

BREAKING DEADLOCKS

**By Laurence J. Eisenstein,
Partner, Eisenstein Malanchuk LLP¹**

All too frequently, deadlocks in negotiations are not driven by the underlying goals of the parties negotiating with each other, but rather are process-driven reactions to the way the negotiation has unfolded. The parties are at a logjam because neither one wants to make the next concession, and neither one wants to appear weak. Too often negotiations get bogged down in the positions both sides take, without regard to whether there is a mutually beneficial outcome that would make much more sense. How often have you mumbled about how ridiculous it is to be litigating a particular dispute? How often do you find yourself so insulted by the other side's negotiating position that you want to (or do) just walk out of the room? Or you know that you still have room to negotiate, but you can't seem to find a way to convey this to the other side in light of their hard line position? Although these deadlocks may look intractable they are, ultimately, wholly illusory.

The key to emerging from such deadlocks is to care more about your long-term goal in the negotiation than about the short-term process in which you are engaging.

Stated differently, don't be afraid to look stupid.

¹ [Publication pending.] Laurence Eisenstein is a founding partner of the law firm of Eisenstein Malanchuk LLP in Washington, D.C., with a practice focusing on representation of corporate policyholders in negotiating complex insurance claims. The views expressed are those of the author, and do not necessarily reflect the views of the law firm or of its clients. Mr. Eisenstein can be reached at 202-965-4700, LEisenstein@em-law.com.

Remember that your goal is to achieve your goal. You are trying to achieve a certain end result, such as obtaining a certain dollar value – you are not trying to achieve some meaningless intermediate results. If your goal is to buy a particular car for no more than \$5,000, then it shouldn't really matter to you whether your current position in the negotiation is that you will buy the car for \$100 or whether your current position is that you will buy the car for \$4,999. You may think it matters, because you may think that offering \$4,999 will make it impossible to accomplish the purchase for \$5,000, or because you may think that your spouse who is standing next to you will think that you are crazy for offering so much money at that point in the negotiation. But, in truth, it should not matter what your current position in the negotiation is so long as you keep true to your goals. Restated, your success is not defined by how well you do on the in-between steps that get you from start to finish in the negotiation. Your success is defined by the end results.

Say you walk into a business negotiation asking for \$1 million from the other side, although you are willing to settle for \$400,000. The other side responds that they are willing to pay only \$10,000. Faced with this situation, many people will storm out of the room indignantly, saying that the \$10,000 offer is insulting and that they will refuse to negotiate further. And sometimes this is the right move to make, to convey the seriousness of your concern about the numbers. Too often, however, people storm out of the room without the negotiations ever resuming. If you truly are willing to settle for \$400,000, and this would meet your goals, then don't you owe it to yourself to see if that is achievable? Maybe the only way to restart the negotiations is to lower your demand to \$500,000. Most people would be afraid to do this. Isn't \$500,000 too close to my

bottom line? How can I possibly get \$400,000 if I move to \$500,000 when they are only at \$10,000? How can I justify to my boss a move to \$500,000 when they are only at \$10,000?

There are ways to solve these problems, which I will discuss in more detail below. However the important point to keep in mind, in the above scenario, is that you are never agreeing to settle below \$400,000 by moving to \$500,000. You can always say no. You can always say that \$400,000 is absolutely the bottom line and that the negotiations cannot go any further. End of story. Think about this more carefully, however, and compare two situations:

The first negotiator stays at \$1 million and makes no deal, and tells his boss that the other side was unwilling to negotiate in a meaningful way.

The second negotiator makes the \$500,000 offer and, ultimately, the deal closes at \$400,000.

The third negotiator makes the \$500,000 offer but the deal still doesn't close. This negotiator tells his boss that he made a valiant effort to settle, but the other side was unwilling to negotiate in a meaningful way.

Who is the most successful?

Remember that your goal was to accomplish the goal of settling at \$400,000. The first negotiator failed, although he or she will likely not bear any adverse consequences, as the other side will be blamed.

The second negotiator, however, will be viewed as a great success. No one will care what was the path he took to get to the deal at \$400,000. They will care that he effectively got the job done.

The third negotiator, however, is also not a loser. Again he has a credible story. Indeed, the third negotiator can say, in truth, that he made valiant efforts to do the deal but, in the end, he held firm and was not willing to give in and go below the target numbers. Indeed, given a choice between negotiators one and three I would hope that most people would prefer to have negotiator three on their side. Why did you start at \$1 million? Do you think this might have settled if you had put on the table a more reasonable number? The first negotiator has no answers to these questions.

