

■ §2.4 BASICS OF PROBLEM-SOLVING (INTEGRATIVE) NEGOTIATION

If distributive bargaining is characterized by concealing and manipulating information, taking tough positions and using persuasive or coercive argument in order to get as much as possible, *problem-solving* or integrative negotiation is characterized by sharing information more openly, identifying the parties' shared and differing interests and collaborative discussion in order to meet as many of the parties' *interests* as possible.

A successful personal injury lawyer recently told us about one of his cases that illustrates something about the basics of problem-solving negotiation. The story is of interest because negotiations in personal injury cases tend to be highly distributive in nature, and this negotiation was not.

The case involved a single mother who had lost both of her teenage children when an allegedly defective product manufactured by the defendant failed. A typical distributive products liability negotiation would have pitted the lawyers against each other, arguing over issues pertaining to liability and trying to put a monetary value on the lives of the two deceased children. But the mother made it clear from the start that she would have nothing to do with a negotiation that treated her children like commodities with a disputed price tag. *"I cannot bear the thought of living a life without children,"* she told her attorney. *"What I really want is to be able to try to start over again—to adopt two children, to care for them without having to worry at all about how I am going to pay the bills, to give them the best possible opportunities for college—opportunities I never had myself."*

Following her instructions, her attorney was able to come up with a plan to meet her long-term goals and the defendant's insurer's interests. In addition to avoiding a costly trial, the insurance company was able to pay a comparatively small sum to cover (in addition to her attorney's fees) the plaintiff's immediate adoption costs and projected annual child care expenses, and to invest money to ensure that when the children were of age, many years hence, a sufficient fund would exist to pay for two college educations.

Problem-Solving Negotiation Is Based on Interests, Not Positions. As a negotiator or mediator, you cannot engage in problem-solving negotiation unless you are able to pierce the positions of the parties and explore their underlying interests. Interest analysis does not guarantee that problem-solving will occur in negotiation, but it is a necessary pre-condition for problem-solving.

What Are Positions? Positions are the concrete, tangible monetary and non-monetary demands and offers that bargainers make in negotiation: *"My client won't accept a penny less than \$1 million to settle this medical malpractice claim"* or *"We cannot agree to this transaction unless your company can guarantee shipment of all 1,000 transformers by December 1"* or *"Mr. Jacobs will never agree to awarding physical custody of the children to Mrs. Jacobs unless a visitation schedule is put in place guaranteeing the boys will be with him at least two nights a week"* or *"We will not settle this case unless you get rid of that damned dog."* When a negotiation is conducted positionally, it often becomes a "stylized, linear ritual of struggle—planned concessions after high

first offers, leading to a compromise point along a linear field of preestablished 'commitment and resistance' points."²⁸

What Are Interests? Interests, Roger Fisher and William Ury tell us in their well-known book on problem-solving negotiation, *Getting to Yes*, are what cause people to take the positions they take. They are "the silent movers behind the hubbub of positions."²⁹ The most powerful interests are based on fundamental human needs, such as the need for physical safety, economic security, a sense of belonging, fair and respectful treatment and control over one's life.³⁰ And much of the potential power of interest-based bargaining lies in the fact that human beings are complex and make decisions for a wide variety of economic, social and psychological reasons.

The positions that negotiators take at the bargaining table are *always* proxies for their deeper-seated needs, fears and concerns. The seriously injured plaintiff wants monetary compensation in order to pay for medical expenses and ease the way to a new life plan. The wholesale purchaser of transformers is worried about injury to its reputation and fears having to pay liquidated damages to retail customers if it cannot meet its own production schedule. The divorcing father is frantic about the potential deterioration of his relationship with his two sons if he does not get quality time to spend with them. The injured neighbor worries for her physical safety so long as the dog continues to live next door.

Consider that in any bargaining process, the parties may be motivated by the following different interests, prioritized in many different ways:

- **Economic interests:** earning a good salary, seeking a profit, reducing costs or developing new business opportunities;
- **Moral and psychological interests:** integrity, consistency, fairness, principled behavior, self-respect, excitement, freedom from anxiety and stress;
- **Ego or psychic interests:** personal satisfaction, accomplishment, autonomy, security and the respect of others;
- **Influence interests:** reputation, credibility, authority, status and good will;
- **Ideological interests:** religious, political or civic values and beliefs;
- **Social or relational interests:** maintaining and enhancing existing relationships, developing good future relationships, terminating detrimental relationships;
- **Freedom of action interests:** avoiding undesirable precedents and agreements that restrict future freedom of choice;
- **Efficiency interests:** resolving existing problems expeditiously, developing efficient and reliable procedures to resolve future problems.³¹

28. Menkel-Meadow, *supra* note 14, at 767.

29. Fisher, et al., *supra* note 6, at 41.

30. *Id.* at 48-49.

