

2013

Getting to Yes: Remembering Roger Fisher

Kevin R. Schock

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Kevin R. Schock, *Getting to Yes: Remembering Roger Fisher*, 5 422 (2013).

This Student Submission - Book and Literature Review is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

GETTING TO YES: REMEMBERING ROGER FISHER

Kevin R. Schock*

The Books and Literature Section of the *Yearbook on Arbitration and Mediation* normally reviews books that have been published within the last twelve months. However, the *Yearbook* is also committed to honoring the scholars that have led to the growth and development of the Alternative Dispute Resolution field. Roger Fisher could properly be considered a foundational scholar in the field of negotiation. Fisher was a law professor at Harvard law school, and published extensively on the topic of negotiation during his tenure.¹ Additionally, Fisher served as the director of the Harvard Negotiation Project, and the Conflict Management Group; organizations devoted to studying and facilitating negotiations as diverse as custody agreements to international peace agreements.² While all of Fisher's professional accomplishments are noteworthy, Fisher is probably most famous for being one of the co-authors of the foundational work, *Getting to Yes*.³ *Getting to Yes* is arguably one of, if not the most famous, works on the topic of negotiation.⁴ Sadly, Roger Fisher died on August 25, 2012 at the age of ninety.⁵

As the calendar rapidly approaches the one-year anniversary of Fisher's passing, the *Yearbook on Arbitration and Mediation* has found it fitting to honor Fisher's contributions to the field of Alternative Dispute Resolution by reviewing the first edition of *Getting to Yes*. While *Getting to Yes* is thirty years old, this literature review will proceed like any other. That is, this review will explore its strengths and weaknesses.⁶ There has certainly been a great deal of scholarship on the topic of negotiation in the thirty years since the first publication of *Getting to Yes*, and the continuing influence and legacy of the work is impressive. Seasoned negotiators will likely recognize tactics they have been using with great success for decades. Relatively new negotiators will find a thoughtful and creative approach to getting past the seemingly omnipresent "no" of negotiation, and learn how to arrive at a mutually agreeable resolution that satisfies the underlying needs and interests of all the parties. Make no mistake, *Getting to Yes* is not some miracle framework that guarantees success in every negotiation, but it is without question, a useful starting point for ensuring an effective negotiation.

* Kevin Schock is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2014 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

¹ Associated Press, *Roger Fisher, 90, Prof Co-Wrote Best Selling Book on Negotiation*, CHICAGO SUN TIMES, Aug. 27, 2012, <http://www.suntimes.com/news/obituaries/14768476-418/roger-fisher-90-prof-co-wrote-best-selling-book-on-art-of-negotiating.html>.

² *Id.*

³ ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Bruce Patton, 1 ed. 1981).

⁴ See, LYNN DURYEE & MATT WHITE, *50 ESSENTIAL TOOLS FOR THE ADVANCED PRACTITIONER* 12 (Thomson Reuters/Aspatore 2012) (In their introduction, Duryee and White write, "*Getting to Yes* by Roger Fisher and William Ury has been the definitive text on negotiation theory since its publication thirty years ago, and it remains a masterpiece").

⁵ Associated Press, *supra* note 1.

⁶ Where appropriate this review will examine other scholarly works, and contrast the claims of those works with the claims asserted in *Getting to Yes*.

Structurally, *Getting to Yes* is broken into three distinct parts, labeled: the problem, the method, and “yes, but.”⁷ Within each of these sections, there are chapters devoted to smaller topics, ranging from core principles of the proffered method, to strategies for dealing with obstinate players. At 150-pages, the book is long enough to be thorough, but short enough to remain manageable. The brevity of the book is sure to be appealing to an otherwise busy practitioner.

I. INTRODUCTION

The authors of *Getting to Yes* begin their introduction by acknowledging that the universe of negotiation is vast. William Ury and Roger Fisher write, “[e]veryone negotiates something every day . . . Negotiation is a basic means of getting what we want from others.”⁸ However, the mere fact that most people are involved in some form of negotiation on a daily basis does not mean that everyone is equally proficient in bargaining; negotiation is a difficult skill.⁹ The authors point out that in approaching negotiation, most people find themselves being drawn to one of two ways of bargaining: “soft” or “hard”.¹⁰ The “soft” negotiator seeks to escape the conflict associated with negotiation and attempts to reach an agreement as quickly as possible. Conversely the “hard” negotiator sees negotiation as some sort of battle of wills, and attempts to “win” a negotiation through the sheer force of personal resolve.¹¹ These two styles represent the extreme ends of a spectrum, and there are plenty of negotiation styles that lay somewhere in the middle.¹²

Fisher and Ury offer a third way of negotiating; a method that seeks to combine the positive traits of both the “hard” and “soft” negotiation styles.¹³ The method the author’s advocate is referred to as, “principled negotiation.”¹⁴ Principled negotiation is a style that attempts to decide issues based on the merits; it requires to parties to look for

⁷ This book review intentionally omits the introductory section of the book, as it does not meaningfully expound on the substance of the text.

⁸ FISHER & URY, *supra* note 3, at xi.

⁹ *Id.* at xii. *See also*, James Boskey, *Blueprint for Negotiations*, 48 DISP. RESOL. J. 8, 8-10 (December, 1993) (Discussing the omnipresence of negotiation in everyday life, and the way in which certain people are able to employ negotiation skills to greater effect than others).

¹⁰ FISHER & URY, *supra* note 3, at xi. *See also*, Boskey, *supra* note 9 (Boskey describes a similar dichotomy in negotiation style, however he uses the labels “competitive” and “cooperative.” Boskey’s description of the competitive negotiator describes a person who takes extreme positions, uses argument as their main negotiation tool, and seeks to impose their desires onto the other party. Conversely, the cooperative negotiator is open in sharing information, uses logic as their main negotiation tool, and tends to shy away from taking extreme positions. The difference between Fishers’ and Boskeys’ labels seems to be semantic and not substantive).