So how do you behave in a negotiation when you care more about your goal than about how you look? Not caring about the intermediate steps in the process can free you up to be more creative in the negotiating process in a myriad of ways:

One possibility is to make “contingent offers.” A contingent offer is an offer in the form of: “I would be willing to move to x, but only on the condition that you move to y.” Let’s take an example. Bob wants to sell some property to Frank. The land is contaminated, and it is not clear how much it will cost to clean it up. Bob would love to sell the property for \$1,000,000, but in light of the contamination he realizes that it would be worthwhile to sell the property for even as low as \$200,000. Still, he does not want to undervalue the land. Frank, on the other hand, also understands the environmental issues, and he sees them as more severe. He is willing to pay \$200,000, but would rather pay more like \$50,000 for the parcel.

Bob offers the property to Frank for \$1,000,000; Frank says he would only value it at \$20,000, and is not willing to negotiate further unless Bob is more in his range. (Or, as another alternative, Frank says that this number is ridiculous, and that he is not even willing to talk unless Bob puts a more reasonable number on the table.) They talk about

the scope of the environmental remediation that will be required, but still make no progress. What does Bob do?

One possibility is for Bob simply to not worry about his intermediate positions, and come back with a much lower number, perhaps \$400,000. From Bob's perspective, however, this has at least two disadvantages: first, it is by no means clear that even the \$400,000 will be looked upon favorably by Frank. Second, if he lowers his number quickly, without any back-and-forth, then Frank may not take his new number very seriously. If Bob is willing to cut his number by half with so little effort, who is to say that his new number cannot also be cut in half?

The solution here is a contingent offer.

Bob says to Frank, "I do think this property is worth a lot more than you do, but our numbers are so far apart that we are not making any progress. How about this to get the negotiations on track: if you would be willing to increase your offer to \$100,000, I would be willing to decrease my offer to \$500,000. Then we could agree to negotiate within that range."

By doing this, Bob is conveying two separate messages. One is that he is willing to move his number substantially downward, i.e., at least down to \$500,000. The other, however, is a message as to where he thinks Frank's numbers should be. Either message, conveyed alone, would be ineffective. Bob's move downward could lack credibility. Bob's demand for Frank to move up would be viewed as argumentative. Put together, however, they convey expectations as to a new negotiating range that might be possible.

Frank, in turn, has several alternatives. He can accept this contingent offer, and then let the negotiations continue from this new bracket. Alternatively, Frank might offer

a “counter-contingent offer.” How about if Bob’s offer was to move to \$500,000 if Frank moved to \$250,000. Frank might counter by telling Bob that he could not accept this range, but that he would be willing to move to \$100,000 if Bob moved to \$400,000. Instantly, the parties have conveyed a wealth of information as to their high-end and low-end expectations for the negotiation. Even if Bob rejects Frank’s counter-contingent offer, you can see that effectively both sides have now narrowed their area of disagreement to a range of between \$100,000 and \$500,000, and have broken the immediate deadlock that threatened to bring the discussions to a close.

A second, somewhat similar technique, is the use of “hypotheticals.” Hypotheticals are negotiating positions that are set forth without any indication that there is or would be authority to take that position, and which are presented to someone on the other side of the negotiating table who similarly does not have full authority. Often these are in the form of a question, to scope out the other side’s reaction to a situation, and invariably they require reliance on some unseen, unpredictable party not present at the negotiation. Thus you can pose a hypothetical about a position your client or boss might or might not take, because you may genuinely have doubts about that position, but if you pose a hypothetical about your own position then it has little credibility, since you, presumably, have control over your own decisions.

Typical hypotheticals could be:

“Where do you think your client/boss is going to want to end up in this negotiation? I don’t know my client’s bottom line, but I can try to get them to _____.”

“I know you and I aren’t deciding where this ends up, but I’m curious where you think this negotiation should end up? My view is that this should probably settle in the range of _____.”

“I haven’t talked about the language of this agreement with my boss, but do you think we could change it to read _____?”

In the negotiation between Bob and Frank, the two principals presumably are also the decisionmakers, so they cannot hypothesize about what their boss or client will do, or not do. But if Bob and Frank were attorneys for their clients, then hypotheticals could prove useful.

“Frank, your client’s numbers are just way lower than any numbers my client has given me, and I don’t see that we’re in the same ballpark. I may be able to convince my client to lower the price substantially, but is your client even going to be willing to make a six-figure offer?”

Or:

“Bob, are numbers are really far apart, and I’m not sure where to head from here. I’d be willing to recommend to my client that they offer a hundred thousand, maybe a bit more, for the property, but I don’t want to go out on a limb unless you think your client might be willing to consider a number that’s a lot lower than \$1 million.”

The key to a successful hypothetical is that it sets forth a potential position in a non-threatening manner, at the same time without having to formally make a unilateral change to your position. The good hypothetical provides the ability to get a soft feel for the other side’s general position. You are not looking to know exact dollars on the other side, or exact language; rather you are hoping to explore the ballpark of a range of

acceptable outcomes, or the key interests that underlie the other side's positions on an issue.

