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McSherry and Trueman: When people are the problem

By: Commentary: M. Natalie McSherry and Jeff Trueman © September 9, 2020

For decades, negotiators have been advised to “separate the people from the problem.” This guidance comes from a popular book on negotiation, “Getting To Yes,” by Roger Fisher and William Ury.

Some people develop passionate and egoistic attachments to their bargaining positions. Their personality becomes more difficult to manage than their interpretation of the law and factual allegations.

Under these circumstances, Fisher and Ury recommend disentangling the emotions from the merits of their position. In other words, along with your assessment of the virtues (or lack thereof) of their position, assess the relationship — how you interact with that person. Think about how much easier it is to get a deal — usually a better deal — when a good working relationship exists with the other side.

What can you do when someone is the problem in a negotiation? Perhaps you perceive their arrogance or incivility to be the real impediment to meaningful settlement discussions.

There are a number of constructive responses available. First, consider the timing of your response. Maybe you need not take action right away, especially if a power imbalance favors the other side. Sometimes time and good fortune produce a personnel change and you may find yourself dealing with someone more reasonable.

Other times, your diligent work on the merits of your position might uncover something valuable in discovery. Sometimes, when given time, their problematic behavior can result in a statement that discloses an underlying interest or weakness you didn't know was there.

But, if you find yourself conceding important issues, or avoiding them altogether because you're worried about a potential blowup, you may have to address that person's behavior eventually, and probably best sooner rather than later. If you avoid it, you run the risk of growing resentful when the other person refuses to acknowledge or reciprocate your concessions.

This resentment could then lead to you becoming a “problem person” yourself. Emulating bad behavior only makes matters worse for you and your client, because it reinforces the very behavior that interferes with a good outcome. Avoidance also runs the risk that the other person's behavior will simply prevent you from being able to objectively get to a solution.



Look for opportunities to discuss or negotiate the ways in which you interact. Don't be afraid to voice your concerns about behaviors you find problematic. Focus the conversation about how you can work together going forward, rather than argue over what was said or done in the past since that usually leads to denial and entrenchment.

Active listening

Of course, it is important to avoid aggravating the very behavior you find problematic. Active listening – the practice of reflecting back what you heard – can help the speaker feel heard and understood, if done properly.

Admittedly, it can be difficult to listen actively to someone who talks seemingly without end. Still, do not discount the power of reflective listening as a critical element in developing rapport and trust.

At the risk of sounding too tactile, take emotional states seriously. They may reveal clues as to what is really important to the speaker. It may also give you some ideas about how you can get better, more focused responses to the merits of your position.

Although anger is a primal emotion, it masks something deeper and more vulnerable. Perhaps the person on other side needs to be recognized or validated for something.

Some difficult people attempt to “spotlight” you, claiming something is not right about your work or about you personally, so that you feel uncomfortable or inadequate. By focusing on what's wrong, they aim to dominate and control the relationship rather than earnestly address the issues.

Rather than react defensively in an effort to justify yourself, in a calm and clear manner, ask questions that constructively address issues important to you and your client. Stay composed and focused on the future. Or you can simply change the subject.

Managing conflict

Although, as attorneys, we analyze factual allegations and interpret applicable law, we are also managers of human conflict. This is why we must learn to manage the “human factors” that are often at the center of legal problems and negotiation impasse.

As frustrating as it may be, there is no formula that assuages difficult personalities, foretells unpredictable behaviors, or reasons with irrationality. In some instances, your influence may be limited. Clients and counsel may make statements that are insulting or demeaning to others, and in turn damage or destroy their own interests.

But you have complete control over how you respond to others who try to “push your buttons” with their condescension, overconfidence, or sarcasm. With some forethought and strategy, you can manage these people problems too.

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