CHAPTER 1

Negotiation and Conflict

A. Introduction to Negotiation

Negotiation is the process of communication used to get something we want when another person has control over whether or how we can get it. If we could have everything we wanted, materially and emotionally, without the concurrence of anyone else, there would be no need to negotiate. Because of our interdependence, the need to negotiate is pervasive.

Everyone negotiates as part of modern life. However, because lawyers are paid to negotiate for others, we are considered professionals. A law student reading only casebooks might not know that the vast majority of disputes in which lawyers are involved are negotiated to a settlement without trial. Many major transactions are also the result of lawyer-negotiated agreements. Negotiation is at the core of what lawyers do in representing clients.

Most lawyers think they are skilled negotiators because they negotiate frequently. However, negotiating frequently does not necessarily result in negotiating effectively. Unlike trial practice, negotiation is usually done in private without the opportunity to compare results or benefit from a critique. Those with whom you negotiate rarely give you an honest assessment of how you did, and it is most often in their interest for you to believe you did well. Regardless of our intuitive ability, negotiation skills and results can be improved with analysis and understanding, as well as practice.

Lawyer negotiation takes place within the dynamics of settling a dispute or shaping a deal. It is not always a tidy process that tracks a textbook diagram. In this book we use a seven-stage model of negotiation, recognizing that all negotiations do not follow the same lineal staging and each stage will not necessarily be completed. The negotiation dance can be improvised to fit the situation. For example, we list initial interactions and offers as part of Stage 2 before exchanging information; however, the initial offer or demand may often follow an exchange of information. The seven stages are:

1. Preparation and Setting Goals
2. Initial Interaction and Offers
3. Exchanging and Refining Information
4. Bargaining
5. Moving Toward Closure
6. Reaching Impasse or Agreement
7. Finalizing the Agreement

Negotiation occurs because there are conflicts between what parties want or how they perceive a situation. As a professional negotiator you have an edge if you understand the nature of the conflict to be resolved, the psychology of negotiation, and contrasting styles of bargaining. So, we begin with the nature of conflict and the role of perceptions, as well as emotional dimensions and psychological traps. Next we look at the advantages and disadvantages of using a more competitive or cooperative bargaining style. We then examine the stages of negotiation and the activities associated with each step. Subsequent chapters look at cyber negotiation, gender and culture, ethics, the role of law, negotiation assistance, and policy issues.

B. Conflict

Although conflict can cause distress and is usually viewed negatively, it can function in positive ways. Conflict may motivate you to take action and change your situation in ways that improve your life and better fulfill your self-interests. Conflict can, however, also create a crisis mentality that becomes destructive. Lawyers can help create more constructive outcomes from conflicts or they can make a difficult situation worse. The ability to help clients better understand the conflict, reframe the issues, and realistically analyze their interests and how those interests can be advantageously negotiated is an important lawyering skill.

Conflict is divided into two categories: interpersonal (differences that arise between individuals or groups) and intrapersonal (conflicts within ourselves). Interpersonal conflict is a situation in which the parties each want something that they perceive as incompatible with what the other wants. Because the parties in an interpersonal conflict cannot both have all that they want, their interests or goals are divergent. Lawyers are retained to help resolve interpersonal conflicts between our clients and others. A client may also be conflicted internally about what it is they really want and how they prioritize their interests. For example, does your client really want to return to the job from which she was fired, or does she want only to restore her self-respect and get compensation? Does the father you represent in a divorce really want custody of the children, or is he internally conflicted about the decision to divorce and trying to hold onto the marital relationship? Recognizing these two different types of conflict can be critical in achieving client goals.

