Twenty-Five Ways to Say No

Jonathan K. Van Patten

Follow this and additional works at: https://red.library.usd.edu/sdlrev

Recommended Citation
Available at: https://red.library.usd.edu/sdlrev/vol63/iss2/8

This Article is brought to you for free and open access by USD RED. It has been accepted for inclusion in South Dakota Law Review by an authorized editor of USD RED. For more information, please contact dloftus@usd.edu.
TWENTY-FIVE WAYS TO SAY NO

JONATHAN K. VAN PATTEN†

The art of negotiation requires learning how to say no, until it is time to say yes. No is essential to getting to yes. Whether in the litigation or transactional context, you cannot be effective in representing your client’s interests without a healthy dose of no. A continual resort to no, however, may be ineffective because it stands as an obstacle to agreement. The very short list of when an unrelenting no is “successful”—including childhood tantrums (rarely), abusive veto power, and the threat of mutually assured destruction—may serve to prove the point, rather than refute it. No is necessary, but off-putting. It advances the process of coming to agreement and yet may derail it, if not used with care.¹

There are many ways to say no. We learned this from parents and, later, from teachers. But no is not the exclusive prerogative of authority. Most of us acquired valuable lessons from our peers through rejection and failure at school, play, and dating.² The educational process, work experience, and life in general, present us with the experience of no in many different contexts. The great variety of ways, ranging from a soft no to a hard no, almost seem to defy categorization. And yet, patterns emerge. There are some uses of no that recur so often that we can identify them as types. Awareness of these types helps us to resort to them more readily and more appropriately, without falling into the trap of repetition, which is the mark of an amateur.

Many of the ways to say no are well-known, but it is useful to look at them collected together and to think about their use, both tactically and strategically. As with cross-examination, there are constructive uses of no in addition to the more well-known destructive ones. It should also be noted that there is nothing magical about the number twenty-five. I have found it to be about the right

---

Copyright © 2018. All rights reserved by Jonathan K. Van Patten and the South Dakota Law Review.

† Professor of Law, University of South Dakota School of Law. I would like to thank my colleague, Professor Thomas Horton, for his kind words of encouragement on this project, as well as Derek Nelsen (USD Class of 2009) and Alexander Sieg (USD Class of 2018) for their careful reading of this article.

¹ See generally ROGER FISCHER & WILLIAM L. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981) (discussing negotiation tactics such as the art of “negotiation jujitsu” and “taming the hard bargainer”); WILLIAM L. URY, GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE (1991) (providing suggestions for how to “bring them to their senses, not their knees” and turn adversaries into partners).

² See, e.g., Judith Martin, Suffer the Little Children—It’s a Right of Passage, WASH. POST (Feb. 18, 1979), https://www.washingtonpost.com/archive/lifestyle/1979/02/18/suffer-the-little-children-its-a-rite-of-passage/bf3effc4-9f75-4245-89cd-f5ba845ed94c/ (“The revival of the junior high school dance is, in Miss Manners’ opinion, a boon to the social development of young adolescents. In no other way can they obtain those deep emotional scars that make people so interesting later in life.”).
number for an article. There are undoubtedly more to be identified. I hope that I have chosen the twenty-five best examples.

1. The Soft No—"Yes, but . . . ." "Yes, but” effectively means no, although it is a soft no. This type of no is not a rejection. It is more like an affirmation, with a suggestion. It is the most useful version of no because it starts from a common ground, while at the same time it points to something that needs to be resolved. "I agree with your approach, but it does not go far enough. Think about this . . . ." It is a no that encourages, or at least leaves room for, a later yes.

The affirmation sets up a suggestion. In a study group, one member might say, “let’s go through the Contracts assignment.” Another member responds, "yes, but we should also leave time to prepare for this Friday’s Property quiz.” In a car sales situation, the salesperson says, “this is our lowest price of the year for this model.” The prospective buyer responds, “yes, but you are not giving me enough value for the trade-in.” In a mediation, plaintiff’s counsel says, “liability is clear because your client rear-ended mine.” Defense counsel points out, “yes, but your client didn’t follow her doctor’s prescribed treatment.” As these examples show, “yes, but” may be a control device to alter the direction of the negotiation. It is also one of the easiest ways to expand a discussion from a single-issue matter to consideration of additional issues. With more issues, there is greater room for give and take on the newly expanded playing field.

Assent to a common ground may sometimes be disingenuous. That is, the apparent agreement on the surface may hide a more fundamental disagreement underneath. Insincere agreement masks the greater degree of real difference between two parties. “Yes, but” cannot always close the gap. It may delay the identification of those differences that could have been resolved with a more direct approach. The loss of credibility when those differences become apparent may serve as a caution to indiscriminate use of “yes, but.”

“Yes, but” is a combination of positive and negative, without being so contradictory so as to promote cognitive dissonance. The combination of yes and no should be viewed in balance. You want both, but think about which one should be stronger. In the legal context generally, the no should be strong enough so that there is no misunderstanding about any deal until there is one. In the sales (or dating) context, the yes probably should be strong enough so that the "but" doesn’t become a “wet blanket,” unless you want it to. The soft no can become a hard


4. If the list grows, I may produce a more extensive treatment of this topic, with the tentative title: "Fifty Shades of No."

5. See, e.g., FISCHER & URY, supra note 1, at 73-79 (describing options for mutual gain).

6. See, e.g., Ernie Humphrey, The power of 'yes and' versus 'yes, but', BUS. INSIDER (Oct. 28, 2015), http://www.businessinsider.com/the-power-of-yes-and-versus-yes-but-2015-10. I recently learned that there is a quality in how you say “yes” which can be greatly impacted by a qualifier. It is quite common to respond to an inquiry with "yes, but", and this can easily take the steam out of the power of saying “yes.” The other side of the coin
no if the negative overwhelms the positive.\textsuperscript{7} And it can become an unmistakable no, if the positive is a mere afterthought.\textsuperscript{8}

2. **Blame Someone Else.** The easiest way to say no without necessarily giving offense is to blame someone else. “I see where you are coming from, but I know my client won’t agree to that.” It is like “yes, but,” with the negative serving as a deflection away from the messenger. It involves a juxtaposition of contrasts, with the more attractive alternate pushing toward the center. “Attractive” is relative. Actually, it might be the least unattractive alternative. “I could tell you, but then I’d have to kill you.” Meaning, “I won’t tell you the secret, but you will at least live.” The strength of blaming someone else lies not in the truth of the blaming but rather in the contrast of the two approaches. It allows for greater flexibility in selling the no by contrasting it with a worse alternative.

As a blame-shifter, this type of no serves to cover your tracks, if only for the moment. “Can I go with my friends to the mall?” “Your mother said no” or “Go ask your mother.” This effectively means no, and mom gets the blame, while dad maintains his coolness. This works for the lawyer, too, as it maintains reasonableness, civility, and open lines of communication, while not moving on the underlying question. It may be that the blame is insincere because it is actually your position as well. Thus, the blaming of another may be a deliberate deception. If it is used against you, remember the smiling cobra: don’t be taken in by the

---

\textsuperscript{7} Id. See also Karen Hough, *Leadership Improv: Use “Yes AND...” Never “Yes, BUT...”, ASS'N FOR TALENT DEV. (Aug. 20, 2014), https://www.td.org/insights/leadership-improv-use-yes-and-never-yes-but (reaffirming the effectiveness of using “Yes, and”). While this may be true in many important contexts, particularly sales, the lawyer should consider tilting the balance towards no, until it is time to say yes. Premature apprehension of agreement can lead to disappointment, if not further litigation. Nevertheless, the point about how to say yes is well made.

