

ETHICAL PERSUASION – PRACTICAL NEGOTIATION STRATEGIES

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I. A Foundation for Negotiation in Legal Practice

- a. Negotiation is a voluntary and usually informal process in which parties identify issues of concern, explore options for the resolution of the issues, and search for a mutually acceptable agreement to resolve the issues raised. The disputing parties may be represented by attorneys in negotiation. Negotiation is different from mediation in that there is no neutral individual to assist the parties negotiate. Due to the decline of jury trials, maximizing negotiation skills is more prevalent than ever.

II. The Decline of Jury Trials

- a. Trials, particularly jury trials, once played a central role in the American legal system. No longer. While trial remains a theoretical possibility in every case, the reality is quite different. Trials occur rarely, typically only in the most intractable disputes. The pronounced disappearance of trials seems to have largely escaped the attention of Hollywood, the literary community, and the mainstream media, but this development is well known to judges, other court personnel, litigators, and academics. However, even those “in the know” often do not appreciate just how rare trials have become.

<https://judicature.duke.edu/articles/going-going-but-not-quite-gone-trials-continue-to-decline-in-federal-and-state-courts-does-it-matter/>

- i. **State Courts.** The data concerning state court trial activity is neither as comprehensive nor as current and consistent as the federal court data. The leading resource for state court data is the National Center for State Courts. The state court database — which only goes back a few years, unlike the federal data — shows that in 2015, 21 states, representing a significant portion of the country, reported data on total civil dispositions in courts of

general jurisdiction, including the number of jury trials and bench trials.

Pennsylvania reported the highest civil jury trial disposition rate at 0.53 percent. Other large states reported low civil jury trial rates, including California (0.21 percent), Texas (0.47 percent), Florida (0.18 percent), and New Jersey (0.12 percent). These outcomes were consistent with results from prior years. In 2014, Alabama reported that 1.53 percent of civil dispositions were resolved in jury trials, and all other reporting states had lower civil jury trial rates. In 2013, 20 states reported civil disposition data in courts of general jurisdiction. No state had a civil jury trial rate higher than 0.62 percent (Nebraska), and fully 18 states reported jury trial rates of equal to or less than 0.55 percent, including Pennsylvania (0.55 percent), Texas (0.47 percent), Michigan (0.47 percent), Ohio (0.38 percent), Florida (0.20 percent), and California (0.18 percent). In 2012, 20 states reported civil disposition data. Only New York, separately discussed below, had a civil jury trial rate greater than 1 percent. Civil bench trials are also declining, except in those states still experiencing the effects of the mortgage crisis. For example, in 2015, in states such as Pennsylvania (1.5 percent), New Jersey (0.95 percent), and Connecticut (0.36 percent), the civil bench trial rates were low; but in states such as Florida (10.05 percent), California (11.92 percent), and Texas (14.34 percent) the rates were much higher, reflecting significant real estate foreclosure activity. In criminal cases, the jury trial rates for four large states (California, Florida, Pennsylvania, and Texas) during the last four years are set forth in Appendix 6 (at right). The jury trial disposition rate was less than 2 percent in all four states and less than 1 percent in California. Trials in felony cases typically occur more frequently than in cases involving misdemeanors, which is consistent with research suggesting that cases involving larger potential penalties are less likely to be resolved through plea bargaining.

- ii. **Federal Courts.** Between 1938 and 2009, “there was a decline in the percentage of civil cases going to trial of over 90%.” There has also been an enormous decline in the absolute number of trials. In 1962, there were 50,320 total civil case dispositions — 5,802, approximately 12 percent, were by trial. There were also 33,110 criminal defendants whose cases were resolved that year — 5,097, approximately 15 percent, were by trial. The high watermark for civil trials occurred in 1985. That year, federal courts resolved

268,070 civil cases, more than five times the number disposed of in 1962, and there were 12,529 trials (6,276 bench trials and 6,253 jury trials). In criminal cases, 1990 was the most active year, when there were 7,874 trials (6,181 jury trials and 1,693 bench trials) in a universe consisting of 56,519 defendants. There has been a continuing decline in both the percentage and the absolute number of trials in more recent years.

III. The Necessity of Negotiation Skills

- a. With fewer than 2% of cases resolved by trial, it behooves the advocate to improve negotiation skills to efficiently effectuate settlement in almost every case they work.