Another distinction that can be useful in negotiation and mediation is between the manifest conflict, which is overt or expressed, and the underlying conflict, which is hidden or not recognized. Lawyers most often deal with manifest conflicts, which we refer to as disputes. A conflict may not become a dispute if it is not communicated in the form of a complaint or claim. However, what is communicated may be only a part of or symbol of the underlying conflict. The dispute between brothers over control of a family business seems safer to contest than the underlying conflict of who was the favored son or a better child. A patent or copyright dispute may focus on lost revenue, while the fundamental conflict is over public recognition of creative accomplishment and originality. Residential development disputes may focus in court on specific environmental regulations or traffic issues, but the underlying conflict is about the changing

character of the community. This dichotomy between the overt dispute and the hidden conflict can be viewed for purposes of negotiation as the presenting problem and the hidden agenda.

If the agreements reached in negotiation resolve only the presenting problems, they are less likely to last unless legally enforced. Surfacing the underlying conflict can clarify issues, focus objectives, generate new possibilities for settlement, and ultimately improve relationships. Dealing with the underlying conflicts, however, may be emotionally difficult for clients and can stimulate internal conflict. Many lawyers are not comfortable with opening emotional issues and may not have the capacity to address them. We will look more into the emotional aspects of conflict and psychological issues shortly.

First, it is helpful to note that lawyers generally negotiate to reach a settlement, not necessarily to resolve the underlying conflict. The resulting negotiated settlement usually involves the payment of money, now or in the future; an agreement to provide goods or services, or to change behavior; or some combination of these. Conflicts over fundamental beliefs, religion, and love are not negotiated by lawyers, even if changes in behavior or payments of money for past behavior based on religion or belief may be within the realm of lawyer negotiation. Although we don't negotiate to change feelings or beliefs, our clients may come to change how they feel about their dispute through discussion, sharing information, and exchanging views.

As lawyers dealing with other people's conflicts, we tend to view our approach to negotiating in their behalf as a choice of different styles reflecting our own understanding about conflict and our own values. These choices may seem like polar opposites that go to the core of how we approach conflict and who we are. This seeming paradox of negotiating approaches can be very challenging for law students and for attorneys. In a recent book, *The Conflict Paradox* (2015), Bernard Mayer lists seven dilemmas in dealing with conflict:

- Competition or cooperation
- Optimism or realism
- Avoidance or engagement
- Principle or compromise
- Emotion or logic
- Neutrality or advocacy
- Autonomy or community

Mayer writes that these polarities are not true choices but are part of the dynamics of human interaction and the nature of conflict. He urges a more sophisticated, nuanced, and complex approach that recognizes in most incidents both sides of these polarities must be embraced. We have to get past understanding them as contradictions forcing either-or choices and accept the complementary unity of both elements. In other words, you need not choose a thoroughly cooperative or competitive stance. You need not be guided by only emotions or logic—one does not foreclose the other. We will look at competitive or cooperative negotiation in detail, the dual roles of emotion and logic, as well as other dilemmas in settling conflicts. For now, there is one other preliminary aspect of conflict that must be considered before negotiation can begin.

C. Ripeness

Before you can negotiate, the conflict must be "ripe" for negotiation. Professor Jeffrey Rubin describes the role of ripeness in his classic article, *Some Wise and Mistaken Assumptions About Conflict and Negotiation* (1991). He explains that just as it takes two hands to clap, it takes two participants to negotiate. Even if you are ready to start serious discussion toward settlement, there must be a counterpart at the table, on the phone, or at the other end of your email. Unless there is someone ready to communicate on the other side, there can be no negotiation.

Even if all parties agree to negotiate, there can be no settlement without mutual motivation to take the conflict seriously. A non-motivated disputant will put off reaching an agreement until the situation changes. People typically do not sit down to negotiate until they realize it is in their interest to do so or they have reached a point where they fear the consequences of not pursuing an agreement. Each side, according to Rubin, must no longer believe "it possible to obtain what he or she wants through efforts at domination or coercion. It is only at this point, when the two sides grudgingly acknowledge the need for joint work if any agreement is to be reached, that negotiation can take place."

