal here is to change the game from positional to problem-solving negotiation.

Fourth, make it easy for your opponents to say yes by "building them a golden bridge."[13] The golden bridge chapter contains a multitude of ideas and techniques for involving your opponent in developing your proposal and for presenting it in a way that makes it easier for her to accept. Guide rather than push her toward an agreement. Consider her interests, involve her in developing your proposal, ask for and use her ideas where possible, and offer her choices. Ury suggests ways of expanding the pie by looking for low-cost, high-benefit trades and using an "if-then" formula, which deals with difficult issues by building flexible provisions into the agreement.[14] Help her save face by showing how circumstances have changed since she adopted her position, asking for a third party recommendation, or urging reliance on a standard of fairness. Ury explains the dangers of trying to go too fast and the value of breaking the negotiation into steps.

The fifth and final step is to "make it hard to say no."[15] This chapter contains a discussion of what to do if your opponent still resists your proposals after you have gone through the first four steps. Ury emphasizes persuasion rather than force or threats. He argues that force or threats often backfire. He suggests that you educate your opponent about the costs of not agreeing, that you warn rather than threaten, and that you demonstrate your best alternative to a negotiated agreement (BATNA). In other words, make sure your opponent understands the consequences of a failure to reach an agreement. Ury points out that, "[P]ower, like beauty, exists in the eyes of the beholder. If your BATNA

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11. *Id.* at 42-43.

12. *Id.* at 59-85.

13. *Id.* at 87-109.

14. For example, if a client's resistance to the amount of your fee results from his uncertainty about whether you can really help him, you propose: "What do you say we make my fee ten thousand dollars as a base, but *if* your sales increase twenty percent over the next six months, *then* you agree to add a ten-thousand-dollar bonus?" *Id.* at 100.

15. *Id.* at 111-36.

is to have its intended educational effect of bringing your opponent back to the table, he needs to be impressed with its reality."[16] If you must use your BATNA, Ury recommends using as little power as possible, exhausting alternatives before escalating, and using only legitimate means. He explains the value of employing third parties where possible. As you try to persuade your opponent and as you resort to your BATNA, you need to remind her regularly of the golden bridge available to her: "Your power to bring him to terms comes not from the costs you are able to impose but from the contrast between the consequences of no agreement and the allure of the golden bridge."[17]

III. WHY *GETTING PAST NO* SHOULD BE READ BY A WIDE AUDIENCE

Getting Past No should be read by a wide audience. Clearly written and filled with interesting anecdotes that illustrate the author's points, it is a how-to book that will help both professional and amateur negotiators. I will recommend it to my three sons, although none of them plans to work as a professional negotiator, because I believe it will assist them in being effective in their various fields in a way that is consistent with their values. It is the first book I would recommend from the negotiation literature for those who are not scholars and those who are not professional negotiators. Not only will it help most people become better negotiators, but it will help them improve their "people skills" in general.

Getting Past No will join *Getting to Yes* as a how-to book that is also important to scholars. Scholars from a variety of disciplines are creating a large body of literature on the subject of negotiation.[18] Those who survey the various orientations toward negotiation usually give principled negotiation a prominent place. Donald Gifford, for example, identifies three negotiation strategies — competitive, cooperative, and problem solving — and says that principled negotiation is predominantly a problem-solving approach but that it includes both cooperative and competitive tactics.[19] Robert Condlin asserts that the central strategic choice in negotiation is whether to cooperate or compete[20] and believes that the theory of principled bargaining was a significant stage in "the

16. *Id.* at 120.

17. *Id.* at 128.

18. *See, e.g.*, ALVIN L. GOLDMAN, SETTLING FOR MORE: MASTERING NEGOTIATING STRATEGIES AND TECHNIQUES (1991); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986); NEGOTIATION THEORY AND PRACTICE, *supra* note 7; HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982). For books of special interest to lawyers and law students, see, e.g., CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (1986); DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS (1989); LARRY L. TEPLY, LEGAL NEGOTIATION IN A NUTSHELL (1992); GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).

19. GIFFORD, *supra* note 18, at 22 n.12.

20. Condlin, *supra* note 5, at 11.

development of the argument for cooperative bargaining."[21] The dispute resolution casebook by Stephen B. Goldberg, Frank E.A. Sander, and Nancy H. Rogers includes excerpts from *Getting to Yes*[22] and *Getting Past No*.[23] *Getting to Yes* and *Getting Past No* appeal to so many readers from such disparate groups because they are clearly written by highly-respected scholar-practitioners with broad experience, grounded in ideas that have a powerful appeal, and are relatively short.

