THE GOOD NEGOTIATOR
Negotiation Theory, Process and Skills for Lawyers

Faculty of Law
Chulalongkorn University
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1. INTRODUCTION

1.1 The Importance of Negotiation for Lawyers

Lawyers spend much of their time negotiating on behalf of their clients. Commercial lawyers create contracts. Litigation lawyers negotiate to settle cases before trial. Lawyers are also often involved in negotiations or dialogues about public policy issues. Negotiation skills are also crucial for the practice of alternative dispute resolution (ADR) including mediation and arbitration. This course introduces lawyers to some basic principles and practices of negotiation commonly taught in North America.

The instructor recognizes that negotiation styles and law practice in your own country may differ from the North American context from which these materials originate. There will be need for readers to consider the relevance and suitability of these materials the culture and legal system in your own country and other countries relevant to your negotiations.

1.2 Course Description

This course introduces lawyers to some theories, processes and skills for negotiation including:

- negotiation theory with emphasis on integrative approaches to negotiation;
- a process for negotiation;
- skills for negotiation;
- important issues in negotiation including culture, power, emotions and face;
- ethical and public policy issues in negotiation.

1.3 Course Objectives

By the end of this course, it is hoped participants will:

- understand several concepts and terms relevant to negotiation and dispute resolution;
- be aware of several approaches to decision making and dispute resolution, including negotiation, mediation (and conciliation), arbitration, litigation and legislation;
- be able to assess a situation to determine its suitability for negotiation;
- understand distributive and integrative approaches to negotiation;
- understand several strategies for negotiation, including competitive, accommodating and collaborative approaches;
- be able to prepare for negotiation;
- understand and apply a process of integrative negotiation;
- understand several listening and communication skills for negotiation;
- understand the importance of culture in conflict, and be able to articulate some of the ways culture and gender affects their own perspectives and approaches to negotiation;
- understand several ethical and public policy issues relevant to negotiation.

1.4 Teaching Methods

This course is taught in English. Methods for teaching include:

- Readings;
- Lectures;
- Group discussions;
- Writing assignments and presentations;
- Practice exercises, case studies and simulations.

1.5 Academic Integrity

Students are expected to adhere to the highest international standards of academic integrity including the rules and regulations of Chulalongkorn University and, for this course, the principles outlined in the Academic Integrity Policy of the University of Victoria, one of the partner institutions in the LLM (Business Law) Program. The UVic policy is found at http://web.uvic.ca/calendar2016-09/undergrad/info/regulations/academic-integrity.html .

1.6 About the author of these workshop materials

Catherine Morris, BA, JD, LLM, is an Adjunct Professor in the Faculty of Law and the School of Public Administration at the University of Victoria ("UVic") in Canada. She is also an Associate of UVic's Centre for Asia Pacific Initiatives. She has taught courses at Chulalongkorn University since 2002. She is the managing director of Peacemakers Trust, a non-profit organization for research and education on peacebuilding and conflict transformation. Professor Morris teaches negotiation, dispute resolution, peacebuilding and international human rights in academic, governmental and non-governmental settings. Her international work has also included assignments in Thailand (since 1994), Cambodia (since 1995), Honduras, Myanmar, Bolivia, Rwanda and Europe. Her publications and papers include works on dispute resolution, religion and peacebuilding and reconciliation.

1.7 Course Syllabus: Schedule, readings and assignments

Please see the syllabus at www.lampion.bc.ca/University/Chulalongkorn/Negotiation2016.html.

2 FOUNDATIONS FOR NEGOTIATION

Good negotiators prepare carefully for each negotiation. Most negotiations conducted by lawyers are for one of two purposes:

- to make decisions or transactions, or
- to prevent litigation or to settle disputes before trial.

To prepare effectively in a given situation, negotiators need to be able make mindful choices – and help their clients make informed choices – about what processes are the most appropriate in the particular case. To make wise decisions – and to help their clients to make wise decisions – good negotiators assess the goals and motivations of all those involved, the sources and dynamics of existing or potential conflict, and the processes available to address the case. This chapter provides some methods for lawyers to analyze and assess their cases in preparation for negotiation in transactions and disputes.

QUESTIONS FOR CLASS DISCUSSION

Most people negotiate every day in their families, workplaces, institutions and the marketplace.

- In a small group, make a list of some things you negotiated within the past several days. With whom have you negotiated? What did you negotiate about?
- What does "negotiation" mean to you?
- When you see or hear the English word "negotiation" what words in your own language (Thai, English, Chinese, or...) come to your mind? Make a list and discuss the meanings of these words. How do these words and meanings affect your understandings of the English word "negotiation"?

2.1 What is negotiation? Some different definitions

The English language literature on negotiation contains a number of different definitions. Here are a few:

- ". . . negotiation can be defined as a process in which two or more people voluntarily attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement of conflict . . . the term 'bargaining' . . . [is] used interchangeably with 'negotiation.'" – Donald Gifford.[1]

[1] Gifford, Donald G. *Legal Negotiation: Theory and Applications*. St. aul MN: West Publish Co., 1989, 3, citing Gulliver, P.H. *Disputes and Negotiations: A Cross-Cultural Perspective*. New York: Academic Press, 1979, viii.

- Negotiation is ". . . a complex process of verbal and nonverbal interaction . . . negotiation involves interaction in an effort to achieve agreement that will have some future binding force." – David V.J. Bell.[2]

- Negotiation is ". . . a process through which two or more parties – be they individuals, groups, or larger social units – interact in developing potential agreements to provide guidance and regulation of their future behavior." – Jack Sawyer and Harold Guetzkow.[3]

- Negotiation is ". . . a process of potentially opportunistic interaction by which two or more parties, with some apparent conflict, seek to do better through jointly decided action than they could do otherwise." – D.A. Lax and J.K. Sebenius.[4]

- "A negotiation is an interactive communication process that may take place whenever we want something from someone else or another person wants something from us." – G. Richard Shell.[5]

- "Negotiation is a fact of life . . . Negotiation is a basic means of getting what you want from others. It is a back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed. – Roger Fisher and William Ury.[6]

QUESTIONS FOR REFLECTION OR CLASS DISCUSSION

- What do these descriptions of negotiation have in common? What differences are there?
- What does each of these descriptions say about the author's view of the goal of negotiation?
- Which definition do you prefer and why?
- Look at the titles of the books from which these passages are drawn. Do you think the context of negotiation might make differences in the ways people define the term "negotiation"? Please comment.

[2] Bell, David V.J. "Political Linguistics and International Negotiation." *Negotiation Journal* (1988): 233-45, 233, 235.
[3] Sawyer, Jack, and Harold Guetzkow. "Bargaining and Negotiation in International Relations." In *International Behavior*, edited by Herbert C. Kelman. New York: Holt, Rinehart and Winston, 1965, as cited in Bell, 235.
[4] Lax, D.A., and J.K. Sebenius. *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*. New York: Free Press, 1986.
[5] Shell, G. Richard. *Bargaining for Advantage: Negotiation Strategies for Reasonable People*. New York: Penguin Books, 2000, 7.
[6] Fisher, Roger, William Ury, and William Patton. *Getting to Yes: Negotiating Agreement without Giving In*. 2nd ed. New York: Penguin, 1991, viii.

2.2 Negotiation: A way to make decisions or resolve conflicts

2.2.1 Three approaches to decision making: consensual, adjudicative, legislative

The ways people resolve disputes – or try to make decisions – are, generally speaking, consensual, adjudicative or legislative in nature. Some processes combine features of these three approaches.

- **Consensual** methods involve the parties who together decide the process and the outcome by themselves. Consensual processes include negotiation, facilitation and mediation.

- **Adjudicative** methods involve a third-party who makes a decision *for* the parties. An adjudicator's decision may be non-binding or binding. Adjudication includes arbitration and court decision making.

- **Legislative (or rule-making**) is a common way to address conflicts or make decisions. Rules are made by groups, organizations, formal legislative bodies, rulers, or groups of states that create international law norms. Rule-making may be formal or informal. For example, formal rules may be found in international treaties, legislation, regulations or policy statements. Formal rules may be made by governments, institutions or organizations. Informal "rules" may grow up within a society, a community, a religion, a profession, an organization, a family or personal relationships. Most families, groups and organizations, including lawyers, also have unwritten customs about "the way we do things." Sometimes these unwritten rules are referred to as part of "the culture" of the organization or group. Unwritten rules may emerge over time through informal consensus or dialogue[7] among peers, or they may be imposed informally by powerful individuals or elite groups. Thus, rules are not always produced through formal legislation alone!

- **"Hybrid**" approaches may combine some features of consensual, adjudicative or rule-making approaches. For example, a "med-arb" process combines mediation (which is consensual) with arbitration (which is adjudicative). In an organization, a manager may first try to negotiate or mediate a solution to a problem (a consensual process) and may end up making a rule that he or she expects to be obeyed (rule-making). People often negotiate to create rules, regulations or laws. A conflict over the meaning or interpretation of a rule may be resolved through consensual or adjudicative means, or in some cases through coercion or force.

2.2.2 Processes for making decisions or resolving disputes

There are several kinds of decision making and conflict resolution processes including negotiation, conciliation, mediation, arbitration and adjudication. Several processes are listed on the diagram below. Please see definitions of processes in the **glossary** at the back of this manual.

[7] For a definition of "dialogue" see the glossary at the end of this manual.

Processes for Making Decisions or Resolving Disputes	
Approach to conflict	**Roles for Impartial Interveners**
Avoidance of negotiation (withdraw, go away) Giving in (accommodate)	No third party
Negotiation	No third party
Neutral observation (e.g. election observation)	Third party: observes/records
Shared decision making Regulation negotiation Mediation Consultation	Third party: facilitates/mediates
Ombudsman	Third party: investigates/recommends/ reports (in some institutions an ombudsman may mediate)
Non-binding tribunals or commissions Non-binding arbitration	Third party: non-binding adjudication (some may use mediation or conciliation)
Binding tribunals Binding arbitration Litigation	Third party: adjudicates (some may also include mediation or conciliation)
Legislation	No formal third party (but there are lobbies and sometimes public participation processes involve negotiation, facilitation or mediation)
Non-violent direct action Violence	Third party: police/military/diplomacy

Some of these processes are cooperative, and others are competitive or adversarial. Some processes involve third parties; others do not. Some processes are "hybrids" because they use combinations of consensus building, adjudication or rule-making. For example, some (but not all) arbitration processes may involve consensus-building including mediation. Some (but not all) arbitration processes may involve *non-binding* recommendations that parties can accept or reject as they choose. Some (but not all) mediation processes include processes that seem adjudicative, such as recommendations from the mediator, which—while never formally binding—may seem persuasive or even coercive. For instance, labour and commercial mediation in Canada and the United States often results in recommendations or case evaluations by the mediator. However, in other kinds of mediation, such as commercial, community or family law mediation, the mediator may avoid evaluations or recommendations. Instead the mediator may encourage the parties to suggest solutions and may insist that the parties receive case evaluation from their own lawyers. Many processes blend mediation, conciliation and arbitration, either informally or formally.

As you may have noticed in the previous paragraph, even processes called by the same name may differ significantly depending on local practices and individual styles. For example, mediation in a community conflict resolution centre may use a relatively lengthy process of consensus-building that may seem quite different from a brief judicial mediation hearing (a mediation conducted by a judge) or an institutional mediation program that utilizes persuasive or recommendatory or "evaluative" mediation approaches. However, if a mediation process is to be seen as fair, it is important to make sure that vulnerable or underpowered parties have good opportunities to be heard by other parties, to present their views clearly, and to suggest their preferred solutions.

2.2.3 People, process and issues

It is important to consider at least three dimensions of each problem or conflict.

- **Issues:** The issues are the **topics** of the negotiation or the conflict. That is, **what** is the negotiation or conflict about? Issues can be substantive (tangible resources) or non-substantive (less tangible values and ethics, emotions, face or power). A focus on this dimension leads to an emphasis on the specific **issues, and the specific solutions and outcomes** that best address the issues.

- **Processes:** The process refers to **how**, **when**, and **where** people will speak and act to proceed toward changed relationships or towards outcomes and solutions. A focus on this dimension leads to an emphasis on procedures and strategies – an emphasis on the best **ways, places and times** for people to act and talk about the issues and possible solutions.

- **People and their relationships**: The processes of conflicting and resolving conflict always involve people in relationships. Without relationships among people there would be no conflicts! The relational dimension emphasizes the **"who"** of the conflict and the **"why"** of the conflict (why people are asking for certain things or speaking or acting in certain ways). A focus on this dimension leads to an emphasis on people's tangible and intangible needs, obligations and entitlements, desires, concerns, fears, world views, cultural preferences, values and ethics.

At different times during the process of negotiation or conflict resolution, different dimensions may need more attention. However, the people, the process and the issues cannot be neatly separated. You cannot attend to the people and their relationships without attending to the process and the substantive issues (and *vice versa*). It may be important to avoid squeezing people and complex relationships into rigidly defined processes which may not suit them or the issues they wish to address. It is important to be flexible in the choice of a process. It may sometimes be useful to create specially designed processes that suit the people, their relationships and the issues.

QUESTIONS FOR REFLECTION OR DISCUSSION

With reference to a given case in your law practice, consider the **people**, the **issues** and the available **processes**. (Or choose an example of well known cases or something that is in the news.)

- What processes are available to help with the case? Consider consensual, adjudicative or legislative (rule-making) approaches.
- What are the strengths and weaknesses of each option? Consider the people, the process and the issues. In this case, what is most important to each party, the outcome or the relationship, or both? What kind of a process might help the parties move towards the best outcomes or the most satisfactory relationships?
- What barriers are there to managing or resolving disputes of this kind? How could you address these barriers?
- What people and resources are available to help decide on a process that will be most likely to help?
- If there are limited resources, what ideas do you have for organizing or expanding resources or making them better available to the parties?

2.3 Framing the Negotiation

An important part of preparation for negotiation is framing the problem.[8] The ways negotiators frame problems determine their overall negotiation goals and strategies. Each party may have a different way of framing the situation.

2.3.1 What is "framing"?

What do we mean by "framing"? Think of your camera. When you point your camera to take a picture, you can choose several ways to frame your photograph. You can focus on a person, an object, or the background landscape. Your choice depends on what you believe is important in that situation.

Another way to think about "framing" is to think about the frame of a structure. The frame controls the shape and size of the structure and what we can put into or onto the structure. In negotiation, there are several types of frames to consider when thinking about the people involved, the issues to be negotiated, or the possible strategies for negotiation.

[8] Please read Lewicki, Roy J., et al. *Essentials of Negotiation*. Homewood, IL: Richard D. Irwin, 1996, 30-42.

2.3.2 Power, Rights, Interests, Needs or Values?

One possible "frame" for negotiation focuses on the **basis** on which decisions are made:

- **Power:** Decision making or conflict resolution methods that are authoritarian or competitive are based on power. The most powerful person or group imposes its will. Many managers of organizations use power-based approaches to make decisions or manage the organization.

- **Rights or entitlements:** Decision making or conflict resolution may also be based on duties, rights or entitlements. "Rights-based" decision making or conflict resolution may be based on people's entitlements under a collective agreement or a law, or cultural norms. This type of decision making may also focus on the duties each person has according to laws or rules.

- **Needs and interests:** Decision making or conflict resolution may also be based on trying to satisfy the needs, desires, fears, concerns or other motivations of people involved. Methods of decision-making or conflict resolution that are based on needs and interests may be characterized by attempts at joint "problem-solving" or developing "win-win" solutions.

- **Relationships:** Decision or conflict resolution may also be based on attempts to create, improve or restore relationships. The emphasis is on building a network of good relationships as the foundation for decision-making, agreements or conflict resolution. This approach emphasises *relationships as important in themselves*, instead of thinking about relationships as a means to satisfy the goals of the parties. Relational approaches may focus on helping people to understand and to express their own or other peoples' needs and values. "Values" refers to what people consider valuable, and the term is often used to refer to ethical values or cultural values.

Good decision making processes encourage *mindful* consideration of power, entitlements, needs, interests, culture and values, all in the context of fair and equitable relationships. Research has shown that agreements or decisions are more likely to be long-lasting if the people affected have been involved in making them. This means that negotiated decisions that satisfy the needs and interests of the parties – or others who are affected – are more likely to be stable and long lasting.

2.3.3 How to we see the resources? Divide the pie? Or create a bigger pie?

Negotiators may have habits or preferences as to how they view resources. The ways negotiators perceive the available resources may lead them to choose "distributive" or "integrative" approaches to conflict resolution or decision-making.

- **"Distributive"** approaches: Problems are seen as "zero sum."[9] Resources are imagined as fixed. Parties "divide the pie." Distributive approaches in negotiation include "value claiming," haggling, or "splitting the difference." Solutions are seen in terms of one party getting more of the fixed resource, and the other less. This approach is usually competitive but can also involve compromises.

- **"Integrative"** approaches: Problems are seen as having more potential solutions than are immediately obvious. Resources are seen as expandable. The goal is to "expand the pie" before dividing it. Parties cooperate to try to create more potential solutions and processes ("value creating"). Parties attempt to accommodate as many interests of each of the parties as possible. This is the so-called "win-win" or "all gain" approach. Mary Parker-Follett told this story to illustrate integrative negotiation:

> In the Harvard Library one day, in one of the smaller rooms, someone wanted the window open. I wanted it shut. We opened the window in the next room, where no one was sitting. This was not a compromise because there was no curtailing of desire; we both got what we really wanted. For I did not want a closed room, I simply did not want the north wind to blow directly on me; likewise the other occupant did not want that particular window open, he merely wanted more air in the room….[10]

In reality, most negotiations have *both* integrative *and* distributive dimensions. In negotiations, there are usually opportunities to create value *and* claim value. It is often possible to *increase* the size of the pie *before dividing* it.

QUESTIONS FOR REFLECTION OR DISCUSSION

Consider a particular case (or a news story).

- How do the parties perceive **the problem** to be resolved?
  - Are the people thinking about the resources in distributive or integrative ways?
  - What seemed to be most important to people in the group: power, rights, interests or relationships?
- What process or processes have the parties used to try to address the situation? Evaluate these processes and consider the outcomes (or likely outcomes) of these processes.

[9] "Zero-sum" describes a situation in which one participant's gain or loss is balanced by losses or gains of other participants. If one person gets a chicken and another person gets no chicken... the sum is 1-1=0. Or if the are 8 pieces of cake and one person gets 7 and the other person, the sum is 8-(7+1)=0.

[10] Follett, Mary Parker, "Constructive Conflict," Paper presented at Bureau of Personnel Administration conference, January 1925..

Further optional reading:

Ury, William L., Jeanne M. Brett, and Stephen B. Goldberg. "Three Approaches to Resolving Disputes: Interests, Rights and Power." In *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, edited by Jeanne M. Brett William L. Ury, and Stephen B. Goldberg, 3-19. San Francisco: Jossey-Bass Publishers, 1988.

2.4 Does the situation involve a conflict? What is conflict?

Conflict is universally experienced by human beings in every culture and every context where people interact. We know that conflict is often damaging, destructive or even dangerous. Conflict can also be productive and may lead to positive change if it is approached constructively.

What is "conflict"?

- **Conflict:** The English language term "conflict" has been defined as "intense interpersonal and/or intrapersonal dissonance (tension or antagonism) between two or more parties based on incompatible goals, needs, desires, values, beliefs, and/or attitudes."[11]

- **Dispute:** Some people distinguish between "conflicts" and "disputes," saying that a conflict becomes a "dispute" when it becomes manifest and "particularized over a particular issue or set of issues."[12] Some say " . . . a dispute exists when a claim based on a grievance is rejected either in whole or in part."[13]

2.5 Sources of potential conflict in negotiation situations[14]

When preparing to negotiate a contract or when assessing a dispute, it is important to consider existing or potential sources of conflict. In an existing conflict, the best resolution will try to address as many sources of the conflict as possible. In a contract negotiation, it is important to understand any potential sources of future conflict so that the contract can prevent disputes or incorporate dispute resolution mechanisms that will address anticipated sources of future conflict. Christopher Moore has divided sources of conflict into five broad categories, including data,

[11] Ting-Toomey, Stella. "Toward a Theory of Conflict and Culture." In *Communication, Culture and Organizational Processes*, ed. W. Gudykunst, L. Stewart, and S. Ting-Toomey.Thousand Oaks, CA: Sage, 1985, 72.
[12] LeBaron Duryea, Michelle. *Conflict and Culture: A Literature Review and Bibliography*. Victoria, BC: UVic Institute for Dispute Resolution, 1992, 5.
[13] Miller, Richard E., and Austin Sarat. "Grievances, Claims and Disputes: Assessing the Adversary Culture." *Law & Society Review* 15, no. 3-4 (1980-81): 525-65, 527.
[14] This section is drawn and adapted from Moore, Christopher. *The Mediation Process: Practical Strategies for Resolving Conflict*. 2nd ed. San Francisco, CA: Jossey-Bass Publishers, 1996, 60-61.

interests, social or institutional structures, relationships and values. Some examples of each are as follows:

- **Data (conflicts about information, facts)**
  - lack of information
  - miscommunication
  - misunderstanding
  - confusion about authority, responsibilities or boundaries
  - differing methods of assessing or evaluating or interpreting information
  - differing perceptions
- **Interests**
  - perceived or actual competition over limited resources or other substantive issues
  - perceived or actual competition concerning procedures
  - perceived or actual competition over emotional needs (affection, respect, dignity)
- **Values**
  - differing world views, beliefs, or philosophies
  - differing values, including moral values
  - differing goals, expectations or assumptions
  - different criteria for evaluating ideas or behaviour
  - differing group or personal history, culture and traditions, or upbringing
- **Relationships**
  - differing personalities
  - repetitive negative or disrespectful behaviour by one or more parties or groups
  - differing behaviour (routines, procedures, methods, styles)
  - misperceptions, stereotypes
  - miscommunication or poor communication (poor listening or unwise speech)
  - poor historical inter-group relationships
- **Structural factors**
  - perceived or actual competition over power or authority
  - perceived or actual inequality or unfairness concerning power, authority, control, ownership or distribution of resources or procedures
  - destructive patterns of interaction
  - problems created by external factors such as time, geography, or physical settings

2.6 The emergence of conflict

In some situations, there may be sources of potential conflict, but no manifest conflict seems to emerge. Sometimes the sources of conflict create tensions, but no conflict is obvious. Some conflicts can simmer quietly for a long time before coming out into the open. Here are some terms that describe conflicts as they may emerge.

- **Latent conflict** describes a situation in which there is potential for conflict but no obvious conflict is apparent.[15] Sources of conflict are present. One or more of the parties may not even be aware there is a conflict. There may be latent conflict in situations where particular facts, laws or circumstances might have potentially bad consequences for one or more parties in – or those affected by – a negotiation or contract. For example, there is a latent conflict waiting to emerge if one party to an international construction negotiation is thinking in metric and the other is thinking in imperial measurements, or if one party is thinking in US dollars and other in Canadian dollars, or if one party has assumed the other knows about certain kinds of taxes. Another example of latent conflict is a situation in which a potentially unpopular idea, decision or policy has not yet been announced. An example of a latent *structural* conflict is a situation of inequity in an organization or a society in which poorer or less powerful people accept bad treatment or injustice for a long time without complaining.

- **Emerging conflict** refers to a situation in which some of the parties and issues are identified, and it is acknowledged by some parties that conflict exists. There may be some apparent tension, but active disputing, negotiation or problem-solving about the conflict has not yet taken place.[16]

- **Manifest conflict** refers to a situation in which parties have engaged with one another in a conflict, and may have reached a deadlock.[17] Latent conflict may underlie a manifest conflict even though the latent conflict may itself remain hidden. For example, an argument that breaks out between neighbours over boundaries, noise or nuisances may be caused in large part by high level conflicts over laws, regulations or policies about allocation of resources, land use or environmental issues. The people in the neighbourhood may not be thinking about the policies or how the implementation of laws or policies (or lack of implementation) may be affecting their situation.

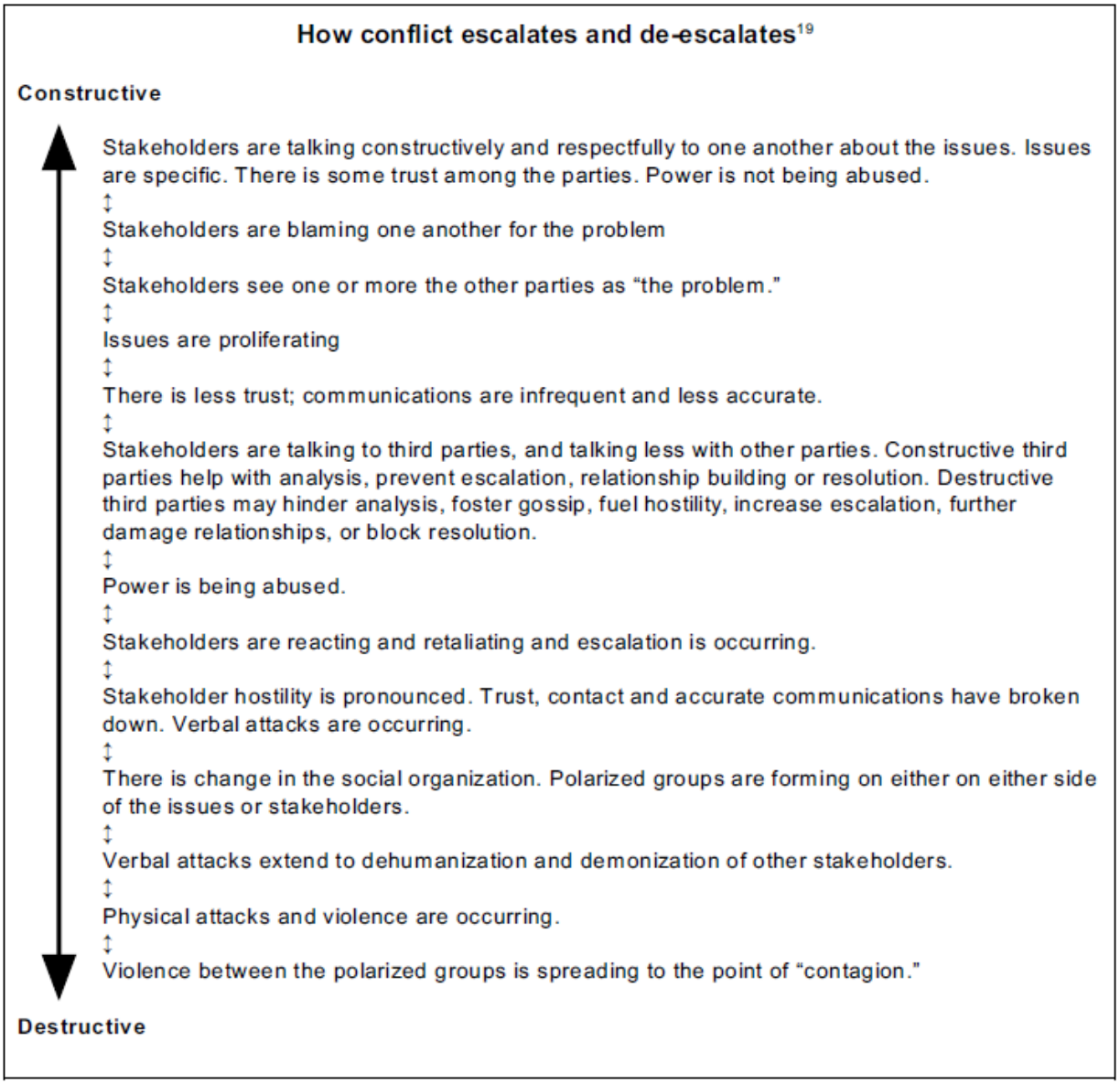
[15] *Ibid.*, 16.
[16] *Ibid.*, 17.
[17] *Ibid.*, 17.

2.7 Dynamics of conflict: How conflict escalates and de-escalates

To help determine the best process to address a conflict, it is important to consider the level of conflict escalation.[18] Unassisted negotiation may not be possible in conflicts that are highly escalated. Consider the diagram on the next page which shows the patterns by which conflict can escalate and de-escalate. You will note that the diagram refers to "stakeholders" who include all persons and groups with a stake in the issue. Please see the definitions of "stakeholders" and "parties" in Chapter 3. Consider a Canadian example. An applicant for a permit might go away feeling angry if a government official refuses to give information or service the applicant feels they need, or if the public official makes demands that seem unnecessary or unreasonable. The government official may believe "there's no conflict," and the issue may be poorly resolved. This may damage public trust in government officials. If this kind of hidden conflict become widespread, it can escalate and become manifest as a public dispute. Social conflicts can escalate to dangerous levels if there are no good processes for people to make complaints or to resolve problems fairly. In some cases, conflicts may simmer under the surface for a long time and may suddenly explode in a dangerous manner when triggered.[19] Fair, impartial and effective complaint processes may seem to increase conflict, but in the long run may foster better relationships and increased trust between authorities and citizens.

[18]Lederach, John Paul. "Understanding Conflict: Experience, Structure and Dynamics." In *Mediation and Facilitation Training Manual: Foundations and Skills for Constructive Conflict Transformation*, edited by Carolyn Schrock-Shenk, 70-73. Akron, PA: Mennonite Conciliation Service, 2000, 35.

[19] Examples of triggers for explosion of simmering public conflicts include elections, arrest or assassination of a key political leader, a sudden down-turn in the economy, a rapid increase in unemployment, a disaster or a food or fuel shortage. For more information on conflict analysis, see "Conflict analysis," Chapter 2 in AFPO et al, *Conflict-Sensitive Approaches to Development, Humanitarian Assistance and Peacebuilding: Resource Pack*. UK: AFPO et al, 2004, available at http://www.saferworld.org.uk/downloads/pubdocs/chapter_2__266.pdf.



