



2005, Volume 08, Issue 4

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## Am I My Brother's Keeper?

Using an exercise in negotiations gives businesses an opportunity to examine ethics.

[Michael B. Rainey, JD, LL.M.](#)

Whether we are dealing with business, global diplomacy, or family matters, we are all perplexed by the complexity of ethics in negotiation. The simple question, "Should I tell the truth in a negotiation?" opens the door to subjects as diverse as philosophy, linguistics, fiduciary duty, and, of course, ethics.

What are the ethical parameters of negotiation tactics? Can we lie? Can we deceive? Is there a difference? [\[1\]](#)



The exercise "Am I My Brother's Keeper?" is a simple, straightforward exercise that can lead to meaningful business discussions regarding ethics, negotiation tactics, and the ramifications and effectiveness of implementing those tactics and ethical decisions in a business setting. Based on an actual 1962 case, [\[2\]](#) the exercise is designed to open discussion regarding various ethical decisions that negotiators must make in the course of a negotiation. However, several cautions must be raised before conducting this exercise.

First, this skills exercise is controversial by design. It calls upon discussion participants to make difficult decisions. The post-exercise discussion requires participants to analyze their decisions in an open forum. The exercise *must* be carried out in a judgment-free manner. Failure to do so can delay reaching the goal of the exercise, a realization of the limits and ramifications of making ethical decisions.

The exercise presents appropriate times to encourage and to limit questions. The leader of the discussion must be cognizant of the tone, context, and syntax of posing questions to the participants so as not to create among them fear of judgment. On the other hand, because of the nature of the negotiation, emotional reactions to questions are likely to occur, and they can prove valuable to the discussion. However, such reactions must be handled carefully and with empathy. The leader must stay in touch with participant's feelings, thoughts, and concerns.

Finally, this exercise should follow comprehensive periods of instruction and discussion regarding the mechanics of conflict, communication skills, and the general *nature* of negotiation. participants must learn that negotiation is a dynamic exercise in which interests, wants, and needs can change from moment to moment. Tools and tactics used in today's negotiation may not work tomorrow.

## **Mechanics of Conflict**

As Lowry, et al. point out in their book, [\[3\]](#) the Chinese character for crisis is comprised of two characters, danger and opportunity. If participants choose to see a crisis or conflict as one of danger, they will use particular skills and tools to fend off the danger. If they view the crisis or conflict as an opportunity, they

will embrace it using a host of other skills and tools. Thus, the perception that participants have and the tools they choose ultimately define the reality that they experience in this exercise.

Participants should also be familiar with the mechanics of conflicts. They should be introduced to the "life cycle" of conflict—from inception, through escalation, to stalemate, and settlement.

- What are the conditions that lead to conflict?
- What are the tactics used to respond to conditions fostering conflict that will curtail the escalation?
- What are the conditions that feed escalation?
- How can one recognize the stage of escalation the conflict has reached?
- What are the conditions that indicate a stalemate?
- Once in a stalemate, what can the parties do to move into resolution?

Each of these stages constitutes steps in the mechanics of solving conflict. Reviewing these mechanics helps participants appreciate that a definitive "map" or "life cycle" of conflict exists. They will use different tools at each of these stages.

Conflict can be defined as a perceived divergence of interests, or a belief that the specific aspirations of the parties in conflict cannot be achieved simultaneously. [4] participants should know how to match the definitions of conflict with the mechanics of conflict resolution in order to fully appreciate the next step in conflict resolution, communication.

## Communication

What is communication? Neuro-Linguistic Programming (NLP) psychologists say that as much as 93 percent of communication is *non-verbal*. [5] The 7 percent that is verbal is plagued by the potential ambiguity within language itself. By its very nature, language itself is both transactional and tied to the context of the subject. Language can also provide meaning out of context. It is inexorably tied to surrounding events, timing, and circumstances. Finally, two crucial facets of communication are the ability to use questions as probes and to actively take in *all* the responses, including the 93 percent constituting *non-verbal responses*. The skills of probing and listening go beyond the physical act of hearing and involve using information gleaned from both verbal nuances and non-verbal cues. Learning and practicing these skills are indispensable to an effective negotiator.

## Conducting the Exercise: Examining the Limits of Ethics in Negotiation

This negotiation exercise can lead to a meaningful discussion of ethics, tactics, and ramifications. It is based upon an actual 1962 case. [6] All the medical language embedded in the quotes in the participant's roles is taken directly from the actual case.

