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PERSPECTIVE

## The wisdom of kindness in negotiations

By Greg Derin

In his book, “The Best Care Possible: A Physician’s Quest to Transform Care Through the End of Life” (Avery, 2012), Dr. Ira Byock described the following scene: “Years ago, anthropologist Margaret Mead was asked by a student what she considered the first sign of civilization in a culture. ... Mead said ... [it] was a femur (thighbone) that had been broken then healed. Mead explained, that in the animal kingdom, if you break your leg, you die. You cannot run from danger, get to the river for a drink or hunt food. You are meat for prowling beasts. No animal survives a broken leg long enough for the bone to heal. A broken femur that has healed is proof that someone has taken time to stay with the person who fell, has bound up the wound, has carried the person to safety and has tended the person through recovery. ‘Helping someone through difficulty is where civilization starts’ said Mead. We are at our best when we serve others. Be civilized.”

As the world assesses the impact of the COVID-19 pandemic, I was reminded of this story. On walks, neighbors waive to make even distant human contact. Customer service representatives become welcome friends, grateful for inquiries about the state of their



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family’s health and safety. We have developed new gratitude for the functions performed by service workers, and admire

great battle.” As a mediator, I respect aggressive bargaining and endorse an interest-based approach to conflict resolution.

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the selfless sacrifices of first responders and health care professionals. One wonders about the longevity of the compassion displayed by neighbors and corporate or litigation adversaries. Something within us recognizes that in crisis, character is forged, and that quotidian acts of kindness yield great rewards.

Philo said “[b]e kind, for everyone you meet is fighting a

I am an advocate of utilizing decision trees and cost benefit analyses to assist parties in determining whether one’s interests can best be met by traditional exchanges of offers or pursuing alternatives (e.g., trial). However, too often parties become consumed by the mechanics of negotiations, and miss opportunities which only arise from more cooperative behavior.

Margaret Mead also famously said, “[n]ever doubt that a small group of thoughtful, committed citizens can change the world; indeed, it’s the only thing that ever has.” My attention in recent weeks to Margaret Mead reminded me of the power of kindness, which in turn made me think of Dr. Robert Cialdini, and the cognitive influence of persuasion. Negotiations involve individuals persuading one another by exchanging things of value. In his book, “The Psychology of Influence” (Quill 1984), Cialdini suggested that parties are influenced by six principles of persuasion:

**Principle 1: Reciprocation:** “[R]epay, in kind, what another person has provided us.” As a society, we recognize that the giving of a gift or favor creates an obligation to respond with something of equal or greater value. Cialdini illustrated this by reminding readers of encounters in airports and on public streets with members of the Hare Krishna Society in the 1970s. Krishnas, dressed in ill-fitting robes and wearing beads and bells, initially had little success raising funds. The Krishnas changed tactics, and began handing passersby a book, or more commonly, a flower. Recipients who tried to resist were met with the response that “it is our gift to you,” and a refusal to accept a return. Only after having

brought the full force of reciprocity to bear, the recipient was asked for a donation. The power of reciprocity was so strong the Krishnas were able to fund the construction of temples and acquire property in 321 centers in the United States and overseas.

Courteous behavior and compromise is almost universally met with reciprocal behavior. As the wily politician Franklin Roosevelt observed, “[i]f you treat people right they will treat you right ... ninety percent of the time.” I regularly advise negotiators to meet cooperation with cooperation, and “punish” bargaining adversaries when they go astray, to remind them of the rule of reciprocity. Concessions are usually met with concessions, and when coupled with expectations regarding the magnitude of the next required move, reciprocity is remarkably consistent. When bargaining patterns change, the reality of case values is generally the cause.

**Principle 2: Commitment and Consistency:** *“Once we have made a choice or taken a stand, we will encounter personal or interpersonal pressures to behave consistently with that commitment. Those pressures will cause us to respond in ways that justify our earlier decision.”* However, what passes for consistency in negotiation is often a passive or lazy adherence to a path of least resistance. A party may simply hold fast to a position when changed circumstances suggest that their interests would be better served by taking a different approach. As

Heraclitus observed centuries ago, “[n]othing endures but change.” Resist the temptation to adhere to outdated positions if circumstances have changed.

**Principle 3: Social Proof:** *“[O]ne means we use to determine what is correct is to find out what other people think is correct.”* There is comfort in numbers. We feel its absence sitting in our homes these past months, and when we walk deserted streets. Why do you own an iPhone or a Galaxy? Toyotas and Hondas are the most popular brands in America for many reasons, among them are long records of reliability and consumer satisfaction. Objective benchmarks such as polls, consumer surveys, statistical analyses, joint expert reports, all can be useful tools to influence decision-making.

**Principle 4: Liking:** *“[W]e prefer to say yes to the requests of someone we know and like.”* We like people for many reasons. We may like people we perceive as similar. Similarity can manifest itself in superficial classifications, or on the deeper levels of shared interests or values. Creating familiarity and comfort with a negotiation process can show caring and lead the way to cooperation. Part of a successful negotiation is one of building rapport and trust. Learning of shared values and interests is an essential element of that process.

Nearing the end of a difficult mediation, involving complex and highly emotional issues, the greatest compliment paid to me as a mediator came when one side was confronted with what looked to be a final

decision. I described the latest proposal and the options. I was asked my view on the seriousness of the resolve of the other side. When the party made a quick decision adopting my recommendation, I asked why. They said that they could not say ‘no’ to me; although we had never met before the mediation, they said they had come to regard me as the “kindest person they had ever met,” and trusted me. They knew their decision would bring them closure — and it did.

**Principle 5: Authority:** *People will be influenced by those with superior knowledge or perspective in their decision-making.* The participation in a negotiation of a trustworthy respected expert provides an advantage. Some counsel and expert witnesses carry their reputations into a negotiation. They, and others, will admit weaknesses in a case to opposing parties and counsel, enhancing their trustworthiness and the strength of other (more important) parts of their case in the process. Mediators also must earn such trust if their reputations do not precede them.

**Principle 6: Scarcity:** *“[O]pportunities seem more valuable to us when their availability is limited.”* People value that which is less available. And perhaps ironically, people are much more loss averse than they are interested in winning the lottery. As Cialdini put it “people seem to be more motivated by the thought of losing something than by the thought of gaining something of equal value. For instance, homeowners told

how much money they could lose from inadequate insulation are more likely to insulate their homes than those told how much money they could save.” This explains why so many negotiations include discussion of the risks of trial, and the costs of litigation. This understanding provides motivation to consider fashioning two options in making settlement proposals, allowing the recipient to choose between them.

We are all engaged in a great struggle. Pandemic or not, this is the nature of our journey. Throughout our negotiations, we seek above all to persuade, to influence the outcome of our conversations to satisfy the interests of clients. According to the Talmud, “[t]he highest form of wisdom is kindness.” And ultimately, wisdom — good judgment — is what clients seek from their counsel. ■

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