



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, and the policies, process and politics that shape them.

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Let’s Make a Deal: The Art of Legislative Negotiation | Feb. 1, 2021 | OAS Episode 120

Ed: Hello and welcome to “Our American States,” a podcast from the National Conference of State Legislatures. This podcast is all about legislatures: the people in them, the policies, process and politics that shape them. I’m your host, Ed Smith.

“In my experience working in different legislative contexts, I think most negotiations are multiparty, because even if you happen to be in a room with only one other person, that level-two game is so important, it’s actually almost easier to think of them as multiparty negotiations.”

Ed: That was Monica Giannone, a consultant and trainer specializing in negotiation and conflict resolution. She is my guest on the podcast.

The ability to negotiate skillfully is critical to a well-functioning legislature, but negotiation skills are not only crucial in making laws, they are similarly important in just about everything you do in life, says Giannone, who runs the Harvard Kennedy School of Negotiation Project and is an adjunct lecturer in negotiations at Babson College.

Monica, welcome to “Our American States.”

MG: Thanks, Ed. Thanks much for having me.

Time Marker (TM): 01:20

Ed: Monica, what are the biggest challenges to effective negotiation in a legislative environment?

MG: It’s a great question. Whenever I think about different contexts of negotiation, so not just legislative negotiations, I think about the people and I think about the system.

And so, when we think about the system, for legislative negotiations we can think about both what's going on in the country, or in the state, and then what's also the system that we're operating in. So, what are the rules within the specific legislature?

Within the country I think we see... it won't come as a surprise to anyone that we see increasing partisanship. We see longer times spent campaigning, so it's almost an era of permanent campaigning in a lot of places, which has the impact of having legislators really receptive and needing to work with their base a lot more than we used to see in the past. And this leads to, with a variety of other factors, just increasing lack of incentives to work together.

Then within the system itself, some of the rules, I mean, it varies greatly from legislature to legislature, but we can see rules that also at certain times don't really incentivize people to work together. So, whether it's the setup of the powers that come with being in a majority and how it incentivizes you to either push through legislation that might be harder if you were to lose power...

And so, all of these specific challenges we try to address when we think about legislative negotiation. And that's not even saying the people. And so, people... where I spend most of my time working is on the individual level. So, how can you as an individual increase your ability to negotiate more effectively with others?

And so those skills, they look pretty similar, other than the fact that these individuals are working in the system that in a lot of ways is pressuring them not to want to work with each other.

So that's the big picture of what we're kind of tackling when we think about legislative negotiation.

TM: 03:08

Ed: Given those challenges, what are some of the best practices you encourage people to adopt in legislative negotiations?

MG: If you've ever taken negotiation classes, a few things you probably remember, and they really work, whether we're talking about one-on-one negotiations with people you work with, but also your family and also your personal relationships, so these tools I'm going to talk about are really universal. They're for those types of interactions and they're also for large-scale when we think about a legislative negotiation that involves many different people, many different actors.

And the other thing I'll say before we jump into some of these tools is the complexity of legislative negotiations... it's important I think for me to define what I think about with these negotiations. We have the obvious one of: I'm trying to negotiate something with someone from a different party, and we want to pass something.

We have the internal negotiation that I'm doing within my party. We have the negotiations I have to do with party leaders if I'm not one of those. We have the negotiations with constituents. We have negotiations with people from other caucuses, from the lobbyists. We have different government agencies. So, all of those are going on at the same time and

sometimes about the same one negotiation at the core. So, we have all these different constituent groups we have to deal with.

So, back to your question about: What can we do? What do we think about here? The first I'll talk about is really this core idea of moving people from positions to interests. When we think about a negotiation, we think about people coming to the table and demanding something, or having something that they want, and trying to either convince the other person why it's right or come to some other agreement.

But we tend to think of these demands, and these demands are things we call positions. So, what people want, what they say they want. And the key to thinking more creatively about negotiation is to move people from these positions at the table to the reasons why they're asking for these positions, which are the interests that are behind the positions.