[19] This section draws on Lederach, *ibid.*; Harris, Peter, and Ben Reilly. *Democracy and Deep-Rooted Conflict: Options for Negotiators*. Stockholm: IDEA, 1998; Kriesberg, Louis. "Timing and Initiation of De-Escalation Moves." *Negotiation Journal* 3 (4) (1989): 375-84; Sisk, Timothy D. *Power Sharing and International Mediation in Ethnic Conflicts, Perspectives Series*. Washington DC: USIP, 1996. Stein, Janice Gross, ed. *Getting to the Table: The Processes of International Prenegotiation*. Baltimore/London: Johns Hopkins University Press, 1989; Zartman, I. William. "Common Elements in the Analysis of a Negotiation Process." In *Negotiation Theory and Practice*, edited by J. W. Breslin and J.Z. Rubin. Cambridge, MASS: Program on Negotiation, Harvard Law School, 1991.

Questions for discussion

- Think of a case within your law practice that you might consider an actual or potential "conflict" or a "dispute." Is it a latent conflict, an emerging conflict, or a manifest conflict? Are all cases that come to the attention of lawyers "manifest?" Can you think of an example of an "emerging" or a "latent" conflict that might come to the attention of a lawyer?
- What are some possible sources of the conflicts you have identified? How do the discussions about sources of conflict compare with the way people in your community describe causes of their injuries, harms or conflicts? Discuss any differences you may notice between the ways lawyers and other people in the community describe the causes of their problems.
- How might you address each potential source of conflict to prevent conflict from emerging later or to resolve an existing conflict?
- At what stage (latent, emerging or manifest) might it be most productive to intervene? Would the type of intervention be different depending on whether the conflict is latent, emerging or manifest?

2.8 The presence of conflict: Good or bad?

While everybody experiences conflicts, the meaning people attach to the presence of conflict may vary depending on the cultural context. For example, some think conflict is quite normal and may say:

> "Conflict is natural in society, is probably desirable, and needs to be addressed if there is to be personal, social or institutional change."[21]

This statement is said to be typical of the attitude to conflict in North America where non-violent expression of conflict is considered legitimate and normal. There is a tendency to assume that the best way to address conflict is face-to-face in open, forthright discussions.[22] Habitual avoidance of conflict is seen as "running away from problems" or avoiding constructive change.

People outside North America and Europe know that not everybody in the world sees conflict this way. Some people and groups place high importance on social harmony. In such groups expression of conflict is not seen as normal or natural; rather social harmony is "normal." Some groups that

[21] See the critiques of this statement by LeBaron Duryea, 1992, 5.

[22] See LeBaron's critique of this idea in LeBaron Duryea, Michelle. "The Quest for Qualifications: A Quick Trip without a Good Map." In *Qualifications for Dispute Resolution: Perspectives on the Debate*, edited by Catherine Morris and Andrew Pirie, 109-29. Victoria, B.C.: UVic Institute for Dispute Resolution, 1994, 119.

place high importance on harmony may see avoidance of conflict and accommodation of others as desirable ways of promoting and maintaining social harmony.[23] In such societies, positive conflict resolution styles may be more indirect, discreet, and face-preserving.[24]

For people from non-English speaking backgrounds, it may be difficult even to define the English language terms "conflict" and "dispute" in their own languages. The English language uses very general words ("conflict," "dispute") to refer to many different kinds and degrees of controversy. Other languages have many different words which precisely describe types and degrees of difference from a scholarly disagreement to a violent political upheaval.

Proverbs and metaphors for conflict have been found to be useful in helping people understand another culture's orientation toward conflict. For example, John Paul Lederach refers to a Central American metaphor for conflict: the Spanish word *enredo* means "entangled," as in a fishing net which is connected in a network of knots. The *enredo* metaphor illustrates several concepts related to conflict, including, for example, the connected nature of the family and the community where people see themselves as responsible to, and interdependent with, a network of family and community members. This differs from concepts of conflict in societies like North America, where people see themselves as more individually autonomous.[25]

Power is also important when we define conflicts or disputes. It is an exercise of power to define a situation as a "conflict" or a "dispute" and to have one's definition of the problem accepted. An individual or group with more power often determines whether an act or an issue will be considered "irrelevant" or "deviant behaviour" or whether it will be allowed to be labeled a legitimate "conflict" that is worthy of attention. For example, a government official may say "there's no conflict when we do things my way," or "they are just crazy." This response may ignore the fact that applicants for a permit may feel differently about not being listened to and being denied information or service to which they feel entitled. If the government official refuses to recognize that the applicants believe there is a "conflict," the issue may not be addressed. If the hidden, "unmanifest" conflict continues, it could one day escalate into a serious dispute.

[23] Ting-Toomey, Stella, and et al. "Ethnic Identity Salience and Conflict Styles in Four Ethnic Groups: African Americans, Asian Americans, European Americans, and Latino Americans." Paper presented at the Paper presented at the annual conference of the Speech Communication Association, New Orleans, LA, November 1994.

[24] LeBaron Duryea, Michelle, and Bruce Grundison. "Conflict and Culture: Research in Five Communities in Vancouver, British Columbia." Victoria, BC: UVic Institute for Dispute Resolution, 1993.

[25] Lederach, John Paul. "Of Nets, Nails and Problems: The Folk Language of Conflict Resolution in a Central American Setting." In *Conflict Resolution: Cross Cultural Perspectives*, edited by Kevin Avruch, Peter Black and Joseph Scimecca. Westport, Conn: Greenwood Press, 1991.

QUESTIONS FOR REFLECTION OR DISCUSSION

- **Some proverbs about conflicts and negotiations from around the world include:**
  - "A bad settlement is better than a good law suit." (Well known in Canada)
  - "A fair-minded person tries to see both sides of an argument." (Aesop)
  - "A fish in the hand is worth two in the sea." (Aesop)
  - "Pride comes before a fall." (Aesop)
  - "Same bed, different dreams." (Chinese proverb)

You can add some more proverbs here:

- **What advice do these proverbs from Southeast Asia suggest? Do you agree with this advice?**
  - "When the elephants fight, it is the ants that get trampled."
  - "Run away from a tiger and into a crocodile."
  - "At high tide the fish eat ants; at low tide the ants eat fish."
  - "Don't turn over the rubbish to look for a centipede."
  - "To get something, one must sacrifice something."
  - "Ride an elephant to catch a grasshopper."
  - "Cover one whole dead elephant with a lotus leaf."
  - "A cake can never be bigger than its pan."
  - "Don't let an angry man wash dishes; don't let hungry man guard rice."

- **What attitudes toward conflict are suggested by the following metaphors?**
  - "We are **'up against a wall'**"
  - "It's a **'dog fight'**"
  - "They are **'up to here'**" (pointing to the neck)
  - "They really **exploded.**"

- What proverbs or metaphors do you or your clients' use about your cases? How might these ways of speaking about the conflict illuminate how clients or lawyers perceive the conflict?

- Think about the ways people in your community talk about causes of injuries, harms or conflicts in everyday conversation. Do they talk about these harms or conflicts in the same ways lawyers do?

Suggestions for further reading:

Lewicki, Roy J., David M. Saunders, Bruce Barry, and John W. Minton. *Essentials of Negotiation*. Third Edition. New York: McGraw-Hill, 2001, pp. 1-41.

Engel, David M. "Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand." *Online Thailand Law Journal* 10 (2) (Fall 2007)

Kraybill, Ron. "Personal Conflict Style Inventory." In *Mediation and Facilitation Training Manual: Foundations and Skills for Constructive Conflict Transformation*, edited by Carolyn Schrock-Shenk, 64-67. Akron, Pa.: Mennonite Conciliation Service, 2000.

Lederach, John Paul. *Preparing for Peace: Conflict Transformation across Cultures*. Syracuse, NY: Syracuse University Press, 1995.

Macfarlane, Julie.*The New Lawyer How Settlement Is Transforming the Practice of Law.* Vancouver, UBC Press, 2008. (See Chapter 1 at http://www.ubcpress.ca/books/pdf/chapters/2007/newlawyer.pdf)

NOTES

3 BUILDING A FRAMEWORK FOR EFFECTIVE NEGOTIATION

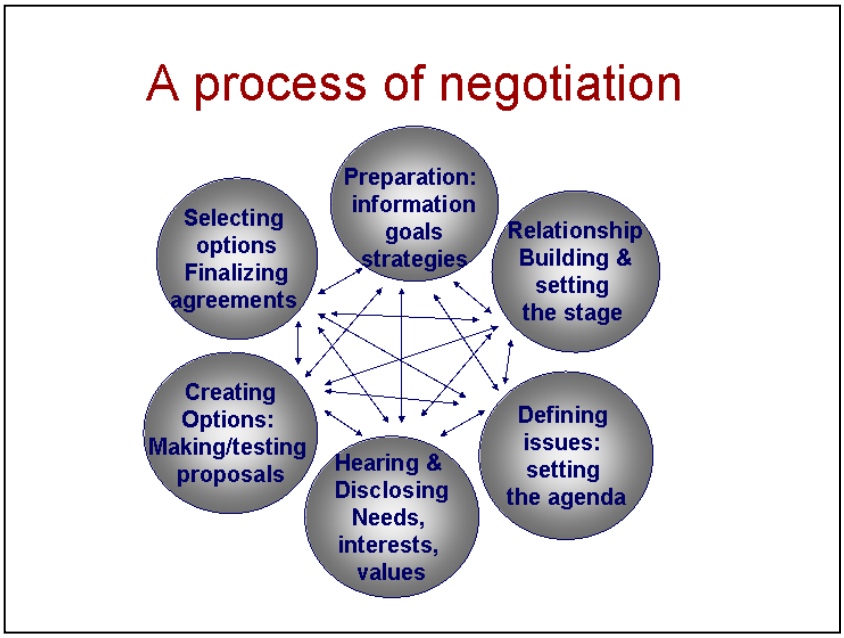
This chapter outlines a process of negotiation, and considers each stage of the negotiation.

3.1 The Process of Negotiation

Roy J. Lewicki[26] and others point out that negotiations tend to proceed through several phases, including:

- preparation (including defining issues);
- relationship building;
- information gathering (including hearing and disclosing needs and interests);
- using the information to formulate proposals;
- making proposals ("bidding");
- closing the deal;
- implementing the agreement.

These phases are incorporated in the following process framework.[27]



[26] Lewicki, Roy J., and et al. *Essentials of Negotiation*. Homewood, IL: Richard D. Irwin, 1996, p. 42.

[27] This process framework has been modified and adapted from a diagram by Darling, Craig, ed. *Working Together: Designing Shared Decision-Making Processes*. Edited by Craig Darling. 4 vols. Vol. 3, *Dispute Resolution Series*. Vancouver, BC: Continuing Legal Education Society of B.C. and Dispute Resolution Office, B.C. Ministry of Attorney General, 1998. In the development of these materials, I am also grateful to Sylvie Matteau and Gordon Sloan for ideas obtained from their training materials.

This process framework emphasizes preparation for negotiation, defining and framing issues, exploring interests and needs of parties, generating options, and jointly developing solutions. This process framework also emphasizes implementation and monitoring of negotiated agreements. This process framework emphasizes "interest-based" negotiation, explained later.

3.1.1 Preparation

Preparation

OBJECTIVE*: To prepare to represent your client's interests or your own interests and to be able to choose the best negotiation strategy and tactics.*

Thorough preparation is essential for effective negotiation. Consider using the planning chart on the next page to help you to organize your thoughts, or make your own checklist. Preparation takes place before meeting or calling the other party's lawyer.

- Interview your client and other appropriate persons to help you understand the relevant issues, interests and goals of everyone who is (or may be) affected. Make careful notes including the date, the time, who was present and what was said.
- Obtain, carefully review and organize all relevant documents and letters.
- Obtain and carefully review all relevant laws, international treaties and instruments, regulations, government policies, institutional rules, and business practices, so that you can propose fair standards by which to evaluate all proposals.
- Assess the situation. Ensure you have identified:
  - all the people or groups who are involved or affected ("stakeholders");
  - the issues (see "bargaining mix" later in this chapter);
  - all potential sources of conflict (see Chapter 2);
  - all existing areas of agreement and disagreement;
  - the degree of escalation of any existing conflict (see Chapter 2);
  - parties' and stakeholders' sources of power and the ways parties are using power (see Chapter 4);
  - likely strategies of parties and other stakeholders (see Chapter 2);
  - the needs and interests of your client and the other parties and stakeholders (discussed later in this chapter).
- Consider political and cultural factors (see Chapter 4).
- Identify the potential *bargaining mix*, *bargaining range* and *bargaining limits*. Guess at the other parties' possible issues and limits. Consider what the *"best alternative to a negotiated agreement" (BATNA) or "walk-away alternative"* might be. Can your client's BATNA be improved? (all discussed later in this chapter).
- Consider all risk factors. Is the issue negotiable? (See Chapter 5).
- Consider whether a meeting might be desirable. This could be a meeting with a relevant government official, or a meeting with the other party's lawyer, or it may be a meeting of the lawyers and their clients. Is there a need an impartial facilitator or mediator?

Negotiation Planning Chart

This chart can be used as a tool to assist you to prepare for negotiation. Make a list of points under each heading. You will probably need more space to write everything.

IMPORTANT FACTS	**ISSUES** (Bargaining mix)	**PARTIES AND OTHER STAKEHOLDERS**
PARTIES' POSITIONS	**PARTIES' INTERESTS:** (Needs, concerns, fears, goals, feelings of entitlement, moral or ideological values)	**LAWS, TREATIES, POLICIES, CUSTOMS, PRACTICES** (to help develop fair standards for evaluating proposals)
PARTIES' POSSIBLE STRATEGIES	**EACH PARTY'S BATNA ("walk-away" alternative)**	**POSSIBLE SOLUTIONS**

3.1.2 Relationship building and setting the stage for a meeting

Set the stage for negotiation

Objective: *To establish a climate of respectful and collaborative communication, and to convene a process in which parties can work together to work toward an agreement that will be satisfactory for all concerned.*

Set the stage for an effective negotiation meeting. In this stage, the first contact with the other party's lawyer is often by telephone, but sometime this happens during a meeting. It depends on circumstances.

- Mutually agree on a location for a meeting that suits everyone.
- Set a positive tone (introductions, speaking in language and tone conducive to resolving problems).
- Mutually agree on the process (negotiation, facilitated planning meeting, mediation, etc).
- Establish the time each party has available for the meeting.
- Establish guidelines or ground rules for discussion.
- Agree on the general purpose of the process as a whole and the meeting specifically.

3.1.3 Framing the issues and developing the "bargaining mix"

Jointly create the agenda:
Frame the issues in an impartial and inclusive way

Objective: *To provide a productive framework for discussion that includes all the parties; to frame the issues as a challenge to be addressed by all parties together and resolved to the satisfaction of each party.*

Together, identify all the issues. The combined list of all the issues of all the parties is sometimes called the "bargaining mix." Lewicki et al suggest that negotiators identify a complete list of issues in order to create the best solutions.[28] Some of this work might be done on the telephone before the meeting. If a matter is complex, more than one meeting may be needed just to agree on the list of issues to be discussed. Sometimes this phase of a negotiation can be contentious.

- Give all parties uninterrupted time to outline the issues briefly or give their perspectives.
- Agree on an agenda of the issues to be discussed.
- Discuss and agree on what if any outside information sources are needed.
- Find out all relevant information.
- Clarify one another's understanding of the issues.
- Frame the issues in ways that are acceptable to both parties.

[28] Lewicki, Roy J., and et al. *Essentials of Negotiation*. Homewood, IL: Richard D. Irwin, 1996, 45.

3.1.4 Hear and disclose what is important to each party

Learn about the parties' needs, interests and moral values:

Objective: *To focus the discussion on needs, interests and other motivations rather than on the parties' positions and demands.*

- Listen carefully to the needs and interests of the other parties. Listen positively and ask questions that will elicit information, build the relationship, and preserve face.
- Disclose your client's needs and interests (be cautious about disclosing interests when trust is a problem).

3.1.5 Generate Options

Generate many options

Objective: *Brainstorm to come up with many possible solutions.*

- Together, develop a variety of possible solutions that meet everyone's needs as far as possible.
- Use brainstorming as a technique.
- Together, generate and determine fair standards (called "objective criteria" by Fisher and Ury) for evaluating proposals.
- Consider each proposal in the light of all parties' needs and interests, and the fair standards to which you have agreed.

3.1.6 Create an integrative solution which addresses all parties' needs and interests

Create a durable, long-lasting solution:
Ensure that the solution can be implemented!

Objective: *to create an equitable, effective, wise and durable solution that takes into account needs, interests and concerns of everyone involved or affected.*

- Select the best solution, ensuring that it can be implemented. The best solution integrates the needs and interests of all parties and others who may be affected.
- Discuss and negotiate implementation methods and timing in detail. Ask "who will do what?" "How . . . ," "When . . . " Where . . . " Test implementation plans. Ask "what if ..." Develop contingency plans and agreements.
- Develop a monitoring plan, for use during and after implementation. Include time lines, monitoring or evaluation processes
- Encourage the parties to develop internal conflict resolution systems and feedback mechanisms for early intervention into problems that may emerge during implementation.
- Formalize agreements in writing, or if it is premature to draft a formal agreement, draft a joint statement of intent.

- Consider a culturally appropriate closing ritual: Take leadership in appropriate expressions of appreciation or congratulation. Consider whether a celebratory event would be appropriate in the circumstances, such as a signing event, luncheon, reception or other ritual.

Further reading:

Lewicki, Roy J., David M. Saunders, Bruce Barry, and John W. Minton. *Essentials of Negotiation*. Third Edition. New York: McGraw-Hill, 2001, pp. 42-58.

Shell, Richard G. *Bargaining for Advantage: Negotiation Strategies for Reasonable People*. London: Penguin Books, 1999.

3.2 Preparing to negotiate

3.2.1 Identify parties and "stakeholders"

In any negotiation, it is useful to consider who will be involved in decision making (the parties). It is also important to understand that people other than the immediate parties may have a significant influence on the negotiation or the implementation of any agreement. Therefore, when preparing to negotiation, consider the parties as well as other "stakeholders."

- **Parties:** Those who are directly and "officially" involved in the negotiation.
- **Stakeholders:** Those who have a "stake" in the negotiation which means that they will be affected by the process or outcome of a negotiation.

Stakeholders may be divided into several groups:
- those who have authority to make decisions ("parties");
- those who have the power to affect parties' decisions;
- those who can make claims for rights that may be affected by decisions;
- those who have power to block or delay the implementation of decisions;
- those with enough political or legal authority power to draw parties into a dispute;
- those whose moral claims can generate sympathy from others, including public sympathy;
- those affected directly or indirectly by decisions-making or implementation including vulnerable people or people with little or no power or voice (including children).

Questions for reflection or discussion:

In a negotiation, it is important to consider the needs and the power of parties *and* stakeholders.

- Think of an example of a negotiation. One simple example might be the purchase and sale of a new computer for your home office, or a contract with someone for a short term contract.
- Who are the parties?
- Who are the other stakeholders?
- Why is it important to consider stakeholders in a negotiation?
- What about illegitimate stakeholders such as corrupt officials to whom one may be asked or expected to pay special fees? Should these stakeholders be considered? Why or why not?

3.2.2 What negotiation strategy might you choose?

Most negotiation and conflict resolution education in North America proposes five common approaches to negotiation and conflict. Each reflects a different intention or goal. Skilled negotiators make **mindful choices** about which one is best for each situation.

- **Competing, forcing or compelling:** People are more likely to compete when they have relatively high concern for their goals and low concern for relationships. Highly competitive persons may make a habit of using their power to pursue their goals, including power at the expense of others. People may compete when it is important to stand up for principles or rights. A competitive strategy emphasises *distributive* aspects of negotiation. (See "hard bargaining" later in this text.)

- **Avoiding or withdrawing**: Avoidance includes postponing, sidestepping, or withdrawing from direct negotiations. In a North American context, avoidance has been described as "unassertive and uncooperative."[29] It is seen as demonstrating low concern for relationships and low concern for goals. However, many societies or groups with collectivist values, including many Asian and Latin American groups, believe that avoidance and accommodation are helpful for *maintaining* relationships. Avoidance and accommodation may be face-preserving for oneself and other people. Avoidance may even be *relational* in orientation. However, avoidance may *ignore integrative possibilities* in the situation. Avoiding or withdrawing may have a *distributive* or a *competitive* orientation if the withdrawing party has the power to remove resources or consent.

- **Accommodating or smoothing:** A strategy of accommodation may be adopted where there is higher concern for relationships and lower concern for goals. The result is often an agreement that suits the other person at the expense of an individual's own interests. Accommodating behaviour includes obeying orders, yielding points of view, or giving in to others' wishes. In Western societies, a habit of accommodating is often seen as timid or weak, but it may not be

[29] Thomas, Kenneth W., and Kilmannm Ralph H. "Thomas-Kilmann Conflict Mode Instrument." Woods Road, Tuxedo, NY 10987: XICOM, Incorporated, 1974.

seen in these negative ways by persons or cultural groups that prize harmonious relationships and respect for elders and those in authority.[30] This approach is *relational* in orientation, and *may sidestep distributive or integrative possibilities* in the situation by deferring to the other person. (See also "soft bargaining" later in this text.)

- **Compromising:** Compromising is typified by midrange concern for both goals and relationships. It is marked by seeking middle ground or "splitting the difference." Compromising may be unwise or impossible in the case of conflicts involving world views or moral values. While compromising tries to pay attention to relationships, this approach is primarily *distributive* in orientation. Note that the English word "compromise" often refers to any kind of settlement, however, here, we use the term "compromise" in a narrower way to refer to giving up some things in hope of a settlement. It is different from "collaboration," defined next.

- **Collaborating, integrating, or problem solving:** Collaborating, sometimes referred to as *integrating* or problem-solving, is said to indicate high concern for relationships *and* high concern for goals. It is both assertive and cooperative in that it seeks to address the interests of all those affected. This approach is emphasized in interest-based negotiation and mediation. It considers both *integrative and distributive* aspects of negotiation. It is different from "compromising" in that collaboration seeks an outcome that avoids compromises (giving up things) as much as possible. While the collaborative approach places a high priority on relationships, its primary focus is on settlements and outcomes. It is different from "reconciliation" which seeks to restore relationships without necessarily seeking agreements.

To these five strategies, one American author, Speed Leas, adds two other potential approaches to conflict:

- **Persuasion**: Persuasion "attempts to change another's point of view, way of thinking, feelings or ideas" using arguments. Persuasion may sometimes be competitive. One form of competitive persuasion is "grinding," by which one party nags or manipulates until the other gives in, becomes stubborn or leaves.[31]

- **Supporting:** Supporting includes giving a person opportunities to talk, express anger or upset, and help make decisions about what to do.[32] Supporters may not negotiate; they may use support as a way to avoid negotiating or intervening to change the status quo.

[30] Ting-Toomey, Stella, and et al. "Ethnic Identity Salience and Conflict Styles in Four Ethnic Groups: African Americans, Asian Americans, European Americans, and Latino Americans." Paper presented at the Paper presented at the annual conference of the Speech Communication Association, New Orleans, LA, November 1994.
[31] Leas, Speed B. "Choosing a Conflict Management Strategy." In *Discover Your Conflict Management Style*, edited by Speed B. Leas, 8-23. New York: The Alban Institute, 1984, 8.
[32] *Ibid.*, 21-22.

Strengths and Weakness of Each Negotiation Strategy: When Should Each Be Used?

- Think of a specific negotiation or conflict case situation. Consider the various conflict strategies below. Consider strengths and weakness of each strategy in this situation.
- Do this exercise again, this time thinking of a different kind of situation or conflict.
- Does your habitual strategy differ in different situations? Does your habitual strategy differ when you have more or less *power or status* in the relationship? Does your strategy differ when the situation involves a family member, a friend, or a stranger? Does your usual strategy work well for you in all situations? What changes might you wish to consider?
- The chart below is available for you to use to make notes.

Strategy (or INTENTION)	STRENGTHS OF THIS APPROACH	WEAKNESSES OF THIS APPROACH
to *avoid* (sidestep or withdraw)		
to *compete* (try to win)		
to *accommodate* (give in)		
to *compromise* ("give and take")		
to *collaborate* (cooperate to meet all needs)		
to *persuade* (argue to change the other's views)		
to *support* (or to seek confidential support or advice)		

3.3 Your choice of strategy depends on your goals for negotiation

Some theorists say that the first stage of a negotiation is to define the issues. However, if we think about it carefully, definition of issues takes place after the parties have developed their vision of a desired future. This occurs before any negotiations take place. For example, think of a law student who finds herself or himself spending time on weekends at car lots admiring new cars and thinking about buying one. The student is probably imagining more than just a buying a car! They may be imagining a different and better future. Perhaps the student is finding it difficult to get around town or out of town because they do not have easy or reliable transportation. An example of a desired future might be "I'd like to be able to go to places where there is no nearby sky train or subway station without relying on taxis, tuktuks or motos." It is this vision of the future that motivates a person to say "I'd like to buy a car."[33] This vision may lead the student to consider negotiating with someone.

3.3.1 What are your definitions of "success" in negotiation?

People negotiate to accomplish their visions for a better future. Different negotiators may have differing definitions of "success" of a negotiation. It depends on the negotiator's goals in a particular case. Depending on the situation, "success" might mean:

- an agreement that is stable and long-lasting, or
- winning, or
- causing another party to stop pressing their demands, claims or grievances, or
- parties going separate ways, or
- an imposed solution, or
- temporary settlement or "ceasefire," or
- a final settlement of disputed issues, or
- making things right through restitution or reparations, or
- permanent reconciliation, or
- building or improving a relationship within which many things may be negotiated over time.

Negotiators might seek one or more of these goals. Definitions of "success" of negotiation or dispute resolution vary with the overall goals of the parties, their lawyers, and their communities and their organizations. The parties' goals are very important in determining their bargaining strategies (e.g. competing, accommodating, compromising or collaborating).

Some suggested criteria for evaluating the success of a negotiation are suggested in the next section.

[33] In fact, the idea of buying a car is only one possible solution to the student's transportation problem. See "positions", section 3.7.1.

3.3.2 The quality of negotiated *outcomes*[34]

The **quality of a negotiated agreement (or other outcome)** may be judged by its:

- **durability**: It is important to address and resolve all aspects of a dispute or problem in ways that are as complete and durable as possible. It is important to avoid making an agreement that contains sources of future conflict. Sometimes it is better not to make an agreement if it is likely to be less durable than another option that is available without negotiation.

- **effectiveness:** An agreement is not much good if it cannot be implemented! It must be sufficiently detailed and take into account all physical, relational, legal, time, geographical or other constraints. If your agreement falls apart during implementation, it is neither effective nor durable.

- **wisdom:** A wise agreement utilizes the *best possible* options for solution. Wise agreements are more likely to be reached through a process of collaborative exchange of knowledge and expertise of all the participants, rather than through competitive hiding of information by one or both parties. A wise agreement considers all available information about things that could affect the situation in the short and long term. Wise agreements that build on good knowledge and everyone's interests are more likely to be durable and effective.

- **fairness:** A fair agreement provides each participant with a sense of fairness. *Legal* norms may be considered the standard of fairness in some negotiations. However, sometimes the legal norms may be seen as unfair! For example, in Canada, critics have pointed out gender inequities in the application of legal norms in divorce settlements and personal injury settlements and other areas of law. Therefore, in some negotiations, fairness may be measured by *social* or *ethical* norms, the normal practices of the particular group of society in which the negotiation arises, or in some cases the norms of the parties. An agreement that is later seen as unfair is less likely to be wise, effective or durable.

3.3.3 The quality of the negotiation *process*

Sometimes all the qualities of a satisfactory ***outcome*** may be present, but it may not be perceived as satisfactory to one or more of the parties if the ***process*** of arriving at the result has not been satisfactory. Therefore, it is important to set up a **process** of negotiation that will be **satisfactory for all parties**. Criteria for a satisfactory process could include:

- **Fairness:** In a fair process, each person has the feeling of having been able to explain everything he or she considers important, and the feeling of having been listened to.

- **Transparency:** In a *transparent* process, the "rules of the game" are clear and acceptable, and consideration is given to all the concerns of everyone affected by the outcome.

- **Efficiency:** An *efficient* process seeks to minimize costs in terms of time, money, emotions,

[34] This section owes much to the French language training materials developed by Canadian educator, Sylvie Matteau, 2001.

productivity, working atmosphere, and working relationships.

- **Respect:** In a *respectful* process each participant has the sense of being at ease and has all concerns recognized, and that differences are explored fully but without personal attacks.

Consider the relationship between the *quality of the process* and the *quality of the outcome*. **Dissatisfaction with the process** can result in **dissatisfaction with the outcome.** "**Dissatisfaction with outcomes** may produce **strain on the relationship**, which contributes to the **recurrence** of disputes, which in turn **increases transaction costs**.[35]

Finally, a good negotiator keeps in mind his or her **long-term purposes and goals** (or those of his or her client).

QUESTIONS FOR REFLECTION OR DISCUSSION

- Think of a particular case. What would be your idea of a "successful" negotiation or conflict resolution? Be as specific as possible. Use the quality criteria above to assess your ideas of success in this case.
- Now consider your client's vision of "success." Are your goals and ideas about "success" the same as your client's goals and ideas?
- How might you find out your client's goals? If your goals differ from the goals of your client, how might this affect the way you conduct the negotiation?
- The material above distinguishes between outcomes and processes – between ends and means. Some people say that there are no "ends," there are only "means." What is your opinion? How might the tensions between "means" and "ends" affect the way you practice law?

