

Dirty Tricks in Mediation

Kluwer Mediation Blog

March 20, 2018

Martin Svatoš (Forum for Mediation and Arbitration)

Please refer to this post as: Martin Svatoš, 'Dirty Tricks in Mediation', Kluwer Mediation Blog, March 20 2018, <http://mediationblog.kluwerarbitration.com/2018/03/20/dirty-tricks-mediation/>

You can get much farther with a kind word and a gun than you can with a kind word alone.

Al Capone

This popular quote attributed to the famous US mobster announce the use of force and other dirty tricks in negotiation. I do not especially like it. I would relativise it by the following supplement: *"Depending on who is sitting on the other side of the table."*

Forbidden Fruit of Negotiation

For a person dealing with conflict and training people in principled WIN-WIN negotiation, it is always very frustrating to meet with dirty tricks in negotiation. Those inherently adversarial unethical (and/or not broadly accepted as ethical) negotiation ploys misuse some of the cognitive biases in favour of the active party to the detriment of the opposing party.

The most common commonly known dirty trick would be *walkouts* but there are some more sophisticated ones as *calling higher authority* and *bad cop-good cop approach*. Those tools may poison the mediation procedure that supposes to be problem-solving oriented and amicable in nature and even abort dispute settlement procedure due to loss of trust. For those instruments are incompatible with mediation, every mediator needs to know the way how to tackle them efficiently and smoothly: He or she has to know how to support the party against

which the trick is used and how to educate the parties which are employing it in a way that would neither embarrass them, nor discourage them to mediate on. And yet, I was surprised how little it has been actually written about the use of dirty tactics in a mediation room.

Recently, I was asked to speak about the use of and remedies against dirty tricks twice. The first time, it was for a seminar held by the ICC Czech Republic that took place yesterday. The second time, it was for the Prague Negotiation and Mediation Week that is going to be organised in Prague in May.

In both cases, organisers were keen on hearing some experiences of a mediator who witnessed parties using those tactics, and also on getting some advice how to cope with those strategies both as a mediator and a negotiator.

Drawbacks of Using Dirty Tactics

During yesterday's event, we had an interesting discussion: While some of the ploys were unilaterally considered as unethical some of them raised a serious discussion. Some of the participants claimed the use of them without considering them unethical. However, apart from deontology, there is another serious drawback related to their use. There is always some countermeasure that is easy to be used and that will leave the party using the trick with empty hands. This is especially the case when negotiating with an experienced negotiator.



Furthermore, they are well known and easy to be discovered. When the trick is revealed it loses its power. Moreover, their use might be usually eliminated by thorough preparation.

Apart from being inefficient and even two-edged, there are other reasons for which I would always discourage their employment. I have got the impression that they are used mainly by rather poor negotiators, though those would rather call themselves experienced bargainers. Moreover, due to its use, the trust in the room might deteriorate. They are always adversarial and tend to strengthen positional bargaining tendencies.

The trick with the tricks is that sometimes they are difficult to decipher as such behaviour can be a sign of both clumsy good-faith behaviour and of the deliberate effort to manipulate the other party. So, for instance, the bad cop may be a role or it may be a typical difficult behaviour of that representative.

Gallery of Dirty Tricks

And what are the most common dirty tricks I have witnessed in mediation room?

Pandora's Box

The negotiator using this trick attempts to reopen already settled points of the agenda. Sure, the principles of “package agreement” and “no agreement until the final agreement is reached” prevail in mediation. Yet every mediator needs to know the difference between those two situations: A party is re-opening an issue because it is interdependent on the one actually discussed. A party is re-opening a topic in order to put more pressure on the other party.

Left at the Altar

Left at the Altar is a trick based on similar principle as the previous one. This time, the negotiator refuses to conclude the deal right at the time when the settlement is ready to be completed. The goal is to gain a last-minute concession. In this situation, the party is gambling on the sunk-cost cognitive bias: An individual facing increasingly negative outcomes nevertheless continues the same behaviour. In order to justify such approach, he or she takes into consideration a cumulative prior investment of money and time despite the fact that the new inputs suggest that the cost of continuing the decision outweighs the expected benefit.

Calling Higher Authority

Despite initial reassurance that the party representative has a full authority to settle, the negotiator declares that he or she is unable to make a final decision. At this point, the party offers either to accept the present deal or wait till the higher authority is consulted. Usually, that authority is called ambivalently (“*my superior*”, “*board*”, “*the owner*”, ...). In some of the cases, the party will not even share who the mysterious person is. Though in some of the cases, the demand to consult someone else is well based due to the broader set of topics actually discussed than foreseen, in the majority of the cases, this ploy serves as an attempt to make the opposing party concede within the settlement range. This is typically illustrated by

the following phrase: *“I was authorised to settle for EUR 20,000. I would be more than happy to give you more, but I cannot go any further, my board would not approve this.”*

I was authorised to settle for EUR 20,000. I would be more than happy to give you more, but I cannot go any further, my board would not approve this...

Good Cop/Bad Cop

This dirty tricks originated from a psychological tactic that has been successfully used in criminal interrogations. It involves a team of two persons who work together but in opposition: The *“bad cop”* takes an aggressive, accusative and negative approach towards the subject, the *“good cop”* behave completely differently – supporting the opposing party and pretending to understand his or her situation. An empirical study has proved that this technic – when used in correct settings – significantly increases the chance of cooperation of the suspect. However, this goes for interrogation, not negotiation. Here, it brings hostility in the room due to its manipulative and aggressive characteristics.

The walk-out

The party using walk-outs is constantly threatening with leaving. In more ostentatious form, it may also deliberately walk out of a negotiation to demonstrate disinterest. The goal of this annoying behaviour is to increase pressure by a hollow threat. Once again, there might be parties who are leaving because they believe the negotiation is really over. An experienced mediator is usually able to spot the difference easily.

And what are your *“favourite”* negotiation dirty tricks?