Rubin defines "ripeness" as "a stage of conflict in which all parties are ready to take their conflict seriously, and are willing to do whatever may be necessary to bring the conflict to a close. To pluck fruit from a tree before it is ripe is as problematic as waiting too long. There is a right time to negotiate, and the wise negotiator will attempt to seek out this point." He notes that it is possible to create ripeness through the use of threat and coercion so that the opposing side can see the consequences of failing to reach agreement. However, he cautions against coercion and threats as a means to ripen the conflict because it encourages conflict escalation and invites a game of "chicken," in which each side hopes that the other be the first to succumb to coercion.

A better way to create a situation that is ripe for negotiation and settlement is through the introduction of new opportunities for joint gain. If all sides can be persuaded that there is more to gain than to lose through negotiation, rewards can be harvested that can advance each side's agenda and form a basis for agreement.

Notes and Questions

1. Morton Deutsch, who pioneered the modern study of conflict resolution, distinguished manifest conflict from underlying conflict, as summarized in our introductory comments. (See Deutsch 1973.) Rubin, a former student of Deutsch, separates settlement of the manifest conflict behaviors from the attitude changes necessary to bring an end to the underlying base of conflict. We noted a similar distinction between the presenting problem and the hidden agenda. Do you agree that settlement only of the manifest problem is unlikely to last? Why or why not? Is litigation limited only to the manifest or presenting issues? Is Rubin correct in indicating that negotiation is only a method of settling conflict rather than resolving it?

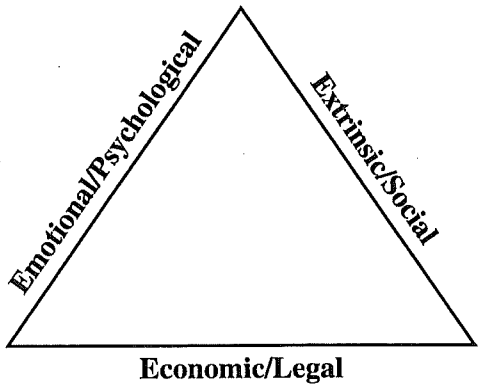
2. Just as it takes two or more people to have a conflict, so it takes two or more people to reach agreement. Ripeness of the conflict is critical for those involved to begin serious negotiation toward resolution. What do you think Rubin means when he suggests that new opportunities for joint gain create ripeness? How might this concept help lawyers get disputes resolved?
3. How do lawyers most often create "ripeness" to seriously negotiate and settle disputes?

D. The Triangle of Conflict and Negotiation

You are now aware that the issue initially presented by your client, which may focus on monetary claims and legal rights, is not necessarily the entirety of the conflict or even the main element. You also know that logic is not the singular path to negotiating settlement of a conflict. There is increasing recognition that to negotiate a satisfactory resolution of a conflict there must be an understanding of and attention to the emotional and relationship components, which may be the underlying bases of the conflict. Even though the dominant focus in most lawyer negotiations is on the trade-offs involving legal claims or economic considerations measured in money damages, neglecting the non-monetary components resulting from conflicts can lead to an impasse or a settlement that does not hold.

There are three sets of factors, or interests, at work in most conflicts. These interests can be thought of as the three "Es": economic, emotional, and extrinsic. They form the three sides of the negotiation triangle, which represent the three sets of interests that must be addressed to reach a satisfactory settlement of a dispute.