¹¹ FISHER & URY, *supra* note 3, at xi.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; *see also* Alex J. Hulder, *Discovering Agreement: Setting Procedural Goals in Legal Negotiation*, 56 LOY. L. REV. 591 (2010). (Hulder describes problem-solving negotiation, which seems to be relatively similar principled negotiation. One of the tenants of problem solving negotiation is a recognition that “cooperation and competition always coexist in negotiation. This assumption stems from the recognition that all trade is both cooperative and competitive. Similarly, principled negotiation attempts to balance, and harness the competitive and cooperative possibilities in a negotiation).

mutual gains, and demands that when interests conflict, the resolution be based on some fair, independent standards.¹⁵ The purpose of principled negotiation is to allow for a party to be equitable in their negotiations, while simultaneously being protected from potential exploitation.¹⁶

Getting to Yes is ultimately about the method of principled negotiation, and it's core, underlying tenets. Fisher and Ury promise that the principled negotiation method has a wide application, capable of being employed with equal success in situations as diverse as resolving a dispute over what movie to see, to military arms control negotiations.¹⁷ The promise of a greater chance of success in negotiations, and broad application ultimately encourages the reader to move beyond the introductory pages, and explore what principled negotiations is *really* about.

II. THE PROBLEM

A. Don't Bargain Over Positions

Fisher and Ury begin the first major part of *Getting to Yes* by arguing that the problem with the way most people negotiate, is that they spend their time bargaining over particular positions, rather than focusing on the underlying needs that are driving the position.¹⁸ According to the authors, positional negotiation is a particularly ineffective approach to bargaining.¹⁹ Fisher and Ury suggest that a method of negotiation can properly be judged by three criteria: whether the style ultimately produces a wise agreement; whether it is efficient at arriving at an agreement; and whether it improves, or at least maintains, the relationship between the negotiating parties.²⁰

According to the authors, positional bargaining tends to produce unwise agreements.²¹ When employing a positional negotiation strategy, negotiators tend to pay more attention to their bargaining position, and spend less of their energy trying to address the actual underlying needs of the parties.²² Furthermore, a negotiator's ego can become attached to a particular position in such a way that movement away from a

¹⁵ FISHER & URY, *supra* note 3, at xii.

¹⁶ *Id.*

¹⁷ *Id.* at xiii.

¹⁸ *Id.* at 3. (The authors suggest that the best example of this type of negotiating is the sort of dickering that people engage in when attempting to settle on the appropriate price for an antique).

¹⁹ *Id.*; see also Michael Palmer, *Problem Solving Negotiation – What's In it For You and Your Clients*, 25 VT. B.J. 21 (September 2000). (Palmer provides a laundry list of ways in which positional bargaining leads to inefficiencies. Palmer writes, "Positional bargaining favors deception and manipulation. It encourages bluffing. It places undue emphasis on the "value of the case" solely from the perspective of an eventual verdict and what it will cost to obtain. It erodes the credibility of the negotiators by forcing them to make an early commitment to an unrealistic number in order to work their way up or down to the number they really have in mind . . . [Additionally], positional bargaining throws the players into a one-dimensional frame of demand and offer (usually of dollars) without regard to how the parties might otherwise help each other satisfy their respective interests at a low cost to the one and high value to the other. In other words, positional bargaining tends to be highly inefficient, some might even say wasteful.").

²⁰ FISHER & URY, *supra* note 3, at 4.

²¹ *Id.*

²² *Id.* at 5.

previously stated position threatens the self-esteem of the negotiator.²³ Additionally, arguing over positions is usually inefficient; positional bargaining encourages parties to use tactics that will ultimately stall agreement, including the taking of extreme positions and stonewalling. Furthermore, positional bargaining puts the parties at risk of damaging their relationship.²⁴ According to Fishy and Ury, “Anger and resentment often result as one side sees itself bending to the rigid will of the other while its own legitimate concerns go unaddressed. Positional bargaining thus strains and sometimes shatters the relationship between the parties.”²⁵

According to the authors, positional bargaining suffers from at least one additional defect; it is ineffective when there are multiple parties involved in a negotiation.²⁶ It is possible for multiple parties to rally around a position by way of coalition.²⁷ Once a position becomes entrenched amongst a group of people, it becomes harder to shift from that position; namely because a greater number of people are invested in that position, and there is an element of community pressure encouraging coalition members to stand firm in their positions.

After describing the variety of problems associated with positional negotiation, Fisher and Ury offer their alternative: principled negotiation (which is sometimes referred to as negotiation on the merits).²⁸ The method of principled negotiation describes the procedural strategy of negotiation.²⁹ While some might believe that the substantive provisions of a negotiation are the most important issues to be settled, the procedure by which a negotiation occurs are the “rules of the game” and will ultimately guide the substantive outcome.³⁰ Fisher and Ury state that at the most basic level, the method of principled negotiation can be reduced to four points.³¹ First, a person using principled negotiation will separate the people from the problem being resolved in negotiation.³² Second, the focus of discussion is on the underlying interests of the parties involved, rather than on specific positions.³³ Third, parties in negotiation should generate a variety of possibilities before deciding on a resolution.³⁴ Finally, where the parties are unable to come to some sort of consensus on a particular issue, principled negotiation requires that the resolution of the dilemma be based on some sort of objective standard.³⁵ The authors remind their readers that the four basic components of the principled negotiation method

²³ *Id.*

²⁴ *Id.* at 7.

²⁵ FISHER & URY, *supra* note 3, at 7 (While preservation of a relationship might not seem particularly important when thinking about negotiation as an isolated event, it is rarely the case that negotiation happens in isolation. Parties have past histories, present relationships, and the possibility of future interactions. Thus, thinking about negotiation without simultaneously thinking about the effects the negotiation will have on the relationship is like spending all of your money as you make it, and saving no money for retirement).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 10-11.

