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LAWYER NEGOTIATION

THEORY, PRACTICE, AND LAW

FOURTH EDITION

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To my father, Lew Folberg, the pawn broker who taught me the art of negotiation

— J.F.

To my wonderful family

— J.R.

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PREFACE

This book is based on three key assumptions: First, to represent clients effectively, lawyers must be skilled negotiators. Second, lawyer negotiation differs from direct negotiation between parties because lawyers are professional agents representing clients and therefore have unique responsibilities and potential conflicts. Finally, a negotiation textbook should be interesting to read; bring together the latest, best, and most provocative thinking on negotiation; and lend itself to interactive, experiential teaching.

Our book, therefore, has a different perspective from most other texts on negotiation. It focuses on legal negotiation—the settling of legal claims in which the disputants are represented by attorneys. Although the emphasis is on lawyers negotiating settlements of disputes, negotiation of deals and transactions is also covered. In addition, this book includes a chapter on obstacles to reaching agreements and the use of assisted negotiation in the form of mediation. Another chapter covers how to advocate in a mediation. The reality is that lawyers, in addition to negotiating directly, increasingly use mediation to conclude difficult negotiations of litigated disputes and need to understand how mediation works and how to use it as an advantageous negotiation tool to best meet their clients' needs. Most students enrolling in a negotiation course will not take a separate mediation course, and if they do, it may focus on how to be a mediator rather than an advocate in the process, as emphasized here. This book concludes with a chapter that asks if there are situations in which you should not negotiate and examines settlement policy.

The text is practical while grounded in theory, and lawyer-focused but also enriched by interdisciplinary material. This book asks many questions and poses problems designed to provoke critical thinking about the readings and stimulate class discussion. Accompanying role-plays and exercises provided in the Teacher's Manual allow students to apply the readings and bring the text material to life. These role-plays center on the types of disputes in which students are likely to find themselves as practicing lawyers—cases with legal claims or issues, rather than purely personal conflicts, neighborhood quarrels, or international peace negotiations.

This fourth edition welcomes a new co-author, Professor Jen Reynolds, who has contributed a fresh perspective from both her practice and teaching experience. Together, we have updated each chapter, adding new insights and examples in place of some of the older material. This book continues to benefit from the input and writing of Professor Dwight Golann, whose contributions are utilized throughout this edition.

We have followed the same general organization that proved popular in prior editions and this new edition contains the same core elements. However, in response to requests that readings be shortened to allow more time for experiential learning, most of the excerpts have been summarized. Former Chapters 3 and 4

have been consolidated into one chapter on negotiator styles, and the material on telephone and cyber negotiation has been integrated into the chapters on negotiation stages to reflect the ubiquitous use of technology and multiple modes of communication in modern law practice. This has reduced the number of chapters to 12. This edition also takes more advantage of technology and students' increasing preference for electronic and video formats. We have removed the appendix in recognition that the selected materials may become obsolete between editions and that electronic searches of foundational documents are more efficient and current.

A new feature is that students can now stream negotiation videos from a special web platform. The text contains references to short videos that illustrate specific stages, techniques, styles and issues that arise in both direct negotiation and negotiating with the aid of a mediator.

The text and accompanying Teacher's Manual are designed for a semester course with readings assigned before class so that class time can be devoted to exercises, role-plays, and discussion. This more streamlined edition also lends itself to concentrated courses taught on a two-unit basis or as professional training. Although the title reflects our combined experience teaching and providing negotiation training in legal contexts, the material is appropriate for teaching anyone who will negotiate on behalf of others.

A note about form: We have converted all in-line citations of articles and other references to chapter endnotes. Deletions of material are shown by three dots or ellipses, but omitted footnotes and other references are not indicated.

Finally, we express our gratitude to the many students and lawyers whom we have had the pleasure of teaching negotiation and from whom we have learned much about what works in a negotiation class. We are also thankful to the professors who have suggested corrections and improvements for this new edition. Finally, we thank our wonderful co-authors of *Resolving Disputes: Theory, Practice and Law*, 4th Edition, Dwight Golann, Thomas Stipanowich and Amy Schmitz, whose collaboration made this "spinoff" volume possible.

J.F.
J.R.

August 2021

Lawyer Negotiation

CHAPTER 1

NEGOTIATION AND CONFLICT

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, however, the need to negotiate is pervasive.

Everyone negotiates as part of modern life. But 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.

A. INTRODUCTION TO NEGOTIATION

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 often may 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, and neither party has the power to impose its preferred solution on the other. 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. With that in mind, 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 gender and culture, ethics, and the role of law in negotiations.

B. THE BASICS OF CONFLICT

Most of us say we do not want conflict in our lives. Few people enjoy being in tension with others around scarce resources, competing values, or incompatible interests. Conflict may create a crisis mentality that can be destructive and draining. Every day we see examples of the damage that conflict can create, from bickering neighbors to combative politicians to warring countries. And the Internet, which has created so many opportunities for community and collaboration, is often the site, if not the instigator and exacerbator, of intense conflicts.

Although conflict may cause distress, it also can function in positive ways. Conflict may motivate us to take actions that improve our lives and better fulfill our interests. Conflict may alert us to relationship problems, organizational shortcomings, or systemic inequities. In short, conflict may be difficult, but it is an unavoidable aspect of human life that can teach us valuable lessons about where and how we may want to seek change.

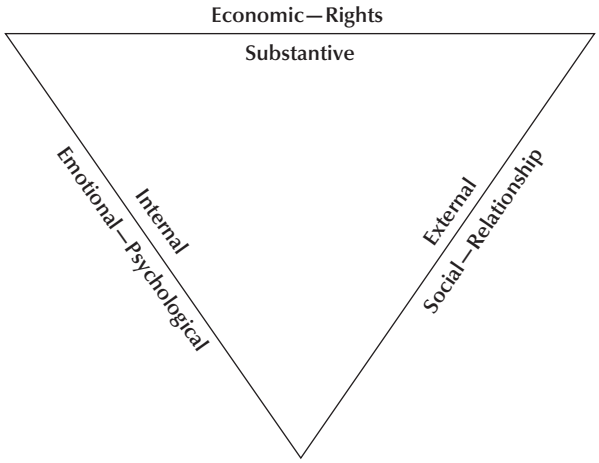
Lawyers, who often are brought in when conflict seems unmanageable to clients, can help create more constructive outcomes from conflicts or they can make a difficult situation worse. The ability to help clients better understand the conflict, reframe the issues, and realistically analyze their interests and how those interests can be advantageously represented is an important lawyering skill. As a threshold matter, lawyers must be able to assess and evaluate conflict, but they need not be sociologists or psychologists to understand and appreciate basic conflict theory. There are some foundational constructs that all lawyers should know when thinking and talking about conflict.

Conflict may be 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 from an opponent. 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 way of thinking about conflict is distinguishing the manifest conflict, which is overt or expressed, from the underlying conflict, which is hidden or not recognized. Lawyers most often deal with manifest conflicts, which are often referred to as disputes (although the two terms are often used interchangeably). 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 thought of as the presenting problem and the hidden agenda.

Satisfactory resolution of a conflict requires 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 legal conflicts is on the trade-offs involving rights-based claims or economic considerations measured in money damages, neglecting the non-monetary, underlying components that cause conflict can lead to an impasse or a settlement that does not hold.



The Conflict Triangle

As this diagram shows, there are three sets of factors, or interests, at work in most conflicts. They form the three sides of the conflict triangle, which represent the three

sets of interests that must be addressed to reach a satisfactory settlement of a dispute. The three sides of the triangle are interrelated and have an impact on one another.

- Economic/Rights: Money issues and rights are what often bring lawyers into a conflict or dispute to litigate, negotiate, mediate, or arbitrate substantive outcomes.
- Emotional/Psychological: The emotional component refers to the internal pushes and pulls on parties created by psychological factors that affect how they feel about themselves.
- Social/Relationship: The social elements include the setting and relationship considerations, such as how others will view what is going on. Acceptance, reputation, and status are extrinsic social factors that also have an emotional impact in creating and resolving conflict.

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 dispute will most heavily involve economic considerations. However, all three elements are involved to some extent in every type of dispute. A businessperson 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 an impasse and move the dispute to resolution.

Traditionally, lawyers have tended to focus primarily on the manifest conflict or dispute in interpersonal (not intrapersonal) contexts. Often they have been more engaged with economic considerations than emotional or extrinsic concerns. Settlements, judgments, and awards usually involve 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 often brought to lawyers or adjudicated by courts, even if changes in behavior or payments of money for past behavior based on religion or belief may be within the realm of lawyer representation. Of course, clients may come to change how they feel about their dispute through discussion, sharing information, and exchanging views, but these changes are typically not goals of legal representation.