NEGOTIATION TRIANGLE



Legal issues and rights are what often bring lawyers to the negotiation table to bargain over economic damages. Once there, the other two sides of the triangle that impact clients enclose and influence the negotiation process and outcome. The emotional component refers to the internal pushes and pulls on parties created by the conflict that affect how they feel about themselves. The extrinsic elements are the setting and social considerations, including how others will view what is going on and how the resolution will appear to third parties. "Face saving" is frequently referred to in the negotiation literature; it is an extrinsic social factor that also has an emotional impact. The three sides of the triangle are interrelated and have an impact on one another. The mix of what matters for purposes of resolving a conflict will vary depending on the subject and the sensitivities and history between the parties, as well as their attorneys. A purely commercial case will most heavily involve economic considerations. However, all three elements are involved to some extent in every type of dispute. A business person sued for breach of contract has feelings about accusations from a longtime supplier and concerns about his reputation in the business community. A divorce or employment dispute, although focused on legal rights and money, will invoke more emotional and extrinsic factors. For example, in a divorce, what will children, grandparents, and neighbors think about new parenting arrangements? In a wrongful termination case, how will acceptance of the economic offer appear to co-workers who remain friends with the terminated worker? Attention to the non-economic factors can help prevent or end a negotiation impasse and move the matter to resolution.

It can be difficult to quantify the emotional and extrinsic factors, but there might be ways to satisfy the internal-emotional and external-social factors in a manner that both settles the case and helps resolve the conflict. As you read the following real-life fact situation and resulting lawsuit, settled a year and a half after the incident, consider what roles both emotional and social factors might have played in negotiating a settlement agreement.

Problem—Tiger Attack

Tatiana, a 250-pound Siberian tiger in the San Francisco Zoo, leapt out of her enclosure, killed 17-year-old Carlos Sousa, Jr., and injured two of his friends, brothers Amritpal Dhaliwal, then 19, and Kulbir Dhaliwal, then 23. The tiger was shot dead by police. The media coverage was extensive. Zoo spokesman Sam Singer, hired by the zoo for damage control, seemed to blame the brothers for the incident, suggesting that they taunted the tiger. Animal rights advocates protested the shooting of the tiger. Zoo attendance and donations dropped.

A claim for the death of Carlos Sousa, Jr. was settled. The Dhaliwal brothers sued the San Francisco Zoological Society, the City of San Francisco, and Sam Singer. Their federal lawsuit alleged that the zoo was negligent in maintaining a tiger enclosure several feet below recommended standards, claimed their civil rights were violated because their car was improperly seized, and accused Singer of libel and slander for comments he made to

media implying that they might have been taunting the tiger. They also alleged that police officials had ordered officers to issue warrants for their arrest, accusing them of manslaughter in the death of their deceased friend, Carlos Sousa, Jr., even though an investigation could not substantiate any basis for bringing charges against them. Substantial damages were sought by the brothers, well beyond the relatively modest amounts for physical injuries and medical expenses.

1. If you were advising the zoo, would you recommend that it negotiate a settlement? Is there any downside for the zoo in negotiating? Would your answers be different if you were representing the Dhaliwal brothers?
2. What are the non-economic factors in this conflict, and how might they be addressed in negotiation?
3. What might the Dhaliwal brothers obtain in a negotiated settlement that they could not win at trial?

The emotional side of the triangle of conflict might be the most difficult for you to deal with if you are not trained in psychology. You might negotiate what you think is a great resolution of a dispute, only to have it rejected by your client, who must agree before a settlement or deal is finalized. Understanding the emotional stages experienced by a client in a conflict can help you better represent your client in negotiations. Professor Gerald Williams identifies the emotional stages a client might follow to move out of a conflict and get on with life or business. The last phase of renewal or transformation listed by Williams may be more an inspirational hope than a realized reality.

❖ Gerald R. Williams, *NEGOTIATION AS A HEALING PROCESS*

J. Disp. Resol. 1 (1996)

The Five Steps for Recovering from Conflict

. . . Just as researchers have found that getting *into* a conflict is a multi-step process that typically involves naming, blaming, claiming, rejection, and a decision to go public, even so, the task of getting *out of* a conflict requires the disputants to work their way through a multistage process.