## The Problem

The participants count off by twos and then separate into two groups. A copy of the problem is given to each participant. The leader reads the Problem aloud while participants follow along on their copies.

## Statement of the Problem

The Human Resources (HR) person is charged with taking care of resolving employee claims. In this scenario, HR is negotiating with the company's employee for a ***fair*** resolution and payment for an injury the employee sustained at work within his/her course and scope of employment.

The purpose of this negotiation is to insure that everyone walks away with a sense that they have been treated fairly. However, each ***should*** get the best deal s/he can.

**\*\*\*Please Note\*\*\***

**Do not discuss the facts *after* you reach a final result.  
Discussion will take place in another session.**

As the leader reads the problem, s/he should emphasize the words **fair** and **should** point out that both words are italicized in bold. The point is to help direct the participants into a principle-based negotiation. The leader must instruct the participants not to discuss the facts in their employee/employer roles until the group meets together at the end of the exercise. To emphasize this point, the leader might also call upon a participant to read the last two sentences in the Statement of the Problem. The leader should not entertain any questions at this time. Not allowing questions is critical because the participants' decisions to disclose or not to disclose particular information is crucial to the post-negotiation analysis. Answering questions at this point might "spin" the results. It is more productive to let the participants come to their own conclusions during the course of the post-negotiation discussion.

## The Employee Role

When the problem has been read, half of the participants are given employee roles. They read the facts silently to themselves.

## The Employee

You were an up and coming employee. Unfortunately, you were severely injured while in the course and scope of your employment. Your injuries were diagnosed by your doctor, Dr. Smith. Your injuries are listed as the following: "...a severe crushing injury of the chest with multiple rib fractures; a severe cerebral concussion, probably with petechial hemorrhages of the brain; and bilateral fractures of the clavicles."

At Dr. Smith's suggestion, you were examined by Dr. Brown, an orthopedic specialist, who made X-rays of your chest. Dr. Brown's detailed report of this examination included the following information:

"...The lung fields are clear. The heart and aorta are normal."

Your employer demanded that you go to the company's doctor for an independent examination. That examination was extensive. However you were not given a report of the exam's results.

After the independent examination, you and your employer agree to discuss a settlement. In the course of the discussions, your employer gave you a release which described your injuries as including, but limited to, the following: "...severe crushing of the chest, with multiple rib fractures, severe cerebral concussion, with petechial hemorrhages of the brain, bilateral fractures of the clavicles."

This was a standard release form. Attached to the release form were affidavits from your physicians, Dr. Smith and Dr. Brown.

Given what you believe are your injuries, you think that \$15,000 is a reasonable amount of a settlement. Do your best to get a good settlement.

Though participants may have some questions, it is absolutely critical not to answer any questions at this point. Let the participants draw their own conclusions. Thinking their way through potential problems is good practice, which also becomes the basis of the participants' post-negotiation analysis. A number of open-ended questions will focus on their decision process regarding both how they proceeded to achieve their goal and *why* they made particular choices in their responses to the other participants' moves.

## The Employer's Role

The remaining half of the participants, who represent the Employer, receive the following role facts to read:

### The Employer

Employee is a very valuable asset to the company. Unfortunately, s/he was severely hurt in the course and scope of employment. His/her physician, Dr. Smith, indicated the injuries were the following:

"...a severe crushing injury of the chest with multiple rib fractures; a severe cerebral concussion, probably with petechial hemorrhages of the brain; and bilateral fractures of the clavicles."

A second physician, Dr. Brown, found the following;

"...The lung fields are clear. The heart and aorta are normal."

As standard operating procedure, the Company sent employee to the company doctor, Dr. Jones, a neurologist, for an Independent Medical Examination (IME). Dr. Jones reported as follows:

"The one feature of the case which bothers me more than any other part of the case is the fact that this patient has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Whether this condition came out of this accident I cannot say with any degree of certainty, and I have discussed it with the Roentgenologist and a couple of Internists. Of course an aneurysm or dilatation of the aorta in a [person such as this] is a serious matter as far as his/her life is concerned. This aneurysm may dilate further, and

it might rupture with further dilatation, which would cause his/her death."