\textsuperscript{8} A humorous example may be seen in Woody Allen’s movie *Play It Again, Sam*. The affirmation comes too late, after some crushing no’s:

Nancy: I don’t want any alimony. You can have everything. I just want out.
Allan: Well, can’t we discuss it?
Nancy: We’ve discussed it fifty times. It’s no use.
Allan: Why?
Nancy: I don’t know. I can’t stand the marriage. I don’t find you any fun. I feel you suffocate me. I don’t feel any rapport and I don’t dig you physically. Oh, for God’s sake, Allan, don’t take it personal.

*Play It Again, Sam* (Paramount Pictures 1972). Ouch! It’s hard not to take it personally after the devastating assessment she has just delivered. Which is just the point.
apparent smile, it is still a cobra. If you are using it, be careful not to jeopardize your overall credibility with this deception.

This tactic is also known as “good cop/bad cop.” As such, it is similar to “yes, but.” It deserves separate treatment here because many examples cannot possibly be taken for a soft no. With good cop/bad cop, the no is more like the contrast between “no, but” and “hell, no.” It also benefits from the seeming improvement that occurs when someone stops hitting you in the face. The good cop doesn’t have to be good, just not quite so bad.9 Thus, you can move the center of the argument by insisting on something impossible (blame assigned accordingly) and then proposing something closer to the realm of possibility, which looks much better by comparison.

The good cop/bad cop tactic does not require two to be physically present to play that gambit. To a certain degree, you are a script-writer and you decide who plays which role. Think about casting yourself in the role of the bad cop, or vice versa. “My client wants to close the deal before the end of the year, but I won’t let him do it until we can resolve the following issues . . . .” “I think it is in the interests of both parties to come to an agreement today, but you have to understand that my client is very skeptical of your client’s good faith.” It may even help if the other person is not physically present. Because you are talking about intentions, emotions, or attitudes, there is inherent flexibility in how you present the contrast.

One can posit a “straw man” to play the role of the bad cop. Many politicians argue this way, with the bad cop being a caricature.10 The straw man can play off


If you often negotiate as a team, the good cop/bad cop negotiation tactic is easy to set up. Decide ahead of time that one of you will always be kind and helpful, while the other is mean, negative, and the deliverer of bad news. If the negotiation gets to a sticking point, the bad cop can offer something out of the range of possibility before the good cop comes in with the true parameters for success. In this way, the good cop’s offer will appear to be far more achievable because it is positioned against the bad cop’s alternative.

Id.

10. For example, consider the following from Barack Obama’s Second Inaugural Address: “For the American people can no more meet the demands of today’s world by acting alone than American soldiers could have met the forces of fascism or communism with muskets and militias.” President Obama’s Second Inaugural Address (Transcript), WASH. POST (Jan. 21, 2013), https://www.washingtonpost.com/politics/president-obamas-second-inaugural-address-transcript/2013/01/21/f1f48d234-63d6-11e2-85f5-a8a9228e55e7_story.html?utm_term=.2f3bc8f93a9e [hereinafter Inaugural Address]. This is a metaphor, so one can cut a little slack here. But no one ever suggested that American soldiers should have met the forces of fascism or communism with muskets and militias. Sherman tanks, the Chance Vought F4U Corsair, the Lockheed P-38 Lightning, and, ultimately, the atomic bombs dropped on Hiroshima and Nagasaki, did what needed to be done. See Chuck Hawks, The Best Fighter Planes of World War II, http://chuckhawks.com/best-fighter_planes.htm (last visited Jan. 19, 2018) (discussing F4U and P-38 planes use in World War II). “No single person can train all the math and science teachers we’ll need to equip our children for the future.” Inaugural Address, supra. No one has suggested this. It is, of course, a call for providing more funding for math and science teachers. No problem with that, but the premise for the call inevitably starts with an exaggerated proposition: “But we reject the belief that America must choose between caring for the generation that built this country and investing in the generation that will build its future.” Id. A classic strawman. Is there anyone out there who believes in this false choice? I don’t think so.
popular conceptions, with a good cop twist: "some say that lawyers are whores and will advocate for any position. But Atticus Finch gives us an example of the lawyer who put principle above personal concerns."11 You can go "off-code," or against the archetype, and play your client or your client’s interests as an exception to a popularly held image.12 “Instead of running away from his mistake, he owned up to it and took full responsibility.” The ability to fashion a bad cop figure to provide contrast allows more flexibility in selling a less than perfect no.

Blaming someone else, through the good cop/bad cop technique, is often effective because it creates a contrast that favors movement toward your preferred position. It takes the sting away from your no and transfers it to someone else, who either has accepted that role or cannot contradict it because he or she is not there (“the empty chair”). You get the benefit of saying no without having to pay a personal price. Cowardly? Maybe. But it maintains your position without losing much, if anything.

Ironically, you might also accomplish the same effect by taking the blame yourself. “I’m new to the case and need a little more time to catch up with the rest of you.” “You may be right, but I haven’t had the time to fully research that argument.” “Perhaps I did not make my point clearly. What I meant to say was . . .” Humility and civility will keep the conversation going while you are still in search of how to get to yes. You can take on the role of bad cop, so long as it does not undermine your credibility or your long-term strategy.

3. Blame Something Else. The bad cop does not have to be a person. The bad cop could be a situation. This is especially important when trying to sell a bad option. Contrast the bad option with a worse option. That is, faced with a situation that may be viewed as “between a rock and a hard place,” the rock you show seems less threatening than the hard place that can only be imagined. A contrast that posits a choice between the lesser of two evils can be effective because it purports to be grounded in the relative realism of the two seemingly bad options. “You can pay me now, or you can pay me later.”

Although much like good cop/bad cop, there is a far greater range of argument because there are many props that can be called into play. The weather: “the kind of payments you are asking for are not feasible because we are still in a drought.” The cattle market: “it is not advisable to sell off right now until the market begins to turn around.” The eclipse: “we are behind on getting orders out this week because half of my work force called in sick in order to view the eclipse.” And on, and on: “I would say yes, but [insert excuse here].” For the

11. See generally HARPER LEE, TO KILL A MOCKINGBIRD (1960) (portraying attorney Atticus Finch as a principal protagonist in the novel).
12. The concept of “codes” that tie into hidden or unconscious cultural attitudes was explored in CLOTAIRE RAPAILLE, THE CULTURE CODE: AN INGENIOUS WAY TO UNDERSTAND WHY PEOPLE AROUND THE WORLD LIVE AND BUY AS THEY DO (2006). Going “off-code” means to act counter to the accepted or shared view. For the lawyer, the existing cultural code may be negative, such as greedy, not trustworthy, or unprincipled. To run counter to that, the lawyer would take extra care to be caring, trustworthy, and principled, like Atticus Finch in Harper Lee’s To Kill a Mockingbird. See also generally DAVID BALL & DON C. KENNAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION (2009) (teaching attorneys how to reach the jurors’ instincts of safety and self-preservation).
lawyer, "I haven’t been able to get to that because I’ve been preparing for trial [or taking depositions] in another case." Obstacles become your allies, if only to provide cover until it is time to move toward agreement.

Excuses are easy to come by. Don’t lose credibility by going to them too early, or too often. Your reputation is important. Share your pain in delivering the news of "I’d like to help you, but . . . ." The bad situation should be verifiable, believable, and, at best, unavoidable, or, at least, not your fault. If so, it will work for you, for the moment. It is a short-term no that may have long-run negative consequences if resorted to on a regular basis.

4. Maybe. In a sense, "maybe" is the softest no. It is intentionally ambiguous. It is neither yes nor no. The power of maybe lies in its versatility.\(^{13}\) It allows the other side room to read it favorably.\(^{14}\) One of the potential meanings of maybe is "that is [or might be] possible." It has the feel of movement, without any commitment to movement. At the very least, it is better than a flat no.\(^{15}\) It may also be understood negatively, if that is the direction you want. It has the feel of rejection, without actual rejection. "Want to go out on Saturday night?" "Maybe." Ambiguity, coupled with silence, will produce the desired effect, depending on how you deliver the maybe, or the silence.