That said, it is important to realize that if the agreements reached in dispute resolution resolve only the presenting problems, these agreements may be less likely to last unless legally enforced, and sometimes not even then. Surfacing the underlying conflict, along with the emotional and extrinsic issues at play, can clarify issues, focus objectives, generate new possibilities for settlement, and ultimately improve relationships. But dealing with the underlying conflicts may be emotionally difficult for clients and can stimulate internal conflict. Furthermore, 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 in Chapter 2.

QUESTIONS

1. What is an example of a "good" conflict? What makes it good?
2. Even though conflict is pervasive in human life, it is not always obvious how to deal with conflict productively. In *The Conflict Paradox*, Bernie Mayer lists seven familiar dilemmas that emerge in conflict situations:

   - Compete or cooperate?
   - Avoid or engage?
   - Be optimistic or realistic about the potential for resolution?
   - Rely on principles or be ready to compromise?
   - Respond with emotion or logic? Stay neutral or advocate?
   - Concern yourself with autonomy or community?[1]

   When you find yourself involved in a conflict, which of these dilemmas is most pressing for you? Does the context matter? If so, how?
3. In Chapter 3, we discuss various negotiation and conflict management styles in depth. Before looking at that chapter, how would you describe your default approach to conflict? (You can reflect on this self-assessment after you've read Chapter 3.)

C. HOW CONFLICT BECOMES A DISPUTE

In light of the discussion above about manifest and underlying conflict, what pushes some people to pursue redress with the assistance of a lawyer? A helpful response to this question comes in a classic article by William Felstiner, Richard Abel, and Austin Sarat. The authors describe the process by which harms become disputes through a sequence of "naming, blaming, and claiming."[2]

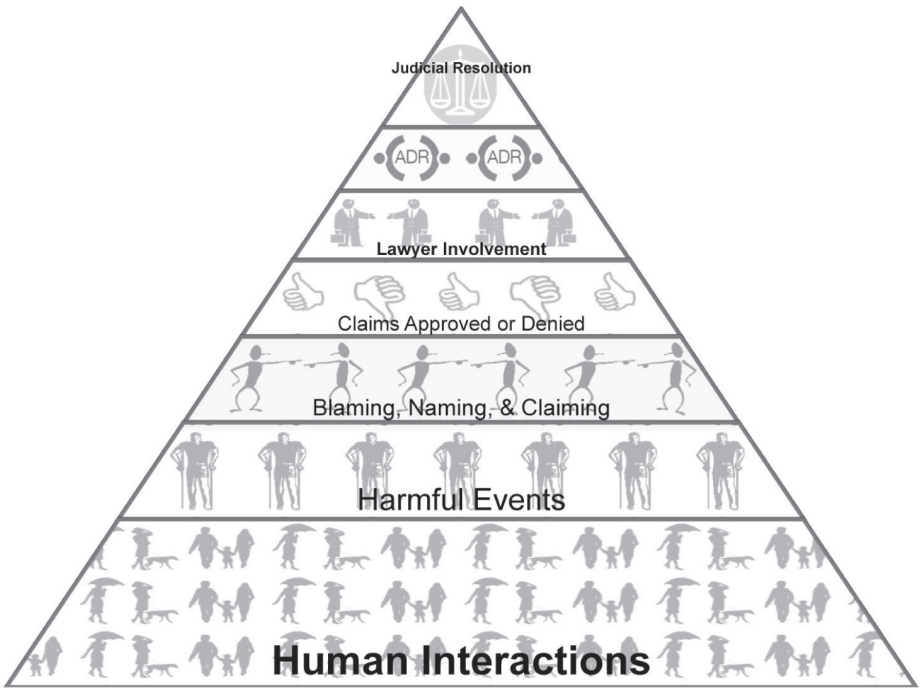
Naming occurs when people recognize they have been harmed and want to do something about it. The distinguishing factor is not awareness of the harm but rather the victims' subjective reactions to it; rather than accepting the harm as fate or one of the risks of life and moving on, they feel this particular harm is too great, or is one harm too many and cannot be ignored.

In **blaming**, the person harmed assigns fault for the injury, identifying a wrongdoer and deciding to hold that person or institution responsible for the harm. Assigning blame does not lead to a dispute until the aggrieved party decides to assert himself through **claiming** or making a complaint against the perceived wrongdoer and asking that the wrong be remedied. If the claim is rejected or the response is not satisfactory, then the matter becomes a full-fledged dispute.

What happens then? Some claims are abandoned for reasons unique to that claimant or the situation. Others are pursued through informal mechanisms, like better business bureaus, complaint hotlines, trade association mechanisms, online resolution programs, social media posts or government agencies, usually without the help of lawyers. A very small percentage of unmet claims are brought by clients to lawyers in the form of disputes to be resolved.

Many of the disputes that clients bring to attorneys never become court cases. Good lawyers perform an important screening function, measuring their client's grievances against the requirements of the law and, perhaps even more critically, the client's larger interests. Is there a viable legal theory on which to base a case? Will discovery produce factual evidence that supports a claim? Will the client be willing to persevere after the initial anger and frustration have died down, and does the client have the resources to do so? Is it in the client's best long-term interest to be involved in litigation? Is a court likely to side with your client, and even if it does, will the potential defendant be able to satisfy a judgment? Just as very few screenplays ever become movies, the large majority of potential legal cases fall by the wayside long before they reach a courtroom.

Assertion of the client's claim by a lawyer may result in providing the relief requested or negotiation of a mutually satisfactory outcome. If not, further cost-benefit analysis may result in a decision to drop the matter. If the claim is formalized by the lawyer into a lawsuit, there are usually further negotiations. Some lawsuits are not contested and go by default. If contested, mediation, arbitration, or other alternative dispute resolution (ADR) mechanisms may resolve the case without the need for a trial. Motions and summary proceedings may also end the case without a trial. Only a minute percentage of cases filed in court go to trial. This is the point of the triangle. It is difficult to depict how small this point is, because the number of disputes that are resolved in court is much, much smaller than the number of disputes overall. That being said, the triangle might look like this:



The Dispute Pyramid

The types of disputes that you will encounter in practice will depend in large part on your professional path.

If you become a transactional lawyer, you will help clients to evaluate and structure potential deals, and then will be called upon to negotiate terms that give them the greatest advantages and least possible risk. Clients will respect you for your ability to keep them out of disputes. They will value you most highly for your skill in bringing disparate parties together into productive agreements. Your ability to bargain well and be a problem solver will be crucial to your success as a deal maker.

If you become an inside counsel to a corporation or nonprofit organization, you will negotiate regularly as well, both with your counterparts in other entities and with colleagues in your own office. You may be surprised to learn that experienced corporate counsel often describe themselves not only as experienced negotiators, but also as "Mediators with a small 'm.'" What this means is that many inside counsel find that a major aspect of their work is to resolve disagreements and disputes between people within their company. Inside lawyers often find that they in fact have multiple "clients" in the form of different personalities and constituencies in their organization. Unless their constituencies can agree on a common course of action, it is very difficult for the attorney to produce a coherent legal policy or negotiate effectively with outsiders. Corporate counsel thus often find themselves playing the role of "honest broker," using mediative skills to forge a consensus among their multidimensional client. Additionally, inside counsel also design resolution systems within companies for employment conflicts and to settle disputes with customers and others claiming harm.

If you become a civil litigator, the disputing landscape you encounter will bear little resemblance to the public perception of lawyers in courtroom dramas. The birth of civil disputes and the role of lawyers in resolving them, which is the focus of this book, can be understood by imagining a fat triangle with the bottom base composed of a vast array of human interactions. The reason the triangle narrows from its broad base is that most interaction, whether social, work related, commercial or recreational, does not result in economic loss or harm that we perceive as due to the actions or inactions of others. As we move up the triangle, even if we experience harm and think someone is at fault, we tend to absorb the harm, particularly if minor.

Although most disputes are resolved without going to trial, note that the possibility of going to trial has an impact on the dispute resolution landscape that is out of proportion to the actual frequency of trials. A major factor motivating parties to choose settlement is their wish to avoid the risks of trial. In other words, we bargain in the "shadow of the law." Decisions about whether and how to settle a dispute are heavily influenced by predictions and concerns about what a court will do if an agreement is not reached.[3]

QUESTIONS

4. Have you experienced a personal injury or an economic loss attributable to someone against whom you did not pursue a claim? If so, why did you not assert a claim?
5. What are other reasons why someone may forgo or "lump" a valid legal claim for damages?

6. Have friends or family asked you, as a law student, if they should pursue a claim for an injury or a wrong? How did you advise them and why?
7. Are those with higher education and higher income more or less likely to pursue claims related to products they buy? Why or why not? How might considerations of class, race, gender, and power have an impact on whether and how someone moves from blaming to claiming?

D. THE CHANGING CONFLICT LANDSCAPE

When you are dealing with the details of a dispute—where the property line between two houses falls, or whether the contract should be interpreted under this or that law, or how the custody arrangement provides for summer vacation—it is easy to forget the larger setting in which disputes develop and arise.