So, a quick example that we use very often in thinking about this distinction is we have two sisters, and these sisters are arguing over one orange. Both sisters really want the orange. Mom walks into the room and what do you think she does when she sees the sisters arguing over this orange?

Ed: Well, she must cut the orange.

MG: She cuts the orange, exactly, exactly. And sometimes when I ask people this, we get creative answers like well, the mom should just eat the orange. But regardless of what you think, the natural thing to do is we see these two sisters, they're fighting over this orange, there's only one orange, I can solve this problem; I'm going to cut it in half.

Now, you give half to one sister. It makes sense to us. We give half to one sister. That sister eats the inside of the orange and throws away the outside, throws away the peel. The other sister zests or grates the outside of the orange and throws away the inside because she wants to make a cake with the orange zest.

So, the question here is, you know the obvious thing is: What's wrong with this story?

Ed: They should have negotiated.

MG: They should have figured out why they wanted the orange, right? And this is as simple as asking one follow-up question, which is: Why do you want an orange? And in this case what we see here is that one question will make you realize there are actually different options that are possible.

We ask sister one: Why do you want the orange? And she says: I'm hungry; I want a snack. We ask sister two: Why do you want the orange? And she says: I want to bake a cake. And we suddenly realize there are other ways that maybe we could satisfy both of these sisters.

And the important thing here I think to note is once you know the interests, you should have more than one option. So, in this case, in this very simple example, we could see one option would be: let's go to the store; let's get another orange. Another option could be well, this sister

just said she wanted a snack. She didn't actually say anything specific to an orange. So why don't we find another snack?

But another option is also: let's cut the orange in half, right? That is still an option. The key is that once you know the interests, that's just no longer a good option. We suddenly can evaluate the options based on the interests and pick a better one.

So that's this key idea of getting people to articulate why they want something with the goal of maybe seeing if we could do something differently than what is currently being presented as the only solution to the problem. This is the backbone of the way we think about negotiation.

I was recently doing a training in Congress actually. It was members of the Senate and the House, their chiefs of staffs, their legislative directors, and we did this training, and I followed up with them a few weeks later on: How are you using some of these tools? What has been useful for you? Have you been able to do anything?

One of them got back to me and she said: It's kind of remarkable. I just have had this piece of legislation that we've been... we had a roadblock with. It's been sitting stalled for two months. There was nothing we could do about it. And I went back, I went to my boss, and I said: What do you think they actually want with this? What is actually going on with them?

And then once we know what's going on with them, is the thing we're proposing actually a win? It's a very simple idea of: Does this actually meet the interests of the other side? Do we even know what the interests of the other side are?

She wrote this longer story about basically at the end of the day, they realized they were crafting a deal, a proposal, a piece of legislation that met their interests, and completely ignored the interests of the other side. So, it makes you realize, it makes sense now why we're not making progress on this, right?

Through this story, through this simple anecdote that she told me, they were able to actually change something, to fundamentally change the way the deal worked or didn't work for the other side, and they were able to make progress on that.

TM: 08:47

Ed: Actual progress with members of Congress. That's a significant accomplishment, Monica.

MG: Yeah, and I can retire tomorrow, I guess.

Ed: Your work here is done.

MG: Exactly. The next key piece that I think is what I hope people think about and take away from any type of either a negotiation class or listening to this interview is, the idea of a BATNA, and this is BATNA – it stands for the Best Alternative To a Negotiated Agreement.

The idea here is we often go into negotiations not really having a clear idea of what we'll do if it doesn't work. So, if this deal today, we can't make it work, what am I going to do? The idea here

is that we always have alternatives that exist. There are things we'll do if I can't make a deal today. But we don't systematically think about those and think about what our best one is.

And the reason why this is important is we need to know whether or not we should take a deal. We have to have some way of measuring whether a deal is actually good for us or not.

Let's imagine I'm buying your house, okay? So, I go to you and I want to buy your house. How much do you want to sell your house for to me?

Ed: So, I want to sell my house to you for \$500,000.

