

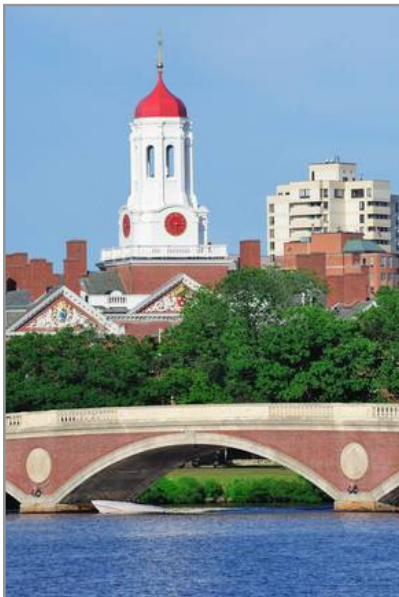
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HARVARD LAW SCHOOL



SPECIAL REPORT

The New Conflict Management

**Effective Conflict Resolution Strategies
to Avoid Litigation**



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Negotiate or litigate?

BY DEEPAK MALHOTRA

WHENEVER A DISPUTE FLARES UP, the parties involved must ask themselves which course of action will yield the best outcome. Should they negotiate, litigate, or simply walk away and accept the status quo?

In fact, litigation and negotiation are not mutually exclusive. Both can—and often should—be pursued simultaneously. Speaking with regard to the Middle East conflict (and paraphrasing David Ben-Gurion's famous quotation), former Israeli Prime Minister Yitzhak Rabin often remarked that he would fight terror as if there were no peace process and make peace as if there were no terror. In other words, he would give up neither negotiation nor the use of military force. Although clearly controversial in the realm of global politics, Rabin's two-pronged strategy illustrates the fact that dispute resolution sometimes requires both a *power-based* and an *interest-based* approach, such as the simultaneous pursuit of litigation (the use of legal power) and negotiation (attempts to reconcile each party's interests).

Here are some strategies that can help disputants keep interest-based bargaining alive even after legal action has been initiated:

- 1. Keep communication lines open.** If you and the other party have a preexisting relationship (as business partners, family members, or friends), it's important to communicate regularly regarding alternative ways to resolve your dispute. As legal bills accumulate, disputants often begin to soften their positions, and new openings for agreement can emerge. In addition, if the dispute was due in part to miscommunication or misinformation, keep working to clarify your perspective and understand the other side's point of view. Just because legal action was pursued prematurely doesn't mean it must be seen through to the bitter end. While it's not easy to negotiate in the midst of legal maneuvers, you should at least leave open the possibility.

2. Ask other parties to mediate. When communication with the opposing side is strained or difficult, consider bringing in a mutually trusted third party to serve as a go-between. Mediators can facilitate information exchange, vouch for good-faith efforts, and propose ways to resolve the dispute. Third parties can also help provide a reality check by reminding disputants of the costs and likely repercussions of litigation.

3. Don't lose sight of your underlying interests. Far too many people view negotiation as a battle in which the goal is to win, a misperception that's accentuated by litigation. When you think you're in the right, both morally and legally, the desire to win can distract you from pursuing your true underlying interests. Revisit the following questions often during your dispute: What are my true underlying interests? How can I best achieve them? How much am I willing to pay just to be able to say that I won? It's important to recognize that when you lose sight of your interests, you lose the possibility of negotiation.

4. Understand your lawyer's role and perspective. Your lawyer's job is to educate you and advocate for you. He or she is not—and should not be—the primary decision maker on your behalf. As the disputant, you must understand not only your rights but also your options—especially your non-litigation options. The best lawyers will help you comprehend all of those alternatives. But the fact remains that lawyers make their living by giving legal advice and pursuing litigation. As a result, your incentives will never be completely aligned with those of your lawyer.

Furthermore, your lawyer's expertise is probably restricted to the domain of law. It's incumbent on the disputants to educate themselves about other ways of resolving their differences, such as through mediation or negotiation. One way to do this is by getting second opinions from legal experts who have no financial stake in the case.

The decision to litigate should not be taken lightly, and the power of negotiation should not be underestimated. You should pursue litigation only as a last resort, staying focused on the pursuit of negotiation, underlying interests, and the goal of preserving and strengthening relationships.

