

# Advanced Negotiation and Mediation

Concepts, Skills,  
and Exercises

James R. Holbrook  
Benjamin J. Cook

**WEST**<sup>®</sup>

# ADVANCED NEGOTIATION AND MEDIATION

CONCEPTS, SKILLS, AND  
EXERCISES



By

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# PREFACE

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Basic books on negotiation and mediation are commonplace. Many are well-written and can provide a solid foundation for learning and practice. Less common, and in great need because of the increasing importance of alternative dispute resolution, are books focused on an advanced understanding of mediation and negotiation. This book uniquely incorporates negotiation and mediation concepts and skills into a single volume with the intent to facilitate learning in both theoretical and practical aspects. Accordingly, we incorporate concepts, skills, and exercises into this book to give the reader an opportunity to explore theory, learn skills, and then put the skills into practice.

The book describes four kinds of negotiation and mediation, including performative (for improving communication), transformative (for improving relationships), integrative (for creative problem-solving), and distributive (for a fair exchange of value). We describe a range of skills necessary for effectively creating deals and resolving disputes, summarizing and integrating the salient points of seminal works in the ADR field. We also include a variety of exercises relevant to the topics presented in each chapter.

## **The Toolbox Approach**

Psychologist Abraham Maslow famously wrote that if all you have is a hammer, everything looks like a nail. This caution against over-reliance on one tool is especially appropriate for negotiators and mediators. There is no single right way to negotiate or mediate. Different circumstances require different approaches—a tactic that works well in one context may fail in another. While certain principles may hold true across a number of negotiation or mediation contexts, effective negotiators and mediators are able to read situations and have a variety of approaches they are able to employ. Because of this dynamic nature inherent to negotiation and mediation, it is helpful to think of the various skills and approaches to be used in creating deals or resolving disputes as tools. Increasing the number of process, communication, problem-solving and other tools in their toolbox can help negotiators and mediators to become much more versatile and effective. In addition to using various negotiation and mediation strategies, this book includes a “toolbox” section accompanying each strategy that provides a number of skills that are relevant to the corresponding strategy. The skills can be useful not just for the strategy section in which they are discussed, but in any of the four primary strategies discussed in this book.

## Why Negotiation and Mediation in the Same Book?

While negotiation and mediation sit closely at the same end of the dispute resolution spectrum, they may appear to be distinctly different approaches. Negotiation typically involves two or more parties communicating directly, while mediation involves a neutral third party whose role is to help the disputing parties come to an agreement. So why cover both approaches in the same book? We believe that despite procedural differences, negotiation and mediation have much in common conceptually:

- Mediation is often described as facilitated negotiation. Most of the principles, tools, and strategies for effective negotiation are directly applicable to effective mediation.
- A mediator often has to be a negotiation coach, helping parties improve their relationship and communication, encouraging them to disclose interests and generate options, assisting their reality-testing by exploring alternatives and employing legitimacy information, and facilitating their making commitments to clear and feasible agreements.
- Similarly, a negotiator can benefit from thinking like a mediator, which helps enable the negotiator to see things from the other side's perspective and think about approaching the issues in terms of joint problem solving, rather than one side competing against the other.

Because of this close interrelatedness, and the opportunity to draw insights from one process that may be helpful in illuminating the other, we believe it is instructive and useful to cover both approaches together.

JAMES R. HOLBROOK  
BENJAMIN J. COOK

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# INTRODUCTION

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In April 2011, Apple Inc., maker of the iPhone and iPad, filed a lawsuit against Samsung Electronics, claiming that Samsung had violated several of Apple's patents. Samsung countersued, contending that Apple had violated Samsung patents. On August 24, 2012, the jury found in favor of Apple and awarded the company damages of \$1.05 billion. As is typical in litigation, the verdict was far from the end of the dispute. Samsung quickly announced its intention to appeal as far as the Supreme Court if necessary, and filed a motion to remove an injunction on one of its products. Apple filed requests for permanent injunctions on several of Samsung's smartphones. Samsung's appeal cannot occur until all of these motions are settled, after which the appeals process could take 9 to 12 months or even longer.

Prior to handing the case to the jury, the judge requested that both sides meet to talk one more time to try to settle their dispute, warning lawyers representing the two companies that there were risks for both sides. Indeed, despite Apple's winning this particular battle, the larger war continues and, as the judge warned, both companies still face significant risks. For Apple, the appeal could mean that the damages award is reduced or, more significantly, the decision is overturned. Even if the decision is affirmed, the legal costs of pursuing litigation will be substantial—some legal analysts have estimated dollar amounts in the hundreds of millions. For Samsung, there is a chance that the damages it must pay are even higher (the jury found that the patent infringement was deliberate, so Apple may be entitled to request treble damages) and, regardless, the legal costs of continuing to appeal will be significant. Further complicating matters for both sides, the two companies have lawsuits pending against each other in several other countries around the world, which increases the likelihood of inconsistent results across the various jurisdictions.