MG: Great. So, you have a price that's \$500,000. Now let's imagine I have gone through my finances, I've talked to different loan offices and figured out how much I can take out and figured out how much I can pay, and I can pay up to let's say \$525,000. I can pay up to that, but I'd really rather pay 450 – that's really my target here. That's the price that I'm really looking for, but I know if I stretch myself, I could get 525.

So, the idea here is if I don't buy your house, if you and I cannot make a deal, what am I going to do? And so, what do you think are some options of things I would do if I don't buy your house today?

Ed: Well, you could look to buy another house. You could rent a house temporarily. So, there are a number of alternatives.

MG: Good. So, I could look to buy a new house, I could stay where I am probably, I could rent in the interim, I could move in with my parents, let's say. These are all alternatives that exist to me. What I'd want to do is pick the best one, right, the one that I like the most.

So, imagine in this fictional scenario that we're talking about, I can't stay in my current apartment. Let's say I just bought a dog and there are no dogs allowed. I've been looking for six months, and no other houses fit my price limit. So, it's unlikely that I'll find another house. I can move in with my parents. And I suddenly realize that that's actually my best alternative here.

Now, the power of a BATNA becomes clear when I kind of play this out a little bit. So, imagine my parents are in their 80s and they're retired, and they travel nine months out of the year, and they have kept this house for no real apparent reason, but I would move in and have this entire wing with a kitchen to myself. What impact do you think that would have on me going into the negotiation with you?

Ed: Well, it gives you something to fall back on, but it also brings to mind whether you really want to go live with your parents.

MG: Good, good, so two things. So, the first one is: I might actually have a lot of confidence going into this negotiation because I know my BATNA is actually pretty strong. Right? Now the question you're asking is: How strong is it really? It's still my parents' house, so we'd have to question that for sure. But we could imagine I might have some confidence that if this doesn't go well, it's okay for me. Right?

Now contrast that to imagine moving in to my parents' two-bedroom house and my 20-year younger brother still lives there. I'd have to share a bedroom with him and he's a high-schooler. Imagine the impact that that would have on me walking into the same exact negotiation.

Ed: You are a highly motivated buyer.

MG: I'm a highly motivated buyer. Right, good. And so, what becomes very clear in this playing with the BATNA assessment is nothing has changed in the numbers, in my financials and how much I can pay. But my confidence or how much I need the deal changes a lot. And this power that a BATNA has over us is really important because most of us don't think about it before we walk into the negotiation. So, that power is just floating around without any sort of strategy behind it.

So, the idea behind BATNA is we want to not only identify what our BATNA is before we go into the negotiation, but strengthen it if possible. Right? So, if I realize my BATNA in this case is moving in with my parents with the kid brother in the one bedroom, that scenario, well, I'm going to want to change my BATNA before I go into that negotiation.

And why this is so important, especially in the legislative context, is we think about power – so we think about majority or minority powers. How can you increase your power in a negotiation? Well, you increase your BATNA. You increase how good your walkaway option is. And so that's really a key idea to play with when we think about not only all negotiations, but specifically legislative negotiations.

TM: 13:46

Ed: So, Monica, how are negotiations affected depending on whether you're in the majority or the minority party?

MG: So, I think part of it is really connected to this idea of power that I just mentioned, which is we think a lot about formal or institutional levers of power. So, with the majority, this becomes intuitive: we have more numbers; we have more votes; we have certain abilities to do things that are institutionally given to us.

So, when we think about the levers of power for a minority, it's a little more complicated. And in my work, not just in Congress, but across the board, I work a lot with groups that have institutional low power, so groups that come to the table without formal resources or the ability to just influence the deal in the same way other parties can. So, in a legislative context this maps very clearly onto majority or minority parties.

So, what do minority parties do? How do we build power when we don't have institutional power? We think about coalitions; we think about strengthening our BATNA; we think about the back table of the other side, and this is this idea... there's this interesting concept in international relations work called a two-level game by someone named Robert Putnam.

And Robert Putnam's idea was certain games have different levels; the negotiation is operating in two different spheres. So, the first one, the level-one game, is me at the table with you buying your house, for example. That's our level one. But my level-two negotiation is my back table. It's whoever I'm going back home to sell the level-one game to.