3.3.4 Tensions in negotiation

Mnookin, Peppet, and Tulumello[36] point out some tensions in negotiations:

- **the tension between cooperation and competition:** How much effort should be given to "creating value" (making the pie bigger) and how much effort in "distributing value" (dividing the pie.) How can negotiators balance the tension between wanting to build the maximum resources to share, and wanting to get the biggest possible share of those resources?

- **the tension between relational goals and outcome goals:** Related to the above tension is the tension between empathy toward the other negotiator and your wish to assert your own interests. How should negotiators balance their own self-interest with the other negotiator's interests? This chapter considers the above two related tensions.

[35] Ury, William L., Jeanne M. Brett, and Stephen B. Goldberg. *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*. San Francisco: Jossey-Bass Publishers, 1988.
[36] Mnookin, Robert H., Scott R. Peppet, and Andrew S. Tulumello. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge, MA: Belknap Press, 2000.

- **the tension between principals and their representatives:** This second tension is particularly important for lawyers, but it also affects commercial representatives and diplomats. This third tension is discussed in Chapter 5 of this manual.

Many important strategic and ethical issues are related to these tensions. For example, how much how much should you *trust* the other negotiator or his or her representative? What should you reveal? How much of the truth should you tell? Who should make the first offer? How should you treat the other negotiator or his or her representative? Should you be conciliatory and soft, or tough and threatening? How much reciprocity is appropriate in terms of revealing of information and concessions? Can you represent your clients' interests effectively and still maintain collegial relationships with other members of the legal profession?

3.4 Three types of negotiation

The now classic *Getting To Yes: Negotiating Agreement Without Giving In*, by Roger Fisher and William Ury, identifies three different approaches or strategies for negotiation:

- **"Hard bargaining"** is a competitive, adversarial approach. The goal is to win (or to minimize loss). It is marked by distrust of the opponent, demands, firm stands or "positions," and contests of will. Hard bargainers may mislead others as to their "bottom line." They may apply pressure or threats. This approach is based on demonstrating who has the most power.

- **"Soft bargaining"** has agreement as its goal. It is marked by trust of the other, concession-making to build the relationship, easy change of positions, openness concerning "bottom line," and yielding to pressure. This approach is based largely on the goal of building or maintaining the relationship.

- **"Interest-based"** (or "integrative") negotiation is said to be "soft on the people, hard on the problem." The goal is an agreement which attempts to integrate the needs and interests of the negotiators. The hallmarks of interest-based negotiation are an integrative, problem-solving approach, a focus on interests instead of bargaining positions or "bottom lines," and use of objective criteria or standards to evaluate proposals. Negotiators are advised to be "totally trustworthy, but not totally trusting." This approach is based on the goal of maximizing mutual gain.

3.4.1 Effective and ineffective negotiation

The following is a list of some goals and characteristics of ineffective and effective problem-solving and adversarial lawyers based on research in the US.[37] This research found that problem-solving lawyers were more likely to be considered effective than adversarial lawyers. Nearly 60% of adversarial lawyers sampled were considered ineffective. As adversarial lawyers become "more irritating, more stubborn and more unethical, their effectiveness ratings drop." (p.196) By contrast, 75% of problem-solving lawyers were considered *effective*.

Ineffective Problem Solving Lawyers	Ineffective Adversarial Lawyers
Characteristics and tactics · Does not make derogatory personal references · Honesty · Adhered to legal courtesies · Courteous · Friendly · Does not use offensive tactics · Zealous representation within ethical bounds · Accurate representation of position · Does not use threats · Forthright · Interested in own client's needs · Inaccurate estimation of case · Narrow range · Sincere	**Characteristics and tactics** · Disinterested in needs of other lawyer's client · Extreme opening demand · Unrealistic opening position · Rigid · Fixed conception of the problem · Negotiation seen in terms of winning or losing · Narrow view of the problem · Narrow range of tactics · Unconcerned about how other lawyer looks · Arrogant · Fixed on a single solution · Inaccurate estimate of case · Unmoveable position · Uses "take it or leave it" tactic · Aggressive · Interested in own client's needs · Obstructive · Does not consider other lawyer's needs · Unreasonable · Uncooperative

[37] Summarized and adapted from Schneider, Andrea Kupfer. "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style." *Harvard Negotiation Law Review* 7 (2002):143-233.

Effective Problem-Solving Lawyers	Effective Adversarial Lawyers
Goals · Ethical conduct · Maximize settlement · Fair settlement · Meet both sides interests · Avoid litigation · Meet clients' needs · Good relationships with other lawyer · Use legal skills well	**Goals** · Maximize settlement · Meet clients needs · Outdo the other lawyer · Profitable fee · Exercise legal skills
Characteristics and tactics · Interested in own client's needs · Does not make derogatory personal references · Honesty · Courteous · Intelligent · Does not use offensive tactics · Pursued best interests of client · Zealous representation within ethical bounds · Friendly · Tactful · Reasonable · Adhered to legal courtesies · Prepared · Cooperative · Forthright · Sincere · Trustful · Facilitates · No unwarranted claims · Viewed negotiation as possibly having mutual benefits	**Characteristics and tactics** · Disinterested in needs of other lawyer's client · Interested in needs of own client · Arrogant · Aggressive · Pursued best interests of client · Intelligent · Active · Extreme opening demand · Zealous representation within ethical bounds

3.4.2 What is the goal of *this* negotiation?

One can see that there are differing opinions about what is "good" negotiation. Both aggressive and cooperative negotiators can be seen as "effective." There are also differences of opinion about whether the primary purpose of negotiation is to create value (using "win-win, integrative approaches) or to claim value ("win-lose" or distributive approaches).[38] However, rather than debating the "true essence" of negotiation in theory, it may make more sense to consider the goals and the resources of the particular parties in their particular situations. A good deal depends on the *overall goals* of the negotiators in a given case, their level of commitment to their goals and the range of resources available to the parties to achieve their goals. Good negotiators are aware of *the range of possible goals, examine the available resources imaginatively, consider the range of possible strategies they can use* and *make mindful choices* based on their knowledge, skills and their ethical foundations.

The next sections discuss several basic negotiation concepts, including aspiration levels, bargaining zone, reservation price, best alternative to a negotiated agreement (BATNA).

3.4.3 Bargaining goal and aspiration level

Negotiation is a process by which one tries to achieve a particular goal. Thus, negotiation is a means to an end. Some goals are more important to negotiators than others. If an important goal is a long-lasting working relationship, a negotiator may choose a more cooperative style of negotiation. However, if it is extremely important to achieve a particular outcome, and the relationship is not important, the negotiators may choose a more competitive style. The culture and ethics of negotiators' are also important factors in setting negotiation goals. For lawyers, both competitive styles and cooperative styles are governed by ethical standards.

Another important factor is a negotiator's level of commitment to her or his goals. If the negotiator's "aspiration level" is high, commitment increases. If the negotiator's aspiration level is lower, commitment is likely to be lower. It is important to understand one's level of commitment both to *relational* goals and *outcome* goals, including understanding the possible tensions between those goals. The goal and the aspiration level will also affect whether to negotiate at all. People are unlikely to negotiate if they do not perceive they will gain something by negotiating. This is why some say that negotiation is essentially a "value creating" process. People do not negotiate unless they perceive they can create something jointly through negotiation that they cannot have without the consent of the other party. These perceptions are important: It is important for negotiators to discern whether their perceptions, goals, aspirations, and commitments are legitimate and realistic.

[38] Mnookin, Robert H., Scott R. Peppet, and Andrew S. Tulumello. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge, MA: Belknap Press, 2000.

3.4.4 Some bargaining terms

The next section explains some negotiation terms you may hear or read about.

3.4.4.1 Bargaining mix: The issues to be negotiated

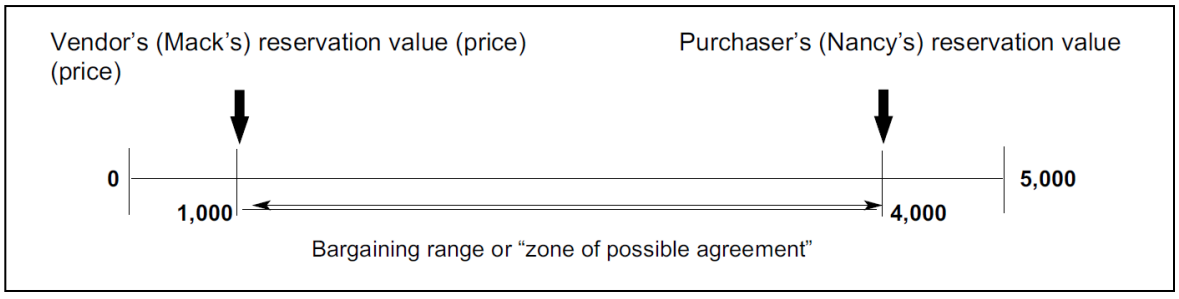
The "bargaining mix" refers to all the issues that all parties wish to address in their negotiation. For example, in a simple contract negotiation, the bargaining mix may include a number of issues, including the price, the quantity, the timing of delivery and payment, method of payment, and other issues. Each negotiation will have a different bargaining mix.

3.4.4.2 Bargaining range, bargaining limits and "walk-away alternatives"

The goals you can attain without negotiation are called "walk-away alternatives" (sometimes called "no agreement alternatives"). These are the *alternatives* a negotiator has if *no agreement* is reached in negotiation. The best of these alternatives is called the "best alternative to a negotiated agreement" (BATNA).[39] For example, if widgets in the market place are usually US$1.00, I should not negotiate a price that is more than US$1.00! Instead, I should "walk away" and take my "best alternative" which is to buy a similar widget for US$1.00 at the store down the street. If there is a glut of premises on the rental market, prospective tenants may have many walk-away alternatives, but one should always ensure to negotiate for something that is better than your BATNA. In employment situations, an employee's walk-away alternative in a salary negotiation may be to accept a better job offer from another employer. In labour negotiations, walk-away alternatives may include a strike or a lockout.

If a person does decide to come to the negotiation table, the range of outcomes (the "bargaining range") is limited by the negotiators' "walk-away alternatives." If a party has few alternatives he or she has less power in the negotiation. There are usually other limits, too, including *ethical* limits.

The "bargaining range," sometimes call the "zone of possible agreement" (ZOPA), includes everything between the bargaining limits of both parties. In a sales transaction, the bargaining limit of each party also may be called the "reservation price."



In the above diagram, let us say that the vendor's name is "Mack." Mack wishes to sell his car. Mack's bargaining goal is to sell a car for US$5000, however, Mack will sell for US$1000 if

[39] Fisher, Roger, William Ury, and William Patton. *Getting to Yes: Negotiating Agreement without Giving In*. 2nd ed. New York: Penguin, 1991, 97-106.

absolutely necessary. He will not sell for less than this because he would lose too much money. Thus, US$1000 is the Mack's "reservation value" or "reservation price." Mack is not likely to disclose this reservation price to prospective purchasers. Let us say that the purchaser's name is "Nancy." Nancy wishes to buy a car. She can afford to pay up to US$4000 for the right car. Thus, Nancy's "reservation price" is US$4000. Nancy is not likely to disclose this reservation price to Mack. In this case, there is quite a large "zone of possible agreement" (also called the "bargaining range") somewhere between US$1000 and US$4000. During the negotiation process, various events may happen that can change the bargaining range and the bargaining limits. For example, let us say that Nancy, the prospective purchaser, offers Mack, the vendor, $2000 for the car. Mack then receives an offer of $2500 from another prospective purchaser whose name is "Kim." This changes Mack's "walk-away alternative" (his BATNA) because he can now sell the car to Kim for more than US$2000. This changes the Mack's reservation price in the negotiation with Nancy to $2500 and thus shifts the bargaining range in the negotiation between Mack and Nancy.

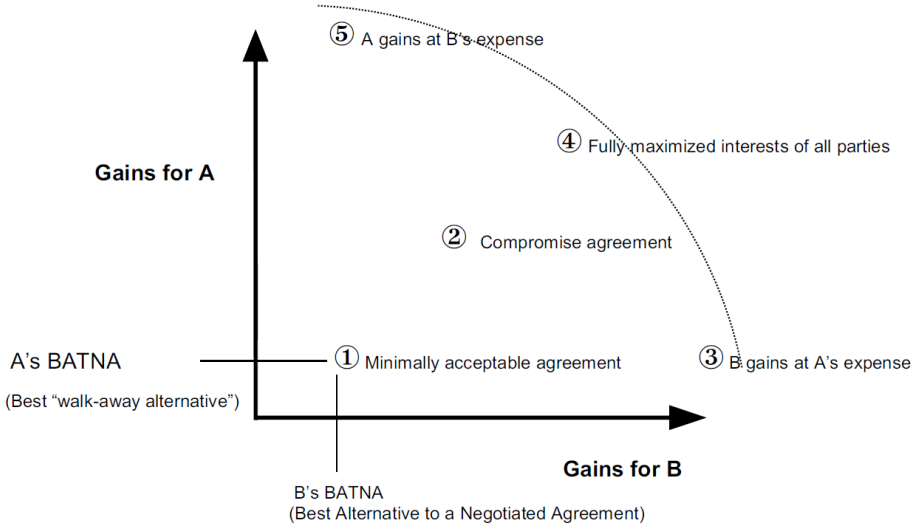
3.4.4.3 Escalation of commitment

Having a good walk-away alternative – the BATNA – can prevent a negotiator from becoming drawn into an escalation of commitment to the point of over-commitment. Sometimes one has spent a lot of time and effort in the negotiation, and this can result in being irrationally committed to a deal and end up paying much more than they should.

3.4.5 The possibilities frontier

Within the bargaining range there are various possible outcomes. Some possible outcomes may favour one party at the expense of the other. Other outcomes may be minimally acceptable or mediocre compromises for both parties. If parties are able to harmonize their interests effectively, they may create outcomes that maximize benefits for both – so-called "win-win" outcomes. But no matter how creative they are, at some point they may find they cannot improve the outcome for one party except at the expense of the other party. The place at which joint gains have been optimized is the place on the "possibilities frontier" of options where one cannot improve one's position further without making the other party worse off. This hypothetical frontier is also called the "Pareto frontier."[40]

[40] This principle is named for the Italian economist Vilfredo Pareto.



Further reading

Lewicki, Roy J., David M. Saunders, Bruce Barry, and John W. Minton. *Essentials of Negotiation*. Third Edition. New York: McGraw-Hill, 2001, Chapter 3.

3.5 Distributive Approaches to Negotiation

Distributive negotiation is also called competitive bargaining. This manual has its primary focus on integrative approaches to negotiation. For more information on distributive bargaining, please refer to Roy J. Lewicki, David M. Saunders, Bruce Barry, and John W. Minton. *Essentials of Negotiation*. Third Edition. New York: McGraw-Hill, 2001, Chapter 3. However, even if competitive negotiation is not one's preferred strategy, good negotiators must be prepared to negotiate with difficult or hard bargainers.

3.5.1 Negotiating with hard bargainers[41]

Sometimes negotiations become very difficult. What if the other party is a hard bargainer or is using "dirty tricks" in negotiation? The following strategies are suggested by Fisher and Ury:

- Use interest based negotiation: keep focused on interests, not positions.
- Learn negotiation "jujitsu."
- Try mediation or facilitation.

[41] This section draws on Chapter III of Roger Fisher, William Ury and Bruce Patton. *Getting to Yes: Negotiating Agreement without Giving In*. 2nd ed. New York: Penguin Books, 1991.

3.5.1.1 Negotiation "jujitsu"

Here are some principles of negotiation "jujitsu":

- **When attacked, do not counter-attack.** Avoid criticizing, rejecting, defending, or arguing. This is unlikely to help. Rather it is likely to escalate conflict.
- **Instead, sidestep (step aside) from the attack and refocus the attack on the problem you are trying to solve in the negotiation**. This means you redirect the attention and the energy into
  - exploring needs and interests,
  - inventing options for joint gain, and
  - searching for fair standards by which to evaluate all proposals and the process.

The following are suggestions as to how to engage in negotiation "jujitsu."

- **Do not argue with the other negotiator.** Do not attack the other negotiator or the other negotiator's demand, threat or position. Instead, look for the needs and interests that motivate the position, demand or threat:
  - e.g. If, a labour negotiation, the other negotiator threatens to fire the employees if they ask for better working conditions or not wanting to work more overtime, ask:
    - "What are the long term effects on the factory if you fire workers who ask for better ventilation and more toilets?" and
    - "What goals do you believe will be served by firing workers who ask for better ventilation and more toilets?"
- **Treat their demand or threat or hard position *as just one of several possible options.***
  - E.g. try saying, "firing workers who complain they do not have enough ventilation or toilets is one option. I wonder if there might be some other options that might accomplish your goals.
- **Treat every threat or demand or hard position as another "proposal option," one of many that could be considered! Test the proposal against parties' interests.**
  - e.g. "We've both agreed that profitability, safety and fairness are important. How is does your proposal for firing this group of employees meet each of these interests you've stated are important to you?
- **Discuss the *ethical principles* that motivate the other person's demand, threat or position**:
  - e.g. "What's your theory that makes your proposal fair (that this group of employees be fired even though they have been productive employees)." [Let's say that the employees have been trying to form a union.]
- **Do not try to defend your idea. Instead, invite criticism and advice**
  - Ask what's wrong with an idea, e.g. "What concerns of yours does my proposal fail to take into account?"
  - "What might you do in this situation if you were advising my client?"
- **If you are verbally attacked, reframe the attack as an attack on the problem:**
  - Listen. Don't defend. Show you have understood; e.g."When you say that my views about overtime show that I don't care about the employees' children, I understand that you realize that your workers need to support their families."
- **Ask questions instead of making statements. Wait for answers.**

e.g. "What do you see as the drawbacks of involving employees in making decisions about the discipline policy?"

- **Remain silent when there is an attack** or an unreasonable statement or demand or when the other party fails to respond to a question.

3.5.1.2 Requesting fairness in negotiations

Here are some sample statements and questions you can use to request fairness:

- **Address misinformation given by the other side:**
  - E.g. "Correct me if I'm incorrect (misinformed, etc.). . .(then make your statement)."
  - E.g.. "Could I ask you some questions just to be sure my facts are right?" (Then ask questions to test or challenge the other negotiator's information.)
- **Respond to a question of "Don't you trust me?" from someone you may not trust:**
  - "Trust is a separate issue. I prefer to focus on (the issue being discussed in negotiation)"

- **Address an unreasonable proposal:**
  - E.g. "Our concern is fairness." We'd like to understand how this is fair. . .
  - E.g. "Let me show you where I'm having trouble following some of your reasoning."
  - E.g. "One fair solution might be. . .."
  - Say: "Let me get back to you later."
- **Respond to a threat.**
  - E.g. "What is the principle behind your proposed action?"
  - E.g. "We'd like to settle this on the basis of some fair standards rather than on who can do what to whom."
  - E.g. "If. . . (a certain thing occurs or is done), then. . .(state the possible consequences)"

3.5.2 Dirty tricks and how to address them

Here are some dishonest and unethical "dirty tricks" that some negotiators try to use in negotiation.

- lies, phony "facts";
- ambiguous or limited authority;
- abuse, insults;
- "good cop, bad cop" tactics (where there are two negotiators operating as a team. One is aggressive, hostile or abusive and the other is soft and pleasant and pretends to sympathize with you. This tactic is used to confuse you so that you will capitulate.)

What can you do about dirty tricks? Here are some suggestions:

- ***Bring dirty tricks out into the open*** **(as diplomatically as you can):**
  - (Regarding lies) "I notice a difference between what you've been saying and what we perceive to be the facts of the situation."
  - (good cop/bad cop) "I notice that you and Bob seem to have different approaches and different positions."
  - (repeated interruptions) "I notice that the telephone keeps ringing, and we have to interrupt

our negotiations when you answer it."
  - (kept waiting for a long time without a good reason) "I noticed that you were not available when we agreed to meet."
  - (Sexual harassment) "I notice you have shifted away from the topic of our lease negotiation." Or "I'm curious to know your statement [about my appearance] is relevant to the lease we are trying to negotiate."

- **Negotiate about the *ground rules* of the negotiation:**
  - (you are seated in a chair with the sun in your eyes and nothing is done to make you more comfortable). "I'm finding the sun in my eyes to be distracting. Unless we can solve this problem I might have to leave to get a break from it. Could we set up a different schedule or a different place to meet?"
  - "I wonder if we could find a more comfortable place to meet."
  - "Shall we take turns sitting in the uncomfortable chair?"
  - (the other person takes an unreasonable position) "I'm wondering what your reasoning is for committing yourself to this position?" or "Should we both take extreme positions?"
  - (acting contrary to previous procedural agreements) "What about our agreement not to call the media until we agreed or until we broke off talks?" "Shall we both begin to talk to the news media without consulting one another?"
  - (if one person is abusive) "Shall we all interrupt one another and raise our voices when we disagree?"
  - (ambiguous authority) "Shall we both treat our joint proposal as a draft to which we are not committed? You could check with your client, and I could think about it over night and suggest changes tomorrow."
  - (concern about good faith) "How will we guarantee this deal will be implemented? Can we set out a contingent agreement that takes effect if something doesn't happen the way we've agreed?"
  - (good cop, bad cop) Ask the same questions of both the 'good cop' and the 'bad cop.' E.g. to both: "How is your proposal fair?"
  - (good cop/bad cop) Say, "I've been noticing that you and Bob have different approaches and different positions. Would you like to take a break so that you can straighten out the differences between you?"
  - (sexual, cultural harassment - a stronger intervention than the one above) "I've noticed that you have mentioned my age (height, accent, colour, gender, ethnic origin, etc) during our discussions. Could you please explain how my age (height, accent, colour, gender, ethnic origin, etc) is relevant to our lease negotiations?"

- **Respond firmly to pressure or threats**
  - Flush out veiled threats. "When you said you were concerned 'something might happen' to our client or his property, what did you mean? Could you please be more specific?"
  - Consider making extreme threats or pressure tactics public. This makes it more difficult for the other negotiator to communicate a threat or use pressure tactics. Threats or corrupt practices often rely on secrecy to be effective.
  - If things seem to be getting too risky, or you discover that power is being used in secret ways that jeopardize fair negotiations or as a delaying tactic, suspend the negotiations as

graciously as possible and consider your other options.

- If you feel you or your client are in any danger from anyone, make a safety plan and get advice from well-respected and trusted institutions or organizations that are devoted to the protection of human rights.

Further reading

Baker, John. "Ask the Negotiator: Preparing to Handle Dirty Tricks." *The Negotiator Magazine*. January 2003, http://www.negotiatormagazine.com/article40.html

Benjamin, Robert. "Cloaked Negotiation: Necessary Back-Channel, Under the Table and Surreptitious Strategies and Techniques to Make Deals Work." Mediation.com, January 2009, http://www.mediate.com/articles/benjamin43.cfm

Craver, Charles B. "Classic Negotiation Techniques." *The Negotiator Magazine* February 2007, http://www.negotiatormagazine.com/feb2007_craver.doc

Fisher, Roger, William Ury and Bruce Patton. *Getting to Yes: Negotiating Agreement without Giving In*. 2nd ed. New York: Penguin Books, 1991. Book summary at http://www.colorado.edu/conflict/peace/example/fish7513.htm

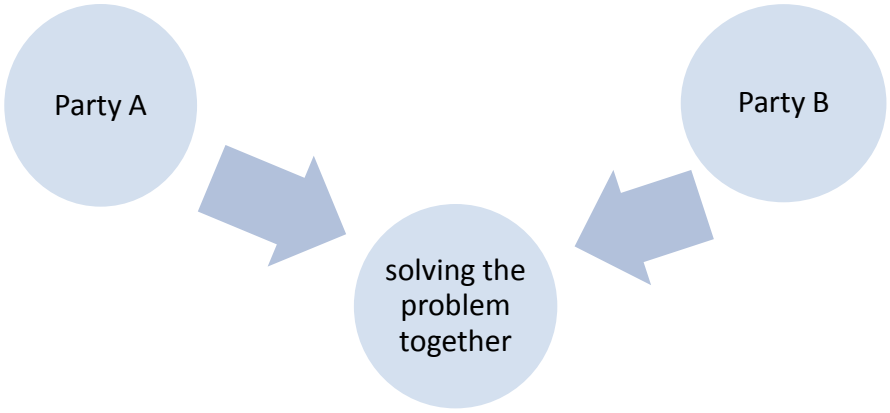
Lewicki, Roy J., David M. Saunders, Bruce Barry, and John W. Minton. *Essentials of Negotiation*. Third Edition. New York: McGraw-Hill, 2001, Chapter 9, 226-247.

Ury, William L. *Getting Past No: Negotiating with Difficult People*. New York: Bantam, 1991. (Available in Thai language)

3.6 Integrative Approaches: The promise of "win-win" negotiations

The world-famous American book, *Getting to Yes*,[42] tries to take into account many of the previously discussed issues in its recommendations for "interest-based negotiation." The authors seek to answer concerns about overly aggressive, power-based negotiation without falling into the pitfalls of "soft," overly trusting negotiation styles. They suggest ways to achieve "win-win" outcomes. They emphasize *creating value before claiming value*. The principles can be paraphrased as follows:

- **Focus on the problem but don't blame the people.** Be "hard on the merits, soft on the people"[43] or "Separate the people from the problem"[44] This means that you do not focus your attention on blaming people. Instead you work to keep the focus of attention on solving the problem.
- **Do not bargain over positions or "bottom lines."** Instead, focus on the "interests" (which Fisher and Ury define as "needs, concerns, fears, goals") that motivate their positions.[45]
- **Create options to accommodate as many interests of all parties as possible.** Try to "expand the pie" of options - ask what other resources can be drawn on.[46]
- **Use fair and objective**[47] **criteria to evaluate all proposals**.
- **Understand your "best alternative to a negotiated agreement" (BATNA).**[48] Please see the material in this Chapter on bargaining range, bargaining limits and "walk-away alternatives." Build on your BATNA to improve it. This will give you more negotiating power.



[42] *Ibid.*
[43] *Ibid.*, xviii.
[44] *Ibid.*, 17-39.
[45] *Ibid.*, 40-55.
[46] *Ibid.*, 56-80.
[47] *Ibid.*, 81-94. The notion of "objectivity" has been challenged as being impossible. I like the idea of "intersubjectively recognized norms" described by Habermas, Jürgen. "Toward a Reconstruction of Historical Materialism." In *From Contract to Community*, edited by Fred R Dallmayr, 47-63. New York and Basel: Marcel Dekker, Inc, 1978. "Intersubjectivity"requires that something be capable of being established to the satisfaction of two or more subjects. This means parties can jointly establish criteria for agreements without claiming objective "truth."
[48] Fisher, Ury, and Patton, *Getting to Yes*., 97.

3.7 Moving from Positions to Interests: Important Skills

3.7.1 Issues, positions and interests: What is the difference?

- **Issues :** Issues are the items to be addressed and resolved (sometimes called agenda items or topics of negotiation).

  Example 1: *The acceptable level of a particular substance in a particular water supply.*

- **Positions:** A position is a proposal as to how an issue should be resolved. A party's position is the *solution that meets their interests*, and may be their *ideal solution*.

  Example 1: *A factory is emitting pollutants into a local river. NGO and villagers' position: that the factory close down so as to eliminate effluent discharge into the water supply. Government officials' position: have the factory continue to operate within the law. Factory position: that the factory continue to operate as it always has.*

- **Interests (and needs, values and ethics)**: Interests, needs, values and ethics are people's tangible and intangible needs, concerns, goals, fears and other emotions, values and ethics need to be satisfied for a solution to be seen as acceptable. These are what motivate people to form positions, especially if they are reluctant to disclose their interests.

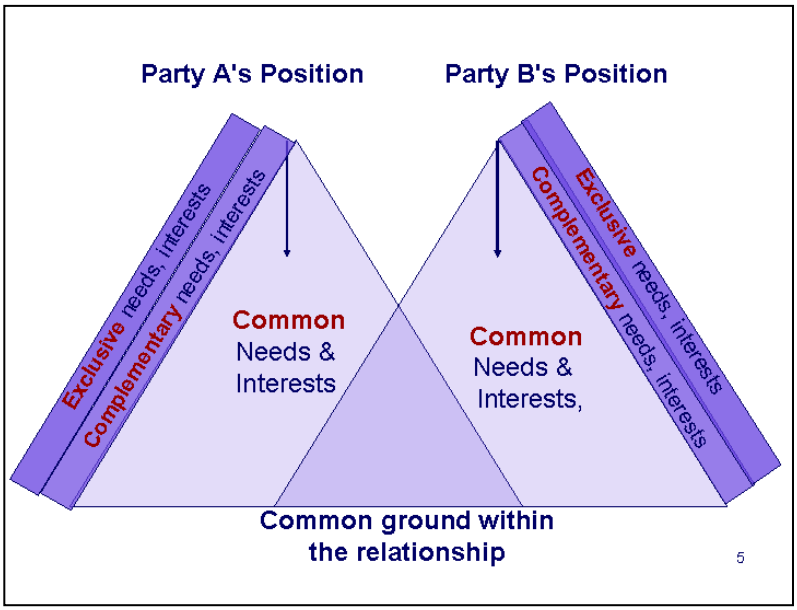
  Example 1**:** *NGO and villagers' interests*: safe water, citizens' wellbeing, reputation for protecting public interests, reputation for being reasonable. Government officials' interests: e.g., safe water, economic prosperity, get re-elected, avoid citizen protests, achieve good international reputation. *Factory owners' interests:* profitable business, good international reputation. Common interests of NGO, government, factory owners', workers' and citizens' interests: safe and sustainable water supply; jobs in the area; economic opportunities and prosperity in the region.