Sometimes litigation is the most appropriate means for resolving certain disputes. In this case, perhaps, pursuing the lengthy and costly process will provide Apple with an outcome with which it is highly satisfied, and Samsung may be content that at least it had its day in court. But it is worth considering, what if the two sides had been committed to resolving the dispute either through direct negotiation or through mediation? When prior settlement attempts failed, what were the barriers that prevented the parties from coming to an agreement? Were there additional negotiation tools that each side might have employed that would have helped overcome their impasse?

While not all disputes can be resolved through negotiation and mediation, far too many conflicts result in less-satisfactory outcomes—either because parties fail to try these forms of dispute resolution or, when attempted, they are done ineffectively. This book broadens understanding of negotiation and mediation as means for creating deals and resolving disputes, and provides tools for effective practice. A large amount of excellent writing in this field is available, and this book not only integrates some of that material into one place, but also examines negotiation and mediation through the framework of four distinct strategies—performative, transformative, integrative, and distributive—an approach that is unique and, we believe, highly useful to the study and practice of dispute resolution.

# CHAPTER 1

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## WHAT IS CONFLICT?



Conflict is pervasive. Whether large or small, between individuals or organizations, short- or long-term, or however it is shaped and defined by a range of other characteristics, conflict presents both a challenge and opportunity:

- A challenge, because too often people lack the knowledge and skills to resolve conflict in an effective and constructive way.
- An opportunity, because when approached skillfully, the resolution of conflict can lead to positive, productive, and successful outcomes.

Because both negotiation and mediation can be effective approaches to resolving or mitigating various types of conflict, defining and having a basic understanding of conflict are important starting points.

### 1. DEFINITION

Basic definitions of conflict range from descriptions of physical interaction, such as “fight,” “battle,” and “opposing action of incompatibles,” to less tangible confrontations, such as a “mental struggle resulting from . . . opposing needs, drives, [and] wishes.”<sup>1</sup> Other definitions can be more expansive: “Conflict presupposes the existence of at least one difference and two identities, one on either side of a difference,” and includes competition for scarce resources and the existence and operation of power.<sup>2</sup> While conflict is often considered negative—something to be resolved or avoided—the existence of conflict, especially when dealt with productively, can be a very effective agent for positive change and progress.

### 2. LEVELS OF CONFLICT

Conflict can occur at various levels. The following are commonly identified as four levels at which conflict takes place:<sup>3</sup>

1. **Intrapersonal:** conflict that occurs within an individual. Our own thoughts, ideas, emotions, etc., are in conflict with each other.

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<sup>1</sup> MERRIAM-WEBSTER'S DICTIONARY.

<sup>2</sup> Leonard C. Hawes, *Conflict and Identity*, Ron Jackson, ed., ENCYCLOPEDIA OF IDENTITY (Thousand Oaks, CA: Sage, 2010).

<sup>3</sup> From Roy J. Lewicki, Joseph A. Litterer, John W. Minton & David M. Saunders, *NEGOTIATION* (2nd ed.) at 5–6 (Boston: Irwin, 1994).

er. We'd like to leave the office early to spend time with friends, but we know that if we don't stay late to finish the report, tomorrow will be especially stressful.

2. **Interpersonal:** conflict that occurs between individuals. We have a heated argument with a friend over his consistent lack of punctuality, or a co-worker engages us in a contentious discussion over who should be responsible for a mistake on a joint project.
3. **Intragroup:** conflict that occurs within a small group, such as a family, class, team, committee, etc. Members of our family can't agree on where to spend Christmas vacation, or team members argue about when to meet for practice.
4. **Intergroup:** conflict that occurs between groups, such as countries, union and management, human rights groups and government, etc. A neighborhood organization protests against the city council's decision to sell wetlands to a private developer, or one country threatens to attack a neighboring country over a boundary dispute.

The concepts and skills covered in this book provide tools for more effectively analyzing and dealing with all four levels of conflict.

### 3. SOURCES OF CONFLICT

Conflict can occur anywhere. Because conflict is so pervasive in daily life and can manifest itself in a vast array of situations, there is a wide range of sources to which we can look to explain the existence of conflict. The following list explores some (but by no means all) common underlying causes of conflict:<sup>4</sup>

