

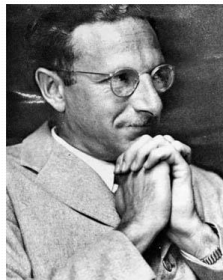
California State Bar
Family Law Section

Don't Let High-Stress Negotiations Make You Crazy, Part 2



by Ronald S. Granberg

Eric Berne, M.D.
Transactional Analysis
Games People Play



2

William Ury, Ph.D.
Harvard Negotiation
Project
Getting To Yes
Getting Past No



3

TA & Harvard Negotiations Project

Berne:

Opposing Team needs recognition –
“strokes” – and so does Client

Ury:

Opposing Team needs recognition –
“to be heard” – and so does Client

Professional/Personal Goals:

calm, conscious, considerate

4

Review: webinar goals

- Understand mental conditions of:
 - Your Opposing Team
 - Your Client
 - Yourself
- Achieve satisfactory professional results while:
 - Promoting sanity
 - “Keeping the edge off”

5

Eight Psycho-sensible Constructs

1. Harry Stack Sullivan’s “Self System”
2. Distortion, Denial, Projection, Transference
3. Elizabeth Kübler-Ross’ “Five Stages of Grief”
4. Lenore Walker’s “Cycle of Abuse”
5. Understanding the Triune Brain
6. Eric Berne’s “Transactional Analysis”
7. Harvard Negotiation Project (William Ury)
8. DSM Personality Disorders

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Review of Psycho-sensible Constructs

1. **Harry Stack Sullivan's "Self System"**
2. ~~Distortion, Denial, Projection, Transference~~
3. **Elizabeth Kübler-Ross' "Five Stages of Grief"**
4. **Lenore Walker's "Cycle of Abuse"**
5. ~~Understanding the Triune Brain~~
6. **Eric Berne's "Transactional Analysis"**
7. ~~Harvard Negotiation Project (William Ury)~~
8. ~~DSM Personality Disorders~~

7

Harry Stack Sullivan, M.D.



8

Shrink Rap

GOOD ME

"Ego-syntonic"

BAD ME

"Ego-syntonic"

NOT ME

"Ego-dystonic" (aka "ego-alien")

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Elisabeth Kübler-Ross, M.D.



10

Five Stages of Grief

- Denial
- Anger
- Bargaining
- Depression
- Acceptance

(not necessarily in isolation, or in order)

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Lenore Walker, Ed.D.



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The Four Stages of Abuse:

1. Tension Building
2. "Blowup"
3. "Honeymoon"
4. Calm

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Freudian Psychoanalysis: Three Personality Structures

S

Superego

E

Ego

I

Id

14

Transactional Analysis: Three Personality Structures

P

Parent

A

Adult

C

Child

15

Things We Do

A “Transaction”

- Any interpersonal interaction

A “Pastime”

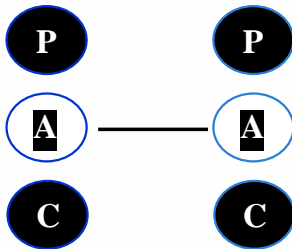
- A good-faith transaction

A “Game”

- A bad-faith (ulterior motive) transaction

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Transactional Analysis: Adult-Adult Transaction



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A Game

• Game

An ongoing series of complementary ulterior transactions progressing to a predictable outcome

• Game Goal

“Payoff” = emotional “reward”

• Split-Level (Bad Faith) Construction

Superficially plausible (Adult-Adult)
BUT contains hidden motive

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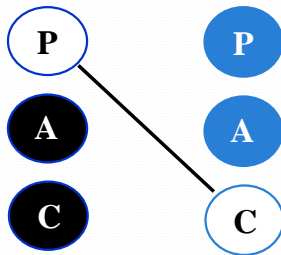
My Parent Abuses Your Child

I play the Game of "Gotcha"

- You repair my car well – but add a \$5.50 "extra"
- I explode, insulting you, your company, your mother
- **Ostensibly:** Adult-Adult transaction
- **Actually:** my Parent abuses your Child
- My payoffs:
 - Safely vent my anger
 - Batter your Child
 - Feel powerful and superior

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Transactional Analysis: Parent-Child Transaction



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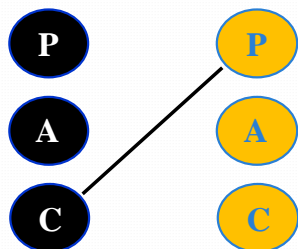
My Child Abuses Your Parent

I play the Game of "Oops"

- You are my social host
- I spill guacamole, coffee, red wine
- **Ostensibly:** Adult-Adult transaction
- **Actually:** my Child abuses your Parent
- My payoffs:
 - Safely vent my passive-aggression
 - Frustrate your Parent
 - Compel socially-mandated forgiveness
 - Feel powerful and superior

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Transactional Analysis: Child-Parent Transaction



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Gotcha vs. Oops

“Gotcha”

- Aggressive
- My Parent dominates your Child
- Revenge for ancient neglect/abuse?

