TRAINING

Cracking the Hard-Boiled Student

Some Ways to Turn Research Findings into Effective Training Exercises

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Authors Senger and Honeyman know that training is the missing link between conflict resolution theory and practice. And they understand that the best practitioners know not only *what* to do, but also *why* to do it. This article shows how simple, powerful training exercises can make dry theoretical concepts come to life for students. We hope the trainers among you will be inspired to expand on the authors' ideas for your own classes. Your students – and the practice of conflict resolution – will be better for it.

Can you convince a group of tough government litigators that they can learn something useful from recent academic research in the field of negotiation? As a matter of fact, you can. And we have.

The Office of Dispute Resolution, U.S. Department of Justice, has been successfully training Assistant United States Attorneys around the country in important negotiation and alternative dispute resolution concepts and skills. This has been a challenging assignment, because many of these professionals see themselves as veteran "tough customers" who have learned more from the trenches of litigation than anyone perched in an ivory tower.[2]

Nonetheless, we believe there have been some profound discoveries in conflict resolution that can be of great value to these lawyers. Our challenge has been to incorporate these discoveries in our trainings in a way that is interesting and relevant to hard-boiled trainees like federal litigators. With that in mind, we have had some recent success re-creating some of the classic conflict resolution experiments from the seminal book *Barriers to Conflict Resolution*,[3] using our trainees as the subjects. In the "rough and ready" circumstances of a training seminar, we have not always reproduced the results achieved by the experiments performed in carefully controlled laboratory conditions, but we have found the attempt helpful in getting our points across. Participants in a "loss aversion" exercise, for example, have become genuinely curious when they realize they just valued an identical item almost three times higher than people sitting on the other side of the room. Once engaged in this manner, the audience members become personally invested in the research and start to see how it could affect their lives as practitioners. Here we show you how we taught some conflict resolution concepts to Assistant United States Attorneys. We hope that our ideas inspire you to include such concepts in your trainings.

"Oh, dear, I'm afraid you've backed me into a corner."

A bunch of mugs and "Loss Aversion"

One of our most effective efforts to integrate classic experiments into conflict resolution training was also our first. For it, we focused on "loss aversion," the concept that we value things we own more highly than other people do, and that this phenomenon affects negotiations at a basic level. For the experiment, we enlisted two dozen Assistant United States Attorneys at a training in St. Louis, and a box of official Department of Justice coffee mugs embossed with the Department seal. We randomly selected eight attorneys, gave them each a mug to keep, and handed them the following written "owner's" instructions:

> You now own the mug in your possession, which you can keep and take home. You also have the option of selling it if a price, which will be announced later, is acceptable to you. For each of the possible prices below, indicate whether you wish to (1) sell your mug and receive this price or (2) keep your mug and take it home with you.

The rest of the group did not get mugs, and received the following written "buyer's" instructions:

> You do not own the mug that you see in the possession of some of your neighbors. You will have the option of buying one if a price, which will be announced later, is acceptable to you. For each of the possible prices below, indicate whether you wish to (1) pay this price and receive a mug to take home with you or (2) not buy a mug at this price.

A table of prices followed each set of instructions. We asked all participants privately to choose the price at which they valued a mug – owners chose the price at which they would sell the mug, and buyers chose the price at which they would be willing to purchase a mug.

While the buyers and sellers were chosen randomly, the results were anything but random. The eight owners valued the mug at an average of $7.87, and the 16 buyers valued it at an average of $2.67 – nearly two-thirds less than the owners' price.

The prices were so starkly different between the two groups that even the skeptics among the trainees had to admit that something significant had occurred. Once we had captured the attorneys' attention this way, their minds were open to discussion of loss aversion research that has shown that people value things they possess very highly and can be extremely reluctant to part with them. The attorneys were then able to envision how loss aversion could affect their negotiations in important ways; some of them even surmised that it might explain why defendants sometimes puzzlingly refuse settlement offers that seem very reasonable. Importantly, the discussion among the students was more personal and more substantive after this experiment than when we have presented the same material without the experiment. Participants confirmed the value of the experiment by rating the presentation very highly in the course evaluations.

A variation of this loss aversion experiment has been effective with

entirely different groups of participants. In one instance (at an Academy of Family Mediators conference), 12 participants were given mugs ("sellers"), 32 were defined as "buyers," and another 32 were defined as "choosers." The choosers were to assume they would be given either a mug or cash upon leaving the room, and they were asked to choose the highest value at which they would prefer the mug to the cash. Research has established that choosers are in the same economic position as sellers – they, like sellers, are free to leave the room with a mug or cash – but not in the same

> "[Loss aversion] might explain why defendants sometimes puzzlingly refuse settlement offers that seem very reasonable."

psychological position, and this demonstration supported the research. The 12 sellers set an average price of $4.96. The 32 buyers set an average of $1.22 – one quarter the sellers' price. And the 32 choosers set an average price of $2.96 – closer to buyers than to the sellers, as the research predicted. Since then, Sharon Press of the Florida Supreme Court's Dispute Resolution Center has conducted this experiment with a group of Florida practitioners using T-shirts instead of mugs, with similar results. (Unfortunately, this exercise has a significant drawback: it costs the presenter several mugs or T-shirts or other enticing props each time one uses it. A search for a cheaper solution for our trainings is under way.)