Hypotheticals can be particularly helpful in negotiations where the negotiation is not simply about money. In these situations, hypotheticals can be used to explore what issues are likely non-negotiable and which issues are negotiable, in a manner that is non-threatening since the parties discussing the hypothetical are seen as not having authority to decide the issues.

“Do you think that this issue is critical, or is it one that could go away if the money is right?”

“I think I can convince my client to accommodate you on paragraph 8 if you can convince your client to make some accommodations in the ‘definitions’ section of the agreement.”

Hypotheticals are presented without fear of whether you are giving away too much, or providing too much of a clue to your ultimate position. Remember that you are focusing on the end result, not the intermediate positions. A willingness to explore intermediate positions, in a noncommittal setting, will not require you to reach a particular end result.

Yet another technique which can prove useful is the willingness to apologize. Initially, I realize that there is a great reluctance to apologize in the middle of a negotiation, as this is intuitively perceived as a show of weakness. Isn't my goal to be tough as nails and show the other side that I am tougher and more determined than they are?

No.

Remember, the goal is to achieve the desired negotiation results, and not to care how you look in the process. Certainly, if you are apologizing multiple times in the same negotiation, or in every negotiation, then at some point this could become a problem. However the well-placed apology is a vastly underutilized tool, and I would urge you to err on the side of over-apologizing rather than saving apologies for special occasions.

First, if you genuinely made a mistake on an ascertainable fact – such as a math calculation -- then you should apologize for it, no matter how often this occurs. In this instance an apology is most definitely a sign, not of weakness but rather of honesty and straightforwardness.

“I’ve looked at my calculation of the environmental remediation cost, and I realize we made a math error. So I am willing to change the amount of money I want for the property to reflect the lower, corrected numbers.”

Or:

“I realize, as I look at this again, that the pages I printed off of the internet are the price for a car without the heated seats. So I’m willing to add in the cost of those seats.”

In the short run such an apology – correcting a mistake – can be embarrassing and frustrating. However the correction will pay dividends in credibility many times over. Just think how you look when you stubbornly refuse to correct an error. Who would you trust more in a negotiation, a party who corrects an error or a party who doesn’t correct an error that you later find?

Sometimes, however, the use of an apology has to go beyond actual, factual errors, and instead extend to more subjective feelings of the other side. An example of this type of apology would be:

“I’m sorry if our initial offer was insulting to you. That certainly wasn’t our intent. We were hoping to have a productive negotiation.”

The goal here is to diffuse a tense situation. Instead of entering into a tit-for-tat as to why the negotiation has stalled, or why the level of hostility in the negotiation has risen, a well-placed apology will take some of the wind out of the other side’s hostility, and frequently can be used to reestablish a more relaxed dialogue.

Indeed, sometimes I would advocate apologizing for errors, even factual errors, which are not your fault, in order to avoid needless tensions in a negotiation. Of course your goal is not to lie and make yourself look bad; your goal here is to diffuse tensions. For example, you arrive at the meeting at 11 am, only to learn that the other side arrived at 9 am. You are certain they said the meeting would be at 11 am; it is in your calendar at 11 am. You did not have any reason to call ahead, because you thought you were on time for the meeting. Nevertheless, this is an important negotiation and the other side is fuming.

What do you do? Much as you might be tempted to argue the point, and insist that you understood the meeting was at 11 am, you accomplish nothing by arguing. To the contrary, arguing the point merely increases the level of tensions, and convinces the other side that you are stupid (for having written down the wrong time, which you didn’t) and also stubborn (which you are).

Instead my suggestion is to say: “I’m so sorry. I wrote down that the meeting was going to be at 11 am, but I may have made a mistake on that. If so, I really apologize. I know how annoying it can be to sit around for several hours, and I know you had better things to do than sit around and wait.”

Such an apology holds hope of defusing a tense situation, and starting the negotiation back on the right track. You do not have to lie – you can always couch your apology in terms of “if” you screwed up – but you do have to be willing to let the other side feel vindicated.

Remember your goal. You don’t care who feels vindicated or who looks careless. You care that you achieve your goal in the negotiation. If you can make the other side feel good, and feel that they are being treated fairly, then you maximize the chance that you will achieve the results you want. Indeed, everyone is more willing to make more concessions to a “nice guy.” You tip the waiter more money if he seems like a nice person, and you tip the waiter more if he apologizes for the spoiled cream in the coffee than if he denies that it is spoiled. This is not to say that your goal is to be a pushover, but you are not being a pushover. You are not compromising your ultimate negotiating position, you are simply trying to break a deadlock, or potential deadlock, which lies between you and your goal.