“Oops”

- Passive-Aggressive
- My Child dominates your Adult
- Revenge for ancient neglect/abuse?

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Gotcha Client vs. Oops Client

(Personal stories – stiffed for fees)

Aggressive/Gotcha Client:

- Example: the fee complainer

Passive-Aggressive/Oops Client:

- Example: the fee promisor

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Freedom's not just another word

"Macro Freedoms" are created in:

- Legislatures
- Appellate Courts

"Micro Freedoms" are created in:

- Trial Courts
- Law Offices

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Maximize Your Client's Options:
There is Freedom in Choices

P

Parent

A

Adult

C

Child

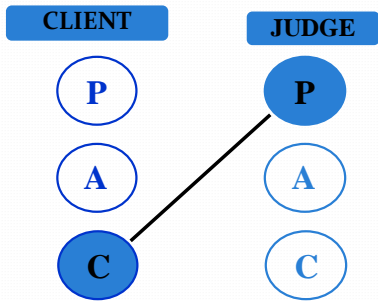
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Absence of Freedom I

Client is a Child
(i.e., lacks freedom) if s/he:
I. Goes to trial

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No Freedom: Judge



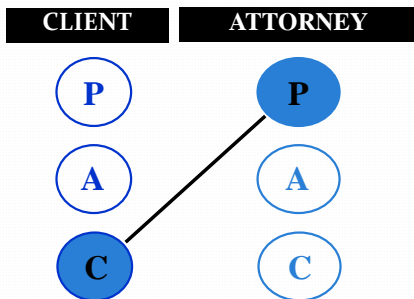
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Absence of Freedom II

Client is a Child
(i.e., lacks freedom) if s/he:
II. Settles due to coercion of
an overbearing lawyer

29

No Freedom: Overbearing Attorney



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Your Art

Help your Client gain freedom by:

- I. Avoiding court
- II. Without coercion
(i.e., Client attains fair settlement
through his/her autonomous
Adult decision-making)

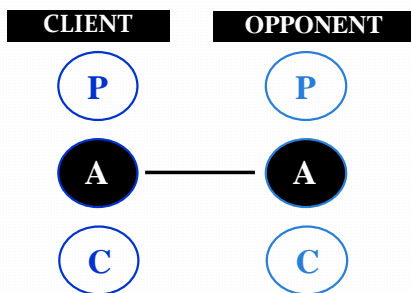
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The Three Reasons a Case Doesn't Settle:

- **REASON ONE:**
Opposing Party is a jerk
- **REASON TWO:**
Opposing Counsel is a jerk
- **REASON THREE:**
Your Client is a jerk
- **(never let there be a
fourth reason)**

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Freedom: Fair Settlement



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Changes, changes . . .

- **QUESTION:**

- How many psychologists does it take to change a light bulb?

- **ANSWER:**

- Only one, but the light bulb has to really want to change.

34

Changes, changes . . .

Professional of the *cloth*?

Professional of the *couch*?

Professional of the *court*?

We lawyers have *practical advantages* over clergy and mental health professionals

Our job is *easier* due to the highly-orchestrated *psychodrama of litigation*

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Changes, changes . . .

We pre-condition our clients toward settlement by explaining:

- Advantages of settlement
- Most cases settle (98.2%)
- Serial opportunities for settlement

36

Changes, changes . . .

Client's psycho-legal journey:

- Client prepares pleadings ↑
- Client reads OP's pleadings ↓
- OP is deposed ↑
- Client is deposed ↓
- Client's stlmt. conf. statement ↑
- OP's stlmt. conf. statement ↓

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COUNSELOR at Law

- "Let the tool do the work"
- Pace Client
- Pre-settlement conference speech:
 - "I am your advocate – ready, willing and able" - BUT -
 - "Trials can be risky"
 - So – How does [*this proposal*] sound?