Maybe can also function like "yes, but," if it is coupled with a condition. "Maybe, if you are willing to . . . ." It uses soft language to possibly affirm the proposal and yet pushes in a direction that seeks a concession. Maybe can also convey a sense of urgency. "Maybe, but only if we can come to an agreement before the end of the week." Like a sale for a "limited time only."

The ambiguity of maybe allows you to take a proposal under advisement. It can buy time when you don’t have enough knowledge or experience to fully respond. It keeps the door open while you take the time to research, or simply think about the new proposal. Maybe is good in that it has little downside, unless you are at a point where a clear answer is required. Also problematic may be the no that is too soft to be heard.\(^{16}\) Otherwise, putting off a definite response with maybe is a no that buys time.

---

13. I wish to thank my research assistant, Alexander Sieg, for this nice line.

14. This is a technique used, with varying degrees of success, by politicians. See, e.g., BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 11 (2006) ("I serve as a blank screen on which people of vastly different political stripes project their own views."). See also BEING THERE (Warner Bros. 1979) (a great movie about projection in politics).

15. The classic line is from Jim Carrey in Dumb and Dumber:
   Carrey: What are my chances [of going out with you]?
   Holly: Not good.
   Carrey: You mean "not good," like one out of a hundred?
   Holly: I’d say . . . more like one out of a million.
   Carrey: So you’re telling me there’s a chance. [Celebrates this news]. Yeah!


16. The problem of the soft no is illustrated in the following blog post written by Courtney Milan, a former law clerk of Justice Anthony Kennedy and Judge Alex Kozinski, regarding an email she received from Judge Kozinski:

   On June 5, 2016, I got this email from Alex Kozinski asking me to speak to a reporter about my experience as a clerk at the Supreme Court:
5. **Redefine the Issue.** Not every path leads to a destination.\(^{17}\) There are some paths that lead to nowhere or to inevitable impasse. There is no sense in using energy or credibility in saying no to the particulars if the whole pathway is misconceived. If you can see a different route to a beneficial end, change the framework of the discussion to go that direction. “Look, this is how I see it.” This might well be a very productive no.

Even if the productive pathway might allow the parties to arrive at an agreed upon resolution, it might be under conditions that are disadvantageous to your side. If you foresee that the endgame for the negotiation would occur under adverse conditions that could otherwise be avoided, change those conditions by redefining the issue. If you can see that slaughter is the inevitable end to starting down the chute, don’t go down that chute. During the Civil War, Southern generals won many victories against greater forces from the North by envisioning

---

Heidi: Hope you’re doing well. A good friend of mine, David Kaplan, is writing a book about the Supreme Court . . . . And this is his description of what he plans to write:

> My book is an ideas book, asking the question whether Alexander Bickel might have been wrong in “The Least Dangerous Branch.” But my book is not aiming to be a scholarly tome, but rather an accessible narrative of recent developments at the court against a larger historical backdrop. That’s where talking to clerks can be vital. I’ve already talked to one justice. Again, I can’t emphasize enough: nobody gets quoted or in any other way sourced.

Think you might talk to him? I’ve known him for 25 years and he’s 100 percent trustworthy. Ciao. AK

There are no words that can describe how it felt to receive that email. For years, I’d been hiding a secret because I had been told that judicial confidentiality protected . . . Judge [Kozinski]—that it applied not just to chambers deliberations, but to [Kozinski’s] showing me porn in his office. But here Kozinski was, asking me to breach my duty of loyalty to Justice Kennedy as if it were no big deal—as if I hadn’t upended my life trying to escape the memories Kozinski had given me. I wish I had taken a little more time to think about my reply. This is how I initially responded:

> Hi Judge, I’m not sure what, if anything, I could say that would be useful in such a project without violating the code of judicial ethics. I’m happy to talk to him as long as he understands I might not be able to answer many of his questions.

I thought, at the time, *this was a way to give a soft “no” that we would both understand.* He had drilled it into me that confidentiality meant you don’t say anything. I was invoking the very thing that he’d used as a shield for years. I never forget why I was keeping quiet.

He, apparently, had. *The judge’s response to my soft “no” was to treat it as a yes:*

> David, meet Heidi Bond. I’ve explained to Heidi the nature of your project, and she’s willing to talk, though she may not be able to answer many questions. I’ll leave the two of you to communicate. Please leave me out of the loop.

Courtney Milan, http://www.courteymilan.com/metoo/kozinski.html (last visited Apr. 17, 2018) (emphasis added). It should be emphasized here that the communication failure was not primarily the fault of the law clerk. Her soft no was not heard by former Judge Kozinski, because he was evidently not a good listener.

how to make the ultimate battle to take place under more favorable conditions. Seems simple, yes? This is much easier said than done, because the forces on the other side are trying to do the same thing. And yet, the South, especially under General Stonewall Jackson, was able, time and time again, to occupy the high ground and engage the Northern army whose generals chose to order uphill attacks over clear terrain into the face of well-entrenched defenders. Envision how the endgame will come down and maneuver to be in the more favorable position when the endgame starts.

Much of the strategy of debate comes down to control of the question. If you can control the question, you are more likely to control the outcome. The definition of the question should reflect your assessment of when and where to fight the endgame. Redefining the issue is a powerful way to say no to a losing strategy and to redirect the discussion to a more positive and productive end.

6. **Ask a Rhetorical Question.** While redefining the issue is a way of moving the discussion in a more productive direction, a rhetorical question may, for tactical (short-term) or strategic (long-term) purposes, stall the discussion. A rhetorical question is not a real question. It is more a statement in the form of a question. Fowler’s Modern English Usage describes its use as follows:

> A question is often put not to elicit information, but as a more striking substitute for a statement. The assumption is that only one answer is possible, and that if the hearer is compelled to make it mentally himself it will impress him more than the speaker’s statement.

"Is this a great country, or what?" A statement in the form of a question. "Is the Pope a Catholic?" A statement, not made for the truth asserted, but to give an emphatic yes to whatever prior proposition is under consideration.

In the context of negotiation, the rhetorical question may be a statement about the discussion itself. "How can you say that?" "Isn’t that just great?" These are not true questions. The former is a criticism in the form of a question, designed

---

18. See, e.g., JAMES MCPHERSON, THE BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 654, 660-63 (1988) (discussing the great irony that General Robert E. Lee, having recently lost General Jackson to war wounds, abandoned that strategy at Gettysburg, with the disastrous charge by General Pickett over clear terrain into the teeth of the well-entrenched Union forces).


An ordinary question—a real question—functions to elicit an answer . . . . A question becomes unequivocally rhetorical when it acquires the hue of a benign deception: a declarative statement posing as an interrogative. It is no more deceptive than other ironies that feint in one direction and move in another, but it has abandoned the beckoning innocence of a real question—one that is seeking an answer rather than sponsoring one. A rhetorical question is asked for the persuasive effect of its asking. It solicits assent to a proposition by a subtle shift of the burden of proof. It is a question whose form baits and whose substance hooks, a declaration that solicits assent to a claim by tickling the auditor’s social obligation to respond to an interrogative. A question is rhetorical if it is either so profound that answering it is obviously impossible, or so superficial that answering it is impossibly obvious. A rhetorical question uses the auditor’s silence for its own confirmation.

*Id.*

to put the other side on the defensive. The latter is pure praise. The question only asks for agreement to the statement. The rhetorical question can be an actual question in addition to its primary function as a statement. “Why do you think that?” “What is the sense of abandoning that line of inquiry?” “How did you arrive at that conclusion?” The question may be intended to foster an explanation, but its attitude is far from neutral. “How can you be so obtuse?”

The point here is that the rhetorical question is not used to gather information. It may energize the discussion with a more striking statement, question the motives or competency of the other side, or redirect or slow down the discussion while interjecting a dramatic question. It stirs things up and breaks the momentum (or monotony) of the discussion. A potential game changer, it is best used knowingly and strategically, not reactively.