All conflict and disputes take place in context and having a better sense of the contextual factors that inform disputes (what we might think about as the greater "conflict landscape") will improve your ability to represent clients effectively and work toward successful resolutions. In addition, appreciating the conflict landscape will help you think through the impacts of your own practice on larger concerns around professional responsibility, community values, and justice. Some of the major factors affecting the conflict landscape today include the following:

- **Technology**. The growth of social and persuasive technologies has had tremendous impacts on the conflict landscape, by disrupting disputing patterns and shaping attitudes towards conflict. Social media, for example, has created new spaces for expressing views and engaging in dialogue and disagreement, and has enabled protestors to find each other and organize more efficiently. Additionally, technologies employing artificial intelligence or drawing on trends supplied by Big Data are helping inform legal strategies and estimations of value around settlements. And finally, online dispute resolution processes are becoming more common, whether because of economic pressures or responses to the recent pandemic, and the applications that support these processes present new challenges and opportunities for disputants and lawyers.
- **Social trends**. Many Western societies recently have seen an uptick in populism and nationalism, which have exacerbated political divides and led to an increase in violent and nonviolent conflict. Here in the United States, commentators have noted that pronounced ideological differences and increased partisanship characterize much of our political discourse. Although we have always had political disagreement, these commentators are concerned about the current tenor and expression of these debates. In a recent example, some residents in eastern Oregon, unhappy with the prevalent liberal politics of the state, have argued for redrawing the state line between Oregon and Idaho so that they can be situated within a historically conservative state. For these residents, the political divide is so intense that they perceive separation as the only workable approach.

- **Historical inequities and oppression**. Historical inequities and oppression, economic inequality, and discrimination have created the conditions for conflict by perpetuating unfairness around opportunities, status, safety, and wealth. As the awareness around these inequities increases, this conflict has started manifesting in various ways, including widespread protesting, more litigation and political action, and louder calls for reform. Additionally, some of these proposed reforms, such as defunding the police and prohibiting confidentiality on certain kinds of settlements, have themselves engendered conflict.
- **Climate change**. Whether and how the global climate is changing has long been a source of conflict and disputes. Generally speaking, political parties have adopted different views of the science, which complicates disputes around the impacts of climate change by introducing political partisanship into these discussions. Furthermore, because addressing climate change will affect business and economic interests, many people are invested in divergent and sometimes incompatible approaches and outcomes, which can cause disputes. Finally, to the extent that climate change will lead to hotter temperatures and greater levels of carbon dioxide, people in general may become quicker to anger and less capable of rational thought.

These are just some of the contributors to the conflict landscape. Lawyers who seek to be effective agents of dispute resolution should recognize that they are working within this shifting, complex context and consider how these and other factors are affecting the parties and their view of justice. Moreover, as officers of the court and stewards of the law, lawyers should consider how possible or proposed resolutions to disputes may affect the conflict landscape going forward.

Endnotes

1. Mayer, Bernard S. (2015) *The Conflict Paradox: Seven Dilemmas at the Core of Disputes.*
2. Felstiner, William L. F., Abel, Richard, & Sarat, Austin. (1981) *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 Law & Soc'y Rev. 631.
3. Mnookin, Robert H. & Kornhauser, Lewis. (1979) *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L. J. 950, 966.

CHAPTER 2

PERCEPTION, FAIRNESS, PSYCHOLOGICAL TRAPS, AND EMOTIONS

Before exploring the major dispute resolution processes, let us turn our attention to one more set of foundational topics in understanding conflict. Appreciating the psychological and emotional landscapes of conflict will make it easier to diagnose some of the causes of disputes and determine appropriate paths to resolving them. Perception, fairness, psychological traps, and emotions are significant contributors to conflict and disputes. Each of these topics merit their own book and course, so the discussion here is intended to provide the fundamentals and whet your appetite to continue learning about rapidly expanding insights to why we perceive things in a way that is not the same.

A. THE ROLE OF PERCEPTIONS

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

Key to managing conflict and resolving disputes is the awareness that people often see the same situation differently. It is these differences that give root to conflict and to the need for dispute resolution, 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.

1. Rashomon *Effect*

The *Rashomon effect* is the name given to contradictory perceptions of the same event by different people. The phrase derives from a classic Japanese story, on which the film *Rashomon* is based, illustrating the subjectivity of perceptions and how the truth through one person's eyes may be very different from another's, as seen through the prism of the individuals' own perceptions. The story and the film explore how perceptions distort or enhance different people's memories of a single event, in this case, the death of a samurai warrior. Each tells the "truth" but perceives it very differently. The film, like the story, is unsettling because, as in much of life, no single truth emerges.

Similarly, the parable of blind men, each touching a different part of an elephant and from that experience describing what an elephant is, has been used to illustrate that there is a range of "truths" based on where you are in relation to what you are experiencing and based on differing perceptions. Even though one's subjective experience can be true, that experience is inherently limited by its failure to account for other truths or a totality of a single truth.

And so these men of Hindustan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong,
Though each was partly in the right
And all were in the wrong.

"The Blind Men and the Elephant" by John Godfrey Saxe (1816–1887)

That something can be simultaneously true (as a matter of one's own experience) and not true (as a matter of larger context or more information) is at the heart of many disputes. In their book *Difficult Conversations: How To Discuss What Matters Most*, Sheila Heen, Bruce Patton, and Doug Stone point out that many difficult conversations are struggles around who is right about what happened.[1] The recognition that both parties may have good reasons for believing what they believe is an important step in managing the conflict effectively.

2. Subjectivity Principle

Differences in perception come from many sources: different backgrounds and experiences, different belief systems and cultures, and different sources of information. All the factors that we base our understanding of the world on can be thought of as part of our individual and unique subjectivity. R. J. Rummel developed the concept of the "subjectivity principle" to explain how people can have different experiences of the same event:

> Even attentive observers often will see things differently. And each can be correct. There are a number of reasons for this. First, people may have different vantage points and their visual perspectives thus will differ. A round, flat object viewed from above will appear round, from an angle it will appear an ellipse, from the side a rectangle. This problem of perspective is acute in active, contact sports such as football or basketball. From the referee's line of sight there is no foul, but many spectators (especially the television audiences who see multiple angles and instant replays) know they saw an obvious violation.[2]

Rummel points out that in addition to different perspectives, people overlay values and meaning derived from culture and background onto their perceptions, and they do so in highly individual ways:

> No wonder, then, that you are likely to perceive things differently from others. Your perception is subjective and personal. Reality does not draw its picture on a clean slate—your mind. Nor is your mind a passive movie screen on which sensory stimuli impact, to create a moving picture of the world. Rather, your mind is an active agent of perception, creating and transforming reality, while at the same time being disciplined and sometimes dominated by it. . . .

As a new lawyer negotiating a dispute, it may seem puzzling when those on the other side of the conflict insist that your earnest client is misstating the facts and is wrong. Lawyers are often presented only their client's factual account, which may be very different than what is told to opposing counsel by their client. In fact, each client may well be stating the situation truthfully as they perceive it.

QUESTIONS

1. Can you recall a conflict you have experienced that might be better understood in light of the subjectivity principle or selective perceptions?
2. The poet John Milton, in *Paradise Lost,* writes: "The mind is its own place, and in itself can make a heaven of Hell, a hell of Heaven."[3] In explaining his subjectivity principle, is Rummel just restating Milton?
3. If a conflict between people is the result of different perceptions, what might be of help in resolving the conflict?

4. Our preference for one group over another—like a sports team or a political party—can also affect our perceptions. Partisanship, or a psychological commitment or affiliation to one position or group, can lead people to take stands and interpret information in biased or self-serving ways. Have you seen examples of partisan perceptions in your own life? How about in national politics?

B. HEURISTICS—THINKING FAST AND SLOW

Making decisions may be a "fast" process, like a gut reaction or an intuitive response, or a "slow process," as might come after careful research and analysis of a problem. Both forms of decision-making have upsides. Intuition based on experience and the functioning of the reptilian part of our brain allows us to make quick "gut" decisions using instinctual shortcuts that can be convenient, if not life-saving. The more deliberate, rational process of decision-making allows us to take in and process more information. The two decision systems modulate one another and can be in conflict, with the instinctive approach initially predominating because of its speed and utility.

Malcolm Gladwell popularized the benefit of nurturing quick, experience-based decisions not encumbered by deliberation in his best-selling book *Blink*. Four years later, in *Thinking Fast and Thinking Slow*, Nobel prize-winning psychologist Daniel Kahneman utilized decades of research in explaining and labeling decision-making shortcuts, or cognitive heuristics, along with the errors we can make when depending on intuitive judgment and how they can interfere with more rational, information-based decision-making.[4] Kahneman acknowledged that our thoughts and actions are routinely guided by intuitive decisions that are generally on the mark and that we cannot live without them. But although instinctive and quick judgments generally produce adequate solutions, they create biases and flawed decisions if not monitored by rationality and more information.