A bunch of problems and "Reactive Devaluation"

We have also successfully recreated in our trainings the "reactive devaluation" experiments described in the *Barriers* book. Reactive devaluation is the concept that a party in a negotiation will value an offer less if he perceives it as having come from an opponent. For this experiment, we gave Assistant United States Attorneys an identical one-page description of a hypothetical Department of Justice civil case against an Army food

supplier for failing to meet the requirements of a contract (see Version A). We then gave the participants an identical settlement proposal and rationale for accepting the proposal. However, one-third of the class was told the proposal and rationale came from a private consultant they had hired; one-third was told they were from the opposing counsel; and the final third was told they were from the mediator. Participants then ranked the acceptability of the proposal from one to 10. The attorneys were asked to respond individually, without talking among themselves.

Our first use of this experiment worked well. The participants who were told the proposal came from their own consultant rated it as more acceptable than the participants who were told it came from the mediator; that group, in turn, rated it more highly than those who believed it was from their opponent. As with the mug experiment described above, even litigators with an aversion to academic research had to admit there was an interesting effect present. The discussion was an effective way for us to emphasize the value of a mediator, who can float a proposal unattributably and allow a party to a negotiation to avoid the damaging phenomenon of reactive devaluation.

Our later attempts to recreate these results have met with mixed success. Sometimes people playing defendants exhibited the expected effect but people playing plaintiffs did not. In one case, some participants actually rated the proposal *more* acceptable when it came from their opponents. We are not certain what has led to these anomalous results, but one possibility is that our sample sizes have been quite small. In a training session with 24 students, for example, each group has only eight people.

We have retooled this experiment several times in an attempt to find a more robust version. In our first change (version B below) we stripped extensive facts from both the case description and the settlement offer, theorizing that our lengthy explanations may have interfered with the results. However, this new adaptation had mixed results as well.

Most recently, we have used an even shorter version (version C, middle paragraph) with greater success. In this version, participants are told to imagine that they have reviewed the file in a new Title VII[4] case and determined that a good settlement offer would be $50,000. At that point, they are told they received a voicemail message from the plaintiff's counsel offering to settle for $50,000. They are then asked whether they would accept this offer and, if not, what their counteroffer would be. This

version has been very effective in capturing consistent experimental differences. In our first group, 48 of the 53 participants were unwilling to accept an offer from opposing counsel that *moments earlier they believed would have been a good settlement*. The average counteroffer was only $29,795. In our second group, 31 of the 32 participants rejected the opponent's offer, and the average counteroffer was $28,992. Finally, the experiment even worked with a group of criminal prosecutors, although the effect was not as strong. In this group, eight of 18 participants refused to accept the offer, and the average counteroffer was $34,666.

The shortened version of the experiment in Appendix C seems to make the reactive devaluation point both effectively and quickly: Your opponents will usually refuse to accept an offer from you even when they would have gladly accepted it – if only you had not been the one to make

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> [In loss aversion] people are willing to take an 'irrational' risk in order to avoid a definite loss.
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it. However, the facts were so stripped down in this version that some participants believed other factors led to the results. For example, some commented that they must have had insufficient information in the case file; that is, opposing counsel must know something about the case that they don't, or counsel would never have made this offer. Our preliminary impression is that this is just another aspect of reactive devaluation – one of the reasons people reject seemingly good offers from an opponent is that they believe they must be missing something. Thus the point still survives.

Variations on the Theme

Finally, we have recreated risk aversion/loss aversion experiments that asked participants to choose between different stacks of envelopes containing money. In the first case, participants are able to choose an envelope

either from a stack where every envelope contains $20 or from a stack where three out of four envelopes are empty but every fourth envelope contains $100. In the second version, participants must choose whether they would prefer to pay a certain $20, or take a three-in-four chance or paying nothing along with a one-in-four chance of having to pay $100.[5]

This experiment has worked well, and has had consistent results the three times we have run it. In the first scenario, more than twice as many people chose the envelopes with the certain $20 bill, even though the expected economic value of the other envelopes is $25 (a one-in-four chance at $100). In the second scenario, close to half of the participants chose the three-in-four chance of paying nothing, even though the expected economic loss from this ($25) is higher. In the first case, the experiment shows aversion to *risk* – people will give up a higher-value but riskier option to ensure they at least get something. In the second, the results show aversion to *loss* – people are willing to take an "irrational" risk in order to avoid a definite loss. The experiment has the added virtue of allowing us to put these two choices side by side in the debriefing, so that many participants realize they have made seemingly opposite decisions in the two cases and have to reconcile them.

