

Negotiating Just Results

[The following is the second installment of a four-part series examining alternatives to traditional civil litigation in the American courts.]

“In the United States legal system, litigants do not get what they deserve; they get what they negotiate.” – *Legal Maxim*

Those unfamiliar with the American federal court system or the policies employed by the various states might assume that “justice” is the inevitable conclusion to a fully-litigated dispute. Aggrieved parties will be made whole through the involvement of impartial judges or juries of their peers. But such assumptions are not borne out in statistical reality.

Nationwide, an estimated 97% of criminal prosecutions terminate in plea agreements, while 95% of civil actions are resolved through voluntary settlement between the parties. This phenomenon, known as the Vanishing Trial, underscores the importance of legal negotiation, whether between an accused and a prosecutor’s office, or among private parties.

Harvard Law School Professor Roger Fisher is universally regarded as the “Father of Modern Legal Negotiation.” His seminal work, *Getting to Yes*, is a former *New York Times* bestseller and one of the most sought-after titles of the past 25 years. Professor Fisher pioneered “Principled Negotiation,” a method which de-mystifies legal negotiation and facilitates attorney efforts to obtain excellent results for their clients.

Fisher’s four-step process begins by “Separating the People from the Problem.” No matter how emotional a conflict may become, the parties must concentrate on the offending conduct, rather than becoming distracted by the person seated across the table. Second, disputants must “Focus on Interests, Not Positions.” In the classic example, an employee tells her employer, “I want a raise.” The typical boss might believe he has only two choices: Authorize the payroll increase or risk losing the employee. A more sophisticated businessman might respond by asking, “Why do you want a raise?” He might then learn that the worker needs additional money to send a child to school. Perhaps the company has a scholarship or loans-for-education program. If so, meeting the interest (financing the child’s schooling) can be met even if the position (“I want a raise”) is left unaddressed. Third, Fisher advocates an “Appeal to Objective Standards.” Arguments are strengthened when the opponent cannot take issue with a proposal grounded in reasonableness. For example, an estate in Beverly Hills, California might well be worth US\$5 million, while a mobile home in Little Rock, Arkansas would not command a similar price. Valuing each of the residences against their respective fair market values grounds a seller’s offering price in equity and increases the likelihood of a deal. Finally, Fisher counsels individuals to “Identify Value-Creating Options.” Rather than sentence a child to a juvenile detention center for vandalizing a house of worship, perhaps the miscreant can make more meaningful restitution through participation in a religious tolerance program. By learning to respect other value systems, the youthful offender becomes a more enlightened member of society, free of the life-long stigma of a criminal record.

The skills of legal negotiation have broad-based value. While they may not provide an adequate substitute for competent legal counsel, the knowledge will enable an individual to more meaningfully participate in a legal proceeding. Such involvement will yield enhanced satisfaction and an increased likelihood of obtaining desirable results.

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