Example 2: **A Negotiation over a Shopping Centre Lease**		
Issues	**Positions**	**Interests**
An acceptable rent, services, maintenance, amenities and other terms of lease renewal for a retail store in the shopping centre.	*Tenants*: that the rent be the same as in the previous year; that certain repairs be conducted, that promptness of maintenance service be improved. *Landlord*: that the rent be increased by 15 percent to cover increased costs of maintenance and repairs.	*Tenants:* to keep the retail store profitable, attractive and well maintained; to avoid moving. *Landlord:* to keep the shopping centre profitable, attractive and well maintained; to keep a good tenant.

3.7.2 More about "interests"

Some theorists say that an "interest" is anything that concerns a negotiator.[49] Lax and Sebenius have articulated several types of interests including:

- "substantive" interests,
- "process" interests,
- interests in relationships, and
- interests in "principles" including historic or ethical rationales or standards.[50]



3.7.3 Common, complementary and separate interests

- **Common interests** are those interests which parties share. An example would be a lease negotiation, where both parties want the building to be attractive to customers.
- **Complementary interests** are interests of the parties that may be very different, but which create the possibility of an agreement. An example of complementary interests in a lease negotiation are the tenants' interest in occupying premises, and the landlord's interest in leasing out premises.

[49] Sebenius says an interest is "anything that concerns a negotiator." Sebenius, James K. "Negotiation Analysis." In *International Negotiation*, edited by V.A. Kremenyuk. San Francisco: Jossey-Bass, 1991, 207.
[50] Lax, D.A., and J.K. Sebenius. "Interests: The Measure of Negotiation." In *Negotiation Theory and Practice*, edited by J.W. Breslin and Jeffrey Z. Rubin. Cambridge: PON Books, 1991.

- **Exclusive interests** are the interests of parties that are not shared at all with the other parties. For example, the tenant wants to minimize costs, and the landlord wants to maximize gains. See the section on "trade-offs."

QUESTIONS FOR REFLECTION AND DISCUSSION

- Are needs the same as "interests"? Some authors, like Fisher and Ury, say needs are an important type of interest. Others say needs are not the same as interests, and are more important than mere interests. What is your opinion?

- Basic Human Needs may include:

  - ✓ ***"security needs***" (including avoidance of violence, assault, torture);
  - ✓ ***"welfare needs"***(including nutrition, water, air, movement, excretion, protection against elements and disease);
  - ✓ ***"identity needs"***(including self-expression, work, well-being and happiness, affection, sexual identity, friendship, belongingness, purpose, partnership with nature); and
  - ✓ **"freedom needs"**(including choice concerning opinions, expression, association, mobilization, occupation, spouse, way of life). – Johan Galtung

- Who should decide what a person or a community *needs?* Discuss.

- "Rights," "needs," or "interests"? What is most important? Discuss.

Suggested further reading

Lewicki, Roy J., David M. Saunders, Bruce Barry, and John W. Minton. *Essentials of Negotiation*. Third Edition. New York: McGraw-Hill, 2001, Chapter 4.

Mnookin, Robert H., Scott R. Peppet, and Andrew S. Tulumello. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge, MA: Belknap Press, 2000, Chapter 1.

3.7.4 The importance of careful listening and understanding

3.7.4.1 Why is listening important in negotiation?

Good negotiators always observe the other parties carefully. It is especially important to listen carefully to what other parties are saying. This is important for two reasons:

- good listening helps build good relationships and trust as a foundation for durable and wise outcomes of negotiation;
- good listening is the best way to gather information about the issues, positions and interests of other party and can help you to gain the best possible transactions or resolutions of disputes.

In order to understand one must listen. In order to listen one must try to:

- stop talking (this *seems* obvious unless you are the speaker!);
- be attentive to the speaker;
- avoid thinking about an argument while the other person is talking;
- avoid assuming that once you have heard the first few words that you understand the opinion of the other person;
- ask questions to clarify and expand understanding;
- summarize your understanding of the other's point of view to see whether you have understood.

3.7.4.2 Positive Listening

The purposes of positive listening -- or "positive reformulation" -- in negotiation are:

- to ensure you understand what the other person is saying;
- to show the other person that you are trying to understand;
- to create a positive climate for building relationships and creating integrative solutions.

How do you reformulate? You put into your own words the *essence* of what the other person has said. You summarize, or *condense the main points* of what the other person has said. It is important to be mindful that when you reformulate you will do one or more of the following:

- *keep* some of the words or ideas that the person has stated, and/or
- *delete* some of the words or ideas the other person has said, and/or
- *change* some of the words or ideas the other person has used, and/or
- *add* some words or ideas to what the other person has said.

Good negotiators carefully choose how they reformulate. They stay focused on their goals of negotiation, and they create good relationships and foundations for an agreement that satisfies the needs and interests of all parties, and is durable, effective, wise and fair. They reformulate *positively*. In general effective negotiators reformulate in ways that:

✓keep as much as possible of the other person's ideas,
✓delete as little as possible of the other person's ideas,
✓transform the other person's unconstructive or argumentative statements into more positive statements about what the other person seems to want or need, and
✗ avoid contradicting the other speaker.

It is important to note that effective negotiators also tend to ask questions instead of making contradictory statements, arguing, or trying to persuade the other person.

Effective negotiators also pay close attention to non-verbal behaviours are integrated into speech and may illustrate or emphasize what the speaker is saying or feeling:

- facial expressions and voice tones,
- eye contact ("gaze")
- gestures with hands, body or head.

There is little research evidence to support some popular ideas that certain kinds of "body language" has specific meanings, or that you can tell whether someone is lying by certain eye movements.[51] Many aspects of speech, facial expressions and certain gestures are specific to the particular conversation or context, including the cultural context. There is good likelihood of misinterpretation within cultures and across cultures, so one should not assume too much about non-verbal language without checking with the other speaker!

In summary, the goal of reformulation in negotiation is to *listen* in ways that *positively* help move the conversation away from confrontational or positional statements, towards identification of what is motivating the other negotiator (true needs and wants), towards ideas that negotiators might share in common, and towards jointly-created, integrative solutions.

[51] Sara Healing, Christine Tomori, Jennifer Gerwing, Janet Bavelas, Grant MacLean, Peter Kirk, "Debunking Communication Myths," Canadian Institute of Health Research, and University of Victoria Bavelas, n.d; Bavelas, J. B., & N. Chovil, (2006). Hand gestures and facial displays as part of language use in face-to-face dialogue," in *Handbook of Nonverbal Communication*, edited by V. Manusov, and M. Patterson, Thousand Oaks, CA: Sage, 2006.

An example of how negotiators may reformulate

[... a negotiation about a lease renewal is in progress...]

Kim (Landlord): **We really need to raise the rent to meet the increasing costs of maintenance.**

Nancy (Tenant): **The rent is already very high for this level of service and maintenance!**
*[Note that Nancy **keeps** only the words "rent" and "maintenance." Nancy **deletes** the landlord's words about raising the rent and the landlord's increasing costs of maintenance. She **adds** two ideas, one about service, and one about rent being already "very high." She **transforms** the landlord's ideas into an argumentative statement. **Kim may feel Nancy has not heard what Kim has said** about maintenance costs.]*

Kim (Landlord): I can understand that you want to be sure that when you pay rent you can count on good service and maintenance.
*[Note that Kim chooses to delete Nancy's statement that the rent is "already too high." Kim keeps Nancy's words "good service and maintenance." Kim changes the meaning of Nancy's statement about rent, service and maintenance and adds that Nancy wants to be able to "count on" good service and maintenance in return for rent. **Kim reformulates positively**, choosing to test whether Nancy will complain again about the current rent.]*

Nancy (Tenant): Yes... the maintenance and repairs have been very poor lately!
*[Note that Nancy **deletes** Kim's statement about "rent" and "good service," **keeps** Kim's word "maintenance," **adds** the word "repairs," and **adds** a comment that maintenance and repairs "have been very poor lately"]*

Kim (Landlord): ...I see ... the maintenance and repairs are important to you. . .
[The landlord keeps Nancy's statement about the "maintenance and repairs" and adds that they are important but deletes "very poor lately." Kim reformulates positively and avoids arguing. It's now time for Kim to ask some questions before returning to the issue of rent!]

Questions for reflection and discussion:

- What do you think of Nancy's and Kim's reformulations?
- How do you think Kim might feel about Nancy's listening skills? How do you think Nancy might feel about Kim's listening skills?
- Note that Nancy tends to keep only a small part of what Kim says, and transforms Kim's statements to create counter-arguments. Kim keeps or refers back to Nancy's words more often and transforms in ways that focus positively on what Nancy wants. Kim avoids counter-argument.
- Who do you think might be more successful in this negotiation, Nancy or Kim? Why do you think so?
- What question might you ask Nancy next? (See the next section on questions.)

3.7.5 Asking effective questions

One of the most important skills for effective negotiation is asking questions that

- elicit valuable information, and
- build relationships

by demonstrating an intention to understand the other person's needs, concerns, goals, fears and other emotions and values.

3.7.5.1 Leading questions

Leading questions are those which can be answered with "yes," "no," "maybe," or "I don't know."

Example: "Can you lower the price?"

Leading questions have **pros and cons:**

- valuable when you want to limit the options for answers.
- useful to help clarify a specific point.
- tend to limit the amount of information you get in response.
- may be statements disguised as questions, since they often reflect the point of view of the questioner rather than eliciting the point of view of the other.
- tend to control the discussion more than do open-ended questions.
- may suggest an answer that is wanted.
- can arouse suspicion and mistrust.
- can put people on the defensive and start an argument.

For example, consider the following leading question (by a tenant in a negotiation about shopping centre a lease renewal negotiation):

> "Do you think other tenants will accept your proposal for changing the signs in the shopping centre?"

This question can be answered with a yes or no with little explanation. The question can also elicit uneasiness since it suggests doubts on the part of the questioner. It can also start a defensive argument.

You can create a similar question in a more open way, for example:

> "How do you think you the other tenants might react to your proposal to add more stores and make the parking lot smaller?"

Phrased this way, the question may draw out more information without seeming hostile or discouraging.

3.7.5.2 Open-ended questions

Open-ended questions, such as the example above, give people a lot of freedom to answer the way they wish to. They also may have the advantage of *revealing less about what the questioner is thinking*. Open-ended questions can encourage people to talk more.

Open-ended questions start with:

- What . . .
- When . . .
- Where . . .
- Who . . .
- How . . .
- Why . . .

Caution: Be careful about asking questions that begin with "why . . . " Asking "why . . . " can sometimes cause people to become defensive and argumentative. An example is: "Why can't you give me a raise?" A less defensive response might be elicited by asking "What are the factors that prevent a raise at this time?" Perhaps you can think of a better question!

Some questions sound like leading questions but have the same effect as an open-ended question, for example:

- "Can you say a bit more about that?"
- "Would you be able to tell me about . . .? "

Also, some statements have the same effect as open-ended questions, for example:

- "You mentioned someone is interested in the property. I'm interested in hearing more ... "
- "I'd like to hear your views about . . ."

You can use open-ended questions to:

- **probe** for more information. Here are some examples of probing questions:
  - "What does 'fair' mean to you?"
  - "You mentioned you needed more land. What would you like to do if you had more land?"
  - "What has it been like since this incident occurred?"
  - "When did things start to change?"
- **clarify** a point which has been raised. For example:
  - *"You mentioned* that other tenants have had similar concerns. *Which tenants are you referring to?*

- *"When you say* we need to do more advertising of the mall, *I'm wondering what you mean?*

- **ask for explanation** of an inconsistency. For example:
  - *"Earlier you said* you were happy here. *Now you have mentioned* you are thinking of leaving. *Can you explain* what you mean?"
- **ask about consequences** if a particular action were taken. For example:
  - *"If you* went ahead with this project, *how do you think the neighbouring businesses might react?"*
  - *"I'm wondering what long-term consequences you might see* for the community if this project went ahead?"
  - "*If you decided to go ahead* with your plans, *how do you see raising the necessary money?"*

Caution:

Be cautious with questions that probe for personal information or deeply held feelings. In situations where there is tension, anxiety or low trust, questions which probe at intense or negative feelings may seem intrusive or threatening and may shut down conversation instead of opening it up. On the other hand, questions that probe for feelings or personal information may be very appropriate and useful *after an atmosphere of considerable comfort and mutual trust has been established.*

3.7.6 Listening and Questioning Skills Practice

An exercise in positive listening

Divide into groups of two people each. Have one person (#1) make the first statement. Try to make the statements realistic (change them a bit if you need to.) Have the other person (person #2) use the guide below to reformulate, including summaries. When you are reformulating, try to resist the temptation to persuade or argue! Avoid adding your own opinion at this stage.

The first person may have to make up some "facts" along the way. Afterwards, discuss the exercise with the other person, including what happened, how each of you felt, and what you learned.

Example 1	**Person #1:** "The rent is too high for this level of service and maintenance!"
	Person #2: At this stage, do not try to solve the problem or to argue. Use positive listening to reformulate, then listen and reformulate again as necessary. Ask some questions. Then, when you think you have a good deal of information, summarize what you perceive the other person has been saying.
Example 2	**Person #1:** When I call for repairs to the mall entrance, no one comes for days! Why don't you hire better people?
	Person #2: At this stage, do not try to solve the problem or to argue. Use positive listening to reformulate, then listen and reformulate again as necessary. Ask some questions. Then, when you think you have a good deal of information, summarize what the other person has been saying.
Example 3	**Person #1:** "I don't think I can put up with this poor level of service for another five years if I have to pay such unreasonably high rent!"
	Person #2: At this stage, do not try to solve the problem or to argue. Use positive listening to reformulate, then listen and reformulate again as necessary. Ask some questions. Then, when you think you have a good deal of information, summarize what the other person has been saying.

An exercise in asking effective questions

How effective are the following questions to obtain information? Discuss in groups of two or three people. Give reasons for your answers. Rephrase ineffective questions, turning them into effective open-ended questions.	
1	Doesn't that seem fair to you?
2	Do you have a problem with my proposal?
3	Don't you want the situation to get better?
4	Didn't you listen to my question?
5	Do you think the declining sales are because your merchandise is unfashionable?
6	Don't you think we are being taken advantage of?
7	Isn't this really just a temporary problem?
8	When you said you were confused, did you mean you didn't understand my letters?
9	Last week you said you thought we were making good progress in our negotiations. This week you say things are hopeless. Haven't you made up your mind?
10	If we put forward that idea to your clients would they accept it?

3.7.7 Framing and Reframing

Think of a photograph or drawing that is beautifully framed and put on the wall. It is pleasing to the eye, and we want to look at it. Now think of the same picture that is placed in a battered or broken frame with cracked, dirty glass covering it. It is the same with the way we speak to one another. The way people "frame" their important needs and opinions makes a big difference in the way people understand them! People may not listen to someone who "frames" his or her needs or interests within blaming and accusing remarks. In contrast, a person who "frames" his or her needs and interests in positive, courteous language is more likely to be listened to.

When people are in negotiations, particularly when they are in conflict, they may get frustrated or upset. This means they may say important things in ways that are not constructive. This section discusses how to extract the useful content from unconstructive statements. This helps to clarify the parties' interests and helps improve the tone of tense negotiations.

3.7.7.1 Framing the issues

> ***An old proverb says:***
> *"A fair-minded person tries to see both sides of an argument."*

Effective negotiators do well to keep this proverb in mind when they are describing issues to be addressed in negotiation. When you frame issues for negotiation, try to frame them as "we" statements as much as is possible and appropriate. Try to phrase the issues in impartial ways so that both parties can agree that they are the issues to be negotiated.

- Present "problems" as "opportunities" or "challenges."
- Present the questions to be resolved as "we *vs.* the problem" instead of "I *vs.* you."
- Depersonalize the questions to be resolved.

For example, what if you frame the issue as a positional statement, such as: "The issue we must negotiate is how to increase the rent"? The other party is not likely to agree to that formulation of the issue, and you will probably get off to a bad start. Instead, try saying: "What we are trying to do is to agree on terms of a lease renewal of these premises including rent. Is this a fair statement of what we are negotiating?" Both parties might agree to this way of framing the issue, and you will get off to a better start. Thus, we can see that the way a problem is formulated (framed) is crucial to the ways in which the issues will be negotiated or resolved. An effective negotiator will formulate (frame) or reformulate (reframe) the points of disagreement, the problems or the challenges in ways that can lead to constructive results achieved in a spirit of collaboration.

3.7.7.2 Reframing negative statements

Reframing is one of the most powerful skills of a negotiator. Reframing is a type of reformulation which transforms positional statements, rigid demands or accusations into ideas that can help negotiators to move forward toward their mutual goals. The purpose of reframing is:

- to improve the tone of negotiation by taking negative statements and extracting and highlighting their useful content.
- to help people express their unmet needs and wishes in positive ways, and thus help them move toward agreement.

Steps for Reframing

Step 1: Listen. Reformulate to check your understanding with the other person..
Step 2: Silently in your mind, make a hypothesis of underlying needs or wishes.
Step 3: Test your hypothesis with the other party by asking a question or reformulating their message. Adjust and test again if needed.
Step 4: When you have confirmation that you have correctly identified the other person's needs or interests, add a positive formulation that will move toward problem-solving.

An Example of Reframing:

Kim's statement to a lawyer: "I refuse to talk with that crook!"

Step 1: ***Kim's lawyer listens and reformulates:***
"You don't want to talk with someone you think has behaved dishonestly." *(note that the lawyer has not agreed with A. The lawyer has kept both of Kim's ideas but has transformed the words "refuse to talk" into "don't want to talk" and the word "crook" into "someone* ***you think*** *has behaved dishonestly." [The lawyer has deleted, added and transformed words in Kim's statement.)*

Kim's response:
"That's right! You can't trust a thing Bob says." *(this confirms that the lawyer's reformulation has been satisfactory to Kim.)*

Step 2: The lawyer has guessed that Kim's need (in part) is to be able to rely on someone s/he might negotiate with.

Step 3: ***Lawyer's reframe:***
"So. . . in order to be able to negotiate with Bob, you would need to be sure that you are getting information you can rely on."

Step 4: If Kim confirms the statement, the lawyer suggests *a positive, future focussed formulation:*
"So you might be prepared to negotiate with Bob or his lawyer if we could create a way to confirm all the facts."

The lawyer is now constructing a way to address the need of information Kim can rely on. An improved foundation for negotiation is being built.

3.7.7.3 Framing and disclosing your client's interests and making proposals

It is important to frame and disclose your client's interests in ways that will be listened to. If you have listened to the other party, the chances are higher that your own views will be considered. Here are some ideas about how best to present your client's point of view.

- For important negotiation sessions, try to have your client with you if it is appropriate and the client can represent himself or herself reasonably well. If not, try to have your client available so that you can consult with him or her over the telephone.
- Remember your client's "best alternative to a negotiated agreement" (BATNA).
- Avoid taking positions from which you might have to back away later. Talk about your client's needs and interests instead.
- Avoid getting trapped into a corner and the possibility of losing face later. Frame your proposals as options (rather than demands). Framing proposals as open-ended questions or as hypotheticals: For example:
  - "What do you think about this option:. . . . ." or
  - "I'm wondering how your client might respond if my client were to propose . . [then state the hypothetical proposal]."
- Be careful about disclosing your client's confidential information, or exposing information that might be detrimental to your client. Don't be too trusting. Carefully match the other party's type and level of disclosures.
- Ensure you have good evidence and reasons to back up your facts and proposals.
- Try to avoid using attack styles of "cross-examination" in negotiation. This may be all right for the court room, but may not be effective at the negotiation table. Instead, raise doubts by asking focussed, probing and consequential questions. Investigate positions with focussed questions that probe, clarify, and ask about consequences.
- Avoid making threats. If you think it desirable to warn about possible consequences, state what you think might happen. If it is something you intend to do, make sure you have the power and intention to carry it out. Also be sure that what you say you will do is lawful, ethical and wise.
- Take a break if you need one to calm down, to clarify your thinking, or to get more information or instructions from your client. Say "let's take a break to consider things, and let's talk again another day. . ."

3.7.7.4 Framing a Statement of Joint Goals

Create a statement of joint goals *after* all the parties' interests have been articulated, and *before* brainstorming solutions. To make a statement of joint goals:

- **First**, lists the needs and interests that all the parties *share* and interests that may be *complementary*.
- **Second**, list the *separate* needs and interests of each party.
- **Third**, ask the parties to think of some ways to meet all these needs and interests.

Sample statement of joint goals:

1. "It is important to both of us that we have a viable lease agreement.

2. (a) You, (landlord's name) need to ensure that the rent and tenant mix will contribute to a profitable shopping centre in the short and long term.

(b) And our priorities, (tenant) are to ensure an affordable long term lease and a storefront that is attractive, clean and accessible.

3. What suggestions could we come up with that would meet all these objectives?"

3.7.8 Brainstorming: Create a variety of options

"Brainstorming" is a popular way to come up with new ideas. Here are some ideas for brainstorming during negotiation.

3.7.8.1 Before brainstorming

- Make sure that the issues have been well-defined.
- Ensure that all parties have had full opportunities to state their needs and interests clearly.
- Be sure that the parties' are capable of respectful interaction sufficient to allow for cooperative creativity.

3.7.8.2 How to brainstorm

- If necessary suggest and explain brainstorming to the other parties:
  - Everyone is invited to contribute ideas.
  - During brainstorming, no idea is rejected.
  - No one criticizes or evaluates another participant or his or her ideas.
  - Each idea is recorded.
- Jointly consider setting a time limit for brainstorming.
- Start brainstorming.
  - Write down all ideas so that everyone can see them (e.g. on a flip chart or a whiteboard.
  - Remind people that no ideas are to be evaluated or criticized until brainstorming has been completed.
- Evaluate the ideas after brainstorming has been completed.
  - Review the needs and interests of all parties, and the objective criteria (fair standards) that have been jointly agreed. Say something like: "Let's now evaluate these ideas in the light of the list of needs that we have developed.
    - Go through the ideas and look for ideas that are repeated or similar.
    - Group similar ideas together.
    - Eliminate ideas that everyone agrees definitely would not work.
    - Discuss the remaining ideas in the light of the parties' needs interests and agreed objective criteria (fair standards).

3.7.9 Some other skills

3.7.9.1 Noticing common ground

Skilled negotiators emphasize common ground or complementary interests whenever they notice them. When negotiations are conflictual, even small things in common can be acknowledged, such as agreements on process guidelines.

3.7.9.2 Refocusing the parties' attention

Sometimes it is important for a negotiator to bring the other parties' attention back to a subject being discussed. To refocus:

- First, when appropriate, interrupt the speaker and note that the discussion has shifted from the subject.
- Second, acknowledge that the other negotiator was talking about something that seemed important, and that it will be important to discuss it.
- Third, suggest that the speaker focus back on the subject.

An Example of Refocusing

1. Politely interrupt: "Kim, I notice that we have shifted from the topic of a *corporate audit* that we have been discussing.

2. Acknowledge: "You have raised the topic of corporate *refinancing*, and it will be important to discuss that. Let's make a note of it so that we will not overlook it."

3. Refocus: "I wonder if we could do that later, and return the subject of the audit."

3.7.9.3 *"Immediacy"*

Sometimes it is useful to intervene immediately at the moment you notice something happening. Interruptions are one example. Inattention by a party is another example. Another time to use the skill of "immediacy" is when you notice something interesting or unusual happening.

Some examples of immediacy

To intervene when the other negotiator does not seem to be paying attention: e.g. "I've noticed that when I began to present my proposal on shipment time-frames, you began to look through your notes. I'm wondering if you need some information."

To notice something interesting: e.g. "I've noticed that several people have used the expression 'running between a tiger and a crocodile' to describe what has been happening. It's interesting that this expression keeps coming up. I'm wondering if we might explore what you mean when you use that expression."

To attend to the needs of people or the process: "Bob, I've been noticing that you have looked at your watch several times in the past few minutes..."

3.7.10 When you are discussing options: Consider trade-offs

While it is desirable to try to reach a full "win-win" outcome, in reality, it may be impossible for both parties to get everything they want. This means it is important to think about trade-offs. Some interests of negotiators are more important to them than others, and good preparation for negotiation includes getting a clear sense of what interests are most important. Negotiators may be more willing to sacrifice some things than others. For example, negotiators may be prepared to take a lower price on something if they are primarily interested in a long-term business relationship. Negotiators may weigh purchase prices against interest rates. Negotiators may be willing to take a lower price in return for cash instead of credit. A negotiator may be willing to take lower fees in return for lower risk. Effective negotiators never trade off their most important interests, values or ethical principles, or those of their clients.

3.7.11 "Reality testing"

Once the parties have agreed on some particular solutions, it is tempting to stop the negotiation process. However, before ending negotiation, it is very important to ensure that the solutions are realistic and that it is possible to implement them. Always negotiate an implementation plan, time lines and methods of monitoring and evaluation.

"Reality testing" involves making sure that agreements meet the needs and interests of parties and stakeholders (short term and long-term needs/interests). Reality testing also helps to ensure that the agreement meets the objective criteria (fair standards) you have developed. An agreement is likely to break down if it does not meet long-term needs and interests of the parties, or does not meet agreed standards of fairness. Short term negotiation "victories" may turn to failure if they are not realistic or durable, or if they contain seeds of future conflict. Reality testing processes and skills include:

- **Reality-testing questions:**
  - "How will implementation take place?"
  - "When will implementation take place – over what period of time?
  - "What time lines can we develop?"
  - "Who will do what, when, and where?" "Where will you get the staff and financial resources for implementation?"
  - "Where will this happen?"
  - "Who or what might block these plans? How might we prevent this?"
- **"Consequential questions"** to test solutions and implementation plans. Ask questions such as:
  - "What will happen if... ?"
  - "What if ...?"
  - "How could we make sure that...?"
- **"Fall-back" agreements** about what to do if things go wrong during implementation.
- **Dispute resolution clauses**,[52] such as:

52 For samples see International Institute for Conflict Prevention & Resolution, " CPR Model Clauses and Sample Language", New York: CPR, n.d., available at www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/635/CPR-Model-Clauses-and-Sample-Language.aspx

- mediation agreements or agreements for non-binding arbitration, and/or
- binding arbitration, including a process for deciding who will make the recommendations or conduct the arbitration, and a mechanism by which to select an arbitrator;
- a "stepped" dispute resolution clause provides first for negotiation, then mediation and finally binding arbitration.

For further reading:

Lewicki, Roy J., David M. Saunders, Bruce Barry, and John W. Minton. *Essentials of Negotiation*. Third Edition. New York: McGraw-Hill, 2001, Chapter 5, pp. 121-139, Chapter 9, pp. 226-242.

Kolb, Deborah, Carol Frohlinger, and Judith Williams. "Managing the Shadow Negotiation," and "Being Your Own Advocate." *The Negotiator Magazine* (April/May 2002): http://www.negotiatormagazine.com/author_index.shtml (Two articles; scroll down the page to find the links)

3.8 Back to the beginning: Should you try to negotiate?

Now that we have considered strategies, tactics and skills for negotiation, it is important to come back to the subject of preparation. Before entering into negotiation, you need to decide whether to negotiate at all. This section considers various factors of negotiability. The most important test is whether you can accomplish more by negotiating than you can by taking up your best alternative to a negotiated agreement (your BATNA), or by using another process to make decisions or resolve disputes.

3.8.1 Easy or hard to negotiate?[53]

There are many factors which indicate the degree of difficulty of resolving a given case, such as:

- how much the parties have in common;
- the previous quality of relationships;
- the number, clarity and separability of issues;
- the number of parties;
- the adequacy or accessibility of resources or options for resolution;
- the degree of commitment or incentives for the parties to resolve the dispute;
- the importance of the issues to the parties;
- the duration of the dispute;
- degree of entrenchment of the dispute;
- the relative power of the parties, and the ways the parties are using power;
- the degree of public attention and controversy.

[53] Blechman, Frank, and George Mason University Institute for Conflict Analysis and Resolution. "Resolving Situations." In *Conflict Analysis and Resolution as Education: Training Materials*, edited by Michelle LeBaron Duryea, 114-17. Victoria, BC: UVic Institute for Dispute Resolution, 1994.

Blechman (1994) suggests the following indicators as to whether a dispute will be easier or more difficult to resolve:

Easier to resolve ⟷ Harder to Resolve	
▪ few parties, ▪ parties have much in common, ▪ Few issues ▪ Issues are clear ▪ More resources/options ▪ More commitment to resolve ▪ Issues are less important to the parties ▪ The conflict is recent ▪ The conflict is superficial ▪ Parties are willing equalize and use power fairly ▪ The conflict is less publicly controversial	▪ more parties, ▪ parties have little in common, ▪ Many issues ▪ Issues are complex or intertwined ▪ Fewer resources/options ▪ Less commitment to resolve ▪ Issues are deeply important to the parties ▪ The conflict has a long history ▪ The dispute has deep roots ▪ Powerful parties unwilling to share power fairly ▪ The conflict is more publicly controversial

It is important to emphasise the importance of power. If there is great disparity in power among the parties, resolution may seem easy, as the weaker party may capitulate to the stronger party. However, in such cases, root causes of conflict are likely to continue until issues of social or private justice are addressed. The conflict may continue to simmer, and may escalate in future.

3.8.2 Deciding Whether to Negotiate: Factors to Consider

There are some prerequisites for the negotiability of a conflict:[54]

- **Trust:** Trust may not be necessary to begin negotiations, but some trust must be built during negotiations. However, where conflict has escalated to the point of demonization or contempt among parties, successful negotiations are unlikely without considerable relationship building among the parties. In the case of multi-party conflicts with large constituencies, relationship-building must occur among key leaders and among their constituencies if leaders are malleable to pressures of their supporters. In historically conflicted relationships, reconciliation processes may be needed before negotiation of agreements will be fruitful; reconciliation processes may include acknowledgement, apologies and reparations and forgiveness for past offences.[55]

[54] Susskind, Lawrence, and Jeffrey Cruikshank. *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*. New York: Basic Books, 1987, 5.