7. Make Concessions on Minor Issues. One of the ways to say no without getting stuck is to look for ways to say yes to something, while maintaining a firm no on the main dispute. Concessions on minor issues can be very useful. Be sure to keep score and use the concessions for leverage on the main issue. Before making the concession, make sure to identify the minor issue as an issue, so that the concession can be counted in your favor. That is, even if you came into the negotiation fully prepared to concede a particular point, make it count as a concession. This allows movement toward agreement without giving in on the main point.

For example, in a negotiation over the terms of a licensing and manufacturing agreement for a promising innovative product, seize the opportunity to make a concession on the price for a test-run where the amounts in question may pale next to the potential for profit from a long-term agreement. Figure out what the other side values most and try to deliver as much of that as possible without jeopardizing your own position. This suggests that the strategy of the discussion starts with the easier issues, with compromises made on your side, and then moves to the more difficult issues, where your earlier concessions can now be cashed in.

8. Clarify the Proposal. One of the more useful ways to say no without aggressively rejecting the proposal is to ask for clarification. “Are you saying . . . ?” This slows down the discussion and makes the other side address potential problem areas. It is a bit like the hitter stepping out of the batter’s box to slow down the pitcher’s pace. Like controlling the question, taking control of the pace of the discussion is important. This can be productive in simply forcing the other side to think through the problem more thoroughly or to reveal some hidden ambiguities that should be accounted for in the final agreement. “Have you thought about . . . ?” is another way of asking for clarification.

Asking for clarification puts the other side on the defensive. Explanation may produce unforeseen benefits by identifying, through the other side’s own account, additional factors that must be addressed before coming to a final agreement. It is important to listen and respond accordingly. Like body blows in boxing, the cumulative effect may wear down the other side. Getting the other
side to talk more is generally a good thing. Unforced errors occur more often than one might otherwise expect.

Conventional wisdom says that you are not supposed to bid against yourself in a negotiation. This means that if you have made an offer or proposal, you should not move from that position until the other side has moved. And vice versa. Asking for clarification, however, allows you to give the impression that you have moved without actually doing so. The requested clarification may induce the other side to modify their last move in response to your question without you having to make a move. This can be done multiple times without having to move yourself. I think here of my mother, whose interrogations often sent me down the slippery slope while she remained intractable. Telling her of the rule about not bidding against yourself would not have impressed her. There are some situations in which the negotiation is stacked against you. Recognize it and do the best you can to change that dynamic.

Asking for clarification is virtually risk-free. It is civil, respectful, and yet probing. It allows the other side to indulge in the possible misconception that they are in control of the discussion. The one who talks the most is often not the winner. This might seem counter-intuitive to some lawyers, but it is true. Clarification provides an opportunity to induce the making of unforced errors. At the very least, it may provide additional information, through careful listening to the words and observation of the attitudes. Information is power.

9. **Counter the Proposal.** Perhaps the most common way of saying no is to make a counter proposal. This is especially useful when you are down to a numbers-specific stage of the negotiation. In mediation, the gap between the numbers may seem to be so wide as to make agreement seem unlikely. But the

---


In negotiating, I think one of the cardinal rules is to “never bid against yourself.” This may seem obvious but it is amazing how many times I see this play out where one side or the other violates it. It is as easy as it sounds; don’t bid against yourself. However, it is not always as easy to spot. In the simple case, you bid $100 for something you want and the other party doesn’t respond. Assuming the worst and being impatient (human weakness), you send another email and offer $125. The other party thinks to himself: . . . gosh, if my phone had been working, I was going to accept the $100. Yikes! However, in complex cases, it isn’t always as clear. Negotiating with someone who isn’t authorized to commit for the other side is in essence bidding against yourself. Once you think you have agreed, he says he needs to get this to his boss and see if it is ok. It never is; boss wants another pound of flesh. In essence, you have told them what you will accept and bid against yourself. Another example I see often in complex deals is the other side wants to “cherry pick” and get something resolved without moving on something that is important to you. The way you keep them from “creeping” on you is to make sure any agreement on a single item is conditioned on the promise that the other item gets worked to your satisfaction or your agreement is null and void. These caveats are important; keep track of each item and your position as it relates to these and the overall deal. Just say . . . I think we can get there on this one but let’s continue through the list and see where we end up overall . . . Finally, remember that conceding to your opponent without getting a concession is like bidding against yourself. You won’t always win in the back and forth bidding; but if you have to concede, get something for it.

*Id.*
mediator may encourage the participants not to lose hope of a settlement simply because the initial differences between the two sides are great. There is a convention in mediation that allows for low or high numbers to be given at the outset without fatal repercussions. This convention allows such numbers to be seriously placed on the table without necessarily needing to ask for forgiveness. Of course, this can be overplayed when one side goes too far.

Forgiveness is an important concept in learning the art of saying no. How do you move toward compromise and agreement without losing credibility over what you have previously stated? For example, if you say, “I think the value of the stock is $12 per share,” how do you leave room to go higher, say to $14 per share, without undermining the *bona fides* of your own previous valuation? Forgiveness is key. Without it, movement is discouraged. Having dug in on a position, it is hard to move without losing face. Forgiveness allows movement without recrimination. It is a form of temporary amnesia, based on mutuality. “I will forgive you for moving toward my position and away from your previously stated position if you forgive me for my movement.” This is not as easy as it looks because there still should be a *reason* for the movement. Movement without justification can undermine credibility because it otherwise appears to be arbitrary. Ironically, the arguments made by the other side may be used to justify the movement. Crediting the arguments made against your own numbers may help to justify an adjustment to a higher (or lower) number. Respect and forgiveness work together.

In mediation, there may come a point when the parties are so close as to make agreement seem likely. Almost like two magnets in close proximity, the gap will then close quickly. One of the forces aiding this “magnetism” is the recognition of the additional costs of rejecting agreement and going to trial. When one considers the costs of going to trial, an agreement to less than these costs is like a zero verdict, for the defense, or a compromise verdict for the plaintiff. As this may involve a fluid situation, keep a firm grasp on how the comparison changes each time there is movement.

10. **A Broad-Based No—Question the Entire Proposal.** Sometimes the best way to defend is to go on offense. You can make this attack without it necessarily becoming a personal attack. A merits-based argument might, for example, question the logic underlying a proposal. The attempt to ban, by Executive Order, travel to the United States by persons from six designated countries may be challenged on account of its over-inclusiveness of persons who pose no danger to U.S. interests. The no offered against political proposals may be stronger than the positive alternatives.

A no in the form of a counter argument is an important way to maintain the conversation on the merits and to keep it going. It is an extended no. Sometimes,

---

23. I have long been very fond of the remark I first heard from Professor Kenneth Graham, U.C.L.A. School of Law: “There are two ways to win a race. One is to run faster than everyone else and the other is to make sure that no one runs faster than you.” Words of wisdom for the practice of law.

24. See *Washington v. Donald J. Trump*, 847 F.3d 1151 (9th Cir. 2017) (demonstrating a case brought against the President for an executive order prohibiting travel from six designated countries).
it is difficult to keep the arguments straight as the conversation moves back and forth. The following is a reminder of the basic types of argument, identified in classical rhetoric, that may help to keep things straight during the heat of discussion.\textsuperscript{25} That is, understanding the structure of an argument keeps you on track and allows you to identify when the other side has veered off from its own argument.

A. \textbf{Definition}. The argument based on definition states what a thing is and how it is different from other things (what it is not). Lawyers are very familiar with this type of argument. The elements of a cause of action define the required parts of the claim. Slander, for example, is a false and unprivileged statement of fact that injures the reputation of another.\textsuperscript{26} A motion for summary judgment (or directed verdict) on a slander claim will be organized around whether the elements have been (or, in opposition, have not been) met.