²⁹ *Id.* at 10.

³⁰ FISHER & URY, *supra* note 3, at 10.

³¹ *Id.*

³² *Id.* at 11.

³³ *Id.*

³⁴ *Id.*

³⁵ FISHER & URY, *supra* note 3, at 11.

are relevant throughout the entire life cycle of a negotiation. In other words, the principled negotiator should keep in mind the four core principles of the method during the planning, analysis, and actual discussion phases of a negotiation.³⁶

III. THE METHOD

While Fisher and Ury briefly introduced the method of principled negotiation in both the introduction, and their discussion of “The Problem,” the authors provide a tremendous amount of detail about the method by devoting an entire chapter to each of the four core principles of principled negotiation in the second major part of *Getting to Yes*.

A. *Separate the People from the Problem*

As introduced above, the first core tenant of principled negotiation is to “separate the people from the problem.”³⁷ At the most basic level, this principle recognizes that negotiations are conducted by people with “emotions, deeply held values, different backgrounds and viewpoints . . . who sometimes behave in unpredictable ways.”³⁸ The failure to treat a fellow negotiator as a human being can risk the success of the negotiation by undermining whatever personal and professional relationship might exist.³⁹ Additionally, the first core principle recognizes that personal relationships and personalities have a tendency to become entangled with the underlying issues of a negotiation.⁴⁰ Thus, in order to effectively negotiate, one must prepare to deal with the underlying relationship of the parties,⁴¹ in addition to the actual substance of the negotiation.⁴²

The authors of *Getting to Yes* argue that the “people problem” can be understood by thinking in terms of three basic categories: perception, emotion, and communication.⁴³

³⁶ *Id.* at 12.

³⁷ *Id.* at 10-11.

³⁸ *Id.* at 19; see also Peter Reilly, *Mindfulness, Emotions, and Mental Models: Theory that Leads to More Effective Dispute Resolution*, 10 NEV. L.J. 433, 437 (2010). Reilly further demonstrates just how important it is to consider the complex emotions that people deal with, particularly in the context of resolving a dispute. Reilly argues that recognizing emotional complexity, and becoming proficient at working with such intricacies can make dispute resolution easier.

³⁹ FISHER & URY, *supra* note 3, at 20; see also Nancy A Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753 (2004). (Welsh describes the importance of relationships between negotiators as a major factor in determining whether a negotiation will be successful and perceived as having been fair. Welsh writes, “Research reveals that negotiators’ aspirations and moves will be significantly influenced by the culture and context within which they are negotiating . . . and most intriguing of all, their sense of connection to each other.”).

⁴⁰ There may be no clearer example than that of the custody dispute. Potentially embittered by the breakdown of some sort of spousal relationship, parties may look at the issue of custody as a conflict between individuals. In reality, the problem to be solved in a custody dispute is the adequate division of parenting time. An overt focus on personal “baggage” will only cloud the fair resolution of the dispute, and perhaps lead to further damage to an already fractured relationship.

⁴¹ The authors label this relationship issue, “the people problem.”

⁴² FISHER & URY, *supra* note 3, at 21.

⁴³ *Id.* at 22.

The underlying assumption is that if a party knows of the types of challenges posed by the “people problem” they can be more effective at managing the way such issues effect the rest of the negotiation. Fisher and Ury begin discussion the concept of perception by stating that conflict is not necessarily a function of objective reality, “it is ultimately the reality as each side sees it that constitutes the problem in a negotiation.”⁴⁴ Thus, to be effective in negotiation, one must adequately understand the perceptions of the other party. The authors urge their readers to be empathic, arguing, “the ability to see the situation as the other side sees it . . . is one of the most important skills a negotiator can possess.”⁴⁵ In addition to developing one’s capacity to “see the other side,” the authors warn negotiators to refrain from projecting their fears and insecurities on to the opposing party.⁴⁶ While it may be easy to blame the opposing side for the problem, or to assume that the opposing side is acting in an uncharitable manner, this attitude will negatively color one’s perception of the entire negotiation, and is likely not an accurate understanding of the intentions of the other party.⁴⁷ The authors suggest that one simple way to come to an accurate understanding of perceptions is to openly discuss them during the negotiation process.⁴⁸

Emotion is the second category of the “people problem.” The authors state, “[i]n a negotiation, particularly in a bitter dispute, feelings may be more important than talk.”⁴⁹ As a result, it is imperative that an effective negotiator be in tune with their emotions, and the emotions of the other party.⁵⁰ However, it is not enough to understand that certain types of emotions exist, the effective negotiator must seek to understand what is producing the emotions.⁵¹ Furthermore, it is wise practice to make emotions explicit; the authors write, “Making your feelings or theirs an explicit focus of discussion will not only underscore the seriousness of the problem, it will also make the negotiations less reactive, and more proactive.”⁵²

⁴⁴ *Id.* at 23.

⁴⁵ *Id.* at 23-24 (The authors point out that seeing the other side necessarily requires the reservation of judgment. In working to understand an opponent’s argument, one must let go of their own intuitions and feelings regarding the issue).

⁴⁶ *Id.* at 25-26.

⁴⁷ FISHER & URY, *supra* note 3, at 25.

⁴⁸ *Id.* at 26.

⁴⁹ *Id.* at 30.

⁵⁰ *Id.*; see also Clark Freshman, *Yes And: Core Concerns, Internal Mindfulness, And External Mindfulness for Emotional Balance, Lie Detection, and Successful Negotiation*, 10 *NEV. L. J.* 365, 372-77 (2010). (Freshman points out that it is possible to improve one’s emotional intelligence (the ability to recognize, and accurately identify emotions of others based on their expressions) with a little bit of training. According to Freshman, this is a function of the relatively few human emotions (7 distinct emotions, to be specific) that humans actively display).

⁵¹ FISHER & URY, *supra* note 3, at 30.