Adapted from "Will You Negotiate or Litigate?"
Negotiation, October 2004

Dealing with difficult people

BY SUSAN HACKLEY

WE ALL HAVE TO NEGOTIATE AT TIMES with difficult people, writes William Ury, author of *Getting Past No: Negotiating with Difficult People* (Bantam Books, 1991). They might be stubborn, arrogant, hostile, greedy, or dishonest. Even ordinarily reasonable people can turn into opponents: A teenage daughter can be charming one moment and hurl insults at you the next. Your boss can be collaborative and understanding most of the time but make unreasonable demands on a Friday afternoon.

Build a golden bridge. When negotiating with difficult people, you may need to build a “golden bridge,” Ury’s term for letting your opponent save face and view the outcome as at least a partial victory. Even when your boss comes into your office on Friday afternoon with an inconsiderate request, you need to say no in a way that conveys your respect for him as your boss. You want your assistant to feel that you appreciate her contributions, even if you can’t agree to let her work at home several days a week.

How do you help your difficult opponent save face, while still standing up for yourself? Ury suggests reframing the problem so that you draw your opponents in the direction you want them to move.

In particular, involve your opponent in finding a solution. It’s unlikely that a difficult person is going to accept your proposal fully, no matter how reasonable it is. Give him some choices: Would you prefer to meet at your office or mine? I could either pay a lump sum or make payments over time; which is better for you?

Pay careful attention to your opponent, realizing that some of her needs may be unstated. A business owner who won’t engage in problem solving to help close a deal to sell her business may turn out to have deep-seated ambivalence about selling. Realizing that, you might structure the deal as a joint venture, with a role for her in the new company.

Listen to learn. If there is a common denominator in virtually all successful negotiations, it is to be an *active listener*, by which Ury means not only to hear what the other person is saying but also to listen to what is behind the words.

Active listening is something frequently talked about but rarely done well; it is a subtle skill that requires constant, thoughtful effort. A good listener will disarm his opponent by stepping to his side, asking open-ended questions, and encouraging him to tell you everything that is bothering him. Beyond that, Ury says, “he needs to know that you have heard [and understood] what he has said.” So sum up your understanding of what he has said and repeat it in his own words.

Ury points out that there is a big payoff for you: “If you want him to acknowledge your point, acknowledge his first.” And you may find you have little choice but to do this—how else to avoid a stalemate?

You don’t have to like them. Dealing with difficult people does not mean liking them or even agreeing with them, but it does mean acknowledging that you understand their viewpoint.

Lakhdar Brahimi, a United Nations special envoy to Afghanistan in the aftermath of the September 11 terrorist attacks, was given the daunting task of negotiating with warlords and others who had caused many deaths, to try to create a stable government. He spoke of the need to negotiate with difficult people: “The nice people are sitting in Paris... To stop fighting, you’ve got to talk to the people who are doing the fighting, no matter how horrible they are... If I don’t want to shake their hands, I shouldn’t have accepted this job.”

Whether you’re negotiating with someone who is dangerously angry or only mildly annoying, the same skills are helpful in getting the results you want. Find out what your opponent wants and begin to build a case for why your solution meets her needs. If you’re successful, you can turn your adversaries into your partners.

Adapted from “When Life Gives You Lemons: How to Deal with Difficult People”

Negotiation, November 2004

Creating value out of conflict

BY ROBERT C. BORDONE AND MICHAEL L. MOFFITT

TOO OFTEN, MANAGERS treat disputes as distinct from other aspects of business deal making. Some behave as if resolving a dispute requires a distinct choice: You get your way, or I get mine. Others focus their energies entirely on compromise, with each party trying to give up as little as possible. Neither of these mindsets serves negotiators well. Savvy business leaders search for the same set of value-creation opportunities in disputes as they do in deals. Here, we present four ways to find value when you're in the throes of a seemingly intractable business dispute.

1. Capitalize on shared interests. Disputes highlight the ways in which we differ from the other side. After all, without differences, there would be no disputes. Yet these conspicuous differences often mask the *noncompetitive similarities* that also exist between those involved in a dispute—similarities that can add value for both sides.