It is standard operating procedure (SOP) for the employee *not* to be given the IME report. You believe SOP was followed and the employee *has not* seen this report. In fact, this report could make the settlement value of this case \$100,000 or more. It is clear that your doctor is concerned that the employee could die from this injury. Then the company might really be on the hook.

Your job is to get the best deal you can. Good luck.



The participants next choose a partner to work with in a place where they can conduct their negotiation free from outside interference and where they cannot hear other participants' negotiations. The negotiation usually takes 20 minutes. The leader should seek out each group and observe their negotiation processes, language, and tactics.

At the end of the negotiation, the participants return to the room with their deal, which should be written. When all the participants are together, the leader puts all the results on the board or flip chart so that all the participants can see the results.

## Analyzing the Exercise

### 1. The Disparate Results

Generally, the first topic of discussion when the group reassembles after completion of the negotiation exercise will be the wide disparity of results between the paired participants. Some participants [7] end with lower settlements in the \$10,000 to \$15,000 range. Other settlements may result in six figures. Some settlements may include terms and conditions such as job guarantees or acceptance of the deal being contingent upon an additional doctor's examination and release of the employee.

When the participants see the range of results, they often begin using judgmental language about how well they did (or did not do) when compared with the rest of the group. The leader must handle this aspect of the discussion deftly by helping participants not to dwell on negative judgments regarding their standing in the range of final figures because they might shut down and fail to continue to contribute to the ensuing discussion.

The leader might begin the conversation with broad, open-ended questions such as the following:

- Why do you think there is such a spread of results from people who are negotiating using exactly the

same factual situation?

- Why did you release or withhold particular information?
- Did you perceive an advantage or disadvantage by being untruthful, deceptive, or worse?
- If you used deceptive tactics in your negotiation, did your tactics work? If you did use deceptive tactics, once the other participant discovered the tactic, how did that discovery affect the participants' relationship or the results of the negotiation?
- What means or tactics did you implement to manage your information and responses to questions?

## 2. Disparate Information

Evaluating the effect of disparate information is also an excellent exercise. The employer participant had more crucial information than did the employee participant. When all the participants are together after the negotiation, they must discuss whether the employer should take advantage of that information disparity, and if so, they should determine the ramifications of such inequality. If a company saves some money by not disclosing the extent of an injury and if the employee then dies, what might happen to the company if the employee's heirs discover that the company knew the full extent of his/her injury? How did the Employer decide that the aneurysm was or was not *actually* precipitated by the incident? These are all questions for which this exercise opens the door to meaningful discussion.

## 3. Discussions Regarding an Opening Gambit

An excellent exercise is to evaluate the power and effect of the opening gambit. The opening gambit is the tactic of determining whether one or the other participant makes the first offer or demand. [8] This initial discussion is also a time to urge the participant to appreciate the importance of asking, "What was that about?" when the participant receives what appears to be an unexpected response. Remember, the facts indicate that the employee thinks he is "sitting in high clover" if he gets \$15,000. What are the ramifications if the employee opens the negotiation with a demand for \$20,000? What information does that give the Employer?

On the other hand, suppose the employer opens with \$90,000? How does the employee modify his/her negotiating plan? If the employee does not modify his/her negotiating plan, what were his/her reasons? If the employee decides simply to go for it and opens with a \$75,000 demand, and the employer takes it without question, what does that tell the employee?

If the employer makes an offer significantly higher than what the employee expects, what questions do the participants ask themselves? What information is given when one side, such as the employee, thinks the case is worth \$15,000 and s/he gets an initial offer of \$75,000? Does s/he ask for the basis of the offer? Does the employee openly admit his/her information indicates the case is worth \$15,000 and ask why the employer thinks it is worth a higher amount? If the employee does ask that question, does it prompt the employer to disclose their information about the aneurysm? Does one party begin to finesse more information from the other party following the opening gambit? Do participants ask questions, or do they just settle? If the employee gets a significantly higher opening offer, does s/he modify the response to ask for even more, thus confusing the employer? Does the employer disclose the aneurysm directly or, by making a physician's examination a contingency, disclose it indirectly? All such questions can be tied to the opening gambit.