⁵² *Id.* at 32.

The last category of the “people problem” pertains to communication. The ability to communicate effectively is one of the most important capabilities of a negotiator.⁵³ However, there are three problems that commonly hinder communication in negotiation. “First, negotiators may not be talking to each other, or at least not in such a way as to be understood.”⁵⁴ Additionally, even if a negotiator is speaking directly to the other party, the other party may not be hearing what is said because they are busy cultivating a response.⁵⁵ Lastly, there is a danger of misunderstanding inherent in almost all communication.⁵⁶

The authors suggest a variety of ways to address problems associated with communication. The authors first suggest using active listening.⁵⁷ Active listening benefits all parties by making sure the message that was communicated was clearly understood.⁵⁸ Additionally, when speaking, the authors recommend that one speak about themselves, and not about the other party.⁵⁹ Fisher and Ury write, “[A] statement about how you feel is difficult to challenge. You convey . . . information without provoking a defensive reaction.”⁶⁰ One of the most interesting solutions for improving communication involves the usage of physical positioning.⁶¹ The authors suggest that sitting on the same side of the table, and facing a physical representation of the problem at hand (such as a copy of a disputed contract, a chart, or even a blank piece of paper) will help parties think of themselves as partners in the solving of a dilemma, rather than as adversaries.⁶² The subtext is that parties are more willing and able to effectively communicate with a partner in a shared venture than they are with someone they actively perceive as an adversary.

Fisher and Ury’s explanation of the first core tenant of the principled negotiation method persuades the reader of the importance of distinguishing the relational aspect of a negotiation from the substantive provisions. In many instances, the relationship of the parties will extend beyond their participation in the instant negotiation; as such, the value of being able to manage the “people problem” is of paramount importance.

While Fisher and Ury offer a variety of specific ways in which the “people problem” can be managed, it seems as if their advice can be reduced down to the

⁵³ *Id.* at 33. (The authors go as far as saying that without communication, there can be no negotiation); see also Kevin Arvuch, *Culture as Context, Culture as Communication: Considerations for Humanitarian Lawyers*, 9 HARV. NEGOT. L. REV. 391 (2004) (Arvuch describes the way in which culture, and a lack of cultural awareness can have profound effects on negotiations. While Arvuch’s article is primarily focused on “humanitarian lawyers” – cultural competency is an increasingly large component of competent communication. Even “main street lawyers” would do well to improve their ability to communicate by improving their cultural competency).

⁵⁴ FISHER & URY, *supra* note 3, at 33.

⁵⁵ *Id.* at 34.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 35.

⁵⁹ FISHER & URY, *supra* note 3, at 35.

⁶⁰ *Id.* at 37.

⁶¹ *Id.* at 39.

⁶² *Id.* (It seems to me that at least some of the subtext of this point is that seemingly insignificant details (like physical positioning) may have greater importance than at first glance. Thus, the decision to remove one's jacket, to actually roll up one's sleeves, or to loosen a necktie may have effects that are not readily identifiable. As a result, the most effective negotiator will have to be mindful of even the seemingly minor personal decisions they make, and determine whether the decision to "roll up one's sleeves" was a net gain or loss).

fundamental importance of treating your “opponent” with respect. The wide variety of advice Fisher and Ury offer demonstrates that respect is a broad, multifaceted concept that is situational, and variable. In dealing with fellow negotiators, one must seek to be aware of how they are trying to show respect; and whether that message is being received and reciprocated.

B. *Focus on Interests, Not Positions*

The second primary tenant of the principled negotiation method is the requirement that negotiators be willing to focus on interests, not positions.⁶³ According to Fisher and Ury, “[t]he basic problem in negotiation lies not in conflicting positions, but in the conflict between each side’s needs, desires, concerns, and fears.”⁶⁴ A person’s needs and desires are their interests; positions are the ideas that someone decides on to effectuate their interests.⁶⁵ Focusing on interests is more effective than focusing on position for a variety of reasons. Most importantly, “for every interest, there usually exist several possible positions that could satisfy it.”⁶⁶ Additionally, the authors point out that in any conflict, parties usually have many more interests in common than the ones that are in conflict. These non-conflicting interests may give rise to creative solutions, and serve as a foundation for building a better relationship.

In order to focus on the interests of the other party, a negotiator must be able to identify what those interests actually encompass. The interests underlying a position are likely to be complex and numerous, and it is entirely possible that a party may have inconsistent interests.⁶⁷ The effective negotiator must put themselves in the shoes of the other negotiator, and ask about why that negotiator is taking a certain position, and why they are not taking other potential positions.⁶⁸ The effective negotiator must recognize that each side has multiple interests, and a constituency that cares about the resolution of a dispute.⁶⁹

A good place to start the process of identifying interests is to look to basic human needs. Basic human needs are those concerns that motivate *all* people; examples include: security, economic well-being, a sense of belonging, recognition, and control over one’s life.⁷⁰ The authors write, “[n]egotiations are not likely to make much progress as long as one side believes that the fulfillment of their basic human needs is being threatened by the other.”⁷¹

⁶³ FISHER & URY, *supra* note 3, at 41; *see also* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). (Meadow’s description of “problem solving negotiation” is similar to principled negotiation. Most noticeably, each approach requires negotiators to find the underlying needs and interests of the parties. Meadow’s discussion of interests provides greater detail than *Getting to Yes* on the subject of how to determine and rank the underlying needs of the parties).

⁶⁴ FISHER & URY, *supra* note 3, at 42.

⁶⁵ *Id.*

⁶⁶ *Id.* at 43.

⁶⁷ *Id.* at 45.

⁶⁸ *Id.*

⁶⁹ FISHER & URY, *supra* note 3, at 48-49.

⁷⁰ *Id.* at 49-50.

⁷¹ *Id.* at 50.