[55] For more on reconciliation, please read Barkan, Elazar, and Alexander Karn, eds. *Taking Wrongs Seriously: Apologies and Reconciliation*. Stanford, CA: Stanford University Press, 2006; Govier, Trudy. *Taking Wrongs Seriously*. Amherst, NY: Humanity Books, 2006; Minow, Martha. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press, 1998.

- **Spokespersons of constituencies:** A key factor in negotiability is the attributes of the parties or their leaders in the case of parties that have large or powerful constituencies. Key traits to consider are the parties' capacity for openness, change and moderate expression. Where the conflict involves outside stakeholders whose consent is important to the implementation of a negotiated agreement or the resolution of a dispute, it is important to be able to find a legitimate spokesperson with authority to speak for (but not necessarily bind) each stakeholder group. Also, to be represented in a negotiation, stakeholder groups need to be sufficiently organized to identify representatives, or in the case of a group that is insufficiently organized, "a stand-in," or "surrogate." For example, in a negotiation about development of a large public project, are there civil society organizations that are sufficiently developed to act as surrogates to represent the interests of some stakeholder groups like poor people, women or children?

- **Clarity of Issues:** It is important to be able to identify the issues in dispute. If the issues are not clear it may be important to hold preliminary dialogues to see whether the issues can be delineated sufficiently for negotiation.

- **Values of parties**: Negotiation can take place only if the issue can be framed in such a way as not to violate the parties' important values. In the case of public officials, issues must be framed in ways that do not violate the terms of their office.

- **Timing:** Practical deadlines must be sufficient to allow consensus building. Relevant deadlines include budget cycles, seasonal deadlines, terms of office, any upcoming elections, etc.

- **Good reasons to negotiate**: Parties must have a reason to negotiate. They will not likely wish to negotiate if they can pursue their interests without the consent of other stakeholders. That is, they will not negotiate if they see that their BATNA is better than what they can achieve through negotiation. It may be possible for negotiations to proceed without some secondary parties, but not without the key parties whose consent and cooperation is essential to implement a decision. There must also be real *interdependence* in the relationship of the parties for the purposes of implementation and not just talk. If one party can get all it wants without coming to the table, there is no incentive to negotiate.

- **Power and good faith negotiations:** Related to interdependence is power. Power relationships among the parties must be sufficiently balanced to allow fair representation and negotiation of interests. Power imbalances that are severe or that include patterns of power abuse or the likelihood of coerced agreements may make negotiation unfeasible or inappropriate.

4 CULTURE, GENDER, POWER, EMOTIONS AND FACE

The first section of this chapter considers culture and gender. The second section considers power dynamics in negotiation. The third section considers the influence of emotions in negotiation, particularly anger and fear. The fourth section considers on face loss and face saving. All these factors are interconnected in negotiation.

4.1 The cultural context of negotiations

The context of negotiation includes, in every case, its cultural context. Cultural differences are commonly associated with race, ethnicity or national origin, but there are important cultural differences associated with age, generation, gender, socioeconomic status, national origin, religion, recency of immigration, sexual orientation or disability.[56] Culture also includes commercial, community, environmental, family or other "sub-cultural" dispute contexts. Institutions, organizations and professions have their own cultural characteristics and norms.

This section is intended to accomplish two tasks. First, the substantive material, together with several questions for reflection, are intended to focus readers' attention on the importance of culture in *all* conflict and negotiations, not just obviously intercultural situations. It is hoped that readers may draw insights into the ways their negotiations are influenced by the cultural contexts in which they take place, and the ways the parties perceive, prevent, generate, contribute to, process and resolve conflict. Second, this section presents a brief summary of some common views about culture present in literature on negotiation and conflict resolution.

4.1.1 The importance of culture and gender in conflict

Conflict is present in all cultures, societies and institutions. Intercultural conflict is pronounced in many places in the world today, including Canada, where there are conflicts about nationhood, language, race, culture, gender and indigenous rights. Complaints about discrimination on the basis of race, culture, gender and indigenous rights now comprise a large part of the case loads of human rights commissions and other complaint mechanisms in Canada.

Between 1990 and 1994, researchers in the Conflict and Culture Project at the University of Victoria in Canada found that intercultural conflict was considered a serious problem by members of cultural minorities and indigenous peoples who frequently reported experiences of systemic racism, discrimination, stereotyping and marginalization. The Project's researchers noted that members of minority cultural groups perceived levels of inter-group tension to be considerably higher than was perceived by the officials of the several large institutions surveyed.[57] This led the research team to hypothesize that if there are no serious, manifest inter-group disputes, people from dominant cultural groups tend to be less aware of culture or culture-related conflict than are people from less powerful groups in society.

[56] LeBaron Duryea, Michelle, 1992, 4.
[57] Lund et al, 1994, 31.

People in conflict tend to accentuate their differences. Some intercultural conflicts become very intense. Therefore, it is tempting to see cultural differences in themselves as a source of conflict, and to miss the true sources of conflict such as unjust attitudes of entitlement or superiority by some people or groups or unfair sharing of land or resources.

All negotiations and conflict occur within a cultural context, even when they do not involve obvious cultural differences such as ethnic or language differences. All people live and work and negotiate within cultural contexts. Some negotiation contexts are more marked by cultural diversity than others. People who are successful in dominant culture settings may have "blind spots" concerning the universal applicability of practices that work well in their familiar settings. When negotiators or dispute resolvers become aware of the need to be culturally sensitive, they often want to know the "do's and don'ts" relevant to a particular ethnocultural group they have encountered. While it is important to know some basic politeness norms in a particular place, it is important to take into account the fluid nature of culture and the fact that within any group there is considerable diversity. There is risk of acting on quickly developed stereotypes that break down when faced with a unique individual who does not conform to the cultural norm or stereotype.[58]

4.1.2 What is "culture"?

"Culture" has been defined by many scholars and practitioners in many different ways in many different contexts and disciplines. A large array of definitions has been catalogued.[59]

In the field of conflict studies, the following approaches are common.[60]

- **National culture:** In this approach, people assume that each country has a different national culture.[61] For example, it may be assumed that Americans have particular cultural traits and Chinese have other cultural traits. As you read on in this section, you will see the limitations of this approach.

- **Culture as learned behaviour.** In a 1990-1994 project for the University of Victoria Institute for Dispute Resolution, Michelle LeBaron Duryea adopted Ralph Linton's classic definition in *The Cultural Background of Personality, New York: Appleton-Century Co., 1945*: "The configuration of learned behaviour and results of behaviour whose components and elements are shared and transmitted by the members of the particular society."[62] LeBaron, whose later work reflects an approach that goes well beyond this behavioural definition, notes that culture is not just linked with race or ethnicity, but with "age, gender, socioeconomic status, national

[58] Rubin, Jeffrey Z., and Frank E.A. Sander. "Culture, Negotiation, and the Eye of the Beholder." *Negotiation Journal* (1991): 249-54.
[59] Groeber, A.L., and C. Klockhohn. *Culture: A Critical Review of Concepts and Definitions*. New York: Vintage Books, 1963.
[60] Janosik, Robert J. "Rethinking the Culture-Negotiation Link." In *Negotiation Theory and Practice*, edited by J. William Breslin and Jeffrey Z. Rubin. Cambridge, MA: Harvard Program on Negotiation, 1993.
[61] Brett, Jeanne M. Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries. San Francisco: Jossey-Bass, 2001.
[62] LeBaron Duryea, 1992, 5.

origin, recency of immigration, religion, sexual orientation and disability."[63]

- **Culture as shared values.** In this view, culture is comprised of values and beliefs that are shared by a particular culture.

- **Culture as socially constructed.** In the past decade, "social constructionist" approaches have become more predominant in the literature on conflict resolution. In this approach, culture is considered to be "webs of significance and meaning that humans have spun for themselves.[64] Thus, culture is not a rigid "thing" or a "container" or "baggage" that we carry around with us. Rather, culture consists of the meanings constructed by people interacting together at particular times and places. Culture, is dynamically *created and recreated* through social interaction and discourse within various kinds of relationships. A "conflict culture" and a "negotiation culture" are built through interactions and discussions of people within particular contexts, places and times, including institutional contexts. In this approach to "culture," the question often becomes which interactions and discourses will create the *dominant* culture within a given context. Which people or groups of people will be included or excluded (either overtly or covertly) from the interactions and discussions that "count" as "important" or "persuasive"?

4.1.3 When we consider "culture" what are we usually thinking about?

The following is a summary of some widely held ideas about what we might consider when we think of culture. In this approach, world view is at the centre of any understanding of culture, and infuses (and is infused by) all other factors.[65]

- **World view**: World view is central in any culture. A key to understanding group behaviours is to understand the dominant beliefs of the group concerning the relations of humans to one another and to the world. This includes their relationships with, and beliefs about, other forms of existence including deities or spirits.

- **Language and symbol system**: "Language is the medium through which a culture expresses its world view." Language includes verbal and non-verbal communication, kinesics (body movements, e.g., shrugs), gestures, eye contact, tactile communication, vocal inflections, pictorial designs and shapes.

- **Beliefs, attitudes and values**: Beliefs and belief systems are formed through the experiences and perceptions of individuals and the group. They are transmitted through language and myths and are influenced by the group's world view and cosmology (view of the universe). Beliefs and values shift and change within all cultures.

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[63] *Ibid.*, 5.
[64] Geertz, Clifford. "Thick Description: Toward an Interpretive Theory of Culture." In *The Interpretation of Cultures: Selected Essays*, 3-30. New York: Basic Books, 1973.
[65] Pennington, Dorothy. "Intercultural Communication." In *Intercultural Communication: A Reader*, edited by Larry A. Samovar and Richard E. Porter. Belmont, CA: Wadsworth, 1985.

- **Priorities of values**: Each culture ranks its priorities and values, such as competition or cooperation, degree of importance of material acquisitions, male dominance or gender equality, individual rights or societal rights, honesty or loyalty, colours, tastefulness, timeliness, etc.

- **Religion, myths, and expressive forms**: Religious expressions, myths, stories, music, art, poetry, dance are connected to the culture's world view and cosmology.

- **Time**: Different groups may treat time differently. Time usage depends on a culture's concept of past, present, and future. For example the world views of Judaism, Christianity and Islam share a linear time orientation, in which there is a linear progression toward the future. This has led to a linear time orientation in Western countries. Buddhism, Hinduism and many traditional religious have a more cyclical view of time and the passage of time. The extent to which there is a sense of change over the generations also affects time usage. For example, where there is a lot of change from one generation to the next, time may be viewed in a more linear way. Where existence over generations is not marked by significant change, time may be viewed as more circular and will be treated as less significant on a day-to-day basis. Time usage may also be related to geography and activities. For example, an agrarian culture may look at the position of the sun to approximate time. A highly commercialized culture standardizes time and may measure time in minutes or seconds.

- **Space**: Each group has rules concerning appropriate physical and psychological spacing by persons or groups for various kinds of communication. This includes customs or rules about touching other people. Different groups also attach different meanings to unoccupied spaces. For example, some groups would view wilderness areas as open, empty spaces. Others view open spaces as having special significance, or as sacred.

- **Social relationships and communication networks**: Culture shapes the nature of the family. In some cultures the family is nuclear. In others it is extended. Community relationships may be communal or individualistic, cooperative or competitive. Communication can flow down through vertical hierarchies or across horizontal networks.

- **Ways of meeting obstacles:** This concept refers to the ways a group meets new or unexpected obstacles between the group and its goals. For example, what interventions are taken by the group: does the group try to remove the obstacle, go over or under it, or find an opening? How does the group interact with the others in the group or with outsiders (including nature and the spiritual world) during the experience?

While ideas about culture such as these are valuable, they can tempt one to see a characteristic as static and as universally true for the whole group in question. But the ways in which groups do things and create meanings are always changing as people interact through circumstances and time. This is why it is difficult to generalize about culture.

4.1.4 Ways of understanding cultural differences about conflict and negotiations

The meaning attached to conflict may vary depending on the culture, the context, the group, and the individual. It is impossible to find one universally accepted understanding of "conflict." For example, one person (or group) may perceive a discussion about a particular law or policy as a vigorous testing of ideas. The other may perceive the discussion as a personal insult or attack. Some consider conflict to be natural and a legitimate opportunity to resolve problems or injustices so as to rebalance the equilibrium of groups, organizations or societies. Others may consider it to be abnormal and to be avoided, placing primary value on social harmony at all costs. Still others see conflict as important in an inevitable struggle towards equality and justice. Thus, people's values and ideologies affect their attitudes toward conflict. Please also refer to Chapter 2.

4.1.4.1 Conflict perspectives of individualists and collectivists[66]

People in every culture have both *individualist* and *collectivist* tendencies. Individualism emphasises the independence, rights and moral worth of the individual, and individualists see society as being composed of individuals. By contrast, collectivism emphasizes the interdependence of every human and emphasizes the importance of group cohesion and the priority of group goals over individual goals.

It is often suggested that North Americans tend to be more individualistic, while those from many Asian and Latin American countries tend to be more collectivist in orientation. However, people from all these countries may exhibit individualist or collectivist characteristics in different situations. Also, with worldwide migration, there are now people from all kinds of backgrounds living in most countries.

[66] Lund et al, 1994.

A summary of some literature about individualism and collectivism[67]	
INDIVIDUALISTS: e.g. observed tendencies in US, Australia, UK, Canada, Netherlands, New Zealand	**COLLECTIVISTS: e.g. observed tendencies in Indonesia, China, Japan, Mexico, Taiwan**
Group affiliations for individualists may be less important than their own beliefs, attitudes and principles.	Collectivists' behaviour may follow group norms more than an individualist's. Collectivist societies may stress family loyalty, filial piety, spiritual values, community standards. Families or groups may prefer insiders to resolve internal conflicts.
Individualists may prefer horizontal authority structures. Authoritarianism may be suspected.	Collectivists may be comfortable in unequal status relationships, and persons of lower status may defer to those of higher status.
Individualists may express pride in their accomplishments and to speak positively about themselves. They may say negative things about other individuals.	Collectivists may not take credit for their accomplishments. Conflicts may occur when collectivists are confronted with individualists who appear boastful because they acknowledge their own accomplishments, They may say negative things about members of "out-groups" (those outside their own social "in-group."
Face and embarrassment considerations are individualized.	Face and embarrassment considerations extend to the family and the in-group.
When resources are to be distributed, the individualist will expect equity (each according to his or her contribution) to be the guiding principle in all relationships.	When resources are distributed, the collectivist tends to use equity (to each according to his or her contribution) with out-group members; and equality (to each equally) or need (to each according to need) with in-group members.
There may be a tendency to try to separate substantive and relational factors. Individualists may seem emotionally detached from events that occur in their group than collectivists. Individualists may try to "get on with business" soon after meeting; they may not like preliminaries and ceremony.	Substantive and relational issues are always intertwined. Collectivists may wish to develop long-term relationships. This may be hindered when an individualist quickly wants to "get down to business" too soon.
Formal agreements (i.e. in writing) may have more weight for individualists.	Informal agreements (i.e. not in writing) may have more weight for collectivists, at least when they apply to those in the in-group.
Conflict may be viewed as an expressed struggle to air out and resolve differences. Open conflict is viewed as functional when it provides opportunities to resolve problems. Conflict is seen as dysfunctional when not addressed and allowed to fester.	Open conflict may be viewed as damaging to social harmony and may be avoided if possible.

[67] Lund et al, 1994. This table summarizes literature surveyed in LeBaron Duryea, 1992.

4.1.4.2 "High context" communication vs. "low context" communication

The famous anthropologist Edward Hall[68] created the idea that communication within cultures may be either "high context" or "low context." "High context" communication occurs within groups where people know each other very well, or where the traditions and history of the group are well-known to the people within the group. "High context" communication means that a lot of the information is in the *context* (rather than just the words). In high context communication, some things do not need to be said because "everybody knows it." Meanings may be less in the actual words said and more in the context. In a high-context situation people may say very little, but everyone knows what is meant by a particular phrase, a particular look, the way things in a room are arranged, a particular symbol, a particular kind (or colour) of clothing, etc. "Insiders" know what these things mean, but "outsiders" may not. High context cultures tend to be more homogeneous and are characterized by a focus on collective identity over individual identity.

"Low context" communication refers to communications in which nearly everything is explicitly stated. If information is not explicitly stated, people might not understand. Low context communication occurs in situations where people are not familiar with one another's traditions or knowledge. Low context cultures are characterized by individualism, overt styles of communication, and diversity.

Examples of countries in which people are said to use a lot of high context communication include Japan, China, and Korea, as well as many Latin American countries, especially in smaller communities where everyone knows one another and everyone knows the traditions and customs. Examples of countries in which people may use a lot of low context communication are the United States, Canada, and Northern Europe where people come from all kinds of countries and backgrounds.

It is important to note that "high context" communication can occur in any close-knit group. Thus, high-context communication often happens within "low context" cultures like North America. Outsiders usually do not know what seems obvious or "common sense" to insiders, sometimes even when they have been working with people in that culture for quite some time. For example, legal jargon used among lawyers is high context communication – lawyers in a particular place may have a common culture that is not shared by the non-lawyers in that same place. Non-lawyers may not know the meaning of words used by lawyers.

4.1.5 Culture: complex and dynamic

After looking at some features of cultural difference, we need to acknowledge that a focus on characteristics and norms within particular cultural groups can be misleading. Looking at particular cultural norms can cause an undue focus on romanticized, static, or out-of-date ideas about a particular cultural group. Also, when looking at a particular ethnic, societal or cultural group, it is tempting to focus on the stereotypical features of one particular dominant group within that society, and to make incorrect inferences that the whole group shares those features. As pointed out earlier, there is considerable diversity– and considerable change–within any group.

[68] Hall, Edward T., and Mildred R. Hall. *Understanding Cultural Differences*. Maine: Intercultural Press, Inc., 1990.

Things are always changing through social, educational, commercial and other human interactions, both locally and internationally. Cultural and ideological norms shift through generations and through adaptation to technological and environmental changes. Sometimes culture change happens rapidly, and sometimes more slowly.

QUESTIONS FOR REFLECTION OR DISCUSSION

- How does Pennington's framework and definition (section 4.1.3) compare with your own understanding of "culture?" Can you think of situations in which this information might be useful to you as a negotiator?
- Consider the concept of "high and low context" and the concept of individualism vs. collectivism in your own negotiations and dealings with other people. Are these concepts helpful? What do these concepts mean for you as a negotiator if you work with a variety of people from different backgrounds?
- Describe some features of the culture of the legal profession, or the culture of the institution in which you study. How do people perceive and address conflict within these settings?
- Consider some aspects of culture in relation to a *particular* conflict in your law practice, workplace, or educational institution. How are they affecting the dispute?
- Consider Michelle Lebaron Duryea's broad definition of culture which points out the cultural differences associated not only with ethnicity, but also with age, gender, socioeconomic status, national origin, religion, recency of immigration, sexual orientation, disability and other factors. How might some of these factors be involved in the conflicts and negotiations? What role does social class play in your law practice or educational institution?

4.1.6 Some common human capabilities

While stereotypical views of any group are to be avoided, human beings do share some things in common, such as:

- mortality,
- a human body,
- the need for food and drink,
- the need for shelter,
- sexuality,
- mobility,
- capacity for pleasure and pain,
- cognitive ability,
- early infant development,
- practical reason,
- affiliation with other human beings,
- relatedness to other species and nature,
- humour and play,
- individual separateness.[69]

[69] Nussbaum, Martha. "Women and Equality: The Capabilities Approach." *International Labour Review* 138, no. 3 (1999): 227-45; Nussbaum, Martha C. "Capabilities and Human Rights." *Fordham Law Review* 66 (1997): 273-317;

Human flourishing is said to be more likely if people have choices to live lives that they value, and the capabilities to exercise their choices (functioning). Related to these peoples' capabilities for functioning are some common basic needs, which may include:

- **"security needs"** including avoidance of violence, assault, arbitrary detention or torture;
- **"welfare needs"** including nutrition, water, air, movement and protection against elements and disease;
- **"identity needs"** including self-expression, work, well-being and happiness, affection, sexual identity, friendship, belongingness, purpose, partnership with nature; and
- **"freedom needs"** including choice concerning opinions, expression, association, mobilization, occupation, spouse, or way of life.[70]

Some of these needs are acknowledged in international human rights instruments.[71] While these lists are proposed as universal, they are also very general. In emphasizing things all humans have in common, it is important to emphasize that it is important not to overlook differences and inequalities in human capabilities for functioning when negotiating, particularly when negotiating the content or implementation of laws or public policies.

4.1.7 Culture, power and discrimination

Issues of cultural difference combined with issues of power cannot be overlooked or underestimated. While every cultural group and every individual has biases, groups and individuals who have less power in society often experience disadvantages in relation to members of the dominant cultural group. This can be due to racism, sexism and prejudice. It can also be due to an unreflective and hegemonic ethnocentricity on the part of the dominant groups in society which may see their own ways of seeing and doing things as "common sense" and "normal." The views and ways of less powerful groups are thus marginalised, advertently or inadvertently. Issues of power and negotiation are considered in more depth later in this chapter.

Sen, Amartya. "Capability and Wellbeing." In *The Quality of Life*, edited by Martha C. Nussbaum and Amartya Sen Sen, 30-53. Oxford: Clarendon Press, 1993; Sen, Amartya. *Inequality Re-Examined*. New York: Russell Sage Foundation, 1992.

[70] Galtung, Johan. "International Development in Human Perspective." In *Conflict: Human Needs Theory*, edited by John Burton, 301-35. London: MacMillan Press Ltd., 1990, 303.

[71] At a minimum, all States that are members of the United Nations are expected to adhere to the *Universal Declaration of Human Rights*, see http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx. To find the human rights treaty obligations binding on particular States, see the website of the United Nations High Commissioner for Human Rights at http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx or search at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx. The controversy within the field of international human rights concerning "cultural relativism" and the complexities of implementing (and the relative priorities of) conventions on social and cultural rights on one hand and individual civil and political rights on the other hand are beyond the scope of this course manual.

4.1.8 Gender and negotiation

Do men's and women's negotiations differ? Research has indicated contradictory results.[72] In 1992, Linda Stamato[73] reviewed a number of research studies. One study found that agreements mediated by women were more likely to last, and those mediated by men more likely to be broken. Another study found that parties' satisfaction with outcomes was not related to the gender of the mediators or whether the dispute was resolved. However, when disputes *were* resolved, the parties tended to be happier with the female mediators than they were with male mediators. Even so, female mediators were judged less competent than male mediators even when the male mediators had not helped the parties to reach agreement and the female mediators had.

Harvard professor Deborah Kolb[74] has drawn on literature by Carol Gilligan, Catharine McKinnon and others, along with her own experience, to express fears that women may not fare as well as men in real negotiations. She feared that conventional stereotypes and perceptions of women may undermine their behaviour and performance. "Existing research is not encouraging and suggests it is not easy for women to act forcefully and competitively without inviting criticisms and questions about both her femininity and ability and threatening some of the accustomed social order."[75] Another researcher, Carol Watson, suggests that is it not gender differences but situational power differences that are important in negotiation. However, regardless of their situational power, Watson's research found that women tended to feel more nervous, perceived themselves as less powerful even when they were not; and felt they were less successful even though objectively they were not less successful.[76]

In classroom settings, it has been found that negotiators of both sexes tend to permit gender stereotypes to influence their perception of other negotiators. However, the stereotypes do not hold up in actual observed classroom bargaining situations, nor are outcomes different in any statistically significant way.[77] Also, gender difference tends to disappear in *representative* negotiations.

In 2009, Deborah Kolb pointed out that *individual* differences in negotiation have dominated studies on gender and negotiation. Recently, this individualist approach has manifested itself in research findings that suggest that "women don't ask" for things on their own behalf.[78]

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[72] Menkel-Meadow, Carrie. "Teaching About Gender and Negotiation: Sex, Truths and Videotape." *Negotiation Journal* 16, no. 4 (2000): 357-75.

[73] Stamato, Linda. "Voice, Place, and Process: Research on Gender, Negotiation, and Conflict Resolution." *Mediation Quarterly* 9, no. 4 (1992): 375-83.

[74] Kolb, Deborah M., and D.M. Goolidge. "Her Place at the Table: A Consideration of Gender Issues in Negotiation." In *Negotiation Theory and Practice*, edited by J. William Breslin and Jeffrey Z. Rubin. Cambridge, Mass: PON Books, 1991.

[75] *Ibid.*, 270.

[76] Watson, Carol. "Gender Versus Power as a Predictor of Negotiation Behaviour and Outcomes." *Negotiation Journal* (1994): 117-27.

[77] Craver, Charles, B. "The Impact of Gender on Clinical Negotiating Achievement." *Ohio State Journal on Dispute Resolution* 6, no. 1 (1990): 1; Menkel-Meadow, Carrie. "Teaching About Gender and Negotiation: Sex, Truths and Videotape." *Negotiation Journal* 16, no. 4 (2000): 357-75.

[78] Linda Babcock, Sara Laschever, Michele Gelfand, ad Deborah Small, "Nice Girls Don't Ask," *Harvard Business Review*, October 2003..

According to Kolb, "by focusing on individuals and their negotiating proclivities, we downplay the cultural and institutional mechanisms that create inequities, some of them around gender, that shape how gender relations in negotiations play out." Finally, a focus on the individual "puts responsibility for change and remedying any disadvantage solely on the individual — a 'fix the woman' approach — limiting the possibilities for negotiating change in the cultures and institutions..."[79]

FOR FURTHER CONSIDERATION

- Deborah Kolb, Key to Effective Negotiations for Women, Stanford University, 2010, YouTube: http://www.youtube.com/watch?v=QSxsksS_eHM
- Carrie Menkel-Meadow asks: "Why do we care so much about whether there are gender differences in negotiation performance? Does it matter than women negotiate differently than blue-eyed negotiators or tall people (if they do at all?)." What is your opinion?

4.1.9 Culture, gender and you

Each individual may have complex and overlapping sets of values and behaviours affected by membership in a number of groups.[80] A group of people who come from largely similar backgrounds may have a surprising diversity.

QUESTIONS FOR REFLECTION OR DISCUSSION

Make a list of the some cultural groups by which you have been strongly influenced. Consider nationality, race, ethnicity, religion, language, gender, marital status, age, socioeconomic status, education, occupation, group membership, sexual orientation or disabilities. After you make your list, you may wish to talk with another person in the class about what you have learned about yourself:

- What views and values about conflict are held by these groups? Think of some of the metaphors or proverbs of this group. What they suggest about how conflict is perceived and handled.
- What are some ways you "normally" approach or handle different kinds of conflicts? How are these ways influenced by cultural groups with which you are affiliated? How might overlaps among these groups affect the ways you perceive and handle conflict?
- What kinds of interveners or intervention methods are seen as "normal" or "correct" within the groups with which you affiliate? What are the strengths, drawbacks of these methods?

[79] Deborah M. Kolb, "Too Bad for the Women or Does It Have to Be? Gender and Negotiation Research over the Past Twenty-Five Years." *Negotiation Journal* 25(4)(2009): 515-525.
[80] Singer, Marshall. *Intercultural Communication: A Perceptual Approach*. Englewood Cliffs N.J: Prentice-Hall, 1987, 23-24.

Suggested further reading

Lewicki, Roy J., David M. Saunders, Bruce Barry, and John W. Minton. *Essentials of Negotiation*. Third Edition. New York: McGraw-Hill, 2001, Chapter 8.

Rubin, Jeffrey, Z., and Frank E.A. Sander. "Culture, Negotiation, and the Eye of the Beholder." *Negotiation Journal* (1991): 249-54.

Salacuse, Jeswald W. "Ten Ways That Culture Affects Negotiating Style: Some Survey Results." *Negotiation Journal* (1998): 221-40.

Menkel-Meadow, Carrie. "Teaching About Gender and Negotiation: Sex, Truths and Videotape." *Negotiation Journal* 16, no. 4 (2000): 357-75.

Kolb, Deborah, Carol Frohlinger, and Judith Williams. "Managing the Shadow Negotiation," and "Being Your Own Advocate." *The Negotiator Magazine* (April/May 2002): http://www.negotiatormagazine.com/author_index.shtml (Two articles; scroll down to find the links)

4.2 Emotions in negotiation

During negotiations people may experience a variety of emotions, both positive and negative. Two emotions that can affect negotiations negatively are fear and anger. Anger that is out of control can impair judgment. Fear can paralyze a negotiator.

4.2.1 Fear

Most people feel some nervousness or anxiety going into a potentially difficult negotiation. It is normal to be fearful when facing a new or challenging situation. Worry can be useful if it causes us to do our research and to prepare well for negotiations. When fear is extreme, however, the body becomes mobilized to flee, sending blood to the legs and away from the brain. Extreme fear can debilitate a negotiator. Negotiators need to learn how to recognize and manage fear.

4.2.1.1 What are your warning signs of fear?

- sweating palms?
- shaky legs, trembling muscles?
- a thumping heart?
- trembling or cracking voice?
- inability to make eye contact?
- other?