In this house example, if we extend that, it could be my family. I could have to go home and talk to my partner, my spouse about this house that we're buying in the level one.

When we think about this in a legislative negotiation context, if you're in the minority party, you have to think a lot about not only your level two, the people in your party, your constituents who aren't at the table. But what about the level two of your counterparts? Who are they going back to? What do those people want? And are there sources of leverage or influence there?

TM: 15:55

Ed: So that could be interest groups as well as other members of the legislature?

MG: Exactly. Interest groups, members of the legislature; we think about constituents themselves – anyone who has a lever of influence on that person sitting at that table that they're going to have to then go back to and justify the level-one game to.

Ed: Monica, thank you. We're going to take a quick break and be back with the rest of our interview.

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TM: 16:47

Ed: I'm back with Monica Giannone discussing legislative negotiation. Monica, what should you do as a negotiator when you face unfair negotiation tactics such as people walking away from the table or renegeing on an earlier agreement?

MG: So, I think the best advice when you face something that we might call a difficult or unfair negotiation tactic is figure out what it is and then, second step is: What's going on here?

So, with the "what it is," I think roughly most difficult tactics fall into one of three categories. We have communication tactics, so this is someone who is raising their voice, someone who is making disruptive comments or confusing statements. That's one idea of a difficult tactic.

We have commitment tactics, so someone who says: take it or leave it, or this is as good as you're going to get or I'm just going to walk away.

Then we have the third category which is relationship tactics, so people who try to leverage the relationship with you, or they request special treatment.

All three of these difficult tactics have the same impact on us at the table. What they fundamentally do is they narrow our idea or our perception of what's possible and what ways we have at our disposal to interact with them. It limits this toolkit that we thought we had

because suddenly we only see this one very loud response, this one action, and we're not quite sure how to respond.

So, what I say to do in this is one, we figure out what's going on. Research says that even bringing awareness to being able to categorize something is helpful, because it actually helps us remove some of our own emotional response from what we're seeing. So, being able to put a label on it is helpful.

And then depending on what you think is going on would constitute a different response. So, why is this happening? Are they incentivized to walk away for some reason? What's their back table saying, their level two – have I missed something there? Are they getting pressure put on them that I don't understand? Is there something else here?

And then once I've kind of figured out, diagnosed what I think is going on with this difficult tactic, well then, what can we do about it? We can leverage different sources of power we might have. So, either skill or knowledge or bring in our BATNA. We can think about what do we have in the moment – so what skills can we use in the moment when we're facing these tactics?

So, one idea would be to listen to them – what are they saying through these difficult tactics? Ask questions. I was going to say the last thing we think about with difficult tactics is: Are the right players even involved in this negotiation? Is there someone else who should be here who might change the way this is going?

Is it something about my relationship with you that's causing this? Is there someone who can be involved or brought in maybe away from the table that can change your approach to this negotiation?

TM: 19:40

Ed: Yes, so I was wondering what you do when it involves the other person's personality, such as a person who uses bullying tactics. Is that a situation where you might try to get another person involved with the negotiations?

MG: Yes, definitely. I think that's why the diagnosis is really helpful because if you can take that step back and separate the person from the problem, figure out what's going on with this person, then you can ask yourself: Okay, this problem, can I still try to solve it with them despite the personality, despite what their approach is? Can I still work on the problem?

And if the answer is no, then a great solution is to bring in someone else. Who else might be able to be a part of this that either has influence over this person or will just help me in the moment? So, I would say one thing you would do in that moment is ask: Can I build a coalition, or who are my allies in this that can help disrupt this unproductive negotiation that I'm currently in?

TM: 20:37

Ed: How about multiparty negotiations? We've been talking largely about one-on-one negotiations.

MG: So, I think in my experience working in different legislative contexts, I think most negotiations are multiparty, because even if you happen to be in a room with only one other person, that level-two game is so important. It's actually almost easier to think of them as multiparty negotiations.