Consider a dispute between a high-tech manufacturer and a small company that licenses a critical piece of intellectual property to the manufacturer. The two sides bitterly disagree about the appropriate method for calculating royalties under the license—but this isn't their only set of relevant interests. Both are interested in sustaining the market's confidence in the new product, and they're aware that suppliers, creditors, and prospective customers might shy away from deals with feuding business partners. Given this shared interest, the two sides could agree to keep certain aspects of the dispute confidential. They could also put the proceeds from the new product into escrow, pending resolution of the dispute according to a specified timeline.

2. Explore differences in preferences, priorities, and resources. In the heat of the moment, disputants too often focus on one conspicuous issue such as money, a mistake that risks masking other important concerns. Whenever more than one issue is on the table, it's likely that parties will value certain issues more than others. You may be able to resolve the dispute by capitalizing on differences in relative preferences, priorities, or resources.

Consider the case of the electro-pop duo The Postal Service. After selling more than 400,000 copies of their 2003 album, band members Jimmy Tamborello and Ben Gibbard received a cease-and-desist letter from the United States Postal Service (USPS) citing infringement of its trademarked name. The dispute could have turned ugly. The USPS was concerned about a dilution of its name in the marketplace. Given their recent success, the band members were reluctant to change their name.

Yet during negotiations, the band managed to turn the dispute into a synergistic opportunity by identifying the priorities and non-competing preferences of both sides. Tamborello and Gibbard pointed out that the losses the USPS had suffered to Internet and e-mail communication were large, especially among the age cohort of the band's fan base. The USPS agreed to grant a free license allowing The Postal Service to continue to use its name. In exchange, the band agreed to print a trademark notice on its albums, to promote the use of the USPS by its young fans, and even to perform at an annual USPS event. As this story illustrates, when negotiators take stock of each other's priorities and resources, they often will spot opportunities for wise trades.

3. Capitalize on differences in forecasts and risk preferences. One common source of conflict arises from diverging expectations about what will happen in the future. And when it comes to predicting the future, disputants tend to behave less than ideally. The overconfidence bias can lead both sides to overestimate the likelihood of achieving their desired outcomes. Similarly, egocentrism can cause people to have an inflated perception of the fairness of their own position. Such biases can easily lead to impasse.

One value-creating antidote may be *contingent agreements*—deal structures that permit parties to “bet” on their predictions by specifying different payoffs based on future events. Take the example of a developer who has purchased a large tract of land with the intention of building a high-end mall. Local residents fear that the development will reduce their property values. The developer disagrees, citing data that suggests that property values near luxury malls actually rise faster than average. A community association demands that the developer make payments to abutting homeowners as a precondition to granting needed zoning variances. The developer views the demand as extortion and considers taking the association to court.

If the developer is highly confident in his assessment, and if the homeowners truly fear declining property values, the parties can structure a contingent agreement that protects them all. The contract might stipulate that they hire agreed-upon real estate experts five years after the completion of the mall to assess local home prices relative to those in the surrounding area. If prices of abutting properties indeed fail to keep pace, the developer would compensate local residents. But if the developer's expectations turn out to be accurate, he would be released from making any payments. The lesson: If you're unable to persuade the other side of your prediction, consider resolving the conflict by making a bet.

4. Address potential implementation problems up front. Resolving a significant dispute typically requires more than a one-time exchange of dollars. Implementation often occurs over time, raising reasonable fears that one or more parties will violate the agreement's explicit provisions or its spirit. The fear of misbehavior can be so great that it prevents disputants from reaching a resolution.

Successful negotiators explicitly address implementation difficulties by crafting resolution terms that manage risk. Suppose that the marketing and information technology (IT) departments of a large company are arguing over how to handle internal charges related to the redesign of a piece of back-end software. The IT department doesn't want to set a flat rate for the work because marketing would have an incentive to demand endless revisions. Marketing refuses to have an open-ended charge-back for the services, fearing that the IT designers would spend too much time and money adding unnecessary features.

A creative resolution would recognize each party's ongoing interests. They might agree to a staged implementation, with a flat fee for the predictable aspects of the redesign and an hourly rate for subsequent components. Or they might agree at the outset on a ceiling for the expense; marketing could put that money in a virtual escrow, and the departments could split any excess remaining upon completion.

By anticipating possible stumbling blocks during implementation, wise negotiators can structure agreements in ways that provide each side with appropriate incentives throughout the life of the deal.

Adapted from "Create Value out of Conflict"
Negotiation, June 2006



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