## 4. Discussions Regarding a Negotiator's Duty

### a. How many employers told relatives of the employee about the potential severity of the aneurysm?

In a typical exercise, when the leader asks employees if the employer told them of the life threatening nature of the injury, they usually say *none* of the employers disclosed this very crucial information. As a

justification for not saying anything in their additional information regarding the employee's injury, most of the participants playing the role of Employer base their silence on their interpretation of the instructions, "Do not discuss the facts after you reach a final result. We will discuss this in class." They follow up with assorted other rationales for not disclosing. As an example, they may cite their duty to their employer. This leads into a general discussion of the nature of ethical duty an agent owes to his/her employer.

At this point the leader may ask the participants what they see as the duty that one party owes to the other party in a negotiation. The answers range from "no duty" owed to responses indicating a more pervasive responsibility. Usually there are widespread opinions on this subject alone. If the discussion becomes chaotic, the leader may ask the participants the benefits of taking the other side's interests into consideration in formulating a durable resolution. Just about the time the participants feel that they have a firm handle on the issues, the leader can seriously up the ante with the following question.

**b. Would you tell your children, sister, brother, your family, your friends?**

This question is designed to get the participants off the esoteric, analytical level and into the emotional issues of the dilemma. The leader should choose one of the students who in the preceding discussion was adamant that s/he would not tell the employee. Predictably, the participant changes his/her answer, now saying they *would* tell the employee. When queried, usually their immediate response is "Because it's family." The leader should establish that they understand that the aneurysm is potentially a fatal problem. Throughout the discussion the leader can direct the conversation to the point of establishing that the only justification between telling family and not telling the employee is money. Then comes the challenge. The leader asks, "In other words, you would sell out and relegate an *employee [who] is a very valuable asset to the company* to a near certain death simply over money?" Such stark language gives rise to some very interesting discussions of ethical issues.

**c. If the HR agent discloses the ramifications of the situation.**

The leader and participants should discuss the potential impact on the HR representative if s/he discloses the information. The HR person could be fired, could be demoted, or could lose his/her position. The person could also be lauded for saving the company from huge potential exposure. When these results are put on the table, the group should take sufficient time to analyze each possibility. The leader might ask the participants if they would want to work for an entity that would fire them for disclosing such valuable information. As a corollary, the leader may ask participants if they were the owner or manager of the company, would they want the HR person to put his/her personal ethics over the company's overall strategic goals? The point is to get the participants to see and evaluate the problem from both sides.

**d. What if the HR person does not disclose the ramifications?**

What if the employee dies and the death can be directly tied to the aneurysm? If the employer's agent knew of the problem and *did not disclose* it to the employee, would the agent incur liability for the company? For him/herself? If so, what would that lack of disclosure cost the company? Would there be an emotional toll on the HR person? These are all questions that can be very disturbing, so the leader must be both persistent in asking the questions and sensitive in handling the responses. The questions should not be asked in a judgmental manner or tone. It is important for the participants to be aware that a human being's life is at stake, but they should not feel guilty about their perspective on handling the problem.

## Conclusion

This is a very simple, straightforward exercise that can lead to very meaningful discussions regarding ethics, negotiation tactics, and the ramifications and effectiveness of the implementation of those tactics and ethical decisions. The leader generally should not disclose that this was an actual case until the end of the exercise. When the participants realize that this business discussion was not just an exercise, but was a

real life drama, it makes the points more salient.

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[1] For one of the most comprehensive discussions of this concept, see Peters, Geoffrey M. (1986) "The Use of Lies in Negotiation." 48 *Ohio Law Journal* 1.

[2] *Spaulding vs. Zimmerman* (1962) 716 N.W.2d 704.

[3] Lowry, L. Randolph & Myers, Richard W. (1991). "Conflict Management and Counseling," Word Incorporated, 1991: 13.

[4] Pruitt, Dean, Rubin, Jeffrey Z., Kim, Sung Hee (1994). "Social Conflict, Escalation, Stalemate, and Settlement," McGraw-Hill, Inc.: 5.

[5] O'Connor, Joseph & Seymour, John (1995). "Introducing NLP," Thorsons Press: 17-18.

[6] All the quoted material is directly from *Spaulding vs. Zimmerman* (1962) 716 N.W.2d 704.

[7] The participants in this example are for the most part fully employed MBA students in Pepperdine University's Graziadio School of Business and Management.

[8] Rainey, Michael (2003). "The Car Deal: An Exercise to Teach About 'First Gambits' in Negotiation," *Graziadio Business Report*, <http://gbr.pepperdine.edu/034/>.



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