31. This is a slightly modified version of a very helpful list of interests that appears in Goodpaster, *supra* note 11, at 95-96.

Many of these interests may be valued for *instrumental* reasons — because they favorably affect the negotiator's wealth, security or expected future dealings. But sometimes the most important interests are *intrinsically* valuable to negotiators, apart from their instrumental usefulness in the dispute or transaction.³²

So, in Professor Bellow and Moulton's dog bite case, the injured plaintiff might simultaneously be concerned about securing her safety at all costs; recouping her medical expenses and legal fees; recovering something more for her pain and suffering; resolving the matter on the basis of governing legal norms if possible, so that she won't feel as if she has caved in; and patching things up with her neighbors so that she won't feel uncomfortable when she sees them on the street. The dog owners might be most concerned about keeping their dog to provide companionship for their children; providing fair but not exorbitant compensation to their neighbor for whose injury they feel responsible; patching up their relationship; and avoiding at all costs a trial judgment that, under local dog laws, would lead to their dog being destroyed if it ever bit another person.

Comparing Shared and Differing Interests to Facilitate "Value-Creating" Trades. If the parties can identify and prioritize their own interests and then at the negotiation table are able to explore each other's interests in an open way, they will often discover that some are *shared*, some are different but *complementary*, and only some are *antagonistic*. The more interests that negotiators unearth and the more interests they are willing to lay on the table, the more likely they will be able to find trades that create value by giving everyone more of what they value most, making both sides better off, or at least making one of the sides better off without hurting the other.

The discovery that bargainers have shared, or at least nonconflicting, interests is often what enables problem-solving negotiation to begin. For example, a reciprocal acknowledgment by both clients in the dog bite case that they share an interest in restoring their relationship and avoiding future dog bites might have a strong impact on the nature of their bargaining and put them psychologically on the "same side of the table." Discovering further that their interests with respect to the dog are different but not necessarily antagonistic (plaintiff wants security; defendants want companionship) might enable the negotiators to identify a variety of possible solutions short of getting rid of the dog (electronic fence, chain-link fence, dog run, etc.) that would accomplish both of their clients' objectives. Note that, in contrast to "take-it-or-leave-it" positions, a party's interests can almost always be met in multiple ways. Having a range of possible solutions greatly increases the chances that a mutually acceptable one can be found.

Trading on Differences. But it is the *differences* between the parties that are often most useful in facilitating settlements. If the parties were identical in their resources, capabilities and preferences, they would have no way to benefit by

32. David Lax & James Sebenius, *Interests: The Measure of Negotiation*, 2 Negot. J. 76, 78-80 (1986).

negotiation, and therefore no reason to negotiate. Consider the following types of negotiation differences:³³

- **Different possessions, resources or capabilities.** These are fundamental to most transactions. Acme Oil Company, best known as a producer and refiner, seeks to merge with BC Oil Company, whose strengths lie in oil trading, transportation and distribution. The merger will provide the newly formed company with market advantages that neither has by itself.
- **Different tastes, preferences and priorities.** The classic story tells of two sisters fighting over a single orange remaining in the refrigerator. The big sister could take the orange by force, but there might be negative consequences for her once mom and dad get home. Or the sisters could sulkily agree to split the orange in half or in some other proportion. In fact, one sister only wants the juice, the other the rind to bake a cake. If they are able to learn of each other's true preferences, they can both get more of what they want.
- **Different predictions of future events.** We saw this earlier in the story of the rock star negotiating his fee. If the rocker and the concert promoter are willing to bet on their differing predictions over the likely size of the crowd, they can trade on those differences by negotiating a base appearance fee with a clause giving the rock star (who is more optimistic about drawing a large crowd) an agreed-on percentage of the gate.
- **Different degrees of aversion to risk.** This is a special case of differently valued preferences. Suppose the defendants in the dog bite case are well off financially but want at all costs to avoid a trial because an adverse judgment exposes their dog to a future risk of being destroyed. Suppose that the plaintiff needs money now to pay for her expenses and is indifferent to the risks and precedent-creating potential of a trial. The defendants might be willing to pay the plaintiff a monetary premium to obtain a quiet settlement with a confidentiality provision. If the parties are able to share their different priorities with respect to the risks of trial, they can both get more of what they want.
- **Differences in time preferences regarding payment or performance.** This is another special case of differently valued preferences. Go back to the product liability case involving the mother who lost both her children. Suppose that because she is not adept at managing money, the plaintiff prefers not to receive a lump sum payment, but rather a structured settlement under which she will receive a guaranteed annuity with a fixed, yearly inflation adjustment for the next thirty years. The insurance company representing the defendant is likely also to prefer such an arrangement, because it can now invest a smaller amount of money than it would otherwise have to pay to the plaintiff and let that money grow over time. The differences between the parties permit a trade by which both parties benefit: The insurance company gets to keep more of its money, and the plaintiff gets her