Once the basic human need interests have been identified, it is perfectly appropriate to openly acknowledge, and explain one's interests to the opposing party.⁷² The authors state that it is important to be specific in explaining one's interests; detail provides a more nuanced picture of the interest and makes the interest seem legitimate.⁷³ However, it would be unwise for a negotiator to spend the entire duration of their negotiation focusing on their own interests; the effective negotiator must acknowledge the interests of the other side as part of the problem to be addressed.⁷⁴

While the method of principled negotiation consistently advocates for flexibility, it does allow for a certain amount of rigidity when it comes to the protection of one's interests. Fisher and Ury write, "It may not be wise to commit yourself to a position, but it is wise to commit yourself to your interests. This is the place in a negotiation to spend your aggressive energies."⁷⁵ An overt focus on interests, with each party pushing hard for their own interests, may lead to exceptionally creative and mutually advantageous solutions.⁷⁶ The authors emphasize this point by reminding their readers that they should not let their desire for being perceived as conciliatory interfere with their interests being adequately satisfied.⁷⁷

Fisher and Ury remind their readers that no matter how hard they are fighting for their interests, they must not channel that passion in a way that demonstrates a lack of respect, or indicates a personal attack.⁷⁸ The authors write:

Fighting hard on the substantive issues increases the pressure for an effective solution; giving support to the human beings on the other side tends to improve your relationship and to increase the likelihood of agreement. It is the combination of support and attack which works; either alone is likely to be insufficient.⁷⁹

The above quotation does a nice job of summarizing, and combining the first two tenants of the principled negotiation method offered in *Getting to Yes*. There is an often used movie quote where a business deal sours, and one party feels jaded: "It's not personal; it's just business." Fisher and Ury remind their readers that, in negotiations, there is always an element of both. The substance of the negotiation must be separated from the "people problem," but each "problem" must be attended to. Focusing only on substance, or only on the "people problem" will lead to agreements that are unwise, ineffective, and inefficient.

⁷² *Id.* at 50-51.

⁷³ *Id.* at 51.

⁷⁴ FISHER & URY, *supra* note 3, at 52-53.

⁷⁵ *Id.* at 55.

⁷⁶ *Id.* at 57.

⁷⁷ *Id.* at 56. (Fisher and Ury write specifically, "Do not let your desire to be conciliatory stop you from doing justice to your problem").

⁷⁸ *Id.*

⁷⁹ FISHER & URY, *supra* note 3, at 57.

C. Invent Options for Mutual Gain

Once a negotiator begins focusing on interests, as opposed to positions, the universe of possible solutions rapidly grows.⁸⁰ The ability to think creatively about potential solutions is one of the most important skills a negotiator can possess.⁸¹ However, creatively thinking about solutions may not be a particularly natural feeling for a negotiator, most people usually believe that they know the correct solution to the resolution of a dilemma: their personal view.⁸² However, this mentality can inhibit the type of openness that is needed for the most successful resolution of a negotiation.⁸³

Fisher and Ury explain that there are four main obstacles that prevent the parties from considering a larger universe of possible options.⁸⁴ First, parties tend to judge possible solutions too quickly; second, parties tend to search for the “single” answer; third, parties tend to assume that their universe of negotiation is closed, and they are unwilling to pursue creative solutions; and fourth, parties tend to minimize the importance of their oppositions interests.⁸⁵

In order to overcome the barriers preventing parties from generating the number of options they will need in order to be successful in their negotiation, Fisher and Ury provide a variety of suggestions.⁸⁶ One such technique is to “separate the act of inventing options from judging them.”⁸⁷ One way to invent new options is to conduct some sort of brainstorming session.⁸⁸ In a brainstorming session, members of the group must feel free to invent ideas without pausing to consider whether they are possible or impossible.⁸⁹ The underlying notion is that criticism stifles creativity; but it is only creativity that will generate the types of solutions that will lead to a successful negotiation. Ordinarily, the generation of ideas is done on an individual basis, but Fisher and Ury urge the readers to consider brainstorming with the other side.⁹⁰ The authors acknowledge that there is some risk inherent in brainstorming with the other side, but suggest that the advantages may outweigh the risks⁹¹ Fisher and Ury write, “joint brainstorming sessions have the great advantages of producing ideas which take into account the interests of all those involved, of creating a climate of joint problem-solving and of educating each side about the concerns of the other.”⁹²

⁸⁰ *Id.* at 58-59.

⁸¹ *Id.* at 58.

⁸² *Id.* at 59.

⁸³ *Id.*

⁸⁴ FISHER & URY, *supra* note 3, at 59.

⁸⁵ *Id.* at 59-62.

⁸⁶ *Id.* at 62. (Fisher and Ury provide four types of solutions, unfortunately due to spatial constraints, I will only be able to discuss two of their techniques. The complete list of techniques is: separate the act of inventing options from the act of judging them; broaden the options on the table rather than look for a single answer; search for mutual gains; and invent ways of making the opposing decisions easy).

⁸⁷ *Id.*

⁸⁸ *Id.* at 63.

⁸⁹ FISHER & URY, *supra* note 3, at 63.

⁹⁰ *Id.* at 65.

⁹¹ *Id.* (The authors point out that there is the risk that a party will say something that prejudices their interests, even if adequate rules have been established for the brainstorming session).

⁹² *Id.*

Another way to generate options is to be deliberate about looking for mutual gain. Fisher and Ury are optimistic that in every negotiation, there is almost always the possibility of a mutual gain.⁹³ In order to find options where mutual gain is a possibility, negotiators must be willing to look towards shared interests as the basis for producing an agreement.⁹⁴ According to the authors, shared interests lie latent in every negotiation, and a focus on these shared interests will likely make the bargaining process more pleasant and productive.⁹⁵ It is possible that the shared interests of the parties may be based on some sort of difference.⁹⁶ For example, one party may care more about the present effect of a negotiation, whereas the other party cares more about the future effects; this situation demonstrates that differences may be primed for mutual gain.⁹⁷ The resolution of the negotiation could give the present minded party a deal that is immediately satisfying, but less desirable in the long term. Conversely, the future minded party would receive a resolution that is not presently satisfying, but will pay dividends in the future. Each party leaves having had at least one of their interests satisfied.

