Focus ALTERNATIVE DISPUTE RESOLUTION

New negotiation techniques can offer more value to clients

Nathalie Boutet

Many lawyers see the benefits of recommending out-of-court negotiations before initiating a court action. Unfortunately, the use of positional bargaining techniques, which are known to polarize clients, continues to dominate and to fail, resulting in cases ending up in court. If we believe our clients' cases could or should be resolved out of court, then, according to science, we should learn and offer our clients interest-based negotiation techniques (the model developed by Roger Fisher and William Ury in their 1981 book, *Getting To Yes*).

There is a large body of scientific research which examines how people make decisions, what promotes empathy and what makes people want to co-operate and work together. Jeremy Lack and François Bogaz, in a 2012 research paper (*The Neurophysiology Of ADR And Process Design: A New Approach To Conflict Prevention And Resolution?*) describe why the designs of interest-based negotiation are likely to promote people's motivation to find common solution and why positional bargaining does the opposite.

For example, the brainstorming feature of interest-based negotiation generates a sense of shared purpose and a new sense of belonging to the same group, which according to research makes parties more likely to empathize and try to co-operate. Interest-based negotiation is also effective from a neuroscience perspective because it is counterintuitive and highly cognitive, requiring heightened cortical thinking. It requires conceptually separating the parties from the problem (thus de-personalizing negative personal emotions), focusing on interests rather than positions (invoking "towards reflexes" as opposed to "away reflexes") and invoking mutual needs rather than independent strategies.

Lack and Bogaz further explain that positional negotiation provokes negative reactions in the brain and entrenches people to feel like they are in a separate clan from the other which, according to research, makes empathy more difficult — a phenomenon also well documented in 2009 by David Rock in *Managing with the Brain In Mind*. Lack and Bogaz also note that "what seemed to initially be perceived as the other side's inability to understand rapidly escalates to being perceived as stubbornness, bad faith, or a threat that needs to be controlled, initially by limited steps and ultimately by a form of war." Research shows that we are less able to think and formulate solutions when we feel threatened.

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> **Nathalie Boutet**
> Boutet Family Law

In an effort to encourage lawyers to offer interest-based negotiation techniques to their clients, I have summarized the process in three easy steps.

First step

For each issue in dispute, parties exchange relevant information before positions are formulated or disclosed. It is unfortunately more common for counsel to default to positional bargaining techniques by advising the client of what result is available or what position to adopt before all facts are known, usually in the initial client meeting. Clients get attached to their early adopted position and may have difficulties accepting input from the other party who has a different view on how the problem can be resolved. Even experienced mediators fall into old habits by asking for a mediation brief containing the parties' "positions."

Second step

After having reviewed the relevant information, the second step in interest-based negotiation is a brainstorming session where all parties and counsel generate ideas on how to resolve the issue. Parties refrain from criticizing ideas at this stage, a design that allows a free flow of creative ideas. This step is thought to promote the release of oxytocin in the participants' body, a hormone known to facilitate collaboration and creative problem-solving noted in the work of mediator Kenneth Cloke (*Bringing Oxytocin Into The Room: Notes On The Neurophysiology Of Conflict*, 2009).

Contrast this with positional bargaining where the lawyers may use archaic techniques such as threatening to go to court, withholding information or making derogatory or intimidating remarks about the parties or counsel to try to achieve a specific result.

Third step

At the third stage, clients evaluate the ideas or options that have been generated in the previous step. A mutually acceptable solution often will be visible. If not, each party is allowed to eliminate the options they can't live with. This is where the magic happens. Clients can see with their own eyes that the option they might have been attached to is not available if it was rejected by the other party. What is left are the gold nuggets: options that neither party eliminated. These remaining options are avenues of resolution that both parties can live with.

Contrast this approach with a popular step in positional bargaining where written offers to settle are exchanged by clients who are then mentally and financially exhausted and resentful for having to compromise from their original position in order for the conflict to end and to avoid court.

Juxtaposing these two systems highlights the unproductive nature of the positional negotiation techniques that lawyers have been using for a long time without questioning their effectiveness. In a time when we seek solutions to access to justice problems and the unnecessary use of court, we could make a real difference to our clients by insisting on the use of effective negotiation techniques, even if our counterpart insists on using positional bargaining. There is always space for brain-friendly negotiation techniques.

Nathalie Boutet of Boutet Family Law (www.boutetfamilylaw.com.) is a leading Canadian family law lawyer and mediator. She is also a deputy judge in the Small Claims Court. She regularly provides comments to the media on legal matters.