33. These differences have been adapted from David Lax & James Sebenius, *The Manager as Negotiator* 88-116 (1986) and Gerald Wetlauffer, *The Limits of Integrative Bargaining*, 85 Geo. L.J. 369 (1996).

money managed for her by means of the settlement structure. (This is also an example of the parties' taking advantage of their differences in capabilities—in this instance, the insurer's superior expertise in money management.)

Expanding Issues to Create Value and Ease the Negotiations. Note an important corollary here: by focusing on the parties' interests rather than the positions they take, negotiators often expand the number of negotiating *issues*—items to be discussed as part of a potential resolution. Adding issues to a negotiation is often what enables value-creating trades to be made. If negotiators have only one issue (usually an amount of money) to talk about, the negotiation is likely to take on a zero-sum, tug-of-war character. If negotiators are candid with each other about their underlying interests, they will often find that there is more than one issue at stake in a negotiation. In the dog bite case, if it is learned that the plaintiff cares more about money and the defendants care more about secrecy, then the parties can trade more money for a confidentiality agreement, and each can get more of what it truly wants.

■ §2.5 STRATEGIC BARRIERS TO SETTLEMENT AND THE MEDIATOR'S ROLE

As we have seen, negotiations often break down where they shouldn't, or are concluded on less-than optimal terms. What are the reasons why this occurs? The first has to do with the parties' strategies.

To begin with, in the real world of legal dispute negotiation, problem-solving bargaining is hard to do. An empirical study of New Jersey lawyers' settlement practices in nonmatrimonial civil cases suggests that problem-solving negotiation is not nearly as common as positional bargaining, and even negotiators who would like to engage in problem-solving negotiation often find it difficult to do so.³⁴

Certainly, the fear of exploitation is an important part of the reason why. As Robert Mnookin and his colleagues write, "Why don't negotiators just share all their information, search for value-creating trades, and both walk away happy? . . . A negotiator who freely discloses information about her interests and preferences may not be met with equal candor. . . . When disclosure is one-sided, the disclosing party risks being taken advantage of."³⁵ Moreover, the fear of exploitation may cause negotiators to choose a positional strategy in *anticipation* of the way they expect their opponent to behave, even if they would prefer to adopt a more problem-solving approach themselves.³⁶

Other factors may also contribute to the prevalence of distributive bargaining. Despite the recent growth of "win-win" negotiation training, lawyers are still far less well trained in problem-solving techniques than they are in standard

34. See Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement in New Jersey: "You Can't Always Get What You Want,"* 12 Ohio St. J. on Disp. Resol. 253, 255-256, 268, 284 (1997).

35. Mnookin, Peppet & Tulumello, *supra* note 11, at 17.

36. Heumann & Hyman, *supra* note 34, at 261.

competitive modes of argument. In many legal quarters, problem-solving negotiation is perceived as weak. In large urban areas, lawyers are likely to negotiate against lawyers who are strangers to them and who they therefore have no reason to trust. Traditional habits of legal negotiation, deeply rooted in lawyers' adversarial culture, die hard.³⁷

Second, even when bargaining in situations in which distributive bargaining is unavoidable, negotiators often negotiate ineffectively. They are overly cautious about sharing information and distort information in ways that make it hard to find a bargaining zone. They take overly aggressive positions that cannot be justified based on objective norms and standards. They make tiny concessions reluctantly, prompting tiny concessions in return, leading eventually to deadlock. Their strategic aggressiveness sometimes turns personal, leading to a downward spiral of anger and mistrust.³⁸

How can the presence of a mediator reduce the strategic tensions inherent in negotiation and help the parties reach more efficient, optimal agreements? By fostering effective problem-solving approaches where this is possible, and by helping the parties negotiate more effectively in a distributive mode where it is not. This will be a large part of our study of the skills of the effective mediator.