PROBLEM: CERTAINTY OR CHANCE?

Students at your school, who had expected to attend a required lecture without charge, are told after they arrive that they will each have to pay $20 to cover unexpected expenses. They can, however, spin a roulette wheel with four chances in five of paying nothing and one chance of having to pay $100. Which will most choose and why? (Hint: The answer is within the list below.)

1. Top Ten Psychological Traps

The following is an alphabetical list of the top ten common mental traps that can create disputes or make them more difficult to resolve. Some are interrelated; some have multiple labels. We will return to these cognitive shortcuts and

expand the list later when we examine why dispute resolution efforts stall out or fail.

- *Anchoring*. A dispute over the value of an item often arises because we form an estimate of an unsure value by comparing it to something we know or to a number to which we are exposed that is then planted in our brain. The number you are exposed to as a value anchors your calculation and influences your thinking. When a client is burnt by hot soup at a restaurant, she may think the restaurant is to blame and her claim is worth millions because she read about a multimillion-dollar verdict against McDonald's for coffee that was served too hot. You, as a sophisticated lawyer, understand that this case is distinguishable from the McDonald's case, which was reduced on appeal as excessive, and that this client's case is much weaker and worth less than that one, so you adjust from the McDonald's verdict downward. The question is whether you adjust far enough. Research suggests that you will not adjust sufficiently because of the anchoring effect of the headline verdict, which distorts your analysis and expectation.[5]
- *Confirmation Bias*. We tend to give credit to information that is consistent with our preexisting beliefs and wishes rather than information that challenges or contradicts them. This can dig us deeper into conflict when dealing with those who have different beliefs or values. We read and believe articles that confirm dark chocolate and red wine are good for us and skim past articles that question the studies.
- *Consensus Error (projection)*. We tend to falsely believe that others think the way we do or have values similar to ours. We also believe that others like what we like and want what we want. Those who enjoy loud music, for example, may assume that everyone will enjoy their amplified radio selections. Conflict can be created when they find out they were wrong.
- *Framing*. Our thinking about an issue and our answer to a question are affected by how the question is presented. For instance, asking a priest if you can smoke while you pray likely will result in a different answer than asking if you can pray while you smoke.
- *Loss Aversion (status quo bias)*. Losses tend to be felt more than equivalent gains are relished, so that the pain from the loss of a dollar is felt greater than the joy of a dollar gained. We tend to overvalue what we have to give up relative to what we might get. Most will not give up a "bird in the hand for two in the bush." In other words, we are willing to take more risk to avoid a loss than to obtain a gain. As a corollary, negotiating parties are more likely to view their own concessions (losses) as more valuable than equivalent concessions they get from the other side (gains). Loss aversion is related to the *endowment effect*, which is the tendency to overvalue something you own.
- *Naive Realism*. We tend to think that the way we see the world is the way it really is and anyone seeing it differently is naive. We each see the world through the lens of our own experience and culture, believing what we see is reality. This bias is in play when your idea or offer is rejected with the preface that in the "real world" things are different.

- *Overconfidence (egocentric bias).* We tend to rate our abilities, chance of being right, and good luck more highly than is warranted. Why else would people buy lottery tickets? We are also overconfident about our ability to assess uncertain data and tend to give more weight to what we know than what we don't know. As a matter of fact, we are overconfident about ourselves in general. As examples, surveys have found that 70 percent of all drivers believe that they are more competent than the average driver, and 80 percent of lawyers think that they are more ethical than the average attorney.[6] In negotiation, overconfidence can be compounded by positive illusions we have about the relative righteousness of our case or cause and how much we deserve. Note that some people suffer from the opposite cognitive tendency, which we might call *underconfidence bias.* Those people tend to judge themselves overly harshly and have an inaccurate view of their own competence and abilities. Underconfidence can be just as harmful as overconfidence in lawyering situations, sometimes more so.
- *Reactive Devaluation.* Whatever proposal comes from the other side cannot be good for us. Anything done or suggested by them is suspect. For example, if Democrats propose legislation, Republicans are likely to reject it, and vice versa. Also, any information or offer received is perceived as less valuable than what might be withheld. This tends to escalate conflict.
- *Selective Perception.* Whenever we encounter a new situation, we must interpret a universe of unfamiliar, often conflicting data that is more than we can process. We respond by instinctively forming a hypothesis about the situation, then organizing what we see and hear with the help of that premise. Our hypothesis also operates as a filter, by automatically screening out anything that doesn't support it—which in turn reinforces the belief that our initial view was correct. Henry David Thoreau may have been thinking about this when he said, "We see only the world we look for." Selective perception is also the basis of self-fulfilling prophesies and stereotyping. For example, if you are negotiating with a lawyer you believe is hostile and not to be trusted, you may dismiss his initial friendly greeting as manipulative and selectively see him scrutinizing you with suspicion. Your stilted behavior toward him will likely result in him seeing you as antagonistic. Mutually reinforced surly behavior will be selectively observed and remembered to the exclusion of overtures of civility. You will feel that your own insight and keen ability to "read" others is confirmed, and your self-fulfilling prophecy will be realized.
- *Self-Serving Bias (attribution error).* We are our own best friend in justifying our actions while seeing the same behavior in someone else as a shortcoming. For instance, we know that we are personally responsible for our successes, but our failures are the result of bad luck or circumstances beyond our control. When we are late it is for good reason; others keep us waiting because of their bad planning and insensitivity. Our miscalculation or misstatement is a simple mistake, often blamed on uncontrollable external factors, but our opponent's similar error is attributed to deception and fundamental defects of character. We also tend to take more credit for favorable results than others attribute to us.

Two more important and common psychological tendencies to consider in dispute resolution are implicit bias and stereotype threat.

Implicit Bias. This refers to the automatic stereotyping that people do unconsciously, drawing on deep cultural notions of the familiar and the normal. Numerous studies have shown, for example, that the same resume with different names (suggesting different genders or races) can lead to different assessments around whether the person is qualified and what their starting salary should be. Implicit bias may be reduced through increased awareness, diligent and constructive "interruptions," and intentional system design.[7]

Stereotype Threat. This arises when people worry about being perceived as conforming to negative stereotypes associated with their social group. These worries create stress and cognitive load that can make it more difficult to engage and perform. In dispute resolution settings, stereotype threat may lead to parties (or even the lawyers and/or third-party neutrals) sidelining themselves or failing to engage effectively. For example, a young woman mediator who is dealing with stereotype threat may feel stymied when she wants to raise the issue of strained feelings between parties in a business dispute, because she does not want to seem like she is "soft" or only capable of helping people work through emotions.

Some of the psychological factors and biases described above may work against one another when making decisions driving behavior in dispute resolution. For example, as will be discussed later, there are differing views about the advantages and disadvantages of making the first offer in a negotiation. Making the first offer, particularly if the values involved are uncertain or without ready comparisons, could take advantage of the anchoring bias set by your offer. However, reactive devaluation, which may be at a peak near the beginning of negotiation, could cause the other side to radically discount your first offer because of their suspicion.[8]

Similarly, these biases have an impact on parties in mediation and arbitration, in that they inform party perceptions around value and fairness. We discuss strategies for managing these biases in those sections.

2. The Myth of Professional Objectivity

Studying the perceptions and psychological traps that immerse people in conflict helps us better understand clients' disputes. Although lawyers advocate and negotiate on behalf of clients, and although mediators and arbitrators are expected to be neutral third parties, we believe that we are less susceptible to the selective perspectives that can skew our client's perceptions. As lawyers, without a personal stake in the outcomes of disputes, surely we think more clearly and rationally than the disputants themselves. After all, we have been educated to think like lawyers, right? This is the common wisdom—but is it true?

Even if we recognize the partisan perceptions of clients and parties, we can be easily fooled by our own ingrained biases and distortions. By definition, what we believe is our reality. The longer we work with a client on a case or a deal, for example, the more we share the same reality—distorted or not—making it difficult for us objectively to analyze the weaknesses of their case or the strengths of the other side's arguments. Likewise, if we are not careful about our professional objectivity

and neutrality in mediation and arbitration, we may succumb to unconscious stereotyping and implicit bias in our handling of the case. It can be helpful for you to recognize now, at the start of your professional career, that the psychological factors likely to affect clients' thinking and decision errors can also affect your own assessment of case value and settlement.[9]

QUESTIONS

5. Does knowing about the potential of these perceptual biases and cognitive errors result in not being affected by them? How can you best guard against them or overcome your own cognitive errors? For those of you who saw the "gold dress" meme, were you able to see the other color once you knew people may have seen it differently? https://knowyourmeme.com/memes/the-dress-what-color-is-this-dress.
6. What might you do if you become aware of your client's perception biases and cognitive distortions? Must you agree to a desired goal or an outcome acceptable to your client if you are aware that the goal or acceptance is the result of a misperception or cognitive error?
7. How might you counter cognitive error and perceptual distortion that may result in your negotiation counterpart rejecting a settlement that is otherwise acceptable? For example, how would you handle the anchoring problem, where your opponent is fixed on what you regard as an unrealistic outcome in another case? How might you deal with the tendency of your opponent to reject your truly generous offer because of suspicion of any offer coming from "the other side"?

