

## **HOW TO SPOT AND COUNTER NEGOTIATION TACTICS**

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### **Introduction**

We engage in negotiations in every facet of our lives, both business and personal. We negotiate with our clients, vendors, opposing counsel, in a mediation, and during all phases of handling a matter.

Often we think about our own negotiation style or techniques. It is beneficial to spot the other side's tactics and more importantly, to know how to counter them. **Almost every tactic can be countered with one simple strategy -- calling it out when you see it.** It is a way to diffuse the technique by making the other side aware that you recognize their tactic.

One great part of being a mediator is that every mediation I handle involves negotiations. Some of the negotiations are traditional. Some are effective and some are ineffective. The mediations involve the negotiation styles of all the lawyers and the tactics of their clients. It has been beneficial to watch and to learn. I have seen people leave money on the table and I have seen people pay more than it took to get the deal.

### **Starting any negotiation**

The first question is who starts the negotiation. One theory is that you anchor the negotiation at a certain number. There are studies that show that anchoring is advantageous because you set the value. The opposite theory is that you never throw the first number because it might mean you leave money on the table.

### **Negotiating with your client**

The client wants to negotiate your fee as part of the settlement - contingency, hourly

*Tactic* - not throwing the first number

*Counters* - get them to state exactly what they want you to do. You can also anchor with a low percentage (you know you are willing to do more) e.g. five percent but you would do ten percent.

## **Litigation**

*Tactic* - Anchoring. Traditionally in lawsuits Plaintiff starts by making a demand and they anchor the value of the case.

*Counters* - consider not making an opening demand. If they anchor, you can re-anchor (may use low ball approach) or not counter at all. You can say their offer is not a reasonable starting point and refuse to respond to it. Sometimes they will just give another number.

*Tactic* - the other side may use the strategy of not presenting a proposal.

*Counters* - you can say you will start the negotiation. You can give information that will cause them to give a proposal.

*Low Ball/High Ball* - if making the opening demand an extreme position may be taken. The flipside is when the person making the offer presents something extreme in the other direction.

*Counters* - for either approach you can either counter with your own high/low ball offer or demand. You can tell the person you will not even respond to it because the proposal is not in good faith or is unreasonable. Get the other side to give the basis for the number.

*Tactic* - Silence. This may be the most powerful negotiation tactic. By remaining silent it creates an uncomfortable environment. The technique is designed to get you to bid against yourself. Extremely uncomfortable over the phone.

*Counters*- Be silent back. You can also ask the other side to simply restate their last position. You can restate your position without changing it.

**Emotional Tactics** - there are a series of negotiation tactics known as emotional techniques. Here are a few and counters you may use to diffuse them:

*Anger* – It is obvious when you see it, but not obvious when it is staged. An example of a situation when you may see this is when you counter their proposal. It may be exhibited in shouting, getting red in the face and/or threatening to end the negotiation. The tactic results in you putting your defenses up, being apologetic, and bidding against yourself. This tactic can also trigger your own anger in response.

*Counters* - You must force yourself not to take it personally. Do not retaliate with anger. Instead, hear them out without defending your position. Let them blow steam and do not interrupt their tirade. While hearing them out, take notes on their position and let them see you taking notes. Then, mirror them back. Let them respond to you mirroring them. Also, identify the cause of their root anger.

*Frustration* - The person pretends to give up in a fluster. They do not come across angry; just flustered. It is meant to throw you off balance and the weight of finding a solution is thrown onto you.

*Counters* - Do not interject yourself into the bluster. Instead empathize with the pressures they face. Suggest that one issue be addressed at a time. Offer to take a break or to reschedule. Keep the frustrated negotiator in the game. Tell them you are not going to do it on your own.

*Personal attacks* - These can be subtle or direct. They may challenge your knowledge or criticize you. They may take calls during the negotiation. They use it to break your concentration, to throw you off balance and/or make you feel less confident. They hope you will focus on fighting back instead of the issues. It is also used to get a power advantage.

*Counters* - Recognize that it is a tactic, take a deep breath and do not counter the attack. Do not call a break because it looks like it has affected you. Redirect the negotiation back to the issues. Resist the urge to counter with silence. That makes it look like they got you. Point out what they are doing, like using their cell phone. Keep the negotiation moving. Stay emotionally detached.

*Confusion (also known as distraction)* - They will come across flustered and disorganized. They may ramble, jump from topic to topic with no rhyme or reason to it, reopen issues you thought were finished and/or introduce new topics out of the blue. This is to have you lose track of your own plan and to fluster you. It is contagious, is used to confuse you and can cause you to lose control of the negotiation because you cannot think clearly. The number of options laid out are so many that it overwhelms you.