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Desired Result

- We want to obtain a resolution that:
 - Is fair, and that
 - ***Client considers fair***
- "Looks good and feels good – today and tomorrow"
- We warn our clients about good ole' "Uncle Eric"
- (CCP 664.6 problem prevention)

39

How Much Client Control?

At what point will you stop trying to convince Client to abandon the untenable position s/he wants you to take, and decide instead to let Client “hear it from the judge”?

At what point in your “helping” process do you become an “Overbearing Attorney”?

Your goal is to maximize Client freedom: so how hard will you push?

40

Give Up Persuasion Efforts?

Case-by-case decisions:

- Is Client asking you to take a factual position that:
 - Is untruthful (easy decision)
 - May be untruthful (difficult decision)
- How difficult has persuading Client become?
- How crazy has Client become?
- Is Client current on fees?

41

The Nose Knows

In Edmond Rostand's 1897 play *Cyrano de Bergerac*, poet Cyrano helped a handsome, inarticulate man woo the fair Roxane.

Cyrano on swordsmanship: “A sword handle is like a bird – hold it too tightly and you will crush it; hold it too loosely and it will fly away!”

How hard should you push Client?

The **perfect amount** . . .

. . . at the **perfect time**.

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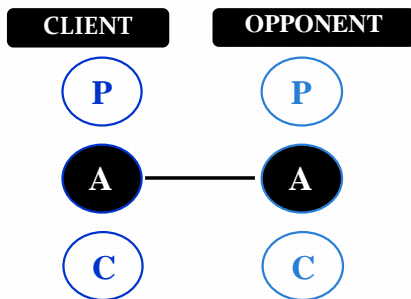
Competent Opposing Counsel

OP's psycho-legal journey:

- OP prepares pleadings ↑
- OP reads Client's pleadings ↓
- Client is deposed ↑
- OP is deposed ↓
- OP stmt. conf. statement ↑
- Client's stmt. conf. statement ↓

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Freedom: Fair Settlement



44

Of Course, Some Don't Settle

The road to a fair settlement largely parallels the road to a well-presented trial . . .

. . . the roads are called **"Preparation."**

45

I respect both viewpoints . . .

- **Loyalist Viewpoint:**
“Once I’m in a case, I very seldom withdraw. I’m willing to put up with a lot of guff.”
- **Self-Preservation Viewpoint:**
“If a client goes 30 days without replenishing the evergreen retainer, I file a motion to be relieved as attorney of record.”

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Diagnostic and Statistical Manual of Mental Disorders

47

A Somewhat Spotted History . . .

A woman who refused bend to a man’s will was diagnosed with *hysteria*
In 1851 American physician Samuel A. Cartwright “discovered” *drapetomania* – the mental illness that caused black slaves to flee captivity
In 1974 the American Psychiatric Association’s membership voted 58% to 42% to delete homosexuality as a DSM illness category
The autistic community has coined the term “neurodiversity,” which may prove is useful in the advancement of “identity politics”

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A Diagnostic and Statistical Manual

- **1917**: precursor
- **1952**: APA's first DSM
- **1994**: DSM-IV
- **2000**: DSM-IV-TR ("text revision")
- **when?**: DSM-5 expected

49

Axis I: Major Mental Disorders

- schizophrenia
- bipolar disorder
- depression
- anxiety disorders
- autism spectrum disorders*
- ADHD* **DSM-IV had these on Axis II*

50

Axis II: Personality Disorders

Enduring patterns of maladaptive:

- feeling
- thinking
- interpersonal functioning
- impulse control

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Axis II: Personality Disorders

Cluster A

- “odd or eccentric”

Cluster B

- “dramatic, emotional, erratic”

Cluster C

- “anxious or fearful”

52

Axis II: Personality Disorders

Cluster A

“odd or eccentric”

- paranoid
- schizoid
- schizotypal

53

Axis II: Personality Disorders

Cluster B

“dramatic, emotional, erratic”

- **narcissistic**
- **borderline**
- **histrionic**
- antisocial

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Axis II: Personality Disorders

Cluster C

“anxious or fearful”

- **dependent**
- avoidant
- obsessive-compulsive

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Some “D” Words

- Personality **Disease**
- Personality **Disorder** (DSM-speak)
- Personality **Dysfunction**
- Personality **Disturbance**
- Personality **Disorientation**
- Personality **Dynamic**
- Narcissistic personality “disorder” vs. Narcissistic personality “type”

56

Narcissistic (DSM 301.81)

- **Grandiose** sense of importance
- Fantasies of unlimited power, love, success, beauty
- Requires excessive admiration
- Expects preferential treatment
- Incapable of empathy