Fisher and Ury's suggestion that parties look for mutual gain is not particularly innovative. To some extent, searching for mutual gain is something that many people do intuitively; one needs to look no further than the concept of carpooling to understand that people think in terms of mutual gain, even in the monotony of everyday life. Additionally, the suggestion that parties "generate options before criticizing them" is not particularly original. However, Fisher and Ury did not promise that every single one of their suggestions would be innovative, they simply promised an effective method.

D. Insist on Objective Criteria

The last core tenant of the principled negotiation method is "insist on objective criteria."⁹⁸ As discussed above, arguing based on positions tends to pit the parties against one another on the basis of will, which is an ineffective method of resolving disputes.⁹⁹ When trying to reconcile divergent interests in a negotiation, it is more effective to insist that objective criteria be used to resolve a dispute.¹⁰⁰ Fisher and Ury write, "The more you bring standards of fairness, efficiency, or scientific merit to bear on your particular problem, the more likely you are to produce a final package that is wise and fair."¹⁰¹

Advising someone to use "objective criteria" does little if there are multiple kinds of objective criteria that might be used to reach different results.¹⁰² The touchstone in

⁹³ *Id.* at 73.

⁹⁴ FISHER & URY, *supra* note 3, at 73.

⁹⁵ *Id.* 75-76.

⁹⁶ *Id.* at 76.

⁹⁷ *Id.* at 77.

⁹⁸ *Id.* at 84.; *but see* Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L. J. 1789, 1825 (2000) (The author contests whether objective criteria is even possible, writing, "[objective criteria] is a misnomer because (1) any such criteria will benefit one party over the other as compared to a different criteria and (2) none can be conclusively established by logical argument to be justifiable ways to divide the cooperative surplus).

⁹⁹ FISHER & URY, *supra* note 3, at 84.

¹⁰⁰ *Id.* at 85.

¹⁰¹ *Id.* at 86.

¹⁰² *Id.* at 86-87.

selecting objective criteria should ultimately be fairness to both parties; furthermore, the criteria chosen should be “both legitimate and practical.”¹⁰³ Additionally, the objective criteria used in resolving the dispute should not apply solely to one side; both parties must be impacted by the usage of fair, objective criteria.¹⁰⁴ Furthermore, when a party insists that an agreement must be based on objective criteria this does not mean that the criteria used will only be the criteria advanced by that party.¹⁰⁵ The selection of criteria to resolve the dispute is a responsibility that is shared by both parties; if the parties can’t agree on what criteria will be applicable they should seek the advice of a neutral third party in cultivating the criteria.¹⁰⁶

As a final point, Fisher and Ury point out that a negotiator should be somewhat suspicious if the opposition is hesitant to work to create objective criteria to solve the dilemma. In fact, some negotiators may try and apply pressure to escape having to decide the merits of the case based on objective criteria.¹⁰⁷ This pressure may take the form of a “bribe, threat, manipulative appeal to trust, or a simple refusal to budge.”¹⁰⁸ Fisher and Ury command their readers to refrain from yielding to such pressure. If a party is unwilling to budge on their rejection of objective criteria, then the negotiation is, in effect, over.¹⁰⁹ What remains is “a choice like the one you face when you walk into a store which has a fixed, nonnegotiable price on what you want to buy. You can take it or leave it.”¹¹⁰

IV. YES, BUT...

A. *What if They are More Powerful?*

It is not always the case that parties have equal power in a negotiation.¹¹¹ Thus, it is important to discuss how one can negotiate if the other party has *more* power. Fisher and Ury write, “In response to power, the most any method of negotiation can do is to meet two objectives: *first* to protect you against making an agreement you should reject and *second*, to help you make the most of the assets you do have.”¹¹² One way of protecting oneself during negotiation is to develop a bottom line, but Fisher and Ury warn

¹⁰³ *Id* at 88-89.

¹⁰⁴ FISHER & URY, *supra* note 3, at 93.

¹⁰⁵ *Id.*

¹⁰⁶ *Id* at 93-94.

¹⁰⁷ *Id.* at 94.

¹⁰⁸ *Id.*

¹⁰⁹ FISHER & URY, *supra* note 3, at 95.

¹¹⁰ *Id.*

¹¹¹ See, Robert Adler & Elliot Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1 (2000). (The authors give perhaps the most thorough account of power in the context of negotiation. The article explores the origins of power in negotiation, the legal implications of power imbalances, and a variety of strategies for maximizing one’s power – or minimizing the power of a more powerful party. At 115 pages, *When David Meets Goliath* provides the theoretical and empirical framework that *Getting to Yes* lacks in its discussion of dealing with more powerful parties).

¹¹² FISHER & URY, *supra* note 3, at 101.

their readers that adopting a bottom line may have more risks than rewards.¹¹³ A bottom line may be too rigid, will likely inhibit imagination, and will probably be set too high.¹¹⁴ Rather than use a bottom line, Fisher and Ury encourage their readers to develop a “Best Alternative to a Negotiated Agreement. (BATNA)”¹¹⁵ Knowing one’s BATNA allows a party to be more flexible in exploring imaginative solutions, and one can get a pretty good sense about whether an agreement is desirable when compared to the attractiveness of their BATNA.¹¹⁶

Developing a BATNA is important if one seeks to increase their negotiating power.¹¹⁷ “Generating possible BATNAs requires three distinct operations: (1) inventing a list of actions you might conceivably take if no agreement is reached; (2) improving some of the more promising ideas and converting them into practical options; and 3) selecting . . . the one option that seems best.”¹¹⁸ This advice is particularly useful, because it requires a negotiator to not only seek to learn more information about their options, but also demands that they improve their options so as to improve their overall negotiating position.