C. FAIRNESS CONSIDERATIONS

Our list of selective perceptions at the beginning of this chapter included "fairness." Differing views of fairness are at the heart of many litigated conflicts and failed negotiations. Fairness, like other perceptions, is in the mind of the beholder. It is a shifting target, affected by perspectives, perceptions, and interests. A client may hire you to negotiate on her behalf or serve as a mediator or arbitrator because she feels she has been treated unfairly and that you, through dispute resolution, can help her obtain what is fair. Fairness, as perceived by clients, can also become central in assessing whether to accept or reject a negotiated settlement or mediated deal.

An outcome that appears to be fair can be more important than winning or losing. Fairness trenches upon core identity concerns and personal values. Everyone wants to be perceived as fair, and no one wants to be vulnerable to processes or outcomes that are unfair. Losers may have an easier time accepting their losses if the losses (or the process leading to the losses) seem fair. And even apparent winners — for example, people who receive offers that are economically advantageous — may reject these offers because in their minds the result is not fair.

Classroom experiments with "ultimatum games" illustrate the importance of perceived fairness. In these games, Player 1 is given a fixed sum of money or chips (e.g., $100) as a windfall that she might have found on the street and is asked to propose a division of that sum with Player 2 (e.g., $75 to Player 1 and $25 to Player 2). Player 1 has complete discretion to divide the money as she wishes; Player 2 can choose only whether to accept or reject Player 1's proposal. If Player 2 accepts the offer, both players will keep the money as allocated. If Player 2 rejects the offer, neither player will receive anything.

Economic theory dictates that Player 1 should offer only a little more than zero to Player 2, and that Player 2 should accept this amount as better than nothing. For example, since Player 1 would be better off receiving one dollar of the found money (because one dollar is greater than nothing—you would pick up a dollar from the ground, wouldn't you?), classical economic theory would predict that Player 1 would accept an offer of one dollar. But we all know intuitively that Player 1 would never accept such an offer. In fact, classroom experiments suggest that Player 1 rarely offers one dollar, instead generally offering 30 to 50 percent of the sum to Player 2. But interestingly, when 50 percent or less is offered, many Player 2 recipients will reject the offer, preferring to walk away with nothing rather than accept what they perceive to be an unfair division. The results of this game reflect the importance of our innate value of being treated fairly, as well as our self-serving perceptions around what a fair division might look like.

PROBLEM: THE HOME-RUN BALL CATCH

More than 40,000 fans were at the ballpark to see the San Francisco Giants' last game of the season. Most had come to see Barry Bonds add another home run to his already record-breaking total of 72. Alex Popov and Patrick Hayashi, who did not know one another, were two fans in the right-field arcade standing-room section, hoping to catch a Bonds home-run ball. Sure enough, Bonds's 73rd home-run ball came sailing over the right-field bleachers into Popov's outstretched glove. Within seconds, Popov fell to the ground as a rush of people converged on him and the ball. Madness followed before security officers arrived. When Popov was pulled from the pile of fans, the ball was no longer in his glove. Patrick Hayashi emerged with the ball in hand.

Both men claimed ownership of the valuable home-run ball, temporarily in Hayashi's possession. Both thought the ball was worth more than $1 million, based on the sale of Mark McGwire's 70th home-run ball a couple of years earlier for more than $3 million. Each man offered the other less than $100,000 to relinquish any claim on the ball. Each expressed strong public views that he was entitled to complete ownership and was making a generous offer to the other. Both Popov and Hayashi cited principles of fairness and baseball fan culture entitling them to the ball. Popov argued that first possession controls, and Hayashi believed the fan who ended up in possession owned the ball. They insulted one another as liars and thieves. They both hired lawyers and filed suit in the California Superior Court.

Newspaper editorials, letters, talk show hosts, Barry Bonds, and several mediators all suggested that the ball be sold and the proceeds be split by the men or that the money be given to charity. Neither Popov nor Hayashi thought that evenly splitting what they were individually entitled to was fair, nor did they feel that they could concede anything in light of the insults cast on them by the other. Following 18 months of public bickering and litigation about what was fair, the judge ordered that the ball be sold and the proceeds evenly split. Twenty months after it was hit into the bleachers, the ball, resting on black velvet and encased in glass, was sold at auction to a comic book impresario for a final bid of $450,000. Popov and Hayashi each received $225,000, minus auction expenses, and each incurred attorneys' fees exceeding that amount. Popov was sued by his attorney for fees and expenses of $473,530, and also for $19,000 by a law professor who served as an expert witness. (The whole story and background are captured in the film *Up for Grabs*.)

1. Did the fact that the entire home-run ball melee was televised and that both men made boastful and insulting public statements influence the outcome? How might you explain this in terms of the conflict triangle presented in Chapter 1?
2. Neither Popov nor Hayashi appeared to be guided by rational self-interest in making decisions about how to maximize their ultimate economic outcome. What do you think got in the way? Might the negotiation result have been different if they had been friends or at least had not publicly insulted one another?
3. Do any of the psychological traps listed above help explain why both men were not happy to evenly divide the economic windfall?
4. Did both suffer from the litigation curse of being in a lawsuit in which they were absolutely convinced fairness was on their side?
5. If you were representing Popov, how might you have approached Hayashi's attorney in terms of the fairness issues? What fairness criteria might you have suggested?

Perceptions of fairness are crucial to understanding disputants' expectations and the behaviors of participants in dispute resolution, as illustrated by the above example of the home-run ball. We can disaggregate these perceptions into two categories: distribution fairness and procedural fairness. Both aspects of fairness shape people's willingness to accept settlements, follow agreements, and assess the effectiveness of attorneys and third-party neutrals.[10]

Distributional fairness refers to the substantive outcome—what you get as the result of a process. Professor Nancy Welsh writes that distributional fairness can be assessed on the basis of equality, need, generosity, and equity:

> The equality principle provides that everyone in a group should share its benefits equally. According to the need principle, "those who need more of a benefit should get more than those who need it less." The generosity principle decrees that one person's outcome should not exceed the outcomes achieved by others. Finally, the equity principle ties the distribution of benefits to people's relative contribution. Those who have contributed more

> should receive more than those who have contributed less. The closer that the actual outcome of a negotiation is to the outcome a negotiator anticipated based on the application of one of these principles, the greater the likelihood that the negotiator will perceive the outcome as fair.[11]

Note that although Professor Welsh is writing in the context of negotiation, her observations have equal force in other dispute resolution contexts. Whether a judgment in litigation is defensible as a matter of distributive fairness, for example, will rely in part on how that judgment is justified as a matter of evidence and precedent, which often point to factors relevant to equality, need, generosity, and equity.

Procedural fairness, in contrast to distributive fairness, focuses on the process used to reach the outcome. As Professor Welsh describes:

> Procedural fairness is concerned with people's perceptions of the fairness of the procedures or processes used to arrive at outcomes. Researchers have found that people's perceptions of procedural justice have profound effects. First, people who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair. In effect, a person's perception of procedural fairness anchors general fairness impressions or serves as a fairness heuristic. Second, people who believe that they were treated fairly in a dispute resolution or decision-making procedure are more likely to comply with the outcome of the procedure. This effect will occur even if the outcomes are not favorable or produce unhappiness . . .[12]

For lawyers and conflict resolution professionals, ensuring that dispute resolution processes afford clients and parties with procedural fairness is a chief concern. As a practical matter, this means making sure that clients and parties have meaningful opportunities to participate and express themselves; that the rules and procedures of the process make sense; and that the third-party neutrals (mediators, arbitrators, and judges) are impartial. When parties in dispute resolution do not have a voice in the proceedings, or when they believe that the process is confusing or the presiding official is biased, they are much less likely to accept the legitimacy of the outcome and may continue disputing.

D. EMOTIONS AND EMOTIONAL INTELLIGENCE

Many of us are attracted to the study of law because we value a rational approach to issues rather than emotional responses that seem to get in the way of logic and problem solving. The conventional wisdom is that legal professionals should leave their emotions behind in their professional roles. This is easier said than done and might not always be wise, for three reasons.

First, emotions are part of human nature. None of us are automatons, even though we may try to appear so. And those with whom we work in dispute resolution contexts also experience emotions that shape their conduct. We all have emotional needs and reactions that contribute to the creation of conflicts and help us evaluate proposed resolutions. Emotions affect how we interact and deal with others. If we pretend our emotions do not exist, we risk having them distort our judgment. Learning to manage these emotions is more helpful than denying and ignoring them.

