
Why Negotiators Should Lose Sometimes



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Lose a battle to win the war.

As a young lawyer working for the Solicitor General of the United States, Roger Fisher, author of the best-selling negotiation book *Getting to Yes*, won eight straight cases before the Supreme Court. His boss then **advised** him that while the government wanted to win *each* case, it wasn't in the interest of the republic for the government to win *every* case.

Why would we not want to win all the time? The truth is that no one can win all the time, since no player is perfect. So if a player never lost, it would mean that the game is flawed.

While it is fine to try to win every time, there is a big difference between trying and actually winning every time. While some players can go on a winning streak, history teaches us that no one person, group, country or organisation can win forever. Be it Roger Fisher, Roger Federer, the Roman Empire, New Zealand's All Blacks rugby team or even our parents...

Perceived unfairness

Our modern society is predicated on the idea that we're all playing a somewhat fair albeit imperfect game and that if one were to win all the time, it would be contrary to the spirit of the game. The rising concern over wealth and income inequality, exemplified by works such as Thomas Piketty's *Capital in the Twenty-First Century*, reminds us of this dynamic.

However, there is a growing perception that the ultra-rich can afford the lawyers, lobbyists, accountants and bankers allowing one to bend – or rewrite – the rules and keep on winning. Many ordinary folks believe the rules only exist to limit their ability to win. In sum, the game seems biased and, for better or worse, perception feels like reality. In such instances, many individuals may choose to ignore or bend the rules, rationalising that this is the only way to ensure fairness. The ends start to justify the means.

When it comes to relationships or negotiations, if we win all the time, our counterparty will come to regard the playing field as not level. The negotiation process is likely to be perceived as a pantomime at best and a farce at worst.

After all, under such conditions, why would people want to negotiate with us? Usually they wouldn't, but at times they may not have a choice. Even then, the counterparty will try to walk away or look for the first opportunity to escape a deeply unfair and unsatisfying relationship. This dynamic usually surfaces in the form of broken promises, escalation, failed deals, etc.

We saw some of these dynamics in our previous article, “[When Winning Means Losing in Negotiations](#)”, when we highlighted how easy it is to do whatever it takes to win a negotiation, only to lose in terms of a damaged relationship, subpar execution, protracted process or potential lawsuits. Here we would like to examine the reverse idea: Could losing a particular negotiation be necessary to secure a bigger win over the long term? Should we learn to lose at appropriate times, to recognise and prove that the negotiation process is indeed fair? Few institutional elements in a democracy define the rules of the games more than its constitutional law. A famous 19th century U.S. Supreme Court decision is a case in point.

Marbury v. Madison

Marbury v. Madison (1803) is a landmark case in the judicial history of the U.S. as it set the precedent for the separation of powers. The events took place during the presidential transition from the Federalist John Adams to

Democratic-Republican Thomas Jefferson. To stymie the transition, Adams hurried to appoint a number of loyal judges and justices of peace to newly created offices. They were nicknamed “Midnight Judges” as Adams was said to be busy nominating them up until the final hours of his presidency. Among them was a successful financier named William Marbury.

Once in office, Jefferson, through his Secretary of State James Madison, managed to partially block Adams’ manoeuvre by making sure that some of the recent appointees, including Marbury, did not receive the necessary paperwork for their appointments to take effect. As a result, Marbury petitioned the U.S. Supreme Court to force Madison to deliver the papers.

Lawsuits are usually petitioned to lower courts and only as a last resort escalated to the Supreme Court. This is because, according to the U.S. Constitution, the Supreme Court doesn’t accept direct petitions. But Marbury invoked a **special law** that gave the Supreme Court the power to intervene in this situation and, more generally, meddle in the affairs of the executive (Presidential) or legislative (Congressional) branches.

The justices found themselves in the unique position of having to decide not only whether Marbury had the right to the job, but also whether they could accept the direct petition. Long story short, they agreed that Marbury had the right to the job, but stopped short of issuing the writ to enforce the delivery of papers, thereby declaring the special law unconstitutional.

The Supreme Court thus chose to curtail its own powers for the sake of establishing a precedent for a much more powerful legitimacy in the future (which became known as the doctrine of judicial review). Its loss paved the way for more stable, fair and successful judicial, social and political processes.

A long-term game

Another story involves the rise of a prominent American political figure who used a similar strategy to win in the long run. After serving in his state legislature for many years, he ran for the U.S. Senate against two opponents, Shields and Trumbull. After a short-lived lead, he quickly fell to second place when the incumbent governor of the state entered the race. Our political figure surprisingly exited the race and then, equally surprisingly, Trumbull won. Why did our candidate drop out and how did Trumbull overcome his underdog position?

Once the governor entered the race with a real chance of winning, our politician's primary goal shifted from winning to preventing the current governor from getting the seat. He realised that it was better to unite with a likeminded candidate, or most of his social and economic policies would not materialise. Besides, he had concerns about the methods of the governor, who was later indicted for fraud. As such, he dropped out and lent Trumbull his very loyal voter base.

By sacrificing himself and putting the issues first, our political figure earned a lot of respect. He modelled and then initiated a new "game" in his political party, one of fairness and collaboration towards mutual success, even if at times one had to wait for their turn. After losing two Senate elections, Abraham Lincoln became the 16th President of the U.S. When Lincoln withdrew from his first Senate race, he partially did so because he shared with Trumbull a commitment to abolish slavery. Years later, Trumbull co-wrote the Thirteenth Amendment to the U.S. Constitution, which did just that.

As you can see, Lincoln had much higher negotiation ambitions than winning a race and was able to keep an eye on the largest prize. Notice that he didn't drop out for the sake of securing a relationship with Trumbull, as this would have been a very risky move. For Lincoln, as for the Supreme Court, losing was about creating a new collaborative game, where individuals accept that they must lose sometimes so that each person can win at least a few times and everyone can win more together.

Why lose a negotiation?

By losing a negotiation, we can create a new precedent or legitimacy resulting in a better game for all. We can also lose a negotiation today to secure commitments for the future. For example, although parents have the power to punish their kids for certain behaviours, they may choose to have a difficult and more time-consuming conversation instead. Such parents are at risk of losing this "negotiation", but even then, they may teach their children that dialogue, arguments and facts are the best way to solve differences.

Still, losing for these purposes remains a risky strategy. Our counterparty may reject our legitimacy or go back on a commitment tomorrow. Nothing in life or negotiations is fully guaranteed. We make deals with the best information we have at the time and hopefully we inspire more trust and clarify expectations as we negotiate further. Sometimes losing a negotiation

is a clever strategy to win in the medium- to long- term. It needs to be done with clear legitimacy and commitment goals in mind to avoid becoming a purely losing strategy now and tomorrow.

However, to insist on never losing means that at times we will do whatever it takes to win, even when we are wrong and undeserving. That is not only selfish and unsustainable, but it is also the quickest way for us to start eroding our social fabric, which ultimately depends on how we behave when negotiating with those around us.

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