It is also very important to recognize that the other side also has their own BATNA, and to consider how the opposing negotiator’s BATNA may affect negotiations.¹¹⁹ If a negotiator determines that the other side has a very attractive BATNA, this will alter the way in which they proceed with negotiation. Additionally, the BATNA of the other side may affect whether a negotiator should disclose their own BATNA.¹²⁰

Fisher and Ury cannot overstate the importance of determining, and developing your BATNA. Having a good BATNA allows the parties to negotiate on the merits, and allows for a greater amount of bargaining power, even if the other side is *more* powerful.¹²¹ The authors conclude the chapter with an important reminder: “Developing your BATNA not only enables you to determine what is a minimally acceptable agreement, but will probably raise that minimum. Developing your BATNA is perhaps the most effective course of action you can take in dealing with a seemingly more powerful negotiator.”¹²²

B. What if They Won’t Play

Next, Fisher and Ury address how to deal with a situation where the opposing negotiator does not want to negotiate based on the merits of the situation.¹²³ Fisher and Ury suggest three approaches for focusing an opposing party on the merits of a dispute: first, you can concentrate on the merits, rather than positions, and hope the other party

¹¹³ *Id.* at 102-103.

¹¹⁴ *Id.* at 102-103.

¹¹⁵ *Id.* at 104. (BATNA for short).

¹¹⁶ *Id.* at 104-105.

¹¹⁷ FISHER & URY, *supra* note 3, at 108.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 109.

¹²⁰ *Id.*

¹²¹ *Id.* at 110-111.

¹²² FISHER & URY, *supra* note 3, at 111.

¹²³ *Id.*

decides to do the same; second, you could employ a third party neutral (mediator); or third, a negotiator could employ *negotiation ju jitsu*.¹²⁴

Fisher and Ury explain that negotiation ju jitsu is the art of deflecting the attacks of a person who insists on using positional bargaining, and directing their energy back towards the merits of the dispute.¹²⁵ The attacks of a person who refuses to negotiate on the merits will usually occur in one of three ways: the forceful assertion of their own position, attacking your ideas, and making personal attacks.¹²⁶

Negotiation ju jitsu requires that one does not attack the positions of the other party, even when the other party is asserting their undesirable position forcefully.¹²⁷ Instead, the effective negotiator must merely treat the asserted position as one possible option.¹²⁸ Additionally, a negotiator should welcome the opposing parties attacks on their positions.¹²⁹ The opposing parties attacks on a negotiators position provides insight into that parties' desires and interests.¹³⁰ Lastly, when personal attacks occur, it is wise to let them occur without any sort of defense. It may be valuable to let the opposing negotiator blow off a little steam, instead of defending oneself, Fisher and Ury suggest that one should simply recast a personal attack as an attack on the problem.^{131,132}

C. *What if they Use Dirty Tricks?*

The last substantive chapter of *Getting to Yes* is devoted to dealing with persons who refuse to negotiate on the merits, and attempt to advance their agenda through the use of tricky bargaining.¹³³ Tricky bargaining encompasses the use of lies, psychological abuse, and pressure tactics.¹³⁴ The authors suggest that most people just put up with these kinds of tactics. While simply ignoring such tactics may work in some instances, more than often, simply ignoring the use of “tricky bargaining” will fail.¹³⁵ The second most common response to tricky bargaining procedures is to respond in kind.¹³⁶ Responding in kind is ineffective because it turns the negotiation into a contest of wills. Rather than simply ignoring the problem, or responding in kind, Fisher and Ury suggest that their readers engage in principled negotiation about the negotiation process.¹³⁷ The use of principled negotiation to craft a fair negotiation process is no different than the principle

¹²⁴ *Id.* at 113.

¹²⁵ *Id.* at 114.

¹²⁶ *Id.* at 114.

¹²⁷ FISHER & URY, *supra* note 3, at 116.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 115.

¹³¹ *Id.*

¹³² FISHER & URY, *supra* note 3, at 123-33. (Fisher and Ury provide a transcript of the way in which a person can use “negotiation ju jitsu” in the context of a rental dispute. This transcript takes up a large chunk of the chapter, but does a nice job of illustrating the way the techniques advanced in *Getting to Yes* can be used with great success. It is worth noting that this transcript likely represents the ideal outcome, and that not all negotiations with obstinate players will be as successful).

¹³³ *Id.* at 134.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 135.

¹³⁷ FISHER & URY, *supra* note 3, at 135.

used to resolve the substantive disputes of a negotiation: separate the people from the problem; focus on interests not positions; invent options for mutual gain, and insist on objective criteria in resolving disputes.¹³⁸

Having already spent a great number of pages discussing the principled negotiation method, Fisher and Ury choose to explore types of tricky bargaining tactics.¹³⁹ According to the authors, such tactics can be broken into three categories: deliberate deception, psychological warfare, and pressure tactics.¹⁴⁰ The remainder of the chapter is spent discussing these kinds of tactics, and the way in which principled negotiation can be used to diffuse their effectiveness.

Methods of deliberate deception include misrepresentations as to facts, authority, or intentions.¹⁴¹ One of the best ways to protect against deliberate deception is to refrain from being too trusting.¹⁴² Fisher and Ury write, “Unless you have good reason to trust somebody, don’t.”¹⁴³ This simply means that a party should ask for evidence and verify the assertions of the other party, not that you should assume the other party is a liar. If a party suspects that their opponent has no intention of honoring whatever agreement is reached at the end of negotiation, they should take care to build compliance features into the language of the agreement.¹⁴⁴ The inclusion of compliance features will be of little worry to someone who is actively invested in creating a workable and lasting agreement, but will force a person with dubious intentions to risk adverse action under contract theory should they not comply with the language of the negotiated agreement.