Second, clients and parties have emotional needs that they might not readily express to us, even though these emotional needs may be driving the conflict. Emotional concerns, as well as substantive needs, are often critical factors that have to be satisfied to reach a settlement. Learning to recognize emotions, understanding the role of emotions in conflict, and having strategies for helping clients and parties to deal with emotions are important to resolving disputes successfully.

Third, and relatedly, most disputes do not only involve emotions—they are, in some significant way, about emotions. Think about disputes you've been involved with over the years. Those disputes were not bloodless math problems in which you and the other side simply had to figure out how to divide or allocate some fixed resource. Rather, they likely involved some measure of feelings—anger about the state of affairs, fear of not getting treated fairly, resentment about previous unsatisfactory interactions, hope around forging new relationships or patterns. These feelings may not have been explicitly addressed in the dispute, but they contributed to your experience of the conflict all the same.

Joshua Rosenberg, a law professor and psychologist, argues that lawyers too often "overestimate the importance of reason and logic" when considering how to assist clients and parties. Perception, self-fulfilling prophecies, and cognitive biases—along with emotions—have an impact on legal practice:

> It is not just how we think about what we perceive that is tainted by our feelings. Our very perceptions themselves are determined, in part, by our feelings (and thoughts). As an initial matter, emotions precipitate changes in the autonomic nervous system. These changes include increasing the heart rate, changing breathing patterns, skin changes such as perspiration or blushing, and redirecting blood flow (anger has been found to direct blood to the hands, presumably for combat; fear has been shown to redirect blood to the legs, presumably for running). At a micro level, these changes in the autonomic nervous system change not only our ability to think, but also our ability to act and perceive. Along with our thoughts, our blood flow, and our energy, the focus of our attention and our ability to take in data are significantly changed by our emotional state. Not only our behavior, but also our perceptions become both differently focused and less accurate. . . .[13]

Emotional intelligence is the capacity to monitor our feelings and read the feelings of those whom we encounter. This then serves as a guide to our actions and responses.[14] The importance of emotional intelligence in personal and professional success was brought to public attention by Daniel Goleman in his popular book *Emotional Intelligence: Why It Can Matter More Than IQ*. Emotional intelligence in dispute resolution helps participants control their own emotions and understand the emotions of other parties, which can help them better control the overall process.[15] This is particularly true in alternative processes such as negotiation and mediation, because these processes often expressly address relational and emotional issues at stake for the parties.

Lawyers who are emotionally intelligent are better equipped, therefore, to assist clients and to navigate conflicts and processes that may have emotional dimensions. Yet ability to read the emotions of others may be on the decline. A meta-analysis study found that today's college students score 40 percent lower than their predecessors in the 1970s in their ability to understand what another person is feeling.[16]

Randall Kiser, an attorney who has empirically studied how lawyers make decisions regarding settlement of lawsuits and measured the frequency and cost of not settling, identified and interviewed many of the most successful lawyers in California and New York. One of the qualities that appeared to distinguish these lawyers from others was emotional intelligence. As Kiser stated:

> At the most elemental level of law practice, emotional intelligence appears to be necessary for attorneys to avoid malpractice liability. Malpractice claims data show a significant and persistent conflict between client expectations and attorney performances in "soft" skills requiring judgment, discernment, awareness, and perspective: case evaluation, risk assessment, strategy development, client communication, and settlement negotiations. According to the American Bar Association's "Profile of Legal Malpractice Claims," . . . more than one-third of all malpractice claims allege errors relating to professional skills required in pre-trial evaluations, discovery, procedures, counseling, negotiations, and settlements. These skills necessarily entail an integration of substantive legal knowledge with a broader range of competencies embraced by emotional intelligence — listening, understanding, communicating, conceptualizing, anticipating, simulating, and perspective-taking. . . .[17]

QUESTIONS

8. Professor Rosenberg states that "[c]ommunication, of course, is a two-way street, and much of the time we are even more misguided about what is headed toward us than we are about where we ourselves are going." Does this statement resonate with you? Can you accurately describe your own emotions around a given conflict? How about the emotions of the other person?
9. Do you agree that lawyers and legal professionals vastly overestimate the importance of reason and logic?
10. How would you describe the connection between emotional intelligence and successful dispute resolution?
11. Think back to an important decision you have made. Did emotions play any part in that decision? If so, what part did they play and were they helpful? If not, why not (and how did you prevent them from playing a part)?
12. Do you think future studies will find a further decline in abilities to understand what another person is feeling following the increase in online schooling and work resulting from the Covid-19 pandemic?

NOTE: NEUROSCIENCE AND DISPUTE RESOLUTION

As Professor Rosenberg explained above, emotions precipitate changes in the autonomic nervous system, which result in physiological reactions like sweating and blushing. Our emotions are also manifested by increased oxygen to specific parts of our brains that effect how we respond to stimuli and make decisions.

Neuroscientists have recently been able to use brain imaging (functional magnetic resonance imagery, or fMRI) to map areas of the brain that show increased oxygen supply during decision-making and other brain functions. These brain maps give clues to the effect of emotions in various types of decisions. Through brain imaging or brain mapping, we can understand better how anxiety, disgust, fear, and joy can influence decision-making. We think that our decisions are logical, based on our perceptions and our conclusions about what is, and of course what we think is logical may not seem logical to others who perceive, interpret, and react to the same information. Brain mapping demonstrates that how things feel is an important contributor to decision-making.[18]

In short, we should not underestimate the role of emotions in the decisions made by us, our clients, other parties, and other lawyers involved in the case. The more we understand how the brain works and about the role of emotions in decision-making, the better we can apply it to understanding and resolving disputes.

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CHAPTER 3
NEGOTIATOR STYLES

By the time you entered law school, you probably developed a personal negotiation style by design or default. Now that you are studying negotiation in preparation for professional practice as a lawyer, it is important to think more deeply about how you negotiate and how your style might vary in different circumstances.

Many terms are used to describe different negotiating styles, such as "hard and soft," "competitive and cooperative," or "adversarial and problem-solving." The distinctions between "hard" styles such as competitive and adversarial, on the one hand, and "soft" styles like cooperative and problem-solving, on the other hand, are not always clear. Depending on context, strategy, and personal preferences, negotiators may move between competitive and cooperative styles in a single interaction. Figuring out whether and how to shift styles is a key challenge for negotiators. Your style choices in negotiation depend on a variety of internal and external considerations.

PROBLEM: *MICROSOFT v. STAC*

Microsoft founder, Bill Gates became one of the richest men in the world by being smart, diligent, and keenly competitive. As a negotiator, he was known for being aggressive and competitive. There are, however, accounts of him using his considerable creative skills to negotiate value-added cooperative outcomes. In the following example, Gates used two different approaches to an intellectual property claim at different stages in the dispute.

> Stac Electronics was a computer engineering company founded by seven friends at Caltech. The company developed its "Stacker" disc compression software to substantially expand the data storage capacity of computer disks. Bill Gates, then CEO of Microsoft, wanted Stac's data compression technology and met personally with Stac's president, Gary Clow, to discuss licensing of Stac's software. The negotiations were turned over to other Microsoft executives and lawyers to negotiate. Although willing to pay Stac a modest gross license fee, Microsoft refused to pay Stac any per-user royalty for its patented compression technology. Microsoft took a hard line, saying that it could have other sources develop reliable data compression technology that could be incorporated into the MS-DOS operating system, which would have an immediate and adverse effect on the viability of Stacker and threaten Stac's continued economic viability. Microsoft

had a reputation of using its huge market share and resources to negotiate in a hard fashion and favorably license software that it incorporated into its products. Negotiations broke off and Microsoft released a new system, which included a disk compression program called Double Space that provided disk capacity similar to that of Stac's data compression technology. Stac was outraged, as Microsoft had previously examined the Stacker code as part of the due diligence process in their earlier negotiations and Stac believed that Microsoft infringed its patent.

Microsoft would not budge on Stac's claim, and Stac filed a patent infringement suit against Microsoft. Microsoft counterclaimed that Stac had misappropriated the Microsoft trade secret of a preloading feature that was included in Stacker. A federal court jury in California awarded Stac $120 million in compensatory damages, coming to about $5.50 per copy for every one of the new Microsoft program sold. The jury also concluded that Stac misappropriated Microsoft's trade secret and simultaneously awarded Microsoft $13.6 million on the counterclaim. Feelings on both sides were negative and intense. Both Clow and Gates made public statements demeaning the other's negotiation style and integrity.

