

CHAPTER EIGHT

NEGOTIATION

Negotiation is a basic life skill that we use every day in many ways. We use it in making business arrangements, family decisions, plans with friends, and commercial transactions. When we work out special arrangements about bedtimes and chores with our children, we are negotiating. When we decide which movie or restaurant we will go to with our spouse, we are negotiating. When we agree on a division of work responsibilities with our colleagues, we are also negotiating. Why is it, then, that when we think of an interaction as a negotiation it can suddenly seem tense, challenging, or tricky? Labeling an interchange as a negotiation seems to take it beyond the everyday kind of transaction we are used to and at which we are mostly competent. Suddenly we start thinking that there are going to be winners and losers, that a game is being played, and that people are out to take advantage of one another. We believe we will have to compromise on issues that are important to us, and we suddenly become concerned about how open to be about our needs and alternatives.

POPULAR ASSUMPTIONS ABOUT NEGOTIATION

Our approach to negotiation is guided by culturally based assumptions or beliefs about negotiation, which are not necessarily grounded in the structure of the negotiation process. Let's consider some of these common assumptions.

- *Negotiation is a game.* The metaphors we use in discussing negotiation often come from sports, poker, or other games. We talk about "putting our cards on the table," "upping the ante," "calling a bluff," "scoring a knockout," "reaching a stalemate," "playing hardball," and the like. Thinking of negotiation as a game implies a particular kind of structure and motivation. Games tend to involve a known process, standards of conduct, and a relatively clear goal. But games also are normally about winners and losers, about fixed-sum outcomes, and about being more competent or clever than the other players (who are viewed as opponents).
- *Negotiation is about compromise.* Many people resist negotiation because they think it implies having to compromise on important issues or values. Although negotiation may involve compromise, that is not its necessary result. In many (but not all) negotiations we do operate from a set of norms that promote compromise and the consideration of an adversary's point of view. Sometimes these collaborative norms may make us resistant to negotiating, especially when we are very angry, feel adamant about our position, consider the other side to be evil, or believe that our self-image is somehow at stake.
- *Negotiation is about giving up power.* Parents are often resistant to the idea of negotiating with their children, managers with their employees, or police with suspects because negotiation seems to imply giving away power. Ironically, parents negotiate with children, managers with employees, and police with suspects all the time, but without the negotiation label. Negotiation often involves applying power, recognizing someone else's power, or discussing arrangements that may realign power, but it does not necessarily imply giving away power. Negotiation is in fact often a way of exercising power more effectively.
- *Negotiation is about being nice.* Do we have to be friendly or deny our anger toward others when we negotiate? Do we have to treat others as if we approve of them in some way? Respect them? Want a relationship with them? Of course not. We have to be willing to communicate with the other parties, but we do not have to pretend that our feelings are anything other than what they are.

- *Negotiation is about being nasty.* Sometimes people assume that to negotiate you have to be belligerent, hard-nosed, and tough—in other words, the opposite of friendly. We may resist negotiation because we do not want to behave in these ways but we worry that the alternative to being nasty is being vulnerable.
- *Negotiation is a complex process.* The consequence of thinking of negotiation as a complex interaction is that we feel intimidated by it—we do not feel we can master it and therefore feel very vulnerable. Although negotiation has its complexities, its essence is fairly straightforward.
- *Negotiation is only okay when it is a win-win process.* Maybe in a perfect world all negotiations would be win-win processes, but in our world that is not possible or even desirable. Sometimes compromise is necessary. Sometimes one side really ought to lose. Sometimes the gist of a negotiation is about dividing up a limited resource. We do not encourage collaborative approaches to negotiation by being naïve about its win-lose aspects or by labeling suggestions for distributive solutions as violations of higher values concerning human interaction.
- *Negotiation is fundamentally a win-lose process (and if you don't recognize this you are naïve).* Although it may be naïve to think negotiation can always be win-win, it is equally misleading to think that negotiation necessarily involves winning and losing. If we think that our choice is to be a winner or a loser in a negotiation, then we face the dilemma of either being taken advantage of or trying to take advantage of others. Negotiation is in part about finding a successful way through unpalatable choices such as these.

The problem with these assumptions is not so much that we consciously ascribe to them. If asked directly, most of us would probably reject all of these in their most rigid or stark form. However, our culture is imbued with many of these attitudes. Consider how negotiation is portrayed in movies (Bruce Willis in *The Fifth Element*, 1997; John Travolta and Robert Duval in *A Civil Action*, 1998; Danny DeVito, Michael Douglas, and Kathleen Turner in *The War of the Roses*, 1989; or Jesse Eisenberg and Justin Timberlake in *The Social Network*, 2010, to name just a few).

Negotiation is frequently portrayed as a divisive power struggle in which the most devious, ruthless, or aggressive player will win. These attitudes are pervasive, and even if we consciously reject them they still have an impact on us. They each contain some truth, but as overarching approaches they are misleading and destructive because they encourage rigidity or resistance to engaging in a potentially advantageous process. So, if these assumptions do not define negotiation, what does?