57

Dependent (DSM 301.6)

- **Wants others to assume control** and responsibility
- Incapable of making decisions
- Incapable of disagreeing with others
- Will self-sacrifice (even tolerate abuse) in order to “tag along”

58

Histrionic (DSM 301.50)

- **Feels unappreciated** if not the center of attention
- Shallow emotional expression (“fishing for compliments”)
- Excessive display of emotions
- Highly suggestible
- Sexually provocative

59

Borderline (DSM 301.83)

- **Must avoid abandonment**
 - (which would mean “*I am bad*”)
- Unstable sense of self and self-image
- Self-destructive impulsivity
- Intense, rocky relationships

60

Autism spectrum (DSM 299.00)

- **Impaired social interactions**
- Lack of emotional reciprocity
- Reduced eye contact, facial expressions, gestures, posture
- Underdeveloped language and other communication skills
- Repetitive behaviors

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Five Clients:

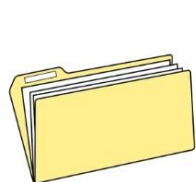
- Narcissistic
- Dependent
- Histrionic
- Borderline
- Autism Spectrum



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Five Clients:

- Narcissistic
- Dependent
- Histrionic
- Borderline
- Autism Spectrum



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Litigator viewpoints

- Perceive the world as a very threatening place (e.g., threat of abandonment)
- Experience chronic inner distress (e.g., obsess about risk of abandonment)
- Exhibit significant adverse behaviors (e.g., rage at a perceived hint of abandonment)
- View relationships from rigid and adversarial perspectives (everyone is either an ally or enemy)

64

Personality-disordered persons:

- Perceive the world as a very threatening place (e.g., threat of abandonment)
- Experience chronic inner distress (e.g., obsess about risk of abandonment)
- Exhibit significant adverse behaviors (e.g., rage at a perceived hint of abandonment)
- View relationships from rigid and adversarial perspectives (everyone is either an ally or enemy)

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Personality-disordered persons:

- Cling rigidly to inaccurate beliefs about the other person when the beliefs are challenged (because being challenged is perceived as a threat)
- Have excessive needs to control others
- Therefore, (understandably) engage in intense conflicts
- Therefore, (understandably) strive to maintain those conflicts

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Personality-disordered persons:

- Experiencing confrontation much more deeply than most people
- Experiencing interpersonal rejection much more deeply than most people
- Likely to make false statements
- Lying is justified in their eyes as appropriate punishment

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Personality-disordered persons:

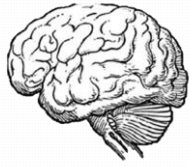
- Stuck in the denial, depression and/or anger stages of grief
- Distortions:
 - Emotional reasoning
 - All-or-nothing thinking
 - Personalization of benign events
- Stubborn avoidance of accepting responsibility

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Litigator's World View

- Don't lie
- Bargaining and acceptance stages of grief
- Avoid Distortions:
 - Logical reasoning
 - Nuanced thinking
 - Don't personalize benign events
- Responsibility must be accepted

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A Sane, Sober Lawyer?

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AVOID THE THREE S's:

Stiffed (on your Fee)

Sued (for Malpractice)

Slandered



**Bad
Client**

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Good Client

- Sincere
- Truthful
- Helpful
- Patient
- Tolerant
- Courteous
- Reasonable
- **TAKES RESPONSIBILITY**

72

Bad Client

- Irritable
- Whiny
- Selfish
- Narrow-minded
- Accusatory
- Uncooperative
- Unreasonable
- **AVOIDS RESPONSIBILITY**

73

“PERSONAL RESPONSIBILITY”



**Bad
Client**



**Good
Client**

**What Makes
the Difference?**

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Transactional Analysis:
Three Personality Structures

P

Subjective

A

“Objective”

C

Subjective

75

Objectification Rocks!

- Lawyer repeats **Client's statement** (reflective listening)
- Client writes it out
- Lawyer whiteboards it, photographs it
- Lawyer confirms it in writing
- Lawyer records it in Client's presence
- Lawyer presents it to another lawyer in firm

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Canned Speeches

- "If OP were sitting here [*indicate empty chair*] and I asked him to state his view of the facts, what would he say?"
- "Of course, we need OP's cooperation in order for this negotiation to succeed. Do you think a remark like the one you made about [*specify insult*] will have a tendency to make her MORE cooperative or LESS cooperative? What effect do you think it would have on the tone of the negotiation if you were to apologize for the remark when we reconvene?"

