

The J.D. Handicap: Logic Over Training in Settlement Negotiations

By Richard G. Halpern

"Your brains are mush," intoned the imposing Professor Kingsfield to his trembling first year law students in *The Paper Chase*. Thus began an indoctrination in legal reasoning, a precise method of analysis and argument based upon definition, comparison, distinction, and an orderly step-by-step progression to a persuasive conclusion.

Primed and trained by real-life Kingsfields, young attorneys leave law school as intellectual terrors, able to argue any opponent (at least one not similarly trained) into submission and surrender. Legal reasoning, the direct descendant of rhetorical techniques taught by Aristotle and Socrates, turns ordinary humans into superhuman weapons of advocacy whose special powers make them champions in the boardroom, the legislature, and many other battlefields, including, of course, the courtroom.

But not at the negotiation table. Legal reasoning, the very essence of the successful advocate, is not an asset here. It's a handicap. And to overcome that handicap, a trial attorney must understand how the dynamics of traditional legal reasoning clash with effective tactics in settlement negotiations.

That's what this column is about.

First, let's agree on what I mean by "legal reasoning." As your family and friends will explain to you, one of the habits of attorneys that drives their non-attorney friends nuts is what I call the "ABC" technique of discussing any issue, no matter how mundane. You know ... "We should go to the Hungarian restaurant rather than 'El Tostido because (a) it's closer, (b) it got a good review in the paper last week, (c) 'El Tostido is always crowded and won't take reservations, and (d) my ulcer is acting up." You talk this way because after Kingsfield and Co. have gotten through with you, your legal training has conditioned you to attack all problems in an orderly, progressively persuasive fashion. It is the advocacy model. In all probability, you began with the desired result: you wanted to go to the Hungarian restaurant, not 'El Tostido. To achieve that result, your goal was to make it unescapable by lining up a series of irrefutable facts that taken together make the Hungarian restaurant the only reasonable choice. A law professor described to me another way of looking at this process. "Legal reasoning," he said, "is the process of making a definition, and laying out a series of arguments that ensure that others have no choice but to accept that definition." In the above example, the definition is "The Hungarian restaurant is the best place to eat out tonight."

The ramifications of extending this approach to negotiations is profound. Why? Because it dictates the objective and process of negotiations as perceived by plaintiffs counsel. Legal reasoning begins with a conclusion, and proceeds with progressive arguments that lead to consensus that the conclusion must be correct. As we all know, this is how a brief is organized, and it is how a case is presented at court. It is very different from the scientific method, which begins with a hypothesis and systematically tests its validity. An attorney is not interested in deconstructing the conclusion that supports the client's case. And legal reasoning is very different from something else: it is very different from problem-solving. In fact, as a process it is almost

the opposite, for in logical problem solving the solution is only reached after successive analysis of a particular problem and its components. The solution is the end of the process. In legal reasoning, it is the beginning. So the critical question is, what is a settlement negotiation? Is it an argument to be won, or a problem to be solved?

I won't keep you in suspense. The answer is that a negotiation is a problem, not an argument. And if you treat it as an argument (as lawyers are trained to do), even if you win, you may still have the problem. The only way to have a successful negotiation is to solve the problem: "How do we arrive at a just settlement that will meet the needs of the injured plaintiff?" Convincing the other side that your figure is fair, just, and consistent with similar cases doesn't do that.

Think of it this way: **negotiation is a process of human interaction in which two or more parties simultaneously attempt to influence each others thinking, while resisting the efforts of the other parties to influence their own thinking, until all participants reach an agreement on a particular action.** A long career as a professional negotiator has taught me that this description is correct, regardless of the topic being negotiated.

When you approach negotiation as an argument to be won, there is a real risk of "winning the battle but losing the war" -- a Pyrrhic victory. This is because winning the argument --proving your number is "right" -- doesn't necessarily further the objective of agreement. Why? Because the other side has its own realities and pragmatic considerations that dictate its position, issues quite separate from the facts in your persuasive argument.

The successful approach in negotiation is to avoid the argument, and deal with each sides realities. Attorneys like to argue, because they are trained to do it and they are good at it. But the negotiation table is not the place to prove rhetorical skills, and showing how smart you are accomplishes little. You must embark on a logical problem-solving exercise that proceeds like this:

1. **Set your goal.** Is it, "Convince the other side that we have a strong case?" No. Is it, "Get them to agree to X dollars?" No! The goal is to **reach agreement on a just and fair settlement.**
2. **Identify the obstacles to reaching your goal.** Take an inventory of the factors standing in your way. Each is a sub-problem, needing to be solved.
3. **Devise and execute strategies to remove those obstacles.**

Once they are removed, you should have yourself a settlement.

I recognize that as a non-attorney, my declaration that the advocacy model is inappropriate for the negotiation table may chafe at some readers. But I also know how many of my attorney clients have confessed to me how uncomfortable they feel in settlement negotiations, how they are relieved to go to trial. I know how often I have to remind other attorneys to stop talking in negotiation settings (trying to win the argument) and to start listening to the other side (and to try to understand the problem).

Legal training is a wonderful thing, and legal reasoning applied through advocacy is a powerful tool. But there are many tasks the tool doesn't fit, and there are some where the tool is actually a detriment, a handicap. Negotiation is one of these. Resolve to use your logic and problem-solving skills instead, and you can overcome the J.D. handicap... for good.

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