Would reading *Getting Past No* really help one improve her ability to negotiate with a jerk without becoming one? I think so. I also believe a lot of jerks could increase their effectiveness by adopting Ury's recommendations. "Jerkness" kills a lot of deals. I have deliberately refrained from defining what I mean by jerk. My use of the term refers primarily to matters of personality and style rather than negotiation orientations and strategies.[24] I do not equate the adoption of a competitive orientation toward negotiation with being a jerk.

My primary professional concern is the education of law students. *Getting Past No* is one of the books I would recommend to law students. Law students would benefit from reading it along with *Getting to Yes* and *Getting Together: Building a Relationship that Gets to Yes*,[25] a 1988 book by Roger Fisher and Scott Brown. I would not, however, recommend that law students rely solely on these three books. Principled negotiation is only one of several approaches discussed in the negotiation literature, and law students need to understand the various approaches and the arguments for and against each alternative. For example, law students would benefit from considering James J. White's argument that *Getting to Yes* seems to overlook the ultimate hard bargaining "in which one seeks more at the expense of the other"[26] along with Roger Fisher's reply.[27] Law students might then ask whether *Getting Past No* strengthens the case made by Fisher.

In addition, law students should consider the competitive techniques described in Harry T. Edwards and James J. White, *The Lawyer As A Negotiator*,[28] and Charles B. Craver, *Effective Legal Negotiation and Settlement*.[29] Law students would benefit from reflecting on the ways in which

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21. *Id.* at 23.

22. *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 48 (1992).

23. *See id.* at 38-45.

24. *See* GIFFORD, *supra* note 18, at 18-21 (discussing the difference between style and strategy); Condlin, *supra* note 5, at 21, 22 (discussing the difference between style and substance).

25. ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES (1988).

26. White, *supra* note 7, at 115-16.

27. Roger Fisher, Comment, 34 J. LEGAL EDUC. 120 (1984) (responding to White, *supra* note 7).

28. HARRY T. EDWARDS & JAMES J. WHITE, PROBLEMS, READINGS, AND MATERIALS ON THE LAWYER AS A NEGOTIATOR (1977).

29. CRAVER, *supra* note 18, at 69-102.

Carrie Menkel-Meadow's problem-solving approach[30] is similar to and different from principled negotiation.[31] They should understand Don Gifford's argument that no one orientation is superior all of the time and that strategies and tactics should vary depending on the kind of issues being negotiated and the stage of negotiation.[32] It is important for law students to understand David Lax and James Sebenius' distinction between creating and claiming value and how a strategy appropriate for claiming value might impede the creation of value and vice-versa.[33] Law students should read the fascinating analysis by Robert Condlin of the implications of game theory studies and a lawyer's ethical obligations for the choices that a lawyer-negotiator is called upon to make.[34]

IV. CONCLUSION

Fisher and Ury assert that principled negotiation is an all-purpose approach suitable for any negotiation with any kind of negotiator on the other side.[35] My reading of the writers referred to in the preceding paragraphs has caused me to be somewhat skeptical of this claim. *Getting Past No* has reduced but it has not eliminated this skepticism. Even though I don't believe students of negotiation can afford to rely solely on Fisher and Ury for guidance, I must say that *Getting to Yes* and *Getting Past No* are my favorite books on negotiation.

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30. *See* Menkel-Meadow, *supra* note 7.

31. *See, e.g.*, Condlin, *supra* note 5, at 39-41.

32. For an overview, see GIFFORD, *supra* note 18, at 13-44.

33. *See* LAX & SEBENIUS, *supra* note 18, at 88-153.

34. Condlin, *supra* note 5, at 50-68, 78-104. The following excerpts are suggestive:

> Given the similarities between a career in dispute bargaining and the iterated prisoner's dilemma, Axelrod's analysis should interest lawyers. It suggests, apparently counter to some lawyers' intuition, that when faced with a choice of adopting either a competitive or cooperative approach to bargaining in relationships or communities in which one will bargain again, lawyers should cooperate. . . . As long as the bargaining community contains a "small cluster of cooperators," lawyers will do better over the long haul by being cooperative.

Id. at 67.

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> Clients do better, at least clients in the aggregate, when represented by lawyers who bargain cooperatively and are known to do so. Nevertheless, a particular client . . . may seek to trade on rather than contribute to her lawyer's history of cooperating. She may instruct her lawyer to defect when the adversary cooperates, and may ground this instruction on the lawyer's ethical obligations to be deferential and competent.

Id. at 78-79.

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> Diligence in the pursuit of a client's interest is often a virtue, just as competing with an adverse bargainer is often a vice, and yet it may not be possible to do one and avoid the other much of the time. A bargainer may have to choose.

Id. at 104.

35. FISHER & URY, *supra* note 3, at xiii.