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Sneaky Shifts

Role shifts happen incrementally, and can be subtle
If you were Marcel Marceau, would you be making:

- the "welcoming arms" gesture, or
- the "warding off" gesture?

When I have become consistently adversarial with Client ("occasionally adversarial" is par for the course) I try to take a step back and analyze the relationship. (Hear any warning bells?)

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A Tool's Two Ends

In my **ADVOCATE** role:

- Business end is for Opposing Party
- Social end is for Client (Client likes this)

In my **REALITY CHECKER** role:

- Business end is for Client
- Social end for me (Client doesn't like this)
(I try to remember to remind Client that:
"I'm on your side")

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Any Sanity for a Lawyer?

Avoiding Client "true believers"

Having a "case" not a "cause"

Spelling "principle" with an "al"

King Solomon story

Maintain boundaries . . .

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Doctors Without Borders

81



Lawyers Without Boundaries

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“Calling All Boundaries”

Evenings/weekends in peace
Released from your “cell”
One lawyer’s isolationism
Avoiding social togetherness
Never riding together
What about Client’s mental health?

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I Respect Both Viewpoints

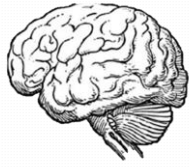
Total Outsource Viewpoint:

“I’m qualified as lawyer, but unqualified as a therapist. (Plus, my hourly rate is higher.)
Here are three names.”

Two (or Three) Questions Viewpoint:

1. “How have you been sleeping?”
 2. “How has your appetite been?”
 3. (“Ever thought about harming yourself?”)
- “Here are three names.”

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William Ury's Negotiation Psychology

85

William Ury, Ph.D.



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Ury's Books

Getting to Yes: Negotiating an Agreement Without Giving In (co-authored with Roger Fisher) (1981)
Getting Past No (1991)
Why Must We Fight: From the Battlefield to the Schoolyard (2001)
The Power of a Positive No (2007)

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Attorney Sunflower

- 28 years old
- Born in Mendocino
- Passed the California bar exam last year
- Hobbies:
 - Making macramé flower pot holders
 - Reading Beatrix Potter books
 - Practicing autoharp and kazoo
 - Playing Frisbee (intermediate level)

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More about Sunflower

- Father: Marijuana Farmer
- Mother: Wind Chime Designer
- Values instilled by parents:
 - Eat organic foods in meditative silence
 - Compromise is heroic
 - Conquest through force is shameful
 - Courtrooms are obscene
- Practices family law in Mendocino

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Sunflower's Negotiation Strategies

1. Make concessions to cultivate the relationship
2. Change your position easily
3. Accept one-sided losses to reach an agreement
4. Insist on agreement

90

Attorney Sabrina

- 28 years old
- Born in Manhattan
- Passed the California bar exam last year
- Hobbies:
 - Chess (master level)
 - Writings of Niccolò Machiavelli
 - Performing concert piano and violin
 - Tae Kwon Do (third *dan*)

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More about Sabrina

- Father: Neurosurgeon
- Mother: U.S. Marine Colonel
- Values instilled by parents:
 - Heated political debates during dinner
 - Conquest through force is heroic
 - Compromise is shameful
 - Courtrooms are fields of glory
- Practices family law in Los Angeles

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Sabrina's Negotiation Strategies

1. Demand concessions as a condition of the relationship
2. Dig in to your position
3. Demand one-sided gains as the price of an agreement
4. Insist on your position

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Sunflower's Negotiation Strategies

1. Make concessions to cultivate the relationship
2. Change your position easily
3. Accept one-sided losses to reach an agreement
4. Insist on agreement

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Ury Says: Begin by Analyzing Your

BATNA	Best	<div>Alternative to a Negotiated Agreement</div>
WATNA	Worst	
MLATNA	Most Likely	

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Principled Negotiation

- Involve your opponent early on – because an opponent who wasn't part of the **process** is unlikely to be satisfied with the **product**
- Give your opponent **recognition** (*does this sound like Eric Berne?*)
- Frankly state your opponent's interests
- Frankly state your Client's interests

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PROBLEM Positional Negotiation		SOLUTION Interest-Based Negotiation
SOFT	HARD	PRINCIPLED
Make concessions to cultivate relationship.	Demand concessions as a condition of relationship.	Separate the people from the problem.
Change your position easily.	Dig in to your position.	Focus on interests, not positions.