IV. Types and Styles of Modern Negotiation

- a. Adversarial vs. Value-Driven
 - i. **Adversarial Negotiation.** Most people without any specific training or experience with negotiation styles automatically think of adversarial negotiation when they think about negotiation. This is the classic tug-of-war over the amount to be paid or the division of finite resources. Every gain by one side is a loss by the other, and every issue is perceived within the prism of a battle between two adversaries. In planning for an adversarial negotiation, each attorney faces a range of outcomes between his or her client's objective and the opposing party's goal. The negotiation consists of efforts to pull the other side toward the negotiator's preferred outcome on a gradation of win-loss outcomes. The goal is to use your arguments and leverage to achieve a result as close to your preferred outcome, and as far from your adversary's, as possible.
 - ii. **Value-Driven Negotiation.** Value-driven negotiation focuses on each side's goals, i.e., the value of certain concessions or objectives to each side. In value-driven negotiation, the negotiators seek to identify—and meet to the greatest extent possible—the goals of both sides, their own and their adversary's. In value-driven negotiation, the negotiators recognize that each item to be negotiated may have different value to each side. Often, value-driven negotiation can produce an outcome that is better for the client (and possibly even better for the other side, as well) than can adversarial negotiation, because value-driven negotiation is fine-tuned to the needs and objectives of each party.

<https://www.americanbar.org/groups/litigation/committees/insurance-coverage/articles/2018/value-driven-negotiation/>

V. Is Persuasion Unethical?

- a. No! Attorneys are advocates. Being persuasive is doing what is in the client's best interest. We all had to take Legal Writing in the beginning of law school. And if you took a Uniform Bar Examination on the written portion you may have had to draft an objective or persuasive brief. The objective memorandum merely states facts available from the global packet. However, the persuasive brief differs in that the writer does not "argue both sides" rather only one side is argued. Any weak points for your case are minimized and any strong points are exaggerated and magnified.

VI. Biblical Considerations

- a. Daniel's alternative.

- i. **Daniel 1:8-16.** "But Daniel resolved that he would not defile himself with the king's food, or with the wine that he drank. Therefore, he asked the chief of the eunuchs to allow him not to defile himself. And God gave Daniel favor and compassion in the sight of the chief of the eunuchs, and the chief of the eunuchs said to Daniel, "I fear my lord the king, who assigned your food and your drink; for why should he see that you were in worse condition than the youths who are of your own age? So you would endanger my head with the king." Then Daniel said to the steward whom the chief of the eunuchs had assigned over Daniel, Hananiah, Mishael, and Azariah, "Test your servants for ten days; let us be given vegetables to eat and water to drink. Then let our appearance and the appearance of the youths who eat the king's food be observed by you, and deal with your servants according to what you see." So he listened to them in this matter, and tested them for ten days. At the end of ten days it was seen that they were better in appearance and fatter in flesh than all the youths who ate the king's food. So the steward took away their food and the wine they were to drink, and gave them vegetables."

Faced with a mandate, Daniel did not compromise. Instead, he effectively negotiated by standing his ground and offering a viable alternative.

Because he refused to succumb to the terms given, God gave Daniel favor and compassion. As believers, we should seek to obtain God's favor above all else. God's favor will always bring the most positive results in any situation.

- b. Abigail's petition.

- i. **I Samuel 25:1-35.** "Now Samuel died. And all Israel assembled and mourned for him, and they buried him in his house at Ramah.

Then David rose and went down to the wilderness of Paran. And there was a man in Maon whose business was in Carmel. The man was very rich; he had three thousand sheep and a thousand goats. He was shearing his sheep in Carmel. Now the name of the man was Nabal, and the name of his wife Abigail. The woman was discerning and beautiful, but the man was harsh and badly behaved; he was a Calebite. David heard in the wilderness that Nabal was shearing his sheep. So David sent ten young men. And David said to the young men, “Go up to Carmel, and go to Nabal and greet him in my name. And thus you shall greet him: Peace be to you, and peace be to your house, and peace be to all that you have. I hear that you have shearers. Now your shepherds have been with us, and we did them no harm, and they missed nothing all the time they were in Carmel. Ask your young men, and they will tell you. Therefore let my young men find favor in your eyes, for we come on a feast day. Please give whatever you have at hand to your servants and to your son David.”

Selected References

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3. Fisher, R., Ury, W., & Patton, B. (2011). *Getting to Yes: Negotiating Agreement Without Giving In*. Penguin Publishing Group.