4.2.1.2 Harness your fear to improve your performance

Here are some suggestions to reduce fear and improve your performance:

- prepare carefully – research the problem and develop a strategy;
- do research about the other negotiator;
- know your bargaining limit, your BATNA, your walk-away point and your strategy
- have a goal and keep it in mind;
- rehearse the negotiation;
- understand what makes you fearful and have a contingency plan for it;
- keep a glass of water nearby in case your voice trembles or your mouth gets dry;

- clear your throat and speak slowly from the bottom of your voice register;
- think about a situation in your past where you felt calm and in control;
- act confident even if you are not;
- do not make hasty bargains that are motivated by fear; instead, say you'll think about it;
- meditate and/or exercise before a stressful event;
- if you have chronic anxiety, reduce your stress level, exercise regularly, talk to friends, or seek counselling.

4.2.2 Anger

Anger is one of our most powerful and complex experiences. With anger come tremendous physiological changes and emotional charges of energy and alertness. Because of the power of anger, it can be dangerous when it results in destructive behaviour. But when anger is channelled productively it can help us bring about constructive change.

4.2.2.1 What is anger?

Anger is always associated with a person's perceptions of fairness and justice. No matter what the source of anger, the angry person will always perceive the situation to be unfair or unjust. These perceptions may be justified, or they may be exaggerated or unreasonable. Here is what David W. Augsburger says about anger:

> People in every culture get angry, and the anger is in service of, obedience to, and defense of their culture's rules. Anger is a sign that the web of oughts, the culture's mores, have been broken. Anger asserts an ought. By power of censure, threat of rejection, and warning or retaliation, anger seeks to regulate infractions, quarrels, disputes, or disagreements. In the absence of a legal representative, anger operates as personal policing power.[81]

Anger is a universal phenomenon, yet people in different cultures may have different norms for the expression of anger and may become angry about different things. Some cultures find any angry outburst to be socially unacceptable; others allow a certain amount of ventilation of angry emotions; in some cultures explosively-expressed anger may be normal and acceptable.

4.2.2.2 The physiology of anger

People experience physical changes when they are angry. There are several phases:

- **Trigger:** Something triggers arousal of anger. This could be a threat such as a physical or verbal attack, a source of frustration or some bad news. The body prepares to respond to the perceived threat.
- **Escalation:** Alertness increases as adrenalin pumps through the body; breathing becomes more rapid, heart rate increases, muscles tense for action, voice pitch and volume changes, eyes change shape and pupils enlarge.
- **Crisis:** The body prepares for action. The person is volatile. Judgment is poor. Decisions and actions are not based on reason.
- **Recovery:** After action has been taken to resolve the crisis, the body begins to recover from

[81] Augsburger, David W. *Conflict Mediation across Cultures: Pathways and Patterns*. Louisville, Kentucky: Westminster/John Knox Press, 1992, 113-142

stress. Adrenalin begins to leave the body gradually, and arousal tapers off. Judgment begins to return.

- **Depression:** After the body returns to normal, the heart rate falls below normal for a short time. Awareness and energy return to the brain, and the person assesses what has occurred. If the person has become violent or has said something they regret, they may experience shame, guilt or depression. Agreements made by a person during this phase may not be durable.

4.2.2.3 Using anger for constructive change

As a negotiator, it is important to become aware of your emotions so that you can stay in control. To negotiate effectively, you need to monitor whether you can maintain:

- accurate perceptions,
- self-control,
- reasonable and fair expectations,
- courtesy and consideration of others.

When you have been triggered, use the resulting energy and sharpened alertness to decide on an immediate action to prevent escalation toward a crisis. Do this immediately while you are still thinking clearly and are in control of yourself.

- count to 10 (or more!);
- take some quiet deep breaths;
- take a break from the negotiations;
- go to the rest-room or get a drink of water;
- try to remember a situation in which you were very relaxed;
- meditate and/or exercise before difficult negotiations.

> ***Above all,*** *do not make decisions when you are in a state of escalated anger, and do not made decisions while you are in a state of depression, shame or guilt as a result of something you have said or done while you were angry*.

After you have calmed down but still energized, use the information to ask yourself:

- Why am I angry?
- Do I have just cause to be angry? Is there some real injustice here? (Or is the anger related more to unrealistic or unfair expectations?)
- If there is a real injustice, ask yourself what constructive things could you do to help bring about a positive change?

After you are calm, and if you have decided it is appropriate, express your frustration or disappointment carefully in effective ways.

4.2.3 Monitoring the other negotiator's emotions

Sometimes we become aware that the other negotiator is fearful, angry or frustrated. Here are some tips:

- Maintain alertness about the mood of all negotiators.
- Help a fearful or angry opponent maintain face; if they lose face during the negotiation process, they may back away from the negotiation. It is sometimes helpful to acknowledge the

difficulty of the situation, and that negotiations can get frustrating.

- Do not be bullied by a negotiator who expresses (or feigns) anger as a threatening technique.
- A fearful or angry opponent can open the door to an agreement in your favour, but beware a hasty agreement in your favour that may not be stable in the long term (see Section 3.2.2 "quality of negotiated outcomes.") Suggest taking a break instead.

Suggested further reading

Fisher, Roger, and Daniel Shapiro. *Beyond Reason: Using Emotions as You Negotiate*. New York: Penguin Books, 2005.

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Daly, Joseph P. "The Effects of Anger on Negotiations over Mergers and Acquisitions." *Negotiation Journal* (1991): 31-39.

Stone, Douglas, Bruce Patton, and Sheila Heen. *Difficult Conversations: How to Discuss What Matters Most*. New York: Viking, 1999.

4.3 Face and negotiation[82]

Face-saving and face-restoration are of central importance in negotiation and conflict resolution.

4.3.1 What is "face"?

According to Stella Ting-Toomey, "[f]ace represents an individual's claimed sense of positive image in the context of social interaction."[83] In some cultures, an individual's face is important. In some cultures, face and face loss are also associated with the image and honour of one's family or group. Loss of face is often associated with feelings of shame or embarrassment. People sometimes fight over issues of face, and in some situations face may be as important as life itself.

Face is connected with:

- status, prestige and reputation;
- dignity, honour and self-respect.

Face-loss is connected to anxiety, shame and guilt. **Shame** refers to being exposed before another person or group as having done something wrong or made a mistake. The phenomenon of shame underscores people's basic need for acceptance within their community. **Guilt** is an emotion that results from behaving contrary to one's beliefs and values. Feelings of face loss are connected primarily to shame rather than guilt. People gain or lose face when other people's evaluations of them affect their standing in their community positively or negatively. People can also gain or lose face as a result of the behaviour of someone else with whom they are associated or related, particularly their families, and sometimes their co-workers.

People try to maintain and negotiate face in all situations where they are communicating with one another. This is called "facework."[84] Facework is particularly important in negotiation and conflict

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[82] This section is drawn from Augsburger, David W. 1992. *Conflict Mediation Across Cultures: Pathways and Patterns.* Louisville, Kentucky: Westminster/John Knox Press; Brown, Bert R. "Face-Saving and Face-Restoration in Negotiation," in *Negotiations: Social-Psychological Perspectives*, ed. D. Druckman (Beverly Hills: Sage, 1977), Brown, Bert R. "Face-Saving Following Experimentally Induced Embarrassment," *Journal of Experimental Social Psychology* 6 (1970), Brown, Penelope, and Stephen Levinson, "Universals in Language Usage: Politeness Phenomena," in *Questions and Politeness: Strategies in Social Interaction*, ed. E. Goody. Cambridge: Cambridge University Press, 1978, David Yau-fai Ho, "On the Concept of Face," *American Journal of Sociology* 81(4) (1976), Andre Modigliani, "Embarrassment, Facework, and Eye Contact: Testing a Theory of Embarrassment," *Journal of Personality and Social Psychology* 17 (1) (1971); Oetzel, John G., and Stella Ting-Toomey, "Face Concerns in Interpersonal Conflict: A Cross-Cultural Empirical Test of the Face Negotiation Theory," *Communication Research 30(6)(2003): 599-624;* Stella Ting-Toomey and et al, "Culture, Face Maintenance, and Styles of Handling Interpersonal Conflict: A Study in Five Cultures," *International Journal of Conflict Management* 2(4) (1991), Stella Ting-Toomey and Mark Cole, "Intergroup Diplomatic Communication: A Face-Negotiation Perspective," in *Communicating for Peace: Diplomacy and Negotiation*, ed. F. Korsenny and Stella Ting-Toomey (Newbury Park, CA: Sage, 1990), Harry C. Triandis, Richard Brislin, and Harry C. Hui, "Cross-Cultural Training across the Individualism-Collectivism Divide," *International Journal of Intercultural Relations* 12 (1988).

[83] Oetzel, John G., and Stella Ting-Toomey, "Face Concerns in Interpersonal Conflict: A Cross-Cultural Empirical Test of the Face Negotiation Theory," *Communication Research* 30(6)(2003): 599-624.

[84] Oetzel, John G., and Stella Ting-Toomey, "Face Concerns in Interpersonal Conflict: A Cross-Cultural Empirical Test of the Face Negotiation Theory," *Communication Research* 30(6)(2003): 599-624; Stella Ting-Toomey and et al, "Culture, Face Maintenance, and Styles of Handling Interpersonal Conflict: A Study in Five Cultures," *International*

management. Good negotiators seek to maintain the face of all parties throughout the negotiation.

Two aspects of facework are important to negotiators:

- **Autonomy**: Effective negotiators try to ensure that parties have sufficient autonomy or control (or influence) in a situation. Good negotiators learn not to "get themselves into a corner" by taking positions, especially arbitrary or unreasonable positions from which they may have to back down later. Instead, effective negotiators focus on their interests. They also learn not to force others into a corner. They learn ways to let other parties save face by learning the other negotiators' interests so as to help them find a way to retreat from their positions.
- **Relationship:** Effective negotiators work to ensure that parties do not feel insulted or rejected to the point that they cut off the relationship or refuse to continue negotiating before a mutually satisfactory agreement has been reached.

4.3.2 Examples of face-preserving strategies

Strategies that work toward maintaining the negotiating ***relationship*** include:

- listening and conveying interest to the speaker;
- noticing and anticipating the other negotiators' wants or needs;
- small talk, discussion of safe topics;
- noticing or establishing common ground;
- conveying a desire to cooperate;
- optimism;
- inclusion of both parties (e.g. "Perhaps **we** could do it together");
- reciprocating courtesies and good will;
- giving gifts, sympathy, cooperation or understanding (but **not** the kind of gifts that could be viewed as bribery or corruption);
- deference and honorifics;
- a humble attitude;
- disclaimers (e.g. "Please correct me if I'm wrong, but.... [then make your statement]...");
- giving an apology if it is appropriate;
- impersonal language (e.g. "The project got delayed," rather than "you caused the project to get behind").

Strategies which preserve a person's sense of ***autonomy*** include:

- giving the other negotiator an honourable or non-embarrassing "way out" of the situation;
- indirectness (e.g. "If it's not too much trouble, I wonder if it's possible to . . .");
- tentative or qualified questions or statements, e.g.:
  - "Perhaps we could find some ways to meet this deadline together?"
  - "I'm wondering... do you think we might run out of time?"
- minimizing imposition (e.g. "Could you spare a few minutes of your time?");
- hints (e.g. "It's warm, isn't it?" – hinting that it's time for a break or that a fan might be turned

Journal of Conflict Management 2(4) (1991), Stella Ting-Toomey and Mark Cole, "Intergroup Diplomatic Communication: A Face-Negotiation Perspective," in *Communicating for Peace: Diplomacy and Negotiation*, ed. F. Korsenny and Stella Ting-Toomey (Newbury Park, CA: Sage, 1990).

on);
- avoiding direct contradictions – agreeing where you can, and avoiding the use of the word "but." (e.g. "I agree with some of what you've said [be specific], **and** I think. . .[then express the contrary view])";
- ambiguity (e.g. "That's a very interesting statement...");
- generalizations (e.g. a sign that says "Smoking is permitted in the [specify the location]. . ." – if smoke has been bothering others, but you do not want to single anyone out).

4.3.3 External factors that affect face

Negotiators may also make good use of external face "regulators," e.g.:

- asking what others may think or say about specific proposals or conduct, including the other negotiator's client, the client's family, organization or constituency, or the media;
- controlling communications, for example by negotiating only with the other lawyer if there is a chance that a client's presence at a meeting could lead to face threats to either party.

QUESTIONS FOR REFLECTION OR DISCUSSION

Consider a situation in which you lost face or where you felt embarrassed, or where you were afraid you might be embarrassed.

- How did you feel? What were you concerned about? What happened that caused you to feel face loss and what did you do about it?

Now consider a particular dispute where a party seems to be behaving in a very stubborn manner.
- Are there face issues involved? Do you think the face issues are related to the need for relationship? Or the need for autonomy (control, influence, power)? Both? Or something else?
- What ideas do you have for helping people back away from positions without losing face?

4.4 Power and negotiation

Negotiation may not be desirable when there is a significant power disparity between parties, particularly when one or more parties have been in a habit of using power to abuse others or gain unfair or unlawful advantage. Where power imbalances are severe or entrenched within the structures or cultural patterns of an institution, organization or society, there may be a need for advocacy or coalition-building by disempowered groups or persons. An impartial third party may also sometimes help in such situations including the use of trustworthy and independent courts. An ombudsman office or human rights commission (if genuinely independent, trustworthy and effective) may sometimes provide useful impartial intervention.

4.4.1 What is power?

Power has been defined as ". . .the ability to make things happen, to be a causal agent, to initiate change."[85] It is often said that "power corrupts," however, within the field of conflict resolution, power, in itself, is seen as neither good nor bad, right nor wrong. Rather it is the way people use their power that determines whether their influence is being used for good or bad purposes. Power is seldom completely balanced among parties, and power often shifts during the course of disputing or negotiations.

4.4.2 Different ways to understand and use power

There are several different ways to understand power and the use of power:

- **Power "over":** People might have power "over" someone. This could be *legitimate* power such as that of an elected or lawfully appointed official or judge. Legitimate power is sometimes referred to as "authority." Persons who have legitimate authority can use their power in ways that are lawful, ethical and compassionate. Their authority ceases to be legitimate when it is used in ways that are unlawful or unethical, or when they use their power to bully, threaten, intimidate, blackmail, or when they are deliberately biased or corrupt. Another kind of power "over" may be the power a patron has over a client or the power a person gains by doing a lot of favours in expectation of returned favours.

- **Power "against":** People or groups can use their power in competitive ways against people for their own ends. This can include good kinds of competition, such as sports or games. It can also include matching wits against an opponent, power struggles, threats, nonviolent struggle or violence. While sometimes "power over" and "power against" are the same, people or groups with equivalent power or less power can use "power against" their opponents.

- **Exchange power:** Exchange power refers to the power to make and create through exchange and trade. It functions on reciprocity. In international diplomacy this might include aid monies offered in exchange for economic or democratic reforms.

- **Power "to":** This expression refers to the power to do things, including capacities to do or create, or to facilitate the increased capacity of other people to do or create. People use their capacity to facilitate the increased capacity of other by teaching, encouraging experimentation and building other people's confidence by encouraging their activities or behaviour. People can build houses, highways or ships. Parents can teach their children how to walk and talk and how to relate to one another in respectful and compassionate ways. Teachers can help students learn to read, write, etc. Employers teach their employees how to do jobs. Professors teach students. Trained lawyers make submissions to judges to enable them to make knowledgeable decisions. Lawyers, civil society organizations and public officials can help the public learn about their legal rights and obligations. Knowledgeable religious leaders can teach people about moral precepts and how to resolve conflicts in ethical ways. When people have knowledge and capacity, it cannot easily be taken away from them, and they can build on what they know to

[85] Follett, Mary Parker. "Power." In *Mary Parker Follett –? Prophet of Management: A Celebration of Writings from the 1920s*, edited by Pauline Graham. Boston, MA: Harvard Business School Press, 1996, 101.

further increase their capacity.

- **"Power with" ("integrative" power):** It is possible to use "power with" others. "Power with" refers to cooperative uses of power. This is the power that results from people working together toward a common goal. This is sometimes called "integrative" power, because the sum total of cooperative power is greater than the power of each individual. To use some every-day examples, a village. People in a village may cooperate to build a road or develop cooperatives to exchange goods and services in a cooperative, common effort. People in a neighbourhood or community might cooperate together to increase security from banditry by watching out for unusual activities or by greeting strangers and learning their purpose in their community. Women may band together to care for children or to build savings and loan groups. In one Canadian town that lost a large factory, the whole community banded together to develop the town into a successful tourist resort; instead of competing for remaining small amount of business, everyone got involved in the cooperative venture. In negotiation of small and large contracts, people use "power with" to cooperatively discover and integrate their interests and resources into a lasting agreement that suits all parties. Another way of using integrative power is to create governance structures and rules jointly. If authorities work jointly with people and civil society organizations to create rules together, it is more likely that everyone will obey them. In such cases, less "power over" is required to enforce them.

4.4.3 Power and society

People often think of power as a kind of commodity, and that if they give power away they will have less power for themselves. This is not the only way to think of power. Many times people actually gain power by sharing it. Often the most influential people in society are those who share influence within their social networks. For example, a teacher who helps students to be good at something is not giving up his or her capacity and power to be good at that job or craft, and is likely to gain stature for his or her expertise and knowledge.

Individuals always exercise power within relationships and within a social context. Every society has prevailing structures in which power is exercised by various groups of people. In every society, some people and groups have more influence than others. The prevailing cultural values of a group or society will determine what power structures are considered "right" or "normal." Within a given society, formal or informal methods may be used to try to maintain – or to challenge – the "normal" or "right" power structures. The distribution of power within society, including the protections given to less powerful groups or members of society, are linked to the society's concepts of justice and fairness.

In North America, some ideas about justice seem to contradict one another. Everyone is deemed to be "equal" under the Canadian *Charter of Rights and Freedoms*, yet some economic and social practices legitimize or aggravate existing social inequalities. For example, in Canada have formal, legal equality, yet women, children and indigenous people are persistently among the poorest people in Canadian society. Canadian women do not earn as much as Canadian men even in similar jobs. There are fewer women in top positions in government and other institutions, and women remain a minority in Parliament. Thus, the legal position is often quite different from actual social and economic position of certain groups in society. Where social practices and values are ingrained in a culture, considerable social, cultural and economic pressure may need to be

exerted to change the values and the actual distribution of social or economic power.

4.4.4 Sources of power[86]

There are many sources of power. As noted above, sources of power are available and exercised within particular relationships in a social context:

- **reward power:** being able to pay someone or give a reward;
- **coercive power:** being able to force or manipulate someone;
- **legitimate power:** legitimate authority;
- **referent power:** power that comes with being associated with a powerful person;
- **personal power**: such as personal charm, persuasiveness or charisma;
- **expert power:** being very knowledgeable about something;
- **organizational power:** being part of an organization or coalition.

4.4.5 Some principles about the use of power

The following ideas about power are currently popular amongst practitioners in the field of conflict management in North America:[87]

- If a person is perceived to have power, then in that situation, the person **has** power whether he or she knows it or not. People often fail to recognize or acknowledge the power they have, or are perceived to have.
- A person who can influence another person's achievement of a goal has power over that person.
- Power is directly linked with dependence: the more dependent A is on B, the more power B will have over A. If A becomes less dependent on B, then B will have less power over A.[88]
- Power may be exercised openly or in secret. Power that is secretly exercised may be more potent than power that is exercised in the open. This is why "transparency" is required in liberal democracies working towards more equality and power-sharing.
- The power a person has is defined by a particular context and relationship. A person who is influential in one relationship or situation may have less influence in another.
- In a conflict, each person or group has some power. No conflict would occur unless the less powerful person or group were exerting some power.
- People who have power over others may resist sharing it for fear of losing it.
- Power is dynamic. In any conflict, the parties' power may shift as information is shared, perceptions are shifted, or coalitions are built.

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[86] French, John R.P. and Bertram Raven. "Bases of Social Power." *Studies in Social Power*. Ed. Dorwin Cartwright. Ann Arbor: University of Michigan, 1959.

[87] In North America, conflicts are often seen as waged largely between individuals, so many ideas within the field of conflict resolution consider power on an individual basis. This means that some North Americans from dominant groups or in positions of power may sometimes forget the power they have that stems from their social positions.

[88] This is the reason negotiators are advised to know and strengthen their BATNA. The better one's BATNA, the less dependent one is on the outcome of the negotiation.

4.4.6 Balancing or sharing power

Negotiators (and mediators) can encourage the balancing or sharing of power among parties by:

- insisting on open sharing of relevant information;
- insisting that parties have opportunities to fully participate, including (for example) opportunities to attend meetings or equal time to speak;
- slowing down the pace of discussion through positive listening, including reformulation and questions (to allow understanding and careful thinking);
- pointing out patterns of power or the way people are using power;
- helping underpowered parties to identify and build on their sources of power, including building alternatives that decrease reliance on the relationship or the outcome;
- flushing out "bogeymen" by testing parties' perceptions of the other person's power;
- building knowledge, for example by referring parties to experts;
- building parties' communication skills and process knowledge;
- creating safeguards against the abuse of power by one or more parties.

QUESTIONS FOR REFLECTION OR DISCUSSION

Consider a particular dispute.

- How is power being used (or abused) by each of the parties? Do the parties see their power as a "commodity" that cannot be shared without losing something? Can the parties be encouraged to see their power as a "capacity" that can be shared with less risk to themselves?
- Consider each party or group. What are their sources of power?
- Do current power structures in this context contribute to productivity? Are the power structures fair and effective? Are individuals using power fairly in the situation?
- Are there ways that the sources, uses and dynamics of power could be shifted in the situation to be more fair or productive? What kinds of conflict resolution processes are most suited to the power structures and ways people are using power in this case?

Further reading

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Boulding, Kenneth. *Three Faces of Power*. Newbury Park, CA: Sage Publications, 1989.

Peter T. Coleman. "Power and Conflict." In *The Handbook of Conflict Resolution: Theory and Practice*, ed, Morton Deutsch and Peter T. Coleman. San Francisco: Jossey-Bass, 2000, 108-130. Summary at http://www.beyondintractability.org/articlesummary/10133 /

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Lewicki, Roy J., et al. *Essentials of Negotiation*. 3rd. New York: McGraw-Hill, 2001, Chapter 6.

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5 CHALLENGES IN REPRESENTING YOUR CLIENT IN NEGOTIATION

This chapter addresses some challenges of representative negotiation, particularly ethical issues. First is a brief section on some key tensions in the lawyer-client relationship. Second is the important issue of negotiation ethics, focussing on representative negotiation. Finally, there is a brief section that introduces mediation and the role of lawyers in representing their clients.

5.1 Representing clients in negotiations: Three key tensions

There are three key tensions in the lawyer-client relationship that are important in negotiations.

5.1.1 Building and maintaining trust

In order to negotiate durable and effective agreements, lawyers need to build trust with their clients **and** with the lawyer on the other side of the negotiation. Lawyers and their clients never have perfectly-matched interests. Lawyers are paid to advance the clients' interests, but lawyers also have interests of their own. For example, lawyers have professional and ethical obligations as lawyers and cannot act merely as "mouthpieces" for their clients. Lawyers may not always agree with their clients about the wisdom or ethics of particular courses of action. Lawyers also need to make a living. Clients may not fully trust their lawyers to advance their interests without charging them too much money. Lawyers have to make judgement calls about how much information to disclose to the other side in negotiations while staying within the bounds of lawyer-client confidentiality. In addition, both of the lawyers in a negotiation will be trying jointly to create proposal packages which maximize joint gains *and* which *both* of their clients might accept – this level of cooperation with the "other side" may cause clients to worry that their lawyer is "cooperating too much," thus creating opportunities for mistrust. On the other hand, if the lawyers are too competitive or "hard nosed," they may cause damage to the relationship between the parties (and the lawyers), thus undermining trust all around.

To build and maintain trust, lawyers need to strike the right balance of:

- integrity and strategic ability;
- seeking enough information *from the client* to ensure they understand their client's interests and goals, and to ensure that they can stay within their mandate of representation;
- providing enough information *to the client* to assure the client that his or her interests are being advanced;
- exercising good judgement and an appropriate amount of control over the flow of information – disclosing enough information about their client's interests to bargain effectively, but not so much information that their clients' interests are jeopardized.

5.1.2 Transforming clients' interests into agreements

As a negotiation proceeds, proposals are made, new facts are discovered, and new ideas are generated. All these factors can reshape negotiation proposals and shift power and leverage. Lawyers experience pressures from their own clients and the other lawyer in the dynamic process of persuasion and construction of agreements. Lawyers must somehow learn enough about the interests of the clients to transform them into viable proposals that the other side will consider. They must also learn enough about the interests of the other party to create ideas for proposals that can be presented to their clients for consideration. There are negotiations within negotiations. Lawyers negotiate with their own clients as much as they negotiate with the other parties' lawyers. As proposals are reshaped, there are increasing pressures on the lawyer from their own client and the other side.

5.1.3 Managing shifting roles: From advocate, to mediator and back again

A lawyer's purpose is to advocate her or his clients' interests to the other lawyer. A lawyer may also need to push toward consensus with the other lawyer. The two lawyers may end up cooperating with one another and needing to negotiate with their own clients. Thus, the lawyer may need to mediate between his or her client and the other side. This means that the lawyer is required to advocate for the client, negotiate with the client, and mediate between the client and the other side – sometimes all at the same time. This requires a nimble mind, a great deal of flexibility, good judgment and wisdom.

5.2 Ethics: The Heart of Negotiation[89]

The title of this section evokes several themes. First, the "heart of negotiation" suggests that ethics is central in any discussion of negotiation. Second, it suggests that ethics is not necessarily intellectual preaching about "dos or don'ts." Rather, ethics involve emotion and sometimes passion. Third, the image of the "heart" emphasises the *relational* nature of negotiation that is often mentioned and then often neglected in discussions of "power negotiation," "value claiming," "value creation," "problem solving" or "win-win" negotiation.

Carrie Menkel-Meadow points out that negotiation "necessarily involves interaction with other human beings"[90] whereby "we seek to do together what we cannot do alone."[91] Negotiation is, in its essence, something we do with other people.
The term "ethics," too, evokes ideas about social interaction. Even if we are individuals reading

[89] Note that there may be similarities between wording in this section and the chapter by Frederick Zemans, entitled "Representative Negotiators of Integrity." In *The Theory and Practice of Representative Negotiation*, ed. Colleen Hanycz, Trevor Farrow, Frederick Zemans, Toronto: Emond Montgomery Publications, 2008. Any similarities result from the fact that Catherine Morris contributed to the first draft of Prof. Zeman's chapter, and it is possible that not all of the phrases in this section have been changed. Remaining similarities are inadvertent.
[90] Menkel-Meadow, Carrie. "Ethics, Morality and Professional Responsibility in Negotiation." In *Dispute Resolution Ethics: A Comprehensive Guide*, edited by Phillip Bernard and Bryant Garth, 119-54. Chicago: American Bar Association, 2002.
[91] Menkel-Meadow, Carrie. "Toward Another View of Legal Negotiation: The Structure of Problem Solving." *UCLA Law Review* 31, no. 4 (1984): 754-842.

articles or codes of ethics, we respond to texts written by other people. When we work and talk together about honesty, fairness and power, we all contribute to the development of the ethics of negotiation in our social and professional groups. Groups of people create an "ethical climate"[92] of negotiation.

There are four types of relationships in which representative negotiations – and ethical climates -- occur:

- relationships between the representatives and their clients,
- relationships between representatives and their "negotiation opposites,"
- the negotiators' own relational interests, such as relationships with family, friends and colleagues, and
- the relationship of the negotiators with "the public interest."[93]

5.2.1 The usual approaches to negotiation ethics and why they may not help the representative negotiator

Studies of negotiation ethics often revolve around rules, including laws, regulations or codes of ethics. For example, G. Richard Shell counsels that the "minimum standard" is to "obey the law."[94] He suggests three common "schools of bargaining ethics" which he describes as the "'it's a game' Poker School," the "'do the right thing even if it hurts' Idealist School" and the "'what goes around, comes around' Pragmatist School."[95] This section examines these approaches along with some other ideas about negotiation ethics.

5.2.1.1 What does it mean to be "ethical"?

A consideration of negotiation ethics must start with a broader discussion about ethics and morality. What does it mean to be "ethical?" Does it mean acting consistently with one's own "ethical compass"? How does one test the accuracy of one's ethical compass? Should negotiators use a different ethical compass for negotiating than they might use for other aspects of their lives? What about negotiating across cultures? When in Rome should our ethics be different from when we are in Toronto or Bangkok? Are there any universal ethical principles for negotiators?

In a given negotiation, who should make the decisions about ethics? Who is the "ethical actor": the principals? the representatives? or both? Should ethics decisions they be made by these individuals alone, or should they be made in the context of shared community values, rights and responsibilities? If so, whose shared values should be taken into account? Where do questions of *professional* ethics fit? Are professional ethics a matter for the legal profession alone? Should governments and broader communities be involved in developing and implementing lawyers'

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[92] Menkel-Meadow, 2002, quoting Bok, Sissela. *Lying: Moral Choice in Public and Private Life*. New York: Pantheon Books, 1978.

[93] Farrow, Trevor C.W. "The Unique Nature of Representative Negotiation." In *The Theory and Practice of Representative Negotiation: A Book of Readings* edited by Colleen Hanycz, Frederick Zemans and Trevor Farrow. Toronto: Emond-Montgomery, 2008.

[94] Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004.

[95] Shell, 2004, 65-71

ethics?

Finally, is it simply "smart" or "technically competent" to be ethical? If so, does competence or intelligence make a person "ethical"?

5.2.1.1.1 Who is the "ethical actor"? "I" or "we"?

Much of the writing in North America on negotiation ethics focuses attention on the individual as the ethical actor. Writing about ethics also tends to focus on *actions* – the conduct of the individual. Ethical questions often revolve around the question: "What should I do?"