A. Denial

As a preliminary model of the process of recovering from conflict, the first stage is typically a condition of *denial.* As James Hall explains, there is in each of us "a deep-seated human desire *not* to be the one at fault, *not* to be the one who must change." This resistance to being the one at fault, to being the one who must change, is part of what makes conflict so painful and its resolution so difficult. Most conflicts are a story of two parties, both of whom contributed to the problem, and neither of whom wants to admit his or her role in it. In the literature on grieving we gain a broader sense of what is meant by the term *denial* and some of the risks it poses to the parties and others: "The person will strongly

deny the reality of what has happened, or search for reasons why it has happened, and take revenge on themselves and others." . . . From this perspective, we might even say that, in most instances, conflicts are meaningful; they have a purpose. Their purpose is to hold up a mirror so disputants may see themselves in a new light, an experience as painful as it is valuable. . . .

Properly understood, then, conflicts serve as such a mirror. They expose the disputants' weaknesses; the areas in which they have been too much the victim, or too much the exploiter; their complexes, their unresolved angers, and their feelings of specialness and entitlement. Because it is so painful for disputants to see these parts of themselves exposed by their own involvement in the conflict, they need the protection and reinforcement, the containment and channeling, that the lawyer-client relationship provides, and they need the benefit of the full play of the negotiation process to help them gradually face what they see in the mirror and to come to terms with it. . . .

B. Acceptance

The next step is *acceptance.* It may take time, but at some point the parties need to move beyond denial and to *accept the possibility that they themselves are part of the problem.* They do not yet need to *do* anything about it, just to accept the possibility that the problem does not begin and end with the other side, that they themselves may have some complicity in the problem. In some cases, however, it may be that one side actually is wholly innocent and the other wholly to blame for the problem. But even when parties are wholly innocent, they still need to accept the possibility there is *something they could do now to move the situation in the direction of an appropriate resolution.* Again, they don't need to actually take action, they simply need to register a change in attitude that opens them to the possibility of movement in the direction of an appropriate solution.

C. Sacrifice

Assuming the parties have accepted the possibility they are part of the problem, or the possibility there is something they could do now to move in the direction of a resolution, the next step is to consider what they might be willing to do about it. In its starkest form, the principle is that, for the conflict to be resolved, the parties must be willing to make a sacrifice. From a judge's point of view, the minimum sacrifice required for a valid settlement agreement is a *compromise* by each side, meaning that both parties must make some concession, must move from their original position. But as a general matter, mere concessions or compromises do not require a change of heart. It has been observed that people usually are not willing to make a sacrifice until they have been brought to a more humble attitude. . . . Assuming that sacrifices need to be made, what should they be? This is an extremely delicate question. We know, for example, that some people have a history of being *too compliant,* of giving away too much, whether motivated by a need for affection and approval, by fear of reprisals, or for some other reason. For those who are too compliant, the sacrifice called for would probably *not* be to make more concessions to their antagonist, but rather to forebear from giving, to reverse themselves, to give up the part of themselves that always wants to please others. For other people, the problem may be just the opposite. They may be exploiters who are too good at

looking out for themselves at others' expense. For them, the sacrifice may be to recognize their exploitive patterns and become more conscious of the interests and needs of other people. There are many other possibilities. The answer will depend on the personalities involved and the particularities of their situations. In some situations, parties may need to sacrifice—to let go of—such things as a desire for a total victory, or an impulse for revenge, a mistaken belief that they themselves are faultless and the other side totally to blame, their pride, their unwillingness to acknowledge or appreciate another's point of view, or their unwillingness to forgive another for his or her mistake. In other situations, parties may need to give up the belief that they can get away with exploiting others, their belief that they are better or more deserving than others, or their excessive opinions of their own abilities, worth, privileged status, etc. There may be situations in which parties need to give up their hope of obtaining a windfall or other unearned benefit, or give up their envy or spite or jealousy with respect to possessions, luck, and social position.