*Counters* – Stay firmly in control of the negotiation process. Do not engage in the “dance” with them. Get them to stop at the first sign of confusion and resolve one issue at a time. Get them to stay on the agenda set.

### **Other Techniques Commonly Used In Negotiations:**

*Rapport Building* - this technique can be seen in any stage of a negotiation. It is very effective. By spending time building rapport one can establish a personal connection.

*Counter* - remember the goal of the negotiation. Although, it may have some advantages if there will be an ongoing business relationship as is the case with opposing counsel.

*Pre-Conditioning* - this is when the other side asks for a concession before the negotiation has even started e.g. request for one side to pay all the mediation costs as a condition precedent to participating in the process.

*Counters*- refuse to pay it. Tell the other side that they need to have skin in the game. You can also defer answering it by saying it will be subject to negotiation at the mediation, but not beforehand.

*The Vise* - common technique that is effective. When presented with an offer the party says “You will have to do better than that.” This often results in negotiating against oneself or giving a better offer.

*Counters* - ask them to be specific. Do not negotiate against yourself or give a free concession.

*Good Cop/Bad Cop* - This is a classic tactic that is seen in movies and tv shows. It can arise in the context of an attorney playing one role while his client plays another role. It can also be when there are two attorneys representing one side. The idea is that the good cop establishes rapport and does relationship building while the bad cop acts unreasonably or entrenched in his position.

*Counters* - Call it out. Let them know you are aware they are playing good cop/bad cop. Create your own good cop/bad cop dynamic. Ignore it. Only negotiate with one of them.

*Bracketing* - a technique often seen in a mediation. When there is still a significant gap between the parties after a long period of traditional negotiation one side will offer a theoretical move in exchange for a theoretical move by the other side. This is usually couched as “We will move to X, if you will move to Y.” One counter is to respond with your own bracket. Another is to accept the bracket. You need to be careful not to respond to a bracket with your own hard number as you will then be bidding against yourself. If you do not like the bracket and do not want to propose a counter-bracket then ask the other side for a hard number.

*Walk out* – (This tactic may be overused but it works) They may say there is nothing left to discuss. It can be used with anger, frustration, and/or good cop/bad cop. It is used to shock, embarrass, or confuse. It gives them much greater negotiation power because they have other options. A withdrawn offer can be part of a walk out. It is a bluff to withdraw the offer or the person with authority will not approve it.

*Counters* – It is often just a tactic so the best way to counter is to recognize it because it takes away the sting. Before they walk out the door say, “you are not going to use the walk out tactic on me.” Check to see if they left a briefcase. Suggest that they go into a caucus or point out that you are really close to getting this resolved. Do not let them say they will get back to you. Let them walk away, or you can walk away also.

*Lock-in a/k/a Take It or Leave It* – This tactic can come in the form of a threat or an ultimatum. They may have also already taken a position they want you to ratify. They want you to think they are locked into their position.

*Counters* – Test their facts for validity as soon as possible. Use the “ambiguous authority” tactic to lock in your own position. If they say they do not have authority, ask who does and ask to speak with them. Ask what it would take to get them to change their mind.

*No settlement authority or apparent authority* – This tactic is used to make you lose confidence. It is used to get you closer to their position. It can take many forms; saying they do not have the authority to make decision. It may be used regarding parts of the deal or the entire deal.

*Counters* – Be sure to get a written commitment in advance that the decision maker will be present for the negotiation. Even if the person is not present, you can minimize its significance by not reacting to the tactic. Reverse the authority, put time pressure on them to get the authority. Negotiate on the merits only. Come to the amount later. Call their bluff. Appeal to their ego by saying you know they will recommend it and it will be approved.

*Nibbling* - Asking for additional terms at the end of the negotiation e.g. additional time to pay, confidentiality and liquidated damages, paying the mediator’s fees, etc.

*Counters* - Ask for all key terms ahead of time in writing. Nibble back by asking for something in exchange. You can say no to the new terms.

*Written settlement agreement* - This is when one side handwrites or types up an agreement at the end of the negotiation and signs it and then submits it to you as a finalized deal.

*Counters* - Ask for the terms in advance or at least at the beginning of the negotiation. You can also decline to sign their written agreement or mark out the parts you do not like and add in your own terms and then sign it. You can prepare your own agreement and execute it. Ask for a counter rather than a written agreement.

*Time pressure* - Parties will sometimes establish a set amount of time for the negotiation.

*Counters* - Get commitment ahead of time to block the whole day. Continue the conversation when the time expires either that same day or reset for another time.

*Time investment* - the idea is that by having put so many hours into the negotiation it will be hard to walk out without a deal.

*Counters* - Be prepared to walk away. Set a time limitation.

## **Conclusion**

By learning to recognize and counter the other side’s negotiation tactics and techniques you become a more skilled negotiator and hone your strategies for effectively negotiating for your client.