A new round of negotiations commenced in the changed circumstances of the jury outcome. Both sides had the option of legal appeals over the jury verdicts. Instead, their lawyers negotiated in a more cooperative manner and created a deal that caught Wall Street off guard, favorably affecting the share price of both companies. Each side agreed to drop its claims in exchange for cross-licensing all of their existing patents, as well as future ones over the next five years. The pact called for Microsoft to pay Stac license royalties totaling $43 million over 43 months, while also investing $39.9 million for a 15-percent equity stake in Stac. The total $82.9 million outlay represented a gain for Microsoft, which had already charged off $120 million for the jury award in its fiscal third quarter and now was able to credit much of the difference in the current period. Stac also came out ahead, by getting a significant cash infusion without a long appeals process to collect money from Microsoft. Mr. Clow said that $82.9 million being turned over by Microsoft represented more than Stac would have gotten had the $120 million been paid, because income taxes and Stac's own $13.6-million penalty would have whittled the final amount to about $64 million. In addition, Stac formed an alliance with the most powerful player in the software industry. Mr. Clow stated that, "this is not personal. This makes good business sense going forward. . . . This demonstrates it is possible to do win-win deals." Microsoft's executives concurred. "This is a lot more fun than disagreeing," said Michael Brown, Microsoft's vice president of finance, referring to the more cooperative final round of negotiation.[1]

Why might Gates have played hardball when he first negotiated with Stac's Clow, and then why did he change his approach and have his lawyers negotiate a more cooperative deal going forward? What are the advantages and disadvantages of each approach to negotiation?

A. COMPETITIVE AND ADVERSARIAL APPROACHES

1. Competitive Approach

We start with the competitive model because it is frequently experienced in everyday bargaining as well as in many lawyer encounters. Understanding competitive/adversarial negotiating will provide a base to contrast cooperative/problem-solving negotiation. The *competitive* approach assumes that the purpose of bargaining is to obtain the best possible economic result for your client, usually at the expense of the other side. A competitive bargainer is likely to think that negotiation involves a limited resource or fund that must be distributed between competing parties—in effect, a fixed economic "pie."

Competitive negotiating covers a continuum of behaviors, from simple unreflective actions to highly conscious, planned moves. Additionally, competitive behaviors may range from "light," such as ingratiation or flattery, to "heavy," such as emotional displays or threats.[2] Competitive bargaining may consist of natural responses in some cases and scripted strategies in others. Sometimes a skilled competitive negotiator may cloak competitive moves with a benign cover or a seemingly cooperative demeanor.

In a competitive approach, the parties' relationships and other intangibles are not of primary importance. The competitive bargainer's goal is to pay as little as possible (if a buyer or defendant) or obtain as much as possible (if a seller or plaintiff), as a dollar more for your opponent is necessarily a dollar less for you. A competitive bargainer, in other words, sees negotiation much as a litigator sees a trial: Someone must win and someone must lose, and the primary mission is to win. Competitive/adversarial approaches are also known as "distributive," "zero-sum," or "positional" bargaining because the negotiators see their task as distributing a fixed, limited resource between them.

A competitive negotiator often begins a negotiation as a contest of hiding the ball. The object is to get as much information from the other side as possible while disclosing as little information as possible. The information sought is about the other party's unrevealed, real bottom line. What's the least they will take or the most they will give to reach agreement? Meanwhile the competitive negotiator wants to convince the other side that the negotiator's own asserted bottom line is firm. The competitor may try to persuade their opponent that they will stick to their asserted no-deal point or walk, even if they have no intention of doing so.

Strong competitive approaches occasionally are used in complex negotiations involving multiple issues and parties. In such a setting, the competitive

negotiation may occur in stages where it is hard to determine at the outset if the process will take on a more competitive or cooperative or mixed approach — the competitive bargainer may be attempting to establish an early favorable position, for example. More often, however, purely competitive bargaining is used in non-complex situations that involve the simple payment of money or exchange of goods. As Gary Goodpaster writes, negotiators may choose a competitive approach when any of the following factors are present: "the parties have an adversarial relationship; a negotiator has a bargaining power advantage and can dominate the situation; a negotiator perceives an opportunity for gain at the expense of the other party; the other party appears susceptible to competitive tactics; the negotiator is defending against competitive moves; or there is no concern for the future relationship between the parties."[3]

An example of where competitive negotiating is likely to occur is when a lawyer negotiates with an insurance adjuster in a distant city to settle a client's claim for property damage to a car caused by a falling tree limb. The client, we will assume, has since changed insurance companies, and the lawyer does not expect to do business with this adjuster again, so neither sees any interest in nurturing a relationship. In this situation, both sides have a joint interest in conducting the bargaining process efficiently and quickly. Both the lawyer and the adjuster are likely to see their sole goal as agreeing on a dollar amount that the company will pay the insured to give up his claim, and to assume that a better settlement for one will necessarily be worse for the other.

In this example, each side may posture about the dimensions of the issue or conflict, initiate a demand or offer (a specific proposal for resolving the dispute), and bargain over that proposal or present a counterproposal. A competitive negotiator will attempt to change the other side's perception to persuade them that their case is weaker and worth less than they thought and that her case is stronger and more valuable than her opponent previously recognized. Incremental concessions are usually made that narrow the bargaining range. Finally, a compromise settlement may be agreed upon.

This type of competitive negotiation, with predetermined positions and the trading of dollar numbers that simply chop from a high demand or add to a low offer, is akin to marketplace bargaining or haggling. The parties' progressively closer dollar figures are not necessarily connected to any reason or rationale, other than a desire to close the remaining gap between the previously stated numbers. Basically, both buyer and seller, or claimant and defendant, are seeking to maximize their gain by seeing how far the other party can be pushed. Such "naked-number" competitive bargaining often occurs in the ending stage of a negotiation that may have started with information-based discussions and rationalized demands and offers. Having narrowed the gap between the initial offer and demand, and having exhausted persuasion pinned to facts and merits, "final" offers and counteroffers are thrown back and forth, each testing the other's resolve to stick close to their side of the gap or walk away. The negotiators move toward a compromise point where both are willing to get the deal done rather than leave empty-handed. This is the typical style of bargaining in flea markets and garage sales. It is often little more than a contest of wills, much like a game of chicken.

2. *Adversarial Approach*

Beyond the boundaries of the competitive approach is the adversarial approach, a more aggressive or extreme version of competitiveness. Adversarial bargainers view negotiation as a kind of war and believe that all is fair in winning it. An adversarial negotiator may provide the other party with misleading clues, bluffs, and distorted facts that cannot easily be checked or challenged, for the purpose of creating incorrect conclusions that are beneficial to the competitor. Extreme adversarial bargainers may be willing to renege on tentative agreements, misrepresent the limits of their authority, make threats, and may also use tactics aimed at pressuring or unbalancing the other party to secure a better outcome. Although these adversarial moves may provide an advantage for the negotiator in the short term, they increase the risk of ending the negotiation with no agreement, jeopardizing any continuing relationship, and being long remembered.

Adversarial bargainers often capture the imagination of the public because they remind us of tough and powerful characters from popular culture. This fascination has not been lost on self-help and business writers, who have produced an enormous literature on how to be adversarial in negotiation. Many of these guides appear to assume that the opposing side is ignorant or gullible and will have no future opportunity to retaliate. Other books and articles bemoan "hardball" tactics, but catalog them to warn you of what you might encounter. These writings are premised on the theory that "forewarned is forearmed." For example, Roger Dawson, the author of *Secrets of Power Negotiating,* provides a long list of power negotiating gambits, from which we have chosen the top ten hardball tactics:

- *Ask for more than you expect to get*: You can get away with an outrageous opening position if you imply some flexibility.
- *Never say yes to the first offer*: Saying yes triggers two thoughts in the other person's mind: "I could have done better," and "something must be wrong."
- *Flinch at proposals*: The other side may not expect to get what is asked for; however, if you do not show surprise, then you're communicating that it is a possibility.
- *Always ask for a trade-off*: Any time the other side asks you for a concession, ask for something in return.
- *Nibbling*: Using the nibbling gambit, you can get a little bit more even after you have agreed on everything.
- *Taper concessions*: Taper concessions to communicate that the other side is getting the best possible deal.
- *Red herring*: This is a phony demand that can be withdrawn, but only in exchange for a concession.
- *Cherry picking*: Ask for alternatives and then pick the best parts from multiple choices.
- *Time pressure*: The rule in negotiating is that 80 percent of the concessions occur in the last 20 percent of time available.
- *Be prepared to walk away*: Project to the other side that you will walk away from the negotiations if you can't get what you want.
- *Ultimatums*: Ultimatums are very high-profile statements that tend to strike fear into inexperienced negotiators.[4]

QUESTIONS

1. Do any of Dawson's tactics seem unethical? Negotiation presents a fertile area for ethical transgressions, with relatively little guidance as to ethical limits. The ethics of negotiation are addressed in Chapter 8.
2. Is there a difference between hard, competitive negotiation and "dirty" or adversarial bargaining tricks? If so, how would you distinguish them?
3. Are there any gambits or techniques that you could add to the above list?
4. If any of these behaviors were successfully used on you, what would be your approach the next time you found yourself matched against this opponent?