The concept of “psychological warfare” includes situations where one party deliberately puts the other in a stressful or uncomfortable situation, makes personal attacks in an attempt to weaken the other parties resolve, or employs the classic good-guy/bad-guy technique.¹⁴⁵ The usage of “psychological warfare” can be diffused in many situations simply by calling attention to one’s perception that the technique is being used.¹⁴⁶ Naming the technique will allow one party show the other party that they are aware of the tactic, and refuse to be influenced by it; or if the psychological pressure one is experiencing was caused by accident, to have the situation rectified.¹⁴⁷

Fisher and Ury explore even more “tricky bargaining” techniques and the ways in which a “principled negotiator” can respond to such tactics in the final pages of the chapter. Overall, the theory about how to respond to tricky bargaining is similar to the theory of the book; depersonalize the usage of the tactic, and refuse to continue negotiating until the other party is willing to decide the issue on the merits, devoid from any positional frills and gimmicks.

¹³⁸ *Id.* at 136-37.

¹³⁹ *Id.* at 137; *see also* Scott Shagin, *The Dirty Dozen*, 228 NJ LAWYER 34 (2004). (Describing 12 common “dirty” negotiation tactics (aka “tricky”), and ways that these tactics can be addressed and overcome).

¹⁴⁰ FISHER & URY, *supra* note 3, at 137.

¹⁴¹ *Id.*

¹⁴² *Id.* at 138.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 139.

¹⁴⁵ FISHER & URY, *supra* note 3, at 140-41.

¹⁴⁶ *Id.* at 141.

¹⁴⁷ *Id.* at 145.

V. CONCLUSION

Fisher and Ury conclude *Getting to Yes* by offering their readers three final points.¹⁴⁸ First, the authors tell their readers that the substance of their book is not meant to be new.¹⁴⁹ Fisher writes, “There is probably nothing in this book which you did not already know at some level of your experience. What we have tried to do is to organize common sense and common experience in a way that provides a usable framework for your thinking and acting.”¹⁵⁰ Second, the authors remind their readers that reading *Getting to Yes* is merely a starting point in becoming a good negotiator.¹⁵¹ Skill is not acquired from reading, but through conscious practice.¹⁵² The last concluding point in *Getting to Yes* concerns the topic of winning.¹⁵³ The authors remind the reader that, “winning” in the context of *Getting to Yes*, is procedural not substantive.¹⁵⁴ Fisher writes, “The thing you are trying to win is a better way to negotiate – a way that avoids you having to choose between the satisfaction of getting what you deserve and of being decent. You can have both.”¹⁵⁵

The conclusion of *Getting to Yes* provides the reader with a snapshot of what Fisher and Ury were ultimately trying to provide. It is against these goals that *Getting to Yes* should be evaluated. Overall, Fisher and Ury succeed in providing a well-organized and balanced method for approaching negotiation that seems intuitive at times. Focusing on the underlying needs/desires of the parties, treating fellow negotiators with respect, searching for opportunities for mutual gain, and insisting on fair criteria for the resolution of disputes are not revolutionary ideas, but they are ideas that are easy to forget when locked in the intellectual and emotional strain of a particularly intense negotiation. Having a principled method, like the one advocated for by Fisher and Ury, can help a negotiator be sure that they are constantly using the seemingly intuitive suggestions that will allow for a greater chance at a successful negotiation.

Fisher and Ury also make clear that reading *Getting to Yes* is merely a starting point in the process of becoming a good negotiator. This recognition is particularly important as it would be easy for the authors to fall into the trap of stating that they have all of the answers. Instead, the authors offer *Getting to Yes* for what it is: a tool for improving one’s skills as a negotiator. In the end, *Getting to Yes* does not offer much in the way of traditional academic theory. The authors offer no citations to other academic sources and the book is entirely devoid of empirical research. The authors rely entirely on their own (albeit, impressive) experience in crafting the “principled negotiation” method. Yet, what the book lacks in terms of academic rigor, it makes up for in practical application. Nearly every page of the book includes some sort of example or some model language for introducing/implementing a particular kind of strategy. Personal experience suggests that the most difficult part of applying any sort of “method” is being able to recognize when application of the method would be appropriate, and what language

¹⁴⁸ *Id.* at 153.

¹⁴⁹ *Id.*

¹⁵⁰ FISHER & URY, *supra* note 3, at 153.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 154.

¹⁵⁴ *Id.* at 154.

¹⁵⁵ FISHER & URY, *supra* note 3, at 154.

should be used. In this regard, *Getting to Yes* is exceptional. By focusing primarily on practical application, Fisher and Ury have ensured that *Getting to Yes* could be one of the most frequently referenced books on a negotiator's bookshelf.

Finally, Fisher and Ury remind their readers that the promise of *Getting to Yes* is not providing a way for the reader to get everything they want, but providing a method for a fair negotiating process.¹⁵⁶ *Getting to Yes* offers no magical incantation, no formula of words that will allow the reader to move an otherwise obstinate negotiator to a more favorable position. By focusing on process rather than substantive results, Fisher and Ury found a way to ensure that all persons, in situations across the negotiation spectrum, could use their method.

Getting to Yes is a highly practical, at times entertaining, but always informative look into the world of negotiation strategy. Variations on the "principled negotiation" method have risen since the time of the original publication of the book, but the original version of *Getting to Yes* stands the test of time. For new students of negotiation, reading *Getting to Yes* may feel like an introduction to a new and very nuanced universe. For seasoned negotiators, reading *Getting to Yes* may be like visiting an old friend: she has a lot of stories that you have heard before, but they are good stories, and somehow, the lesson you take away from her words is different each time.

¹⁵⁶ *Id.*; but see Eleanor Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989). (Norton raises questions regarding the extent to which a bargaining process can ever truly be fair or ethical. Norton argues that bargaining encourages people to adhere only to ethical minimums in the procedure of bargaining).