This has resulted in prescriptions and prohibitions of certain actions or behaviours of individuals. It has also led many lawyers to govern their behaviour by checking to see whether their conduct is forbidden or permitted by law. The narrowness and ambiguity of laws to address all cases has led occupational groups, such as the legal profession, to create additional codes of conduct that go beyond the law.

Recent writing on business ethics has questioned whether there should be so much focus on whether particular *acts* are right or wrong. Instead, literature on business ethics has begun to focus on a different question that emphasises *virtues*, such as honesty, loyalty or non-corruption. The question becomes one of moral *character*. Some scholars in the field of legal ethics and negotiation ethics have also been writing about "virtue ethics."[96]

There have also been increasing questions about individualist approaches to ethical reflection and accountability and increased attention on the relational and communal nature of conduct and deliberation about ethics, responsibility and accountability.[97]

5.2.1.1.2 Moral and non-moral deliberation and decision-making

Not all difficult decisions involve ethical issues *per se.* Some are technical questions such as "for how much should I settle this case?" Such a question may be difficult, but it may not necessarily involve ethical questions. It may involve issues of competence or prudence more than ethics. Another type of question that is prudential (rather than ethical) is: "Might I be disciplined by my professional body if they found out what I said or did? Might I get caught?" A third prudential question that finds its way into the literature on negotiation is the idea that "what goes around comes around."[98] Richard G. Shell articulates this approach:

> ... lying and effects of deceptive conduct are bad not so much because they are 'wrong' as because they cost the user more in the long run than they gain in the short run.... Lies and misleading conduct can cause serious injury to one's credibility. And credibility is an

[96] E.g. Feldman, Heidi. "Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?" *South California Law Review* 69 (1995-1996): 885-948.

[97] McIntyre, Alasdair. *After Virtue: A Study in Moral Theory*. 2nd ed. Notre Dame, Indiana: University of Notre Dame Press, 1984.

[98] Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004, 68-69.

> important asset for effective negotiators both to preserve working relationships and to protect one's reputation in a market or a community."[99]

A familiar "ethical" test question proposes a related kind of non-ethical question: "Would you like to see your conduct 'on the front page of the *New York Times* or the *Wall Street Journal*...'[100] or in the history books." Questions that focus exclusively on whether I might get caught, disciplined or shamed are not true questions about morality or ethics.

5.2.1.1.3 Morality and ethics: Is there a difference?

Some literature talks about the difference between morality and ethics.[101] Is there a difference between personal morality and negotiation ethics? Many ancient and contemporary authors use the terms "morality" and "ethics" as synonyms, but some literature on moral philosophy makes distinctions that are worth discussing.

Moral deliberation is said to involve consideration of universal, "categorical" norms binding on all individuals at all times and in all places.[102] For example, Immanuel Kant said that the maxim "always tell the truth" is a categorical imperative, meaning that it is universally mandatory for everyone without any exception. Many philosophers have argued about this, using hypothetical examples. For example, should one tell a lie to a murderer about the whereabouts of friend hiding in our house, even if we believe the murderer wants to kill our friend?[103] Kant said that even in this extreme case one should tell the truth.[104] Kant believed that all individuals should be given the choice not to commit murder, even if someone tells them the truth about where to find their victim. Kant's view was that morality is primarily individual. According to Habermas "...*moral issues* are at stake when we wish to *solve* interpersonal conflicts in concordance with the interests of everybody involved and affected." Thus, moral discourse concerns principles and norms as they apply to individuals in their relationships with other individuals.

Ethical issues, on the other hand, are seen as related to particular groups or cultures. Thus, ethical deliberation involves relationships among people in particular groups. The maxims, "you may use puffery[105] in negotiation, but you must not lie about material facts" arose in the context of particular ethical discussions among particular lawyers in the Britain and other common law jurisdictions.[106] Other lawyers in other jurisdictions may come up with different (or similar)

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[99] Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004, 68.

[100] Lax, David A., and James K. Sebenius. "Three Ethical Issues in Negotiation." *Negotiation Journal* 2, no. 4 (1986): 363-70, 8-9.

[101] Piercey, Robert. "Not Choosing between Morality and Ethics." *The Philosophical Forum* 23, no. 1 (2001): 53-72.

[102] Piercey, 54.

[103] See Kant's discussion of this critique in Kant, Immanuel. "On a Supposed Right to Tell Lies from Benevolent Motives." In *Critique of Practical Reason and Other Works on the Theory of Ethics*. London: Kongmans, Green and Co, 1889. http://oll.libertyfund.org/Home3/HTML.php?recordID=0435 (Accessed 28 March 2007)

[104] Kant's reply to such a critic is worth reading. Kant, Immanuel. "On a Supposed Right to Tell Lies from Benevolent Motives." In *Critique of Practical Reason and Other Works on the Theory of Ethics*. London: Kongmans, Green and Co, 1889. http://oll.libertyfund.org/Home3/HTML.php?recordID=0435 (Accessed 28 March 2007)

[105] "Puffery" means exaggeration of facts.

[106] A common law school case is used to teach the difference between a "mere puff" and an actionable

results of their deliberations about ethics. An example of discourse on ethics can be found in discussion by lawyers of the American Bar Association (ABA) in the United States. This discourse pertains to a proposed "duty of fair dealing"[107] in settlement negotiations and an existing duty not to make "false statements of material fact or law.[108] However, the latter does not include "statements of opinion or those that merely reflect the speaker's state of mind."[109] ABA Model Rule 4.1, comment 2, states:

> Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category. . .[110]

Lawyers discussed this ABA Model rules in late 2006 when the ABA Ethics Committee commented on negotiations of counsel in mediation. The Ethics Committee said that "statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing,' ordinarily are not considered 'false statements of material fact' within the meaning of the Model Rules."[111]

Dispute resolution scholar, Kimberlee Kovach, denounced the opinion of the ethics committee, saying that it allows deceit "under the characterization of 'puffery' in negotiation," and "allows attorneys to make misrepresentations to the mediator as well as one another." Professor Kovach found this troubling given ABA's endorsement of a mediator duty to "promote honesty and candor between and among all participants."[112]

We can see here the tensions between the moral and ethical precept "do not lie" and commonly accepted practices of deception and puffery within the field of representative negotiation. According to Piercey,[113] some moral philosophers derive ethics from deeper moral norms which must take priority over – or trump – contingently situated ethics. Thus, the precept "do not lie" could trump any suggestion of any type of deception in negotiation, including puffery or misleading about one's principal's "bottom line."

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misrepresentation. *Carlill v. Carbolic Smoke Ball Company* [1893] 1 QB 256. Thus, first year law teaching may works toward the developmenet of a legal culture that fosters this kind of untruth.

[107] American Bar Association, Section on Litigation. "Ethical Guidelines for Settlement Negotiations." Chicago: American Bar Association, 2002 (ABA), section 2.3.

[108] ABA, section 4.1.1.

[109] ABA, section 4.1.1.

[110] American Bar Association, Section on Litigation. "Ethical Guidelines for Settlement Negotiations." Chicago: American Bar Association, 2002, section 4.1.1, citing the ABA Model Rules of Professional Conduct, 2002, found at http://www.abanet.org/cpr/mrpc/mrpc_toc.html (Accessed 28 March 2007).

[111] *Ibid.*

[112] Kovach, Kimberlee. "Ethics Opinion a Step Back in Time, Complicates Responsibility of Mediators." In *American Bar Association Committee on Ethics*, 2006. http://www.abanet.org/dch/committee.cfm?com=DR018000 (Accessed 28 March 2007) citing n Standard VI, 4 of the Model Standards of Conduct for Mediators approved by the American Bar Association, the American Arbitration Association and Association for Conflict Resolution in August, 2005, http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf (accessed 28 March 2007)

[113] Piercey., Robert. "Not Choosing Between Morality and Ethics." *The Philosophical Forum* 32 (i) (2001): 53.

Others claim the opposite – that morality is derived from localized and particularized ethical discourse. Thus, for the members of the ABA, "puffery" and misleading about the bottom line are seen as ethical, since this is customarily part of the rules of the negotiation "game" that all players should know. This has been referred to by Albert Z. Carr as "the poker analogy."[114] In poker "it is right and proper to bluff a friend out of the rewards of being dealt a good hand" but it not right for poker players to "keep an ace up their sleeves or... mark the cards."[115] Carr claims "the ethics of business are game ethics, different from the ethics of religion."[116] Thus, business ethics are distinguished from personal morality in which "the golden rule" would normally apply. Legal scholar James J. White uses the poker analogy to point out that

> a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker plays, in a variety of ways he must facilitate his opponent's inaccurate assessment.... I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions.... To conceal one's true position, to mislead an opponent about one's trust settling point, is the essence of negotiation.[117]

White then shifts to a metaphor about war, saying: "Of course there are limits on acceptable deceptive behavior in negotiation, but there is a paradox. How can one be 'fair' but also mislead? Can we ask the negotiator to mislead, but fairly, like the soldier who must kill, but humanely?"[118] White presents several cases for consideration:

- misrepresenting one's true opinion about the meaning of a case or statute;
- distorting the value of one's case or other subject matter of the negotiation through "puffery";
- making demands that one knows one's client cares little about (but acting as though they are important to the client) in order to trade it for a concession from the other;
- misleading or lying to one's bargaining opposite about one's own client's bargaining limit in order to get a better offer.

White concludes that the first three are "within the rules of the game," and are therefore ethical, but that the last one is not, and is therefore unethical.

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[114] Carr, Albert Z. "Is Business Bluffing Ethical?" In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 246-56. San Francisco: Jossey-Bass, 2004, first published in (1968) 46 *Harvard Business Review* 143-53; See also Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004, 65-67.

[115] Carr, Albert Z. "Is Business Bluffing Ethical?" In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 246-56. San Francisco: Jossey-Bass, 2004, 248, first published in (1968) 46 *Harvard Business Review* 143-53.

[116] *Ibid.*

[117] White, James J. "Machievelli and the Bar: Ethical Limitations on Lying in Negotiation." *American Bar Foundation Research Journal* (1980): 926-38, at 927, citing, by way of example, the same Chester Karrass whose advertisements are seen in flight magazines all over the world. White points out that Karrass "states bluntly that 'bluffing is part of negotiating.'" Chester Karrass. *The Negotiating Game: How to Get What You Want*. New York: Thomas Y. Crowell Co., 1970, 187.

[118] White, 1980, 928.

Who set these rules of this game? Professors Carr and White? We cannot discount the power of academics, particularly since both Professors Carr's and White's articles have become classics in the field of negotiation. But who says negotiation is a game – a competitive game – let alone a poker game?

Not everyone sees negotiation as a game.[119] Yet those in "poker school" may insist on their game metaphor to justify their ethics. They may continue to play "poker" even when other "players" do not agree that negotiation is a game to which the rules of poker apply.[120]

Lax and Sebenius address the ethical issue of power (but do not challenge the game metaphor) by asking "are the rules known and accepted by all sides?" They also ask how any "rules" of the game can meet the test of mutual "awareness and acceptance of the rules"?[121] Lax and Sebenius suggest that not only must all parties understand the rules of the game, but they must be equally free to enter and leave the situation.[122] We now see that the question is not merely about the ethics of *honesty* in negotiation, but the ethics of *power* exercised in negotiation *relationships*.

Shell points out that in addition to the "poker school" and the pragmatist school, there is the "Idealist School" of negotiation ethics which says "bargaining is an aspect of social life, not a special activity with its own set of rules. In the 'idealist school' of ethics, the same ethics that apply in the home should carry directly into the realm of negotiation."[123] Thus, the distinction between individual morality and a special set of "negotiation ethics" may break down.

Piercey argues that the distinction between "morality" and "ethics" is false. He points out that *moral* discourse relies on particular, local *ethical* discourse. Ethical discourse presumes some moral norms (although different people may presume different moral norms.) Piercey argues that one cannot have moral discourse without presuming certain ethical *virtues* that people learn during educational processes.[124] But what virtues might these be? We shall return to virtue theory later to see whether it can help us.

5.2.1.2 Diverse communities with different ethics: Does ethical relativism help?

Discussion about the poker school of ethics brings us to the challenge of ethical relativism. Ethical relativism points out that there is huge diversity among moral and ethical principles around the

[119] We note Deborah Tannen's work which suggests that boys' and men's games tend to use competitive sports or war metaphors, and that men are more likely than women to characterize everyday interactions in terms of fighting. Tannen, Deborah. *Talking from 9 to 5: Women and Men in the Workplace: Language, Sex and Power*. New York: Avon Books, 1994, at 57, citing Ong, Walter. *Fighting for Life: Contest, Consciousness and Sexuality*. Ithaca: Cornell University Press, 1981.

[120] Shell, Richard G. "Bargaining with the Devil without Losing Your Soul: Ethics in Negotiation." In *What's Fair: Ethics for Negotiation*, edited by Carrie Menkel-Meadow and Michael Wheeler, 57-74. San Francisco: Jossey-Bass, 2004, 66-67.

[121] Lax, David A., and James K. Sebenius. "Three Ethical Issues in Negotiation." *Negotiation Journal* 2, no. 4 (1986): 363-70 at 365.

[122] Ibid, 365, citing Bok, Sissela. *Lying: Moral Choice in Public and Private Life*. New York: Pantheon Books, 1978.

[123] Shell, 2004, 67-68.

[124] Piercey, Robert. "Not Choosing between Morality and Ethics." *The Philosophical Forum* 32, no. 1 (2001): 53-72, 65.

world. Different moral and ethical principles generate different ethical questions and answers.[125] What is considered wrong for those in one group may be considered right for others who do not want other people's moral or ethical standards imposed on them.

Relativism judges behaviour by the standards of the community involved. What may be considered wrong in one context (e.g. in interaction among family or friends) may be considered right in another (e.g. in negotiations according to the poker school). Cultural relativists may say that these ethical differences should not be criticized by outsiders.

Some people say that relativism is a form of "pseudo-morality" in which individual preferences are used to justify just about any kind of attitude or behaviour. However, very few people believe that "anything goes as long as you sincerely believe it."

Relativism deserves attention for at least four reasons. First, individualist forms of relativism are prevalent in popular culture in many parts of the world, particularly North America, Northern Europe and Australia. It is common to hear: "I have my values and you have yours. Don't impose yours on me." Ethical relativism is often viewed as a form of respect and acceptance of others.

Second, relativism is the subject of considerable literature.[126] While some deplore relativism as an assault on universal moral standards, some literature suggests that relativism is an indicator of inter-cultural competence.[127]

Third, in intercultural business negotiations, ethical relativism often comes clearly into focus. For those who undertake international work on a regular basis, it will not be long before there will be an informal invitation to adopt someone else's ethics in preference to one's own. These invitations are very often couched in the vocabulary of relativism: "When in Rome do as the Romans do."[128] This statement may be a form of moral pressure to agree to evade local laws or taxes or to pay illegitimate "expediting fees" or "bonuses" as bribes. However, in "Rome" there are usually many "Romans" who are working on anti-corruption measures. Relativism does not much help people who find themselves negotiating ethical issues found on some negotiating partners' foreign shores, particularly in light of increasing efforts to internationalize anti-corruption measures and human rights norms through treaties and other instruments.[129] Can ethical relativists really take into

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[125] See, e.g. Chan, Ricky Y. K, Louis T. W. Cheng, and Ricky W. F. Szeto. "The Dynamics of Guanxi and Ethics for Chinese Executives " *Journal of Business Ethics* 41 (2002): 327–336.

[126] There is a voluminous literature on the topic of relativism in contexts of rule of law and international human rights contexts which surely places the topic of relativism beyond easy dismissal.

[127] See, e.g. Barsky, A, E.D. Este, and D. Collins. "Cultural Competence in Family Mediation." *Mediation Quarterly* 13 (1996): 167-78. We do not believe Barsky et al meant to suggest that "anything goes," however they do use the term "relativism" to encourage cultural sensitivity and respect.

[128] It is important not to name any particular country, since, as recent events tell us that all over the world, including Canada, cheating and corruption in various forms are very common.

[129] See, e.g. the *United Nations Convention Against Corruption*, 31 October 2003, A/58/422, available at: http://www.refworld.org/docid/4374b9524.html and the current effort of a UN Human Rights Council working group to draft a binding treaty on business and human rights, which may be based largely on the non-binding United Nations. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, A/HRC/17/31, June 2011, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

account questions of personal and professional ethics or the public interest in a particular place without sacrificing one group's ethical values in favour of other group's values which seem more powerful in the situation?

Finally, ethical relativism comes with some false assumptions that are illustrated by the previous example. Communities are rarely ethically homogeneous. In a given negotiation, which ethics of which sectors of society should be copied by a given negotiator? Does a negotiator emulate those within society or the legal profession seeking social transformation towards public honesty, accountability, integrity and respect for human rights? Or should a negotiator emulate those profess belief in the moral guidance of powerful elites or the "invisible hand" of an unregulated market-place?

Relativism may seem to respect people by providing them with ethical autonomy and choice, but in a given negotiation, whose choice governs? Which version of negotiation is to prevail in a given negotiation? The Poker School, the Idealist School or the Pragmatic school? The problem of ethical diversity is a constant challenge.

5.2.1.3 "Right is right" for everyone, everywhere: The problems of universalism

Universalism is often held up as opposed to relativism. Immanuel Kant provides a secular example of universal ethics. He states: "Act only according to that maxim whereby you can at the same time will that it should become a universal law." In Kant's view the ethical *intention* is important.

However, it is difficult to find universally acceptable standards in any field, including business. An attempt at creating universal standards is found in the United Nations (UN) Human Rights Council's *Guiding Principles on Business and Human Rights*[130] based on the *Universal Declaration of Human Rights* (UDHR).[131] While knowledge and acceptance of the *Guiding Principles* is growing, not all States or all businesses adhere to them. Another problem with universalism is that a conflict among two "universal" principles can create a problem. For example, let us imagine that we accept the universal validity of two ethical maxims, telling the truth and keeping confidences, both of which are said to be imperative in representative negotiation. What if, as a representative negotiator, one has promised not to reveal any information that is against the interest of one's principal? Can one always maintain both principles?

5.2.1.3.1 Duty-based ethics

Duty-based ("deontological"[132]) ethical theories hold that certain actions are inherently right and obligatory, regardless of the consequences. The ethical value of an act is in "doing the right thing" intrinsically for its own sake, not because of any self-interest.[133] Some deontological views are

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[130] United Nations. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, A/HRC/17/31, June 2011, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[131] Universal Declaration of Human Rights. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[132] Webster's dictionary. The term *deon* derives from the Greek and refers to "that which is obligatory." Jeremy Bentham is said to have created the term "deontology" in the 19th century. Bentham, Jeremy. "Deontology or the Science of Morality." (1834), http://www.iep.utm.edu/b/bentham.htm (accessed 15 October 2014).

[133] Lax, David A., and James K. Sebenius. "Three Ethical Issues in Negotiation." *Negotiation Journal* 2, no. 4

based on principles of revelation set out in sacred scriptures. Others, such as Kantian ethics, are based on principles understood through the application of reason rather than religious precepts. Some deontological approaches are universalist, and some are not. For example, professional codes of conduct prescribe rules and precepts, but they do not apply to everyone in the world. They apply only to the professional group in question.

A negotiator from Shell's "Idealist School" may subscribe to a deontological view, which might be religious precepts, the laws of a particular jurisdiction, or professional codes of ethics. As Shell suggests, the idealist deontologist is likely to say "do the right thing even if it hurts." Immanuel Kant took this view concerning truth-telling, which he said is a "categorical imperative." It is "imperative," because it is mandatory, not optional. It is "categorical" because there are no exceptions.

Most negotiation ethics literature denounces such rigid deontological approaches because they do not take consequences into account. A "consequentialist" approach (see below) suggests that it is not *un*ethical but *ethical* to tell a lie to a murderer who has asked us whether our friend, of whom he was in pursuit, has taken refuge in our house.[134]

5.2.1.3.2 Do codes of conduct ensure ethical practice?

A number of scholars have questioned whether duty-based codes of conduct ensure ethical practice.[135] First, the prescriptive lists of "dos and don'ts" in codes of ethics and even their explanatory notes rarely fit the unique particulars of an ethical problem. Case studies on violations of codes of ethics tend be technical explanations of how offenders breached the rules and how they will be punished. Professor Heidi Feldman fears that the statutory language and structure of codes of ethics may actually invite people to find technical loopholes in rules and may even discourage ethical deliberation."[136] Feldman illustrates with examples including the famous "Lake Pleasant Bodies Case" in which a murderer disclosed the murder and the location of the bodies to his lawyers. The lawyers visited the site and found the bodies, but they did not report the location of the bodies to anyone. Instead, they unsuccessfully tried to negotiate favourable treatment of their client in return for helping authorities find the bodies.[137] Professor Feldman analyses the case using the Model Rules of the American Bar Association. She finds that a skilled "technocratic"

(1986): 363-70, at 71.

[134] See Kant's discussion of this critique in Kant, Immanuel. "On a Supposed Right to Tell Lies from Benevolent Motives." In *Critique of Practical Reason and Other Works on the Theory of Ethics*. London: Kongmans, Green and Co, 1889. http://oll.libertyfund.org/Home3/HTML.php?recordID=0435 (Accessed 28 March 2007). However, also see Griffiths, Paul, ed. *Lying: An Augustinian Theology of Duplicity* (Eugene, OR: Wipf & Stock, 2010).

[135] See e.g., Menkel-Meadow, Carrie. "Ethics, Morality and Professional Responsibility in Negotiation." In *Dispute Resolution Ethics: A Comprehensive Guide* edited by Phyllis Bernard & Bryant Garth, 119-54. Chicago: American Bar Association, 2002; Macfarlane, Julie "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model." *Osgoode Hall Law Journal* 40, no. 1 (2002): 49-87; Wilkinson, Margaret Ann, Christa Walter, & Peter Mercer. "Do Codes of Ethics Actually Shape Legal Practice?" *McGill Law Journal* 45 (2000): 645-76.

[136] Feldman, Heidi. "Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?" *South California Law Review* 69 (1995-1996): 885-948. Note that Feldman uses the term "sentimental" not in the colloquial sense of shallow sentimentalism. Rather she uses the term to mean feelings and emotions in the sense the term is used in the literature on virtue ethics, discussed later.

[137] The facts are more complicated than this. For details and discussion, see Feldman, Heidi. "Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?" *South California Law Review* 69 (1995-1996): 885-948 at 889-908.

lawyer could either choose to disclose or not to disclose using legal argument and "black letter" rules regarding solicitor-client confidentiality and rules against concealing evidence. The lawyers had no intention to hurt families of victims by their silence; rather this result was an unintended by-product of their intention to maintain their client's right to confidentiality.

5.2.1.4 Utilitarianism: Thinking of Consequences & Trying for a Win-Win?

Consequentialist ethics say that the ethical value of an action is not the *intention* of the actor, but the likely *consequences* of the conduct. The classical proponents of utilitarianism, including John Stuart Mill, say the desirable outcome is the one that will achieve the "greatest happiness for the greatest number." The right action is the one that maximizes the happiness of the maximum number of people.[138] Utilitarianism remains one of the dominant public policy doctrines in North America. One of the commonly-expressed problems with utilitarianism is that the good of some minorities is sometimes sacrificed to the good of the majority.

The claim of interest-based negotiation is that it can avoid outcomes that favour one party at the expense of the other. If parties harmonize their interests effectively, they may create "win-win" outcomes that maximize beneficial outcomes for both parties. Utilitarian arguments may be used to suggest that interest-based negotiation is ethically superior to competitive "win-lose" negotiation.[139] In a given negotiation, a utilitarian ethical approach would favour cooperation of parties to maximize their joint satisfaction and eliminate the negotiators' dilemma that seems to force a choice between value creating and value claiming. Interest-based negotiation (and mediation) seek cooperative value creation *and* joint maximization of distributive gains. There are questions about whether integrative, interest-based negotiation can deliver what it promises, particularly in cases where mistrust and power imbalance lead to mismatches between interest-base negotiators and competitive negotiators. Despite more than two decades of training of lawyers and others representative negotiators in interest-based negotiation, in practice, adversarial power negotiation remains prevalent.

Can principlist codes, utilitarian approaches or relativism deliver consistently ethical negotiations? Many say no. One reason is that the focus on *acts and conduct* is not enough to create ethical negotiators. It is important to look at the *character* of the actor.

[138] It is acknowledged that this brief description may oversimplify utilitarian ethics. Utilitarianism was formulated most famously by John Stuart Mill, *Utilitarianism*, John Stuart Mill *On Liberty.*

[139] See, e.g. Menkel-Meadow, Carrie. "Ethics, Morality and Professional Responsibility in Negotiation." In *Dispute Resolution Ethics: A Comprehensive Guide* edited by Phyllis Bernard and Bryant Garth, 119-54. Chicago: American Bar Association, 2002, particularly her note 112.. Also see Menkel-Meadow, Carrie. "Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers'? Responsibilities." *South Texas Law Review* 38, no. 2 (1997): 407-54.

5.2.1.5 The Good Negotiator: Back to the Virtues?

Virtue ethics puts the focus on *character* rather than on actions. Thus, the primary question is not "what should I do," but "what is my character?" Character is formed through consistent practice of particular virtues, for example, honesty. Thus, a person with an honest character is one who has consistently practiced honest actions. This does not mean there is no need for rules or law.[140] Rather, the practice of virtue provides the practical wisdom required to apply the rules in particular cases.

Aristotle (384-322 BCE) set out a list of intellectual and moral virtues in his *Nicomachean Ethics*.[141] Aristotelian moral virtues include courage, temperance, liberality, truthfulness, justice. Justice is broken down into virtues such as lawfulness, fairness and equality, distributive justice, reciprocity, political justice and natural or legal justice. Aristotelian virtue also includes practical wisdom or prudence. In Western thought, ancient scholars, Aristotle[142] and Thomas Aquinas (1225-74),[143] still provide the main background for contemporary virtue ethics.[144] Aristotelian ethics are increasingly being examined internationally in areas of public policy,[145] business ethics and occupational ethics.

Aristotelian virtue theory is based on the premise that everything has a purpose or function. The function – or "virtue" – of a foot, for example, is to allow the body to walk, and the function (virtue) of a knife is to cut. A well-functioning foot allows one to walk well, and a good, properly sharpened knife cuts well. According to Aristotle's view of human nature, the function (virtue) of a human life is to achieve a state of "living well" or "flourishing."[146] To live virtuously is to live well and thus fulfil one's human function. Aristotle did not exclude emotions from his moral reasoning. Nor did he exclude relationships including the social context of civic responsibility.

A chief criticism of the virtues approach is the fact that there are so many different and even incompatible accounts of "virtue."[147] In addition to Aristotle's list of virtues, we may add the list of Thomas Aquinas, a Christian during the Middle Ages in Europe, who said there are four cardinal (paramount) virtues: prudence, justice, temperance and fortitude. Buddhist virtues are

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[140] See Brosnan, Donald F. "Virtue Ethics in a Perfectionist Theory of Law and Justice." *Cardozo Law Review* 11 (1989-1990): 335-425.

[141] Aristotle. *Nicomachean Ethics, 350 B.C.E.* Translated by W.D. Ross. Oxford: Oxford University Press, 1972.

[142] *Ibid.*

[143] Aquinas, Thomas *Summa Theologica*. Translated by Fathers of the English Dominican Province. New York: Benziger Bros, 1947.

[144] While many ethics associate Immanuel Kant with deontological ethics, scholars are increasingly reexamining Kant's works on virtue. Some utilitarians have been discussing consequentialist views of virtues. See, e.g. Driver, Julia. *Uneasy Virtue*. Cambridge: Cambridge University Press, 2001. (These works were not reviewed for this essay.)

[145] Sen, Amartya. "Capability and Wellbeing." In *The Quality of Life*, edited by Martha C. Nussbaum and Amartya Sen Sen, 30-53. Oxford: Clarendon Press, 1993; Sen, Amartya. *Inequality Re-Examined*. New York: Russell Sage Foundation, 1992; Nussbaum, Martha C. "Women and Equality: The Capabilities Approach." *International Labour Review* 138, no. 3 (1999): 227-45; Nussbaum, Martha C. "Capabilities and Human Rights." *Fordham Law Review* 66 (1997): 273-317.

[146] One may debate Aristotle's (or Thomas Aquinas' or others') variousdifferent views of human nature and teleology, but that would be the subject of different paper.

[147] McIntyre, Alasdair. *After Virtue: A Study in Moral Theory*. 2 ed. Notre Dame, Indiana: University of Notre Dame Press, 1984, 181.

detachment,[148] generosity and compassion. Confucian virtues include self-respect, generosity, sincerity, persistence, and benevolence. In the field of conflict resolution, John Paul Lederach, while not discussing virtues per se, uses the language of virtue to propose that reconciliation integrates the Hebrew and Christian virtues of justice, truthfulness, mercy and peacefulness.[149]

What virtues of a negotiator will fulfil a negotiator's function? There are considerable tensions between accounts of virtues of good negotiators, who in the competitive mode display the virtue of shrewdness and in integrative modes may be characterized by "cooperativeness" and "honesty." Thus, there are competing ideas about the virtues of "the good negotiator." For these reasons, some say that virtue ethics falls into the trap of relativism.

5.2.1.6 The ethics of care

Individualist, rationalist understandings of ethics have been much critiqued.[150] According to Gilligan, discussions of ethics are usually dominated by notions of justice, rights and individual autonomy, and ideas about ethics that emphasize relationships, care and responsibility may be ignored. Gilligan suggests that a complete ethical theory requires both justice *and* care.[151] Scholars in the field of dispute resolution, such as Professor Trina Grillo, echo this concern, pointing out that dominant approaches to dispute resolution (and negotiation) may disadvantage persons who give expression to passion and emotion over those tend to favour rational approaches.[152]

The "ethics of care" is now receiving considerable attention[153] and is linked to Aristotelian virtue ethics which speak to the importance of emotions (or "sentiment") such as compassion. The "ethics of care" underline issues that are "very fundamental to human life, namely the disposition to make ethical commitments and to get upset about them."[154]

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[148] In Buddhism, the term "detachment" does not mean an overly rationalized objectiveness, but rather not being enmeshed or caught up in things so that one greedily craves or clings to it.