NOTE: RESPONSES TO COMPETITIVE TACTICS AND DIFFICULT PEOPLE

Some of the books and articles cataloging competitive negotiation tactics also prescribe competitive antidotes that could be used in response. Most of these reactive "hardball" tactics are either responses in kind or intended to notch up the positioning in a dance of "one-upmanship." The most effective countermove or response to sharp competitive tactics will depend on the context of the negotiation, your relationship with the other negotiators, your alternatives to continued negotiations, the strength of your own position, your goals in the negotiation, and the information available to you. The key to any effective response is being able to recognize aggressive and deceptive tactics and understanding their potential effect in distorting your perspective and masking the opposition's weaknesses.

There are alternatives to responding in kind to hardball tactics or ending the negotiation. The behavior can be recognized and labeled for what it is and then dismissed by making light of it, or you can just ignore it. You can be direct by making it clear that the tactic is not working and is interfering with either of you getting what you want out of a possible deal or settlement, and that it will not be tolerated. In effect, you can discuss and set ground rules for further negotiations. Hardball tactics are most commonly used in the absence of an ongoing relationship or friendship. Taking time to become friendlier before the bargaining begins or emphasizing the likely continuing contact or repeat plays following this negotiation might discourage hardball tactics—or it might not.

The subject of responding to aggressive moves is related more generally to how we can best negotiate with people we consider difficult. Seminars and training programs are frequently offered to help us deal with "difficult people." The proliferation of these programs, including ones offered for attorneys, reflects the commonly experienced frustration most of us have had in trying to work or negotiate with others whom we perceive as being insensitive, obstinate, selfish, overly competitive, or generally unreasonable. It is an

interesting paradox that experience with difficult people should be so common when few, if any, of us view ourselves as being difficult. Do you think the people you consider difficult believe themselves to be so? Studies show that opponents usually see us as more demanding and less reasonable than we view ourselves.[5]

Negotiating with difficult people can be—well, difficult. Here are a few counter techniques offered by William Ury:

- Become an observer to an opponent's bad behavior rather than getting sucked into the game. This means controlling your own behavior and distancing yourself from your reactive impulses and emotions.
- Ask questions to figure out what motivates the difficult behavior and then defuse the anger, fear, or other causes of the bad behavior.
- Reshape the negotiation to address the issue you want to resolve and to move the negotiation in the direction you want it to move.
- Make your preferred outcome the opponent's idea by involving him in the solution, and helping him "save face" and look good.
- Act more like a mediator than an adversary by making it clear that what you are offering is better than the realistic alternatives.[6]

B. COOPERATIVE AND PROBLEM-SOLVING APPROACHES

1. Cooperative Approach

A cooperative negotiator does not view the negotiation "pie" as fixed. Cooperative bargainers work to identify interests and examine differences in how the parties value items. They then search jointly with the other negotiator—viewed more as a partner rather than an opponent—for options and a solution that will best satisfy both parties' interests. Cooperative negotiation is marked by an effort to understand one another's perceptions and reexamine them together to arrive at a shared picture or a mutually acceptable valuation. This cooperative approach is frequently called "integrative" bargaining, because it emphasizes integrating the parties' needs to find the best joint solution. It is also referred to as "interest-based" negotiation because it sees the goal of bargaining as satisfying people's underlying interests.

Rather than haggling between positions and counter-positions, cooperative negotiators search for a variety of alternatives that optimize the interests that they have prioritized. The parties can then create an outcome from a combination of generated options so that a joint decision, with more benefits to all, can be achieved. This more collaborative approach does not necessarily produce a simple compromise between competing positions. It seeks a creative settlement not bound by predetermined positions.

A classic situation that calls for cooperative bargaining is an effort by two businesses to form a joint venture. Cooperative bargainers would first ask what special resources and capabilities each partner could bring to the deal. For example,

does Partner A have special expertise in marketing, whereas Partner B has more strength in design? Does one have good access to financing, whereas the other has available office space? The negotiators would also ask whether either partner has particular needs. For example, one partner may want an assured stream of income while the other is interested in having access to cutting-edge technology. Cooperative bargainers focus on finding terms that best exploit each partner's abilities and minimize weaknesses, creating the strongest possible future partnership.

Cooperative and competitive bargaining are not mutually exclusive. Working to create the biggest possible pie does not, in itself, say anything about how the final pie will be divided. Savvy competitive negotiators, for example, may look earnestly for ways to "expand the pie." Competitors, however, are likely to see expanding the pie as less important than getting the largest possible piece for their clients. Cooperative bargainers must also face the pie-dividing problem, but tend to give it less significance than competitors. In the joint venture example described above, cooperators would emphasize creating the best possible deal. They would then look for a principle for dividing the benefits (the "pie") that both partners can accept as fair, rather than trying to outfox their partner to get the lion's share.

In practice, cooperative and competitive approaches may be mixed or sequenced, depending on the setting, subject matter, and personalities of the negotiators. However, descriptions of cooperative and competitive styles, as well as distinctions between these two approaches, provide a framework for understanding the dynamics of negotiation.

Cooperative negotiation involves parties in an effort to jointly meet each other's needs and satisfy interests. In their best-selling book *Getting to Yes*, Roger Fisher, William Ury, and Bruce Patton suggest that "you can change the game" so that negotiation need not be positional or competitive.[7] They prescribe an interest-based approach with suggested tactics and the use of objective criteria for joint decisions, which they refer to as "principled" negotiation or "negotiation on the merits." Five basic elements of principled negotiation from *Getting to Yes* are as follows:

1. *Separate the people from the problem.* The negotiators should focus on attacking the problem posed by the negotiations, not each other.
2. *Focus on interests, not positions.* Distinguish positions, which are what you want, from interests, which are why you want them. Look for mutual or complementary interests that will make agreement possible.
3. *Invent options for mutual gain.* Even if the parties' interests differ, there might be bargaining outcomes that will advance the interests of both. There is a story of two sisters who are trying to decide which of them should get the only orange in the house. Once they realize that one sister wants to squeeze the orange for its juice, and the other wants to grate the rind to flavor a cake. A "win-win" agreement that furthers the interests of each becomes apparent.
4. *Insist on objective criteria.* Not all disputes and negotiations lend themselves to a "win-win" outcome. An insurance claim for damage to a car may create such a dispute, as each dollar paid by the insurance company to the claimant is one less dollar that it has. (Bargaining about issues of this nature is generally referred to as "zero-sum" bargaining.) Fisher, Ury, and

Patton suggest that the parties first attempt to agree on objective criteria to determine the outcome. Thus, instead of negotiating over the value of a destroyed car, both parties might agree that the standard "blue book" price will determine the settlement amount. "Commit yourself to reaching a solution based on principle, not pressure."

5. *Know your Best Alternative to a Negotiated Agreement (BATNA).* The reason you negotiate with someone is to produce better results than you could obtain without negotiating. If you do not know the best result you are likely to obtain without negotiating, you might accept an offer that you should reject or you might reject an offer that is better than you can otherwise get. Your BATNA is the measure to decide if you are better off agreeing to a negotiated outcome or pursuing alternatives, whether it be a trial or a deal with someone else. Your BATNA is the basis of comparison to protect you from bad negotiating decisions and permits the exploration of imaginative solutions to satisfy your interests.

A central theme of cooperative negotiation is that the negotiators focus on the parties' underlying interests rather than on the positions they take. Interest-based bargainers begin with the assumption that a party's position is simply one way (and often not the most efficient or effective one) to satisfy a need or interest. In most disputes parties have multiple interests of varying intensities, including:

- *Process Interests.* People have a "process" interest in having disagreements resolved in a manner or process they consider fair. This usually includes the opportunity to tell their story and have the feeling that they have been understood. A cooperative negotiator will sometimes address an opponent's process interest by listening quietly while he vents angry emotions or accusations, then demonstrating, for example, by summarizing what has been said, that while the listener does not agree with what the speaker has said, he has heard and made an effort to understand it. This is also called active listening (e.g., "So if I understand you correctly, you believe that. . ."). Participants may also have an interest in having a negotiation proceed in an orderly and predictable way.
- *Personal Interests.* Most people have a personal interest in feeling respected in their work and as unique human beings, and in being seen as acting consistently with what they have said in the past and in accordance with their moral standards. Negotiators might address these personal interests by treating everyone courteously and attending to "face saving" needs.
- *Relational Interests.* The parties might also have an interest in preserving or creating an ongoing relationship. This is particularly true in contractual disputes, because the very existence of a contract indicates that the parties once saw a benefit in working together, but it can also be true in disputes that arise from less formal connections. Examples of situations with relational interests include divorce and child custody disputes, land use controversies between neighbors, workplace disputes, and disagreements between companies and longtime customers.
- *Economic Interests.* Disputants usually have economic or substantive interests. This is where most negotiations begin and where many end unsuccessfully because other interests are not addressed. Economic interests are most easy