So, multiparty negotiations... everything we're talking about here is relevant to multiparty... the thing that complicates things is we really have to think about the impact of what we call coalitions. So how do we form groups of allies on different issues? And how do we mobilize? Coalitional formation is really interesting because we have to think in what we call often a 3-D approach to negotiations.

There's a book called *3-D Negotiations* by David Lax and Jim Sebenius out of Harvard Business School who talk about the idea that negotiation works in three different dimensions. So, the third dimension, 3-D, is the setup – everything away from the table that sets up the right negotiation. So, we want the right parties and the right issues.

This has a lot to do with the sequencing, and this is really important in multiparty negotiations, like: Who have you sequenced and who have you talked to, in what order, in order to backward map from your goal, from success? So, that's the third dimension.

The second dimension of negotiation is all about the deal itself. So, in the context of legislative negotiation, this might be the actual piece of legislation. What are we trying to do here? How are we going to structure that deal?

And then the first dimension is all about the tactics, the at-the-table approach you have. In a lot of thinking around negotiation a lot of people who haven't studied negotiation think it's all about your at-the-table tactics, like being a hard bargainer or not, or how do I deal with difficult tactics, or how do I, if we're thinking about salary negotiation, how do I do that, should I put the offer down first.

Those are all 1-D tactics. What we think about often in legislative negotiations, but specifically around your question of multiparty is: What's our 3-D thinking? How are we setting this up and what's the scope? And how are we going to think big picture about everything that happens before we ever get to a place where we're negotiating a specific piece of legislation, or voting on a bill?

So, it starts much earlier than most people think. I think this ties directly to what I'd actually advocate for, which is the third skill. I would say that's important in this context. So, the first one I talked about was moving from positions to interests and the second was figuring out how to do a BATNA analysis. Then the third skill is preparation.

When I run these trainings in different state legislatures or the U.S. Congress, what I want to be a takeaway and one of the most key takeaways that I hear when I do survey data afterwards is: well, I didn't realize the importance of preparation; I didn't think about how early it should start or how comprehensive it should be; so much of what happens in a negotiation happens before you ever get to the table and I've been missing that piece of it.

So, I think that's really essential, especially when we think about these highly complex, multiparty negotiations that are so common in the legislative setting.

TM: 23:52

Ed: Well, Monica, this has been a fascinating discussion. I do know that I'm not ever going to try to negotiate a house deal with you. I'm wondering if there is anything else you'd like to share with listeners before we wrap up.

MG: I think the thing that I've reflected on a lot in the past couple of years as I've done more and more of these trainings is the system that we work in, and this is universal... the systems we work in are often problematic for different reasons, and the rules that we operate in don't often create efficiency or create the right conditions for working together collaboratively.

And I think that's true in most legislative environments. And that said, there are two things that are still really impactful, two ways to be impactful within these systems. One is to figure out what the system is, what the process is, and is there a way to change it to make it more collaborative, to try to increase the incentives for working together and to increase the ability to find a mutual gain with people who might not actually on the surface agree with you. We think of that orange example.

So, one, are there system changes? But the second is negotiation is often about relationships at the end of the day, and how can you focus on the people you're negotiating with and the relationships you may be able to have with them in order to find ways to find mutual gain, to find better deals, to find deals that are sustainable and work long-term.

And so, I think the takeaways there are: find ways to impact the system if you can, and the second is, on a one-on-one basis, find ways to seek out mutual gain with others, because it's there, the opportunities are there; we're not conditioned, and especially this is true in Congress – we're not conditioned and we're not often rewarded for looking for those, so we have to seek them out ourselves.

Ed: Monica, thanks so much for sharing your time and expertise. I know these are critical skills for our listeners and I'm sure they've gotten a lot out of this conversation. Thanks, and stay safe.

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And that concludes this edition of our podcast. We encourage you to review and rate our episodes on iTunes, Google Play or Spotify. You may also go to Google Play, iTunes or Spotify to have these episodes downloaded directly to your mobile device when a new episode is ready. For the National Conference of State Legislatures, this is Ed Smith. Thanks for listening and being part of "Our American States."