The argument from definition is often used in what Rick Friedman calls “moral core advocacy.”\textsuperscript{27} They are strong propositions that drive the argument:

In the eyes of the law, the defendant is presumed innocent.\textsuperscript{28}

“The Constitution is color-blind.”\textsuperscript{29}

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”\textsuperscript{30}

Locating the moral center of the case is a form of case framing.\textsuperscript{31}

B. \textbf{Comparison}. Lawyers are always comparing things. Comparison, through analogies and metaphors, is the language of the people and thus, of

\begin{itemize}
  \item \textsuperscript{26} S.D.C.L. § 20-11-4 (2016 & Supp. 2017).
  \item \textsuperscript{27} Moral Core Advocacy: Finding the Heart of Your Case (Trial Guides 2010).
  \item \textsuperscript{28} See, e.g., Wagner v. United States, 171 F.2d 354, 358 (5th Cir. 1948) (discussing the presumption of innocence in criminal law).
  \item \textsuperscript{29} Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
  \item \textsuperscript{31} See generally Mark S. Mandell, Case Framing (Trial Guides 2015) (expanding upon the concept of case framing).
\end{itemize}
TWENTY-FIVE WAYS TO SAY NO

persuasion. They work when there is resonance with the decision-maker's experience and judgment. What is to be determined is compared to a familiar thing or concept:

This evidence should be excluded because it is the "fruit of a poisonous tree."[33]

"[Detroit Mayor] Coleman Young and his successors ate their seed corn, and now there is no harvest."[34]

"Great nations, like great men, should keep their word."[35]

The decision-maker is invited to become part of the process by affirming the similarity or confirming the dissimilarity. The persuasiveness of the comparison is utterly dependent upon your audience understanding the reference. Only if your audience is familiar with The Wizard of Oz will this striking analogy even begin to work: "Truth is sometimes toxic, like water to witches."[36]

Comparison is not limited to analogies and metaphors. It can include the use of inference from circumstantial evidence: "If this person stole from a friend, he would steal from a stranger."[37] This is an example of an a fortiori (from the stronger) argument. An argument-based comparison is more likely to stick if the audience makes the connection before the speaker utters it. The conclusion is adopted as one's own and is thus resistant to change.

C. Relationship. Litigation often deals with the relationship between events.

Did the breach of duty cause the damage?
Did the breach of contract cause the loss of profits?

What are the consequences of the failure to properly maintain the aircraft?

Cause and effect inquiries are fundamental in the law. Relationships have legal consequences.

The law also considers the connectedness between situations and what follows.

Are the defendant's actions here a violation of the terms of the court's prior order?

"If the glove doesn't fit, you must acquit."[38]

Before the government may imprison someone, it must play by its own rules.

---


36. See Van Patten, Metaphors and Persuasion, supra note 32, at 299 (quoting this metaphor).

37. See Van Patten, Themes and Persuasion, supra note 25, at 272 (quoting this saying).

These are if/then relationships. The argument might question the connection. “You claim to want X, but you are not willing to undertake the steps to get to X.” The argument from relationship often doubles the field of potential arguments. You can support or attack both sides of the relationship. Again, there are two ways to win a race.

D. Circumstance. The argument from circumstance is usually situational. It is not based on principle, but on the exigencies of the moment:

Based on current projections for the state budget, there will be no raises for state employees during the next fiscal year.
The law school should consider moving its location in order to become a more attractive venue for prospective students.
The law school should not move because the cost of finding or building comparable facilities is far too great.
The team decided to trade its most promising prospect because the player obtained in return could help them win their division and, possibly, the championship.

The circumstances can also furnish a basis for a prediction about the future:

If Johnny cannot do these simple math problems, it is not likely he will be able to pass the year-end test to advance to the next grade.
Whenever he drinks, he becomes abusive and angry.
If Hannibal Lecter is released from prison, he will almost certainly kill again.

This is not about an if/then relationship; it is a prediction, based on probabilities, about what might happen with a particular individual in a given situation. Arguments from circumstance are fact intensive.

E. Testimony. The argument from testimony includes authority, testimonial evidence, statistics, maxims, law, and precedent. What they have in common is their source comes from the outside, that is, external to the question. Sometimes, the question is resolved by resort to an agreed upon authoritative text, like a statute or a constitutional provision. The authority may be discovered through an agreed upon process, as when legal research yields a convincing precedent. The most common type of argument, for law, is testimony—establishment of what is, not by a priori surmise, but through evidence from a competent witness. If understanding of the evidence is beyond the normal experience of a juror, then an expert may be brought in to give opinion evidence to assist the trier of fact.

This brief survey of argument types may help one to appreciate that not all arguments are alike. Arguments have distinct forms, with identifiable methods and limitations. Knowledge of argument types assists in the making of coherent arguments as well as defending against them because you recognize the pathway that the other side’s argument must travel. Recognizing the pathway of the argument allows you to go on ahead and set up your attack.

39. CORBETT, supra note 25, at 137-42; Van Patten, Themes and Persuasion, supra note 25, at 276-79.

40. See FED. R. EVID. 702 (explaining testimony by expert witnesses).
11. **A Narrow-Based No—Question Part of the Proposal.** This is a form of "yes, but," without the affirming yes. You use the same types of argument discussed above, focusing on a part of the proposal. This also might be part of a divide and conquer strategy, where the questioning of a portion lays the foundation for a broader ejection of the whole proposal. It is done a step at a time, and this allows the making of different types of argument for separate parts of the proposal. The attack on a portion of the proposal saves one's resources for a later full-scale attack.

When you question the feasibility of a proposal, you might accept, for purposes of argument, the premises of the proposal, but you question whether it will work. "Your idea won't work because . . . ." It might be on grounds of feasibility (including impossibility) or unaccounted for (i.e., unintended) consequences. Or, you grant the argument, but question whether your side can make it work. "Good idea, but I don't have that kind of money right now." The limited no keeps the conversation going without raising the stakes for what may be a larger attack in the future.

12. **Attack the Proposer—the *Ad hominem.*** The no may take the form of an attack on the other person. Attacking the messenger should be one of the least convincing forms of argument, although, unfortunately, it is not the least effective form. At its worst, it is an argument by insult. Logically, who you are should not make a difference in the argument. But, as its Latin identification suggests, it has been a staple of argument for a long time. And we know, from Aristotle and Cicero, that it does make a difference who you are. In lawyer terms, your

---

41. *An ad hominem* (to the person) argument ignores the message and attacks instead the messenger. **CORBETT, supra** note 25, at 91-92.

42. Author S. Morris Engel explains:

Fallacies of personal attack can take various forms, depending on the nature of the attack. One of the simplest is the *abusive form.* Here, aspersions are cast on the character of one's opponent.

a) This theory about a new cure for cancer has been introduced by a woman known for her Marxist sympathies. I don't see why we should extend her the courtesy of our attention.

b) Oglethorp is now saying that big corporations shouldn't pay more taxes. That's what you'd expect from a Congressman who lived in Washington for a couple of years and has forgotten all about the people back home.

c) In reply to the gentleman's argument, I need only say that two years ago he vigorously defended the very measure he now opposes so adamantly.

Turning attention away from the facts in arguments to the people participating in them is characteristic not only of everyday discussions but of many of our political debates as well. Rather than discuss political issues soberly, rivals may find it easier to discuss personalities and engage in mudslinging. This can be effective because once a suspicion is raised it is difficult to put it to rest. It is not surprising, therefore, that the argument against the man is all too common in debates among people seeking office.

S. MORRIS ENGEL, *WITH GOOD REASON: AN INTRODUCTION TO INFORMAL FALLACIES* 166-67 (2d ed. 1982).

43. **CORBETT, supra** note 25, at 35.

A third mode of persuasion was the ethical appeal. This appeal stemmed from the character of the speaker, especially as that character was evinced in the speech itself . . . . Aristotle recognized that the ethical appeal could be the most potent of the three modes of persuasion. All of an orator's skill in convincing the intellect and moving the will of an audience could prove futile if the audience did not esteem, could not trust, the speaker. It is for this reason that politicians seeking election to public office take such great
credibility is almost as important, or sometimes even more important, than the message you are delivering. And if it makes a difference who you are, it makes a difference who your opponent is. The messenger is not irrelevant. Take note of it where appropriate.