[149] Lederach, John Paul. *Building Peace: Sustainable Reconciliation in Divided Societies*. Washington, DC: United States Institute of Peace Press, 1997.

[150] Gilligan, Carol. *In a Different Voice: Psychological Theory and Women's Development*. Cambridge, Massachusetts: Harvard University Press, 1982.

[151] French, Warren, Christian Häßlein, and Robert van Es. "Constructivist Negotiation Ethics." *Journal of Business Ethics* 39 (2002): 83-90; Freshman, Clark. "Re-Visioning the Dependency Crisis and the Negotiator'?s Dilemma: Reflections on the Sexual Family and the Mother-Child Dyad." *Law and Social Inquiry* 22, no. 1 (1997): 97-129; Williams, Barbara Blake. "Implications of Gilligan for Divorce Mediation: Speculative Applications." *Mediation Quarterly* 12, no. 2 (1994): 101-15;. Glennon, Theresa. "Lawyers and Caring: Building an Ethic of Care into Professional Responsibility." *Hastings Law Journal* 43 (1992): 1175-86.

[152] Grillo, Trina. "The Mediation Alternative: Process Dangers for Women." *Yale Law Journal* 100, no. 6 (1991): 1545-610.

[153] Held, Virginia. *The Ethics of Care: Personal, Political, and Global.* Oxford: Oxford University Press, 2005.

[154] Nussbaum, Martha C. "Valuing Values: A Case for Reasoned Commitment." *Yale Journal of Law and the Humanities* 6 (1994): 197-217.

5.2.2 What (and who) is on your ethics screen? Which moral theory should you choose?

Poker, ideals or pragmatics? Principles and rules? Consequences? Virtues? Care? When grappling with an ethical dilemma, which account of ethics does one choose? Surendra Arjoon points out that "the literature is [typically] filled with proponents of one particular moral theory, which is often pitted against other theories."[155] Arjoon and others suggest there is no real need to choose just one theory of ethics. Principlist and consequentialist theories do not necessarily discount considerations of character. Virtue approaches do not discount the usefulness of laws, rules or codes or consequences. It may be helpful to consider all these theories of ethics to address particular ethical problems.

5.2.2.1 A Relational Approach: An Expanding Circle of Moral Concern[156]

Reflection by oneself (as an individual) on principles, consequences and virtues may not be enough to meet the needs of representative negotiators, their clients, the occupation or profession or the public. Individual reflection does not always adequately take into account that negotiation is always a relational venture (albeit with differing priorities on differing relationships). Individual reflection also may fail to take into account relevant people's differing sources of power, capacities to make choices, differing world views, differing ethical frameworks and different priorities of various players and others affected.

This section proposes an ethics screen for representative negotiators that takes account of the negotiating relationships between the representative and the client, between representatives and their "negotiation opposites," among the negotiator's own relational interests, and "the public interest." These relationships are only examples of the relationships that may be considered in "'expanding circle' of moral concern."[157]

The "glue" that can bind considerations of principles, consequences, virtues in an expanding relational circle of moral concern, is practical wisdom born of habitual practice of virtues.[158] "In other words," says Arjoon, "a virtuous or morally licit act is one based on practical judgement or prudence, with an upright motive (intention), with a steady disposition of character, or simply put, doing the right thing... in the right place, at the right time, with the right person (circumstances/consequences)."[159]

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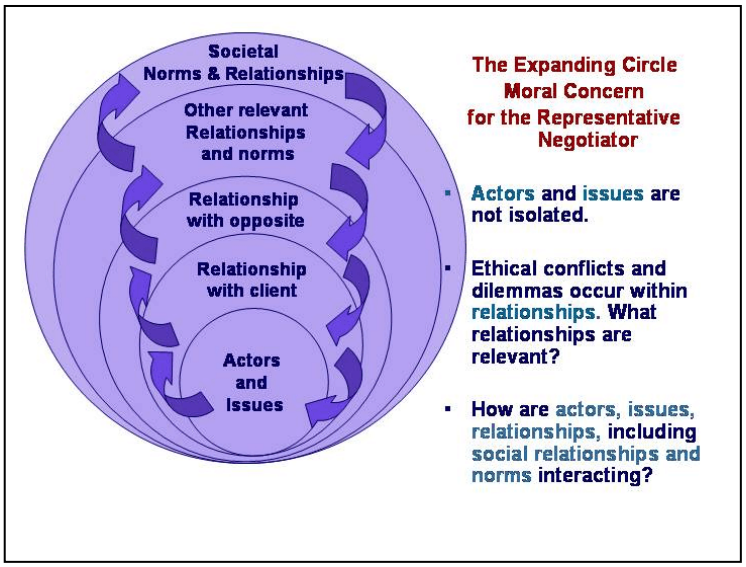
[155] Arjoon, Surendra. "Ethical Decision-Making: A Case for the Triple Font Theory." *Journal of Business Ethics* 71, no. 4 (2007): 395-410.
[156] Gibson, Kevin. "The New Canon of Negotiation Ethics." *Marquis Law Review* 87 (2003-2004): 747-52, at 750-751.
[157] Ibid.
[158] Arjoon, supra note 153.
[159] Arjoon, supra note 153, at 404.



5.2.2.2 A Multiple-Model Approach

Taking the lead from Arjoon and negotiation theorists like Lax and Sebenius,[160] what follows is a decision-making model that combines several basic moral theories. See the box below.

A Multiple Model Approach

1. **Consider act-oriented approaches**, and ask:
   a. What is my i*ntention*? Is it a morally good intention?
   b. What are my legal or social *duties or obligations*?
   c. What are the likely *consequences* to others, including those who are not at the negotiation table including:
      - yours and the parties' family, colleagues and friends
      - the legal profession;
      - children;
      - members of vulnerable groups;
      - the public;
      - next generations.
      -

2. **Character-based approaches** that ask questions based on virtue:
   a. What is my *function* in this situation?
   b. What moral excellence (virtues) would tend towards fulfilling this function?
   c. What do the particular moral virtues of truthfulness, compassion, justice and peacefulness (for example) tell us?

3. **Relational dimensions:** "expanding circles of moral concern": What are the relevant relational dimensions to be considered,
   a. Lawyer-client relationship;
   b. Relationship with the other negotiator;
   c. The negotiator's other relationships;
   d. Civic relationships (sometimes referred to as "the public interest")?

[160] Lax and Sebenius, 1986 present a multi-faceted framework for ethics in negotiation.

For Further Reflection

Imagine the following scenario, summarized by Carrie Menkel-Meadow in "Ethics, Morality and Professional Responsibility in Negotiation." In *Dispute Resolution Ethics: A Comprehensive Guide* edited by Phyllis Bernard and Bryant Garth, 119-54. Chicago: American Bar Association, 2002, at 132.

> "Just before the closing of a sale of a closely held business, a major client of the business terminates a long-term commercial relationship, thereby lessening the value of the firm being purchased, and you represent the seller. Do you disclose this information to the buyer?"

Professor Menkel Meadow asks: "Do you disclose the information to the buyer?"

There is pressure of a closing. There may be significant financial and other interests of the client and the lawyer at stake. What does the lawyers consider? What are the lawyer's choices? Discuss this scenario using the ethical approaches discussed above.

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5.3 Getting third party assistance with complex or difficult negotiations

When negotiation breaks down or is unproductive, an impartial third party may be able to intervene to assist the parties to come to their own solution. The following section includes some ideas from North America about mediation.

5.3.1 What is mediation?

Mediation is a process in which an impartial third party helps disputants resolve a dispute or plan a transaction, but does not impose a solution. Mediators use a variety of processes. Some styles of mediation utilize recommendations or suggestions to the parties. However, the mediation models taught widely in North America for the purposes of workplace, community, family, or commercial mediation foster the avoidance of mediator recommendations or suggestions in order to preserve mediator neutrality and encourage party control of outcomes.

A typical approach to interest-based mediation taught in North America involves a problem-solving approach in which the needs and interests underlying parties' positions are identified with a view to developing solutions that address as many of those needs as possible. Attempts are also made to meet party needs by exploring available resources to test whether a perceived "fixed pie" or a "zero sum" can be expanded as in the illustration about the library window from Follett above (see 2.3.3). A staged model emphasizing face-to-face mediation is common, involving introduction and commitment to the process; identification of issues and generation of an agenda; exploration of the parties' positions for underlying interests; design or solutions; and formal agreement.

5.3.2 Preparing and Accompanying Your Client in Mediation

Here are some ideas that Canadian lawyers use when representing their clients in mediation processes. Lawyers in Thailand may need to adapt these suggestions to fit the processes of mediation or conciliation available in Thailand.

5.3.2.1 Preparing your client for mediation

In preparing your client for mediation, you should cover the following topics:

- Who is the mediator (background, style, experience, etc.)
- What to expect: Explain to your client the mediator's role, the mediation process and how it differs from adjudication processes, how formal or informal the meetings will be, where and when, what to expect from the other side, how the meeting will proceed, what to expect as an outcome.
- If your client will be present at the mediation, help your client prepare to express his needs and concerns over his position. Help your clients identify his or her interests, and work with your client to guess at the interests of the other side. Help your client practice framing his or her issues and interests. Investigate some impartial standards and objective criteria for decision-making. Start brainstorming with your client about various possible options for solutions.

5.3.2.2 During the mediation process

- Be respectful of the mediator. This way you will encourage the other side to do the same.
- Ensure that the mediator describes and explains the process to **both** sides. Do not allow the mediation process to continue if you feel your client or the other side has reservations or does

not understand the process, the role of the mediator, their own role, or the role of their lawyer.
- Ensure that the ground rules are clear and accepted by both sides.
- If you need to talk to your client or your client asks to talk to you, call for a break or "caucus" with the mediator (as this should also be part of the ground rules).
- Do not hesitate to call for a break in the process if you feel your client needs time to think, needs more coaching, needs to find a way to save face, or if you feel the other side needs to think, needs more time or needs to save face. You may also want to provide time to meet with your colleague (the other party's lawyer) to help either one of your clients through a difficult point in the negotiations.

5.3.2.3 At the end of the process

- Take time to envision all the different consequences and possible problems of implementation, and create plans to take these possibilities into account.
- Verify that the final text of the agreement represents the agreement accurately and fully. Ensure that your client and the other side understand it completely.
- Follow up with any appropriate procedure needed in Court, such as formal consents, consent order, or discontinuation of proceedings.

5.3.3 Desirable attributes, qualifications and skills of impartial third parties

In Canada, some mediation programs require a minimum of eighty hours of training in conflict resolution and mediation. Canadian mediators who work on divorce cases are encouraged to take special training of at least 120 hours to equip them to understand difficult issues such as family violence.

Some research[161] suggests that in order to be trusted, credible and legitimate to the parties in a case, mediators must display:

- fairness to all parties;
- confidentiality;
- credibility with those sectors in the community in which they work;
- competence in the language of comfort for disputants;
- sufficient cultural knowledge;
- good reputation or liaison with relevant institutions in the community, e.g. business, community, religious or other relevant institutions;
- an awareness of gender issues relevant to the specific context of the conflict, including the need for gender matching of the mediator and disputants for some personal types of problems.

The Association for Conflict Resolution (ACR) in North America suggested that third parties require the following skills:

- ability to listen well to all the parties;
- ability to analyze problems, identify and separate the issues involved, and frame these issues for resolution or decision-making;

[161] LeBaron Duryea, et al., 1993.

- ability to use clear, impartial language in speaking and in writing;
- sensitivity to the strongly held values of the disputants, including sensitivity to gender, ethnic, and cultural differences;
- ability to work with complex facts;
- an obvious commitment to honesty, dignified behaviour, respect for the parties, and an ability to create and maintain control of a diverse group of disputants;
- ability to remain detached from personal opinions, feelings and values from issues under consideration; and
- ability to understand power imbalances.

Adjudicators and arbitrators are seen to require the following additional skills:
- ability to make decisions;
- ability to run a hearing;
- ability to distinguish facts from opinions;
- ability to write reasoned opinions.

Mediators are considered to need the following additional skills:
- ability to understand the negotiating process and the important advocacy role of lawyers;
- ability to earn trust and remain acceptable to the parties throughout the mediation;
- ability to convert parties' positions into needs and interests;
- ability to screen out issues that should not be mediated;
- ability to help parties to invent creative options;
- ability to help the parties identify fair standards and objective criteria that will guide their decision making;
- ability to help parties assess their alternatives if the matter does not settle;
- ability to help the parties make their own informed and voluntary choices;

- ability to help parties assess whether their agreement can be implemented.

QUESTIONS FOR REFLECTION OR DISCUSSION

- What do you believe would be the characteristics of a good mediator in your country? In Thailand?
- How does the discussion of mediation in these materials resemble or differ from mediation in Thailand?
- These lists of attributes and skills were developed by and for conflict resolution practitioners in North America. What similar, different or additional attributes or skills might be needed by mediators in Thailand?
- What mediation services are available in Thailand? Do you think more mediation would be useful in Thailand? What kind of mediation? Traditional or contemporary approaches? Are there any unnecessary legal or other obstacles that should be removed to enable the development of more mediation services in Thailand?

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7 GLOSSARY

Adjudication: "Adjudication" is a term that can include decision making by a judge in a court, or a government tribunal, or a private arbitrator. An adjudicator determines the outcome of a dispute by making a decision for the parties that is final, binding and enforceable. The parties present their case to the adjudicator (judge, tribunal or arbitrator) whose role is to weigh the evidence and make a decision that is final, binding and enforceable. Arbitration differs from courts and government tribunals in several ways. For example, many arbitrations are voluntary, because both parties agree to submit the dispute to arbitration, and the parties often agree on the selection of the arbitrator and the procedural rules. In courts or government tribunals, the parties rarely choose their own judge. Arbitration may also be ordered by a court or be compelled by a statute. In such cases, the arbitrator may be appointed by a judge or government official. An arbitrator has limited jurisdiction determined by the relevant arbitration agreement or statute. In Canada, a number of arbitrators are retired judges, although arbitrators may come from a variety of occupations, such as law, engineering, real estate valuation, or construction. Arbitrators are often sought for their substantive expertise in a particular area. In arbitration, the rules of evidence and procedure are more relaxed than the rules of court. In many places in the world, the climate for international and domestic arbitration is made more hospitable through the adoption of United Nations Commission on International Trade Law (UNCITRAL) conventions and model arbitration laws.

BATNA: An acronym for "Best Alternative to a Negotiated Agreement." This is a negotiators best "walk-away alternative." See "walk-away alternative" below.

Bargaining limit: This is the limit beyond which a negotiator will not go, and may not care whether he or she continues to negotiate or walks away from the negotiation. See "reservation value."

Bargaining mix: This refers to the package of issues for negotiation and includes the combination of all the issues of all the parties to the negotiation.

Bargaining range: The bargaining range, also sometimes known as the "zone of possible agreement" what is between the bargaining limits of both parties. In a sales transaction, the bargaining limit of each party is called the "reservation price."

Conciliation: Some authors distinguish carefully between "mediation" and "conciliation," but there is no universal consensus as to what these terms mean. Some people use the "conciliation" interchangeably with "mediation." In Canada, the term "conciliation" generally refers to a process of dispute resolution in which "parties in dispute usually are not present in the same room. The conciliator communicates with each side separately using "shuttle diplomacy." Most Canadians use the term "mediation" to describe third-party intervention in which the parties negotiate face to face. The distinction between "mediation" and "conciliation" often breaks down, because mediators may hold some separate caucus meetings with parties, and conciliators may hold some face to face meetings with the parties.

Conflict: The interaction of interdependent people who perceive incompatible goals (or interests) and interference from each other in achieving those goals.

Dialogue: Conversation among people with different points of view on issues of mutual concern. People engaged in dialogue to not try to reach a joint solution or persuade others to accept their position. In dialogue, people listen carefully to understand one another. They try to avoid judgments about other points of view, and they are invited to examine their own assumptions. The objective of dialogue is to think together so as to discover all the important points of view on the topic in question, and to see possible new options that may lay the groundwork for future negotiations.

Dispute: A conflict becomes a "dispute" when it becomes particularized over a particular issue or set of issues.

Facilitation: Facilitation is a process by which a third party helps to coordinate the activities of a group, acts as a process facilitator during meetings, or helps a group prevent or manage tension and move productively toward decisions. The facilitation role can be placed on a continuum from simple group coordination and meeting management to intensive multi-party dispute mediation.

Facilitated policy dialogue, regulation-negotiation ("reg-neg") and shared decision-making: These terms refer to negotiated approaches to the formulation of public policies or regulations. In "policy dialogue," "reg-neg," and "shared decision-making," representatives of affected parties and sectors of the public (termed "stakeholders") work together with government officials to develop policies or regulations. These complex processes utilize impartial process facilitators—often people who are experienced mediators. These participatory public decision-making processes differ from two conventional approaches to government decision-making. First, in traditional decision-making processes government (or the civil service working under a legislative, regulatory or policy framework) makes decisions based on the advice of selected experts, and with the influence of lobby groups. A second conventional model is more broadly consultative: government consults with a representative group of people through advisory councils, public hearing processes and lobby groups and then independently makes a decision. Public dissatisfaction with these conventional approaches has led to increased demand for citizen participation in public decisions by a growing number of interest groups (stakeholders). Conflict over public decision making has become a significant concern, especially when it comes to environmental issues. During the mid-1990s, British Columbia, Canada, experimented with public participation processes that invite government to share the decision-making power with groups of citizens using consensus-based, decision-making processes. A leading experiment was the shared decision-making processes of the Commission on Resources and Environment (CORE). This project used regional and local "round-tables" to attempt to build broad consensus among the various stakeholders. In this model of decision-making, government participates as a stakeholder at the negotiating table. The theory underlying this method of public participation is that, to the extent that consensus is reached by the table, government has no reason to do anything other than adopt the consensus decisions of the round-table. This is because government interests are reflected in the consensus outcome. Thus, while the legitimate authority of government remains intact, the consensus decisions of a representative group in which all interests have been

accommodated will be "irresistible" to government policy makers. The thinking behind shared decision-making is that with this high level of public participation, the quality of information brought to the table will be more balanced and of a higher quality, leading to a better quality decisions. Furthermore, with a decision reached by a process that fosters a high level of consensus, there should be less public conflict about decisions that are made.

Interests: Interests are the motivating factors which lead a party to propose a given position. Interests are defined by Fisher and Ury as people's needs, concerns, fears and goals. Some people distinguish needs from interests. Some people include rights within the definition of interests; others say interests are different from rights. Some people include in the term "interests" the whole range of people's tangible and intangible needs, concerns, goals, fears and other emotions, values and ethics must be satisfied for a solution to be acceptable to them.

Issues: Issues means the specific matters that need to be negotiated in order to reach agreement. Example: The acceptable level of a particular substance in a particular water supply.

Mediation: Mediation is a process in which an impartial third party helps disputants resolve a dispute or plan a transaction, but does not have the power to impose a binding solution.[162] Mediators use a variety of processes. Some mediators use **"interest-based"** processes,[163] while others use **"rights-based"**[164] approaches. Some mediators are **"facilitative,"** providing only process assistance for negotiation and using interest-based approaches. Facilitative, interest-based mediation is taught widely in North America for the purposes of community, family and commercial mediation and tends to foster the avoidance of mediator recommendations or suggestions in order to preserve mediator neutrality and to encourage party control of outcomes. Other mediators, including many labour mediators and commercial mediators, may use an **"evaluative"** style, providing suggestions or recommendations.[165] Evaluative, rights-based mediation processes are similar to adjudicative processes such as non-binding arbitration. Other mediators may be **"activist,"** intervening to ensure all parties are represented and that power balances are addressed,[166] but activist mediators do not necessarily evaluate a case or make recommendations. Other mediators consider themselves to be **"transformative"** mediators, working less toward settlements and more toward transformation of relationships.[167] Still others foster **"narrative"** mediation processes in which the mediator is more of a joint participant with the parties in the joint creation of new possibilities for the future.[168] There is considerable debate

[162] LeBaron Duryea, 1992, 6.
[163] Fisher et al, 1991.
[164] Stitt, A.J. "Mediation." In *Alternative Dispute Resolution Practice Manual*, edited by A.J. Stitt, 1451. York: CCH Canadian Limited, 1996.
[165] *Ibid.*
[166] Forester, John, and David Stitzel. "Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts." *Negotiation Journal* (1989): 251-59.
[167] Bush, Robert A. Baruch, and Joseph Folger. *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition*. San Francisco: Jossey-Bass Publishers, 1994; Lederach, John Paul. *Preparing for Peace: Conflict Transformation across Cultures*. Syracuse, NY: Syracuse University Press, 1995.
[168] Cobb, Sara. "A Narrative Perspective on Mediation: Toward the Materialization of the 'Storytelling' Metaphor." In *New Directions in Mediation: Communication Research*, edited by Joseph Folger, and Tricia Jones, 48-63. Thousand Oaks, CA: Sage Publishers, 1994; Winslade, John, and Gerald Monk. *Narrative Mediation: A New Approach to Conflict Resolution*. San Francisco: Jossey-Bass Publishers, 2000.

in the field of conflict resolution about these differing approaches and styles of mediation. Many mediators are familiar with all these approaches and design mediation processes to suit the particular parties and the situation.[169] A typical approach to interest-based mediation taught in North America involves a problem-solving approach in which the needs and interests of all parties are identified. Solutions are created to address as many of those needs as possible. Attempts are made to meet party needs and interests by exploring all the available resources to see whether a perceived "fixed pie" or a "zero sum" can be expanded. A staged model emphasizing face-to-face mediation is common, involving introduction and commitment to the process; identification of issues and generation of an agenda; exploration of the parties' positions for underlying interests; creation of solutions; and formal agreement. This is quite similar to the staged problem-solving model of negotiation described in Chapter 3 of this manual.

Negotiation: A process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict.

Non-binding arbitration: In non-binding arbitration, the disputing parties voluntarily put their case before an impartial third party who renders an opinion or recommendation, which the parties may choose to accept or not. The process is adjudicative, but not binding. Non-binding arbitration processes include the following:

- "mini-trial": In a mini-trial, counsel for the disputing parties, and possibly the parties themselves, appear before a judge or expert lawyer who hears the case for both sides and renders an opinion as to what a judge might award in the case;
- "summary jury trial": In a summary jury trial, an informal "jury" is convened to make non-binding findings of fact or recommendations to the parties.
- Non-binding methods such as these can be effective as part of the traditional method of resolving disputes through litigation. If the resulting recommendation does not result in settlement, the parties usually go on to trial.

Nonviolent direct action: Nonviolent direct action (sometimes called "nonviolent struggle" or "nonviolent conflict") refers to the coordinated actions of people to influence or change government policy or legislation through non-violent means, such as public demonstrations and protests, lobbying and media campaigns. While non-violent in philosophy, methods are competitive and non-collaborative: techniques include non-violent coercion such as sit-ins, blockades, persuasion, arousal of public sympathy for the cause and sometimes civil disobedience.

Ombudsman,[170] Ombudsperson, or Public Complaints Commission: The term "ombudsman" is Swedish in origin. In the English language, the term is often changed to "ombudsperson" or "ombuds" office. In the "classical" model, the ombudsman is an independent high-level public official appointed by constitutional or legislative provisions to monitor the

[169] Waldman, Ellen A. "The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence." *Marquette Law Review* 82 (1998): 155-70; Waldman, Ellen A. "Identifying the Role of Social Norms in Mediation: A Multiple Model Approach." *Hastings Law Journal* 48, no. 4 (1997): 703-69.

[170] Reif, Linda, Mary Marshall, and Charles Ferris, eds. *The Ombudsman: Diversity and Development*. Edmonton, Alberta: International Ombudsman Institute, 1993.

administrative activities of government. A classical ombudsman reports to the parliament or legislature. The ombudsman has the power to investigate citizen complaints of maladministration and administrative unfairness, as well as act on his or her own motion. The ombudsman may issue public reports and recommend changes to prevent further administrative unfairnesses. There are several forms of ombudsman office, but their common characteristics are impartiality, the power to investigate and the power to recommend. Often there are ombudspersons in educational or corporate institutions. They have impartial authority to investigate complaints and to make recommendations to remedy valid complaints. The ombudsperson's sources of power including the ability to investigate, his or her persuasiveness and the ability to make situations public. To be effective, an ombudsman needs sufficient security of office to ensure independence. In many institutions, the ombudsperson's power is backed up by the possibility of support from the governing body or the administration. In a "classical" ombudsman model, the ombuds office is separate from the executive body or administration, and reports directly to the governing body of the institution. Another type of ombudsman is called an "executive ombudsman" who reports directly to the chief executive officer of the institution. Corporate ombuds offices usually follow the executive ombudsman model.

Position: A position is one party's solution to a given problem. A position is often framed as a demand or a claim.

Principled negotiation: "Principled negotiation" is a term made famous by Roger Fisher and William Ury to describe negotiation in which negotiators attempt to 1) separate people from the problem; 2) focus on interests not positions, 3) invent options for mutual gain, and 4) insist on using objective criteria to measure fairness of outcomes. This type of negotiation is also referred to as "interest-based negotiation."

Reservation value: This is the value at which a negotiator does not care whether s/he bargains or walks away from the negotiation to his or her BATNA. This is sometime called the "bargaining limit." In a sales transaction, the bargaining limit of each party is called the "reservation price."

Stakeholder: a person or group who can make, affect, block or sabotage decision-making or implementation, as well as all those affected directly or indirectly by decisions-making or implementation (whether or not they command public attention).[171]

Walk-away alternatives: This is the whole range of things a negotiator can do without the other negotiators' agreement. These are also sometimes called "no agreement alternatives."

Zone of Possible Agreement (ZOPA): This is the bargaining range between the reservation values of the negotiators. See "reservation value" and "bargaining range."

[171] Darling, 1998. Craig Darling defines a "stakeholder" as ". . . a person, group or organization representing a section of the public having a particular interest in the issue. Stakeholders include those directly affected, those who can block a decision and those who it is important not to surprise in the outcome."

NOTES

8 ROLEPLAYS AND ROLEPLAY OBSERVER CHECKLIST

Several role-plays and discussion scenarios will be distributed during the course.

8.1 About role plays

The purpose of role play is to provide opportunities to try new skills in a pleasant learning environment. Roleplays also offer opportunities to gain insights into what it is like to be in the position of a client or a party. In some ways, roleplays are like theatre. This means the roles you play may be different from your own character. Whatever role you play, you should try to play the role as you might in real life.

8.2 About the role of observer

The role of observer is important in negotiation training. The observer's job is to listen and watch carefully, and to make careful notes. At the end of the role play, the observer leads a short discussion with the roleplayers about what happened during the roleplay. This is meant to be a very positive and constructive discussion. The attached checklist suggests ways the observer may take notes and lead a discussion after the role play. There are discussion questions on the last page.

8.3 Confidentiality

Professional development courses are intended as opportunities to learn in a collegial, friendly atmosphere. Another purpose of professional development is to build collegial relationships among lawyers. When people are engaged in roleplays or case studies, it is important that learners be able to explore new ideas and practice skills that are new to them. To provide a good learning atmosphere, here are some guidelines about confidentiality of the training setting that we suggest in Canadian courses on conflict resolution:

- feel free to repeat what you have said during the course.
- please do not repeat what other learners have said during the course without their permission.
- always be careful to maintain professional lawyer-client confidentiality during case study discussions.

Negotiation Roleplay: Observers' notes and debriefing outline

Introduction, Agenda, Interests, Solutions

Please make notes including specific examples. Observers are asked to help keep groups working on the assigned topic and to assist with debriefings of small and large groups.

1. Introduction

Objectives

· set a collaborative tone for negotiation

· propose and secure agreement for overall purpose of meeting

· secure agreement on time frame for meeting

2. Setting the Agenda

Objectives

· giving a succinct and clear narrative, or a statement of the issues

· impartial (non-positional) framing of issues

3. Interests

Objectives

· understand all parties' relevant interests (needs, wants, concerns, fears, hopes, values, including the entitlements/rights perceived/sought by the parties)

· Impartial and integrative framing of goals

4. Solutions

Objectives

· brainstorming options

· testing all options against all parties' needs, interests and principles

5. Use of listening skills

· paying attention

· obtaining of information

· creating an atmosphere that invites disclosure by the other party

· probing questions ("Who. . .What. . .Where. . .How. . .When. . .Why. . .?")

· ensuring understanding

· clarifying questions ("Could you say more about what you mean by. . .")

· positive listening (positive reformulation)

· summaries

· testing consequences

· "consequential" questions ("What might happen if. . ." "What will we do if...")

6. Use of reframing

· depersonalizing accusations or complaints

· restating the accusations or complaints in terms of the needs or wishes they express

· moving the conversation toward a more constructive tone for problem-solving

7. Debriefing questions.

To observers: Before offering any comments of your own (using the following questions as a framework), **first ask each roleplayer:**

a) What specific things worked well?

b) What might you do differently?

c) Did anything happen that was different from what you expected?

d) What were your own reactions to what was happening?

e) Was there anything you noticed during the role play that you would like to discuss so that you can understand it better?

Please give each roleplayer a chance to respond to these questions before discussing the roleplay as a group.

Notes:

THE GOOD NEGOTIATOR

Negotiation Theory, Process & Skills for Lawyers

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