Now You Try It

In conclusion, we have found these attempts to recreate classic social science research in the classroom setting to be valuable teaching tools. The experiments are easy to run, take little time, and have led to stimulating discussions that engage the participants personally. More important, these experiments, when tailored to the audience, can get through to the toughest skeptics. Self-confident attorneys, such as the students we train, are usually quite certain that they, if not their opponents, are fundamentally rational bargainers. They believe that they are too experienced to fall prey to common psychological distortions such as "reactive devaluation" and"loss aversion" – until they themselves produce evidence to the contrary in the kinds of demonstrations we've illustrated here.

We would like to point out that we are not the only people qualified to design such exercises,[6] and we encourage conflict resolution trainers and teachers to use our efforts as examples. We hope that researchers will be able to help us fine tune these experiments to make them even more effective, and we hope to continue to translate additional important research into similar experiments we can take into the field.

All of the training participants received the following background information:

Fine Foods, Inc. v. Department of the Army
(E.D. Mo., Case No. 4:97CV1475-SNL)

In June 1997, Fine Foods, Inc. ("FF") secured a two-year contract with the Department of the Army to provide food service to three U.S. Army military posts in the Midwest region, beginning on October 1, 1997. In return for $24 million, which was to be paid to FF in monthly installments, FF promised top-quality food properly prepared, and submission of monthly invoices.

In January 1998, the Army began to receive complaints on posts being served by FF about both the quality of food and the manner in which the food had been prepared. In March 1998, cases of food poisoning appeared at an unusual rate – 30 cases at one post, 43 cases at the second post, and 125 cases at the third. However, there were no additional complaints or reports of illness after April 1998.

After an investigation, the Army determined that during the first three months of 1998, FF employees were acting improperly in a number of ways. FF employees on the posts were found diluting some foods such as milk and juice, using sub-par ingredients in many other foods, and, in some cases, using foods that were past their shelf-lives. Uneaten food was incorporated into subsequent meals, and the Army found indications that food handling and storage practices by kitchen employees had been less than careful. In addition, FF substituted lower-quality products and ingredients than contracted for in approximately another 10%-15% of each shipment.

The Army investigation revealed that FF had leased a large warehouse at a centrally located Army installation for the sole purpose of satisfying its obligations under this contract. The warehouse was used to store much of the food served pursuant to the contract. In late December 1997, U.S. military engineers were working on a nearby construction project and severed a major underground electrical cable servicing the warehouse and other buildings in the vicinity. As a result of extended loss of electricity, FF lost large quantities of perishable food. To meet its immediate needs, FF was forced to obtain replacement inventory from secondary distributors, many of whom were unable to provide first quality food. Moreover, because this event occurred between Christmas and New Year's Day, senior management at FF were not available and the warehouse crisis was handled by mid-level staffers recently hired to service the Army at these three posts.

The United States filed a complaint under the False Claims Act, which provides for triple damages plus a $5,000-$10,000 penalty for each violation of the Act. Based upon FF's statements in its monthly invoices asserting that the food met the quantity and quality required under the contract specifications which the government asserts are false, the government has sought $3,040,000 in its complaint. The Contracting Office has also advised FF of the possibility that the contract might be terminated for default.

In addition to the previous background sheet, all training participants received one of three variations of the following settlement proposal; the three variations were identical except for who offered the proposal. One-third received information that a private consultant had proposed the settlement; another third was told that defense counsel proposed the settlement; and another third was told the mediator proposed the settlement. For reasons of space, we reproduce only the first variation here.

Reactive Devaluation, Version A

CONFIDENTIAL INFORMATION FOR THE ASSISTANT UNITED STATES ATTORNEY

Your supervisor has told you this is a high-profile case that the Department does not want to take to trial for a number of reasons and has instructed you to negotiate a settlement. You have consulted with a former Army official, who is now in a private consulting firm, to suggest a settlement proposal in this case and explain it. He has responded as follows.

The consultant says it would be difficult for the Army to find a replacement contractor for the duration of this contract if the contract was terminated for default. A better solution would be for FF to continue to provide food to the posts, subject to frequent random inspection and new written policies relating to food handling that will be distributed to all employees and posted in all kitchens.