For some, identity is paramount to the argument. In fact, political argument seems to be trending in that direction. There is a danger with accepting or rejecting arguments based solely on whether a person is a member of your “tribe.” Judge Abner Mikva related a humorous, but instructive, story about when he came to Chicago as a young man, seeking to help Democrats in the 1948 elections. As Judge Mikva related the incident:

I came in and said I wanted to help. Dead silence. “Who sent you?” the committeeman said. I said, “Nobody.” He said, “We don’t want nobody nobody sent.” Then he said, “We ain’t got no jobs.” I said, “I don’t want a job.” He said, “We don’t want nobody that don’t want a job. Where are you from, anyway?” I said, “University of Chicago.” He said, “We don’t want nobody from the University of Chicago.”

“We don’t want nobody nobody sent.” Identity, at least through an endorsement, is paramount. You need to be introduced by someone they already trust before they will consider you. With the wrong label given as an introduction, like “Republican” or “Democrat,” you can almost hear the mind snapping shut.

The attack on the person can be done gently: “Have you done many bankruptcy cases before?” Less subtle would be: “I think you should go back and read the Code before bringing that argument to us” or “I don’t think you know enough about the problem to propose that kind of solution.” The point of the *ad hominem* argument is to undermine the confidence of the other side or to warn others away through discrediting and ridicule. You can attack the credentials of the person without directly attacking the person: “I don’t think you have the authority to say that.” Questioning credentials is also a useful technique for gaining information from the other side.

The last few ways of saying no have involved attacking the proposal or attacking the proposer. Can you get to yes through a strategy of attack? Yes, but it is a high-risk strategy. It may be the best way because the other side needs to be taken down in terms of ego or perception of the merits of their own case before any progress toward yes is possible. For some, it is the most natural form of argument, learned possibly around the dinner table at home or on the playground at school. Argument through intimidation, a form of bullying, has short-term
care to create the proper image of themselves in the eyes of the voters. It was for this reason also that Cicero and Quintilian stressed the need for high moral character in the speaker.

*Id.*


46. *Id.*
effectiveness, but potential long-term drawbacks. If the attack goes too far, there is the risk of no agreement or an agreement that does not last. If you do utilize this strategy, try to have some self-awareness of how this might be coming across to the other side. What seems normal to you may be very off-putting to the other side. Don’t just attack because it feels good. Do it with purpose and with skill.

13. **Timing**—Not Ready to Say Yes. Timing is essential in negotiation. You are not always on the verge of settlement, just a step away from yes. It may be a long journey. There are many situations where settlement is not possible at the moment, or rather, it is premature. Sometimes, you just need to let the emotions run their course. In effect, it is a “time-out” while the parties and their counsel part ways in order to cool-off and reassess the situation. As one negotiator put it, you may have to wait until the principal (money) becomes more important for the client than the principle. You often do not know when the journey will end, but you always have to be vigilant to recognize the opportunity.

There is an aspect of ritual inherent in the process. Like sumo wrestlers, the two sides may follow a formulaic approach to the opening. Part of the ritual is intended to affirm a basic agreement to play by the rules, much like the ritualistic intoning of “may it please the court, counsel” that begins many court proceedings. Like the touching of gloves before a boxing match, this simple legal ritual is a reminder for everyone that we are all in this together, that the end we all seek is justice. In negotiation, it may take time to run through the ritual. It is not meaningless; it may be a test to see if you are a novice (or an outsider) or whether you are acquainted with the ways of the ritual. Everything you say is important. Even when you talk about the weather or the latest event, you are being measured. There is no small talk.

One can sense that there are almost stages to negotiation. Like Elisabeth Kübler-Ross’s stages of the dying process, there seems to be discrete stages to the negotiation process. For Kübler-Ross, the stages of the process of dying were denial, anger, bargaining, depression, and acceptance. The stages of the negotiation process have a similar structure, even though the facts vary greatly.

47. It is always good to keep in mind the following words of wisdom:
To every thing there is a season, and a time to every purpose under the heaven:
A time to be born, and a time to die; a time to plant, and a time to pluck up that which is planted;
A time to kill, and a time to heal; a time to break down, and a time to build up;
A time to weep, and a time to laugh; a time to mourn, and a time to dance;
A time to cast away stones, and a time to gather stones together; a time to embrace, and a time to refrain from embracing;
A time to get, and a time to lose; a time to keep, and a time to cast away;
A time to rend, and a time to sew; a time to keep silence, and a time to speak;
A time to love, and a time to hate; a time of war, and a time of peace.

Ecclesiastes 3: 1-8 (King James).


49. See ELISABETH KÜBLER-ROSS, ON DEATH AND DYING: WHAT THE DYING HAVE TO TEACH DOCTORS, NURSES, CLERGY, AND THEIR OWN FAMILIES 51-146 (2003) (describing the five stages in the process of dying).

50. Id.
from case to case. We might sense, however, that there is a structure that helps to explain the reticence of parties to go further than perhaps the lawyers would like them to go. Like the hospice counselor, the lawyer who has been down the path of conflict resolution many times before can help the first-time client through these stages. But the experienced lawyer must not forget that the client’s reluctance to go forward is real and must be respected.

One of the recurring questions that impacts the timing of settlement is whether a defendant can get out of the case short of trial. The potential swing inherent in that situation (zero liability versus some liability risk) should probably be resolved before trying to close the gap between the two sides. It may be too early because discovery, especially depositions, has not been completed. The defendant’s fundamental questions regarding who is the plaintiff and who is the plaintiff’s attorney will be answered after there has been time to size them up during discovery.

The way to say no here, without precluding a later yes, is to acknowledge that the case is not yet at a stage where acceptance or settlement can occur. If it comes from the lawyer, it is a form of blaming the client, but it is not just that. It is a recognition that the case is not yet ready to settle. If the other side understands this, it is a no with a tacit understanding that there will be time to consider an eventual yes down the road.

14. Not the Right Place. If timing prevents getting to yes, place may also be an obstacle. That is, some disputes may need a better place in which to work out differences. Pre-litigation settlement discussions may prove to be unproductive because the players (like who will be the judge) are not set or the rules are not yet clear. The litigation process is sometimes not the best place to resolve disputes because it may be too adversarial, slow, and expensive. There are other places to resolve disputes, like mediation, arbitration or the administrative process, as well as less formal means, like counseling. Sometimes a change of venue, even with the same parties, can present the matter in a new light and help move the dispute toward a resolution. Suggesting that the matter be moved to another place is a way of saying no that is constructive, if it puts the dispute in a better position for resolution or it buys more time to put it in a better position for resolution.

15. Change the Subject—the Non Sequitur. If you don’t want to move closer to agreement, but you don’t want to end the negotiation, punt. One way to punt, that is, to shift the burden of talking to the other side, is to change the subject and invite a response. So, when stuck on the basic terms of a licensing and manufacturing agreement, raise a side issue, like where the manufacturing plant will be located. Changing the subject may not move the dispute any closer to resolution, but it looks like movement or at least it is not a shutdown of the discussion. A non sequitur (literally, not in sequence) is a way of not ending the discussion without actually moving. Like treading water, you give the appearance of movement without advancing or retreating. It also has the advantage of avoiding bidding against yourself. If the other side expects you to submit a better
TWENTY-FIVE WAYS TO SAY NO

16. **Silence.** Silence is undervalued as a tactic. A good lawyer should be comfortable with silence. Likewise, a good negotiator should be comfortable with silence. You get time to think and good things might happen. At the very least, silence allows you to stay in the conversation without confirming that you don’t know what comes next. Lawyers like to talk. Let the other side talk. You might be surprised at what is revealed. Sometimes, they wind up bidding against themselves in order to fill space with talk, a clear mark of an amateur. If nothing else, it gives you time to assess whom you are dealing with. Reading your opponent is a vital part of negotiation. It is harder to do this when you are doing most of the talking.