Chapter 10

PREMISES OF MEDIATION

Regardless of the approach taken, certain implied assumptions tend to govern how a mediation process unfolds. These premises exist because of the structure of mediation, and they define some of its greatest strengths and limitations.

- *Disputants need help (and can benefit from it).* A conflict goes to mediation because parties need help to interact effectively. They may have failed in their independent efforts to work on their dispute, or they may recognize that without mediation the conflict is likely to escalate or be prolonged. The acceptance by disputants that they need help is an important source of mediator power and legitimacy. When parties do not believe they need help (in a mandatory process, for example), the mediator's job becomes much more difficult.
- *There is an advantage to disputants' entering into a voluntary process.* Why not go straight to a third-party decision maker

where at least some substantive outcome is guaranteed?

There are certain tactical reasons not to do this—uncertainty about the outcome or the time and transaction costs of going to trial or arbitration, for example. But beyond this is the notion that people are likely to take more ownership over the interaction and reach better, more carefully crafted, and more durable solutions if their participation is voluntary and if they are the primary architects of those solutions. It is therefore worthwhile for them to try to work with a mediator before turning the decision over to an external decision maker.

- *Mediators help people communicate more effectively and work on their conflicts more constructively, even though they do not have the power to impose an outcome.* Participating in mediation usually implies that there is at least a possibility that a third party with no power over the outcome can make a difference. More than that, mediators' lack of decision-making power is part of what allows disputants to engage in the process. The deal disputants make with a mediator is, in essence, "I'll give you power to run an interaction (up to a point), and I will reveal things to you and listen to your ideas about how to proceed, but in the end I get to decide."
- *Process is important.* For the most part, participation in mediation suggests that it is not just the elusive solution that is missing when parties are in conflict—something about the process of the interaction needs work. How negotiations are conducted and how communication occurs are important. Mediators are called in to alter the process.
- *Third parties can be attentive to potentially competing interests and stories.* People do not necessarily have to believe a mediator can be neutral, impartial, or even fair. But by entering into mediation they accept the possibility that a third party can at least understand competing needs and views and can conduct a process without exclusively promoting the position of one side. Moreover, disputants often have to accept that mediators can listen to entirely different stories without having to choose one of them as the only reality. This implies the possibility (although parties usually do not explicitly accept this) that apparently contradictory narratives can be legitimate.

These assumptions exist regardless of the approach of the mediator. Other assumptions are dependent on the particular approach taken or are rooted in the system or culture within which the mediation occurs. For example, there is no automatic assumption that direct communication among the parties is beneficial, and mediators vary widely on how they handle such communication. Many believe that direct communication is critical to an effective resolution process, although it may not always be possible. But other mediators, often those specializing in commercial cases, do not believe in bringing the parties together until the basis of an agreement has been crafted. The implication of the first approach is that people in conflict, even if they are very upset with each other, are capable of and can benefit from direct communication with effective third-party assistance. The implication of the second belief is that progress is easier to make if a consideration of the issues occurs without the additional stress of face-to-face contact among contesting disputants.

Mediators also have different approaches to confidentiality. There is significant legal protection for the confidentiality of mediation in most parts of the United States and Canada, and most mediators use confidentiality as an important tool when trying to change the dynamics of a negotiation. However, not all mediation is confidential—public policy mediation in particular often has to occur in public. Mediators differ in opinion and practice about the confidentiality of private communication—for example, in regard to whether they will reveal what occurred in mediation if the parties give them a release to do so and what confidentiality restrictions parties must agree to when they enter into mediation. Furthermore, court practices, statutory frameworks, and interpretations of professional obligations vary considerably from jurisdiction to jurisdiction in their interpretation of the parameters around confidentiality in mediation. Confidentiality is a strategic and legal consideration, but not one that is necessarily built into the structure of mediation itself. What is always necessary for the credibility of the process is that the ground rules around confidentiality be clear from the beginning.

Impartiality and *neutrality* (terms interpreted in many different ways) are usually associated with mediation but are not implicit in the fundamental structure of the mediator's role. Without getting

into a discussion of whether it is even feasible for third parties to be completely neutral or impartial, it is clear that most mediators put themselves forward as having no interest in any particular outcome, no special relationship with any of the parties, and no intention of advocating for any one disputant at the expense of another. In this sense they indicate that they are neutral, unbiased, and impartial and offer that as part of what they bring to the process.

But mediation does not demand neutrality or impartiality. In many settings the mediator is not neutral and may have a special connection to one of the parties. In-house mediators in organizations, village elders in mediative roles, and family members who try to reconcile differences among other family members may not be neutral or impartial. What is required is for the mediator to try to help the parties interact with each other more effectively and to not take the side of one of the parties in the mediation.

The mediator's credibility is established in different ways depending on the values and needs of the people involved and the cultural context in which mediation occurs. In the middle-class professional world in which most of us operate, the promise of impartiality, neutrality, and confidentiality is usually essential for establishing the credibility and safety of mediation. But in other settings the community standing and personal status of the mediator may be far more important.