The consultant says he understands that government may want to send a message with this case. Military morale is already at an all-time low because of pressures to cut defense spending and the appearance at these posts that the government may have cut corners on such basic necessities as food certainly doesn't help. The government probably also wants the word to get out to contractors who may be tempted to try similar activities that such conduct will not be tolerated.

However, the consultant says that until discovery has been completed, the possibility exists that FF's failure to meet contract requirements was primarily the result of the damage to the warehouse caused by the government's accidental cutting of the electrical cable.

Given the government's potential contributory fault, the consultant recommends you settle for $1,750,000, new written policies on food handling and preparation, a provision allowing frequent inspections by the Army, no termination of the contract, and no debarment. Please rate the acceptability of this proposal in addressing the United States' interests in this case from 1 to 10, with 1 being an offer that you would recommend rejecting and 10 being an offer you would recommend accepting. Circle the number of your choice.

1 2 3 4 5 6 7 8 9 10

Reactive Devaluation, Version B

Version B of the reactive devaluation exercise uses the same "common facts" but strips all rationale from the settlement offers. Once again, the three variations were identical except that one third was told the settlement was from a private consultant, one third was told the settlement was from defense counsel, and another third was told the settlement was from the mediator. We reproduce only the first version here.

CONFIDENTIAL INFORMATION FOR THE ASSISTANT UNITED STATES ATTORNEY

Your supervisor has told you this is a high-profile case that the Department does not want to take to trial for a number of reasons and has instructed you to negotiate a settlement if possible. You have hired a former Army official, who is now in a private consulting firm, to suggest a settlement proposal in this case. His proposal is as follows.

Your consultant recommends you settle for $1,750,000, new written policies on food handling and preparation, a provision allowing frequent inspections by the Army, no termination of the contract, and no debarment.

Please rate the acceptability of this proposal from 1 to 10, with 1 being the least acceptable and 10 the most acceptable. Circle the number of your choice.

1 2 3 4 5 6 7 8 9 10

Loss Aversion/Risk Aversion and Reactive Devaluation, Version C

This is an extremely simplified version of loss aversion and reactive devaluation exercises. The reactive devaluation exercise is placed in the middle as a minor attempt to distract respondents from noticing the symmetry between the loss aversion paragraphs.

When you are leaving for lunch, each of the two doors in the back of the room has a stack of envelopes. All of the envelopes at the door on the left contain $20 bills, and everyone going out that door receives one. Three out of four of the envelopes at the door on the right are empty. However, one out of four envelopes at the door on the right contains a $100 bill. Which door do you go through?

_____ Door on left _____ Door on right

During lunch, you look over the file on a brand new Title VII case you just received. After reviewing the file, you believe that a good settlement for the government would be to pay about $50,000. You then check your voicemail messages and find a message from the plaintiff's counsel offering to settle the case if the government will pay $50,000. What do you do?

_____ Accept the offer _____ Make a counter-offer

If you make a counter-offer, what amount will you propose

When you return from lunch (where you spent any money you received earlier), each of the two doors in the back of the room has a staff member with his hand out. Three out of four of the people who come in through the door on the left get in for free. However, one out of four people coming in the door on the left has to pay $100. All of the people who come in through the door on the right have to pay $20 to enter the room. Which door do you go through?

_____ Door on left _____ Door on right

End Notes

1. About the authors: Jeffrey M. Senger is Deputy Senior Counsel for Dispute Resolution, U. S. Dept. of Justice, and is primary author of the experiments described in this section. His e-mail address is Jeffrey.M.Senger@usdoj.gov

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2. To illustrate the culture involved, at the start of our training sessions, we read this quote from Genghis Khan: "The greatest joy a man can know is to conquer his enemies. To ride their horses and take away their possessions. To see the faces of those who were dear to them bedewed with tears and to clasp their wives and daughters into his arms." We use this as an example of an outmoded, 12th-century way to deal with conflict. But a number of attorneys in the back have been heard to react, "Way to go, Genghis!"– apparently only partly in jest.
3. Kenneth Arrow et al., ed., *Barriers to Conflict Resolution* (New York: Norton, 1995).
4. Title VII of the Civil Rights Act of 1964, prohibits discrimination in federal employment on the basis of race, color, religion, sex or national origin.
5. As we were unable to convince the Justice Department disbursements office to provide us with actual cash for the first experiment, and we were unable to convince the participants to pay us actual cash for the second, we used the paper and pencil version also shown in version C.
6. Colleagues who have already experimented with variations include Sharon Press, Lela Love and Josh Stulberg, and we expect more people to follow. For example, one well-received talk was given to a government-wide group of 30 dispute resolution professionals in early 2000. The discussion focused on how each agency's typical parties and fact settings could be used by these dispute resolution professionals to tailor these exercises to "hit home" for different audiences.