Not responding when the other side is too far away from rational is a good response. Don’t get into a pissing match with a skunk. Wait for the skunk to come around, if not due to a change of character, at least from a grudging recognition of reality. Reality is a good enforcer of reason. Reality makes your point without you having to spend capital to make the point. Silence also keeps you from overreacting to the irrationality. It allows for forgiveness to occur when the time is right.

Silence favors the status quo. If the status quo favors your side, use it. Let time, place, or the reality of the situation work for you. Silence is a soft no and allows the other side to fill the space. It is like the empty chair at trial. You never know what might happen. When the other side knows what it is doing, it is nonetheless instructive; when the other side is not so good, it is in a different way, instructive. Silence is often golden.

17. **Body Language (aka Non-Verbal Communication).** Tone is an important aspect of communication. Think about how movies communicate their message on many levels. There is the script, in which the words are delivered by the actors, who themselves are an essential part of the message delivery through visual means. There is the setting, which provides a visual accompaniment to the words. A picture is said to be worth a thousand words. While one may quibble on that number, trial lawyers would agree that the visual is very important. And there is the sound, especially the music. *Jaws* is well-known for its signaling the presence of the great white shark through the low bass theme before we actually

---


52. The opening scene of *Fargo* (Metro-Goldwyn-Mayer 1996) sets very memorably the tone of the dark comedy to follow.
The Shawshank Redemption uses music to support its portrayal of the grimness of the prison setting and the grandeur of freedom. The statement and restatement of musical themes is a way for the storyteller to underscore the message, as if to say: "This is important. You are invited to participate in the emotions of the story." But this invitation is subtle. In the words of Allan Bloom, it causes the audience "to know without knowing that they know." Lawyers, on the other hand, don't ordinarily get to supply music to their closing argument, although it has been done.

What can be done is the purposeful use of non-verbal communication skills. Whether it is the simple raising of an eyebrow to show skepticism, or the nodding of the head to show agreement, or a quiet stare of displeasure, there are many ways to show yes, no, or maybe, without saying it. Hand gestures allow for a variety of ways to communicate. (No, don't use that one! That's a hard no.) Putting up one hand, as if to motion the other person to stop, gesturing to keep going, pointing to an object or person in the room, rubbing one's chin as if in contemplation, all send a message. If the concept of mirroring is acknowledged as a non-verbal technique of encouraging agreement, there must also be the opposite of mirroring to show disagreement.

One time-honored technique of emphatically saying no is to walk away, especially when you are in someone's shop, or car lot, or on the street. The visual metaphor is of a train leaving the station or a ship leaving the dock. "This is your last chance to stop me from leaving. If you change your mind, it better be good." This is harder to do when you are in your own office, but it can be done if you have thought about it ahead of time. A modern version of the walk away, and easily done in your office, is to hang up the phone. The visual is not nearly as strong, but the non-verbal message remains clear.

Related to setting the tone for negotiation is the concept that psychologist Robert Cialdini calls "pre-suasion." Before the pitch or the offer is made, you decide to set a tone of competence, compassion, trust, strength, disdain, fear, or irrationality, or whatever the underlying tone you want to adopt to set up getting to yes. It may include verbal cues in addition to the non-verbal messages. It is

53. JAWS (Universal Studios 1975).
54. THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994).
55. ALLAN BLOOM & HARRY JAFFA, SHAKESPEARE'S POLITICS 7 (1964). "The poet can take the philosopher's understanding and translate it into images which touch the deepest passions and cause men to know without knowing that they know." Id.
57. Your spouse or best friend can probably provide you with a lengthy list of unintentional non-verbal messages that you send without knowing it.
58. See, e.g., THE PERSUASION EDGE FOR LEGAL COMMUNICATION: MIRRORING & RAPPORT (Trial Guides 2012) (describing how to improve communicating and influencing skills).
60. See infra number 22, The Game of Chicken.
about attitude, either your attitude or creating the right attitude in the other side. The significance of pre-suasion is to understand that the set-up is as important, if not more important, than the argument itself. For example, Cialdini related the story of a successful salesman, who would routinely forget some materials necessary to his in-home presentation.61 After asking for permission to leave to retrieve these materials, he would return and complete his presentation.62 Everything else he did followed the company protocols, yet this salesman was uniquely successful. Cialdini was puzzled:

I watched Jim make three presentations. Each time, his “forgetfulness” surfaced in the same way and at the same point. On the drive back to the office later that evening, I asked him about it. Twice, he wouldn’t give me a straight answer, annoyed that I was pressing to discover his selling secret. But when I persisted, he blurted, “Think Bob: Who do you let walk in and out of your house on their own? Only somebody you trust, right? I want to be associated with trust in those families’ minds.”63

Being associated with trust was the foundation, or “pre-suasion,” before the sales pitch. One can see many potential applications of this concept. In fact, lawyers do it all the time, without necessarily being aware that they are doing so.

Lawyers would call this posturing. There are many examples from the animal world, many of them arising from mating rituals. A particularly useful metaphor comes from the mating habits of the bull walrus. In contrast to many other male animals, who establish dominance through fighting, male walruses establish the hierarchy within the herd on the basis of body size, tusk size, aggressiveness, and general posturing (probably snorting and bellowing), without necessarily fighting.64 The “winner” is the one whom the herd believes would have won had they fought. Not a bad way to resolve the matter (certainly less harsh on the losers), and not unlike negotiation among lawyers. Posturing creates the proper tone for delivering either the yes or the no.

18. **Claiming the Middle as a Basis for Making the Other Side Make the Next Move.** When the negotiation comes to an impasse, one way to gain movement again is to assert the status quo that favors your position. That is, it is up to the other side to change the present situation. In a personal injury case, this means that the plaintiff is seeking compensation for losses, and the other side has the money. It is up to the plaintiff to keep moving toward that goal. The status quo favors the defendant. The defendant (and the insurance company) is content to await further developments.

Arguments rarely take place on a level playing field. Someone will have the upper hand because of convention, presumptions, or the basic rules of the game. You can make this into a no by asserting that the present standoff will ultimately

---

61. CIALDINI, PRE-SUASION, supra note 59, at 6-7.
62. Id.
63. Id. at 7.
favor your side, if nothing else changes. Claim the middle. For example, the plaintiff, in most cases, has the burden of proof. If the case is too close to call, then it is up to the jury, and the tie-breaker is the burden of proof. When the defense makes an offer, it might say: "This is as far as we can go. You have not convinced us that we should go any higher. It is not an insubstantial amount we are offering. The jury might not be so generous." This is a no that contrasts the other side's position, under conditions of uncertainty, with the tendencies of juries to act conservatively with respect to money awards. Claim the middle, or status quo, as favoring your side. Summarize the present impasse and suggest that if there is to be any further movement, it will have to come from the other side. This is more easily done when the status quo favors you. Much less so, if you need to change the status quo. The goal is to make the other side move closer to you. It's more effective than a simple no.

19. Claiming the Unknown as Being in Your Favor. You never know what the jury will do. Then again, there is prior history, which suggests that the unknown—what the jury will do—is not so inscrutable that nobody has any idea what will happen. Many a defense lawyer has said, especially in South Dakota, "if my client is going to write a check for that amount, we will have to hear that from the jury." More often than not, this calculation has been proven correct.

Trials and settlements are about risk management. Decisions are made under conditions of uncertainty, without full knowledge of what the future will bring. Sometimes, the best alternative to a settlement is to go to war and let twelve strangers decide the matter. At other times, there is too much at stake to let twelve strangers decide a matter that means so much more to the parties involved. In making this decision, it may help to assert that the unknown favors your side. This is not always a defense argument. Both sides can play that game. What is required is nerve, and the ability to convey the narrative favorably so that the other side has legitimate worries about what may happen in the absence of an agreement.