PROBLEM Positional Negotiation		SOLUTION Interest-Based Negotiation
SOFT	HARD	PRINCIPLED
Accept one-sided losses to reach agreement.	Demand one-sided gains as the price of agreement.	Invent options for mutual gain.
Insist on agreement.	Insist on your position.	Insist on using objective criteria.

PROBLEM Positional Negotiation		SOLUTION Interest-Based Negotiation
SOFT	HARD	PRINCIPLED
Participants are friends.	Participants are adversaries.	Participants are problem solvers.
The goal is agreement.	The goal is victory.	The goal is a wise outcome reached efficiently and amicably.
Make concessions to cultivate relationship.	Demand concessions as a condition of relationship.	Separate the people from the problem.
Be soft on the people and the problem.	Be hard on the problem and the people.	Be soft on the people, hard on the problem.
Trust others.	Distrust others.	Proceed independently of trust.
Change your position easily.	Dig in to your position.	Focus on interests, not positions.
Make offers.	Make threats.	Explore interests.

PROBLEM Positional Negotiation		SOLUTION Interest-Based Negotiation
SOFT	HARD	PRINCIPLED
Disclose your bottom line.	Mislead as to your bottom line.	Avoid having a bottom line.
Accept one-sided losses to reach agreement.	Demand one-sided gains as the price of agreement.	Invent options for mutual gain.
Search for the single answer: the one <i>they</i> will accept.	Search for the single answer: the one <i>you</i> will accept.	Develop multiple options to choose from; decide later.
Insist on agreement.	Insist on your position.	Insist on using objective criteria.
Try to avoid a contest of will.	Try to win a contest of will.	Try to reach a result based on standards independent of will.
Yield to pressure.	Apply pressure.	Reason and be open to reasons; yield to principle, not pressure.

Learn to Dance the “Ury Five-Step”

1. Don't react: “Go to the balcony”
2. Don't argue: “Step to their side”
3. Don't reject: “Reframe”
4. Don't push: “Build them a golden bridge”
5. Don't escalate: “Use power to educate”

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1. Don't react: “Go to the balcony”

“Speak when you are angry and you will make the best speech you will ever regret”
 Don't get mad, don't get even: Get what you want
 Avoid your three dangerous natural reactions:

- breaking off (“I'll take my ball and go home”)
- striking back (*does this sound like stress dumping?*)
- giving in (*does this sound like stress processing?*)

Identify the stone walls, the attacks, and the tricks
 Know your hot buttons . . .

102

Your Opponent: Pushing Buttons

- Made you wait
- Gave you a low chair, with window glare
- *Comment #1:* "I see that you're putting on a little weight, aren't you?"
- Took a phone call
- Finished coffee without offering you any
- *Comment #2:* "Are you still having some difficulty keeping things organized?"

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2. Don't argue: "Step to their side"

- Give your opponent recognition
- Agree whenever possible
- Make "yes...and" statements
 - (Avoid "but" statements)
- Make "I" statements
 - (Avoid "you" statements)

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(More "Step to their side")

- State loudly and clearly all areas of agreement
- Practice active listening:
 - "Let me see if I can state your interests, and please correct me if I'm wrong."
- Opponents who believe their interests are being ignored will:
 - Repeat/rephrase them, and
 - Ignore your interests

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3. Don't reject: "Reframe"

- Ask for your opponent's advice
- Engage your opponent with open-ended questions
- Ask problem-solving questions:
 - Why?
 - Why not?
 - What if _____?
 - What makes that fair?

106

(More "Reframe")

- Negotiate the rules of the game
- Defuse a negotiating trick by:
 - Naming the trick, and
 - Asking clarifying questions
- Reframe an **attack against you** as an **attack against the problem**
- Test a stone wall by ignoring it
- Tap the power of silence

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4. Don't push: "Build a bridge"

- Don't overlook human needs
- Overcome classic obstacles to an agreement:
 - "Too much too fast"
 - Your opponent's fear of losing face
 - "Not your opponent's idea"
 - Your opponent's unmet interests
- Don't assume a fixed pie

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(More “Build a bridge”)

- Involve your opponent:
 - Ask for constructive criticism
 - Ask for ideas, then build on them
 - Offer a choice
- Help your opponent save face by helping write the “victory speech”

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5. Don't escalate: “Educate”

- Close the deal by getting aggressive
- Demonstrate the legitimacy of your MLATNA
- Don't threaten - warn
- Educate your opponent about consequences with reality-testing questions:
 - What do you think I will do if we don't settle?
 - What will you do if we don't settle?

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The End