Before proceeding to the fourth step, there is one final consideration. Is it mandatory that parties make a sacrifice? The answer is a firm "no." There can be no *requirement* that the client have a change of heart. It is fundamental that, as lawyers, we implicitly and explicitly declare to our clients that they can stay just the way they are, and so long as they do not expect us to do that which is illegal or unethical, we will stand by them. Our willingness to represent our clients should not depend upon their willingness to change, much less to move in directions *we* think right. As Shaffer and Elkins remind us, "the client has to be free to be wrong." The negotiation process, then, is not intended for lawyers to impose our values upon our clients, but for us to help contain and channel our clients' energies in appropriate ways until they have had enough time to see their own situations more clearly and to discover for themselves what steps they may be willing to make.

D. Leap of Faith

The fourth stage refers to action or movement, what might be called the *leap of faith.* It is a leap of faith, for example, to admit to the other side that you might be *willing* to make a sacrifice to resolve the case. Practicing lawyers recognize it as the moment when their client looks them in the eye and asks, "If I do this, can you guarantee it will work?" And the lawyer has to reply, "No, I can't guarantee that, because I don't know that. But the trial is coming up really soon, and we haven't thought of anything better to do, but you decide." And the client must decide. . . .

E. Renewal or Healing from Conflict

If the process works well enough, and both parties are willing to move by incremental leaps of faith in the direction of agreement, and if they seek in the process to fathom the underlying problems and address them along the way, the effect can be two-fold: they may reach a mutually acceptable solution and, in the best of circumstances, they may also experience a change of heart, be reconciled to one another and healed and feel renewed as human beings. This is the transformation objective; it is the goal or purpose of all ritual processes, whether it be theater or court trial or graduation exercise or religious rite or

negotiated settlement. Rituals are to help prepare the participants, those on whose behalf the ceremony is enacted, to move forward in a new condition, to a new phase of life. *Renewal* or transformation in this context means not simply they are as good as they were before the conflict, but they are better—they are more whole, or more compassionate, or less greedy, or otherwise changed in an important way from their attitude or condition before the crisis began. Certainly, when people experience such a fundamental change through the process of conflict resolution, they will be far less likely to find themselves in a similar conflict again. On the other hand, if they fail at this process, then to the extent the conflict was a product of their own developmental shortcomings, it is likely they will find themselves in similar conflicts in the future, returning again and again until the party acknowledges and addresses the underlying developmental need. . . .

Notes and Questions

4. Elizabeth Kubler-Ross, in her 1969 book *On Death and Dying*, introduced a model known as the five stages of grief, by which people deal with grief and tragedy, specifically when diagnosed with a terminal illness. Kubler-Ross's five stages are denial, anger, bargaining, depression, and acceptance. This five-stage model, or some variation, has since been applied by authors to every type of personal loss, including divorce and bankruptcy. How does Professor Williams's five-stage model differ from Kubler-Ross's five stages of dealing with death? Do you agree with Williams's five-stage analysis as applied to conflict?
5. Many people have a negative view of conflict and try to avoid it. Do you? Was conflict viewed as negative in your family? During your childhood, how did your family deal with conflict? Will you try to model the same conflict process for your children?
6. As a lawyer, will you welcome representing clients who seek your help to resolve their conflicts with others? Why or why not?

CHAPTER 2

Perception, Fairness, Psychological Traps, and Emotions

A. The Role of Perceptions

> "We do not see things as they are. We see things as we are."
>
> — *The Talmud*

The key to understanding and mastering negotiation is to be aware that those in conflict and who want something from one another see the situation differently. It is these differences that give root to conflict and to the need to negotiate, as well as to the possibility of agreement. We assess conflict and evaluate a case or the worth of an item differently because of differing perceptions. Our individual perceptions determine how we view ourselves, others, and the world. No two views are exactly the same. For example, we may selectively perceive or differ in our perceptions of the following:

- facts
- people
- interests
- history
- fairness
- priorities
- relative power
- abilities
- available resources
- scarcity
- timing
- costs
- applicable law or rules
- likely outcomes

Our view of each of these elements, as well as our perceptions of other variables, shape how we see the world and how we form differences. It is because of such differences in perceptions that people bet on horse races, wage war, and pursue lawsuits.