20. It's Your Move, Really. There is a natural rhythm of the back and forth in negotiation. This is backed up by the conventional wisdom of not bidding against yourself. But there are times to go against the rules. First, when the other side has purported to make a move that isn't a genuine move, it is fair to call them out and insist that they make a substantial, good faith move. That is, the natural back and forth only works if there isn't manipulation, like moving game pieces, but arriving back at the very same spot.

When the natural back and forth has resulted in an impasse, it is acceptable to take a break, to call a time out, and, when resuming the discussion, to insist that it is the other side's turn to move since they are the ones who brought about the prior impasse. Blame, if effective, is the basis for insisting that it really is their move. "If we are going to solve this dispute, your client is going to have to reassess how vulnerable his position is and come back with a proposal that reflects that reality." They caused the impasse, you did not. They should be the ones to move next.

21. I Don't Know—Kick the Can Down the Road. There are times when you are out of options on offense and you need to punt. Let the other side wrestle
with the problem for a while, until conditions change in your favor. If time does not favor the status quo, then perhaps time will change things. Situations hardly ever stay the same. On the value of waiting until you are in a position to win, consider the advice of Dashiell Hammett, speaking through his protagonist, the Continental Op: “Plans are all right sometimes... and sometimes just stirring things up is all right—if you’re tough enough to survive, and keep your eyes open so you’ll see what you want when it comes to the top.” You are not always in a position to win. Sometimes, you need to wait for that opportunity. It takes experience and judgment to know when the time is right. In the meantime, be tough enough to survive and keep your eyes open.

The reality of the situation may be that you find yourself overmatched against a more experienced attorney. This happens all the time because you cannot know everything. You will even run up against a seeming newcomer, who happens to know the particular area of the law better than you do. There are worse things than that, like not recognizing when you are overmatched in terms of knowledge and experience. Admit, carefully, that you are not sure and need additional time to make a knowledgeable and reasoned response. Admissions in private are preferable to being exposed in court. Live to fight another day.

22. The Game of Chicken. This is a very hard no, until it is time to say yes, if at all. It is the penultimate play before getting to yes, or to mutual destruction. The traditional protocol for the game of chicken is to situate two drivers on opposite sides, with a substantial amount of space in between. They drive toward each other until one decides, sensibly, to veer off. That one is the “loser.” How does one win the game of chicken in the context of negotiation? You must convince the other side that you, or better, your client, is crazier than they are. It involves posturing, and it requires you to pull it off convincingly. This type of no is obviously high-risk, but it can be effective, if played deftly.

The posturing requires a seeming indifference to the potential bad result. It would be as if one of the bull walruses proclaimed, “I will fight to the death because I no longer care to live as second-best. I’ll take the prize or death.” The one with nothing to lose is the most dangerous in this game. Posturing with words only, however, may call forth a response that calls the bluff. The posturing must be convincing. Words are cheap and by themselves may be insufficient. Actions speak louder than words. Posturing that cuts off the avenues of escape is more convincing, like giving the Kamikaze pilots only enough fuel to reach the target. The posturing preys upon the other side’s will to survive. If the threat of mutual destruction is credible, then rationality and self-preservation may be exploited. It

65. Of course, there are some teams, like the 1985 Chicago Bears, who regarded defense as another form of offense. In one four-game stretch during that season, the Bears’ defense outscored the opposing offense. Robert Mays, In Chicago, It’s Forever 1985, SPORTS ILLUSTRATED (Jan. 31, 2016), https://www.si.com/mmqb/2016/01/31/nfl-1985-chicago-bears-30-years-later.
67. If it is both you and your client, that is known as “bad cop/bad cop” or “bad cop/worse cop.”
is not necessarily the one with the most to lose; it is the one who most cares about losing. "Freedom’s just another word for nothing left to lose." 68

23. Make Impossible Demands. This is another high-risk strategy. Keep making impossible demands until it is time to relent with your first realistic demand. It feels better to the other side when you stop making impossible demands. An extreme variation of good cop/bad cop. This only works if the other side is invested enough in getting to yes, so that they do not walk away before you relent with a realistic demand. The key is how you sell this one. If the impossible demand leaves room for movement later, then it might work. Slamming the door will not. Perception is all important here.

One way to possibly soften this one is to think of it as the counterpart to “yes, but.” In this case, it is “no, but,” meaning that the answer is no, but that might change if the other side will move off of its position. There may be a symmetry of impossible demands on both sides (as in the game of chicken). You might have made your impossible demands in order to mirror the impossible demands of the other side. The way to break the standoff might be with “no, but.” Invite the other side to consider dropping down to something at least possible or realistic. In other words, invite them to come off the ledge.

24. Last best offer . . . almost. The last best offer, almost, is what appears to be your final offer. You make it seem like this is it, there is no more room to give. It is another version of the walk away. But you will actually entertain, without necessarily saying so, one more offer from the other side. You are trying to squeeze out the last few dollars. Again, there is high risk here because the ultimatum may force the other side to walk. They can play these games, too. You may even have to back down later rather than lose the whole bargain over your attempt to squeeze too hard. Be sensitive to the signals.

25. Hell No. There comes a time when the no is final. This is the real walk away. When you have reached that point, be strong. Do not waiver. Do not spoil your reputation by walking back on your final no. And yet, it is not over until it is over. So, perhaps, hell no is too dramatic. You don’t need to salt the ground so that nothing will ever grow there again. If not for the immediate matter, perhaps for the sake of working with the other side, or the other side’s attorney, on some future matter. A simple no, without the recriminations or bitterness, should suffice. Such a no might well lead to some future yes.

CONCLUSION

The foregoing many ways to say no are tools. They are tactics, not strategy. In order to properly use these tools in furtherance of your strategy of negotiation, you must bring all of your knowledge, skill, and experience with you. In other

68. This line, performed by Kris Kristofferson in “Me and Bobby McGee,” is more often associated with Janis Joplin, whose posthumously released version topped the U.S. singles charts in 1971. Lydia Hutchinson, Kris Kristofferson’s “Me and Bobby McGee”, PERFORMING SONGWRITER ENT., LLC (Sept. 25, 2015), http://performingsongwriter.com/kris-kristofferson-bobby-mcgee/.
words, you must be smart, conscientious, and tough. To be smart, you must learn how and when to use these tools. Smart is not just a measure of intelligence, it is evidence of certain habits, like listening, judgment, patience, and, at times, forgiveness. Successful negotiation requires you to be conscientious, to be diligent, to work hard. Although cooperation is a necessary aspect of negotiation, it is not sufficient. You must be tough as well.

For those who are by nature agreeable and cooperative, negotiation requires an expansion of the “comfort zone.” The varieties of no provide assistance for the gentle-mannered, as well as for the rest of us. If this is unfamiliar territory, the implementation of tough-mindedness may be uneven and, at times, overdone. Learn about yourself as a negotiator through trial and error. Reflection on why you do the things you do will show how you have been shaped by family, friends, and culture. Study your opponent as you slow down the negotiation with no.

The art of negotiation requires learning how to say no, until it is time to say yes. The varieties of no allow for control of the pace and direction of the discussion. Negotiation in real time is an extended discussion, with starts and stops, ups and downs, progress and retrenchment. There are cases that one would swear at the outset are unsealable. And yet, circumstances may change and attitudes may change. A careful use of no keeps the discussion going until the parties feel that the time is right to close on a deal. With most negotiations that have any complexity, the way to yes is through understanding how to say no.

---

69. Consider Professor Jordan Peterson’s advice:

One of the things I do in my counseling practice, for example, when I’m consulting with women who are trying to advance their careers, is to teach them how to negotiate, and to be able to say no, and to not be easily pushed around, and to be formidable, and you need to . . . If you are going to be successful, you need to be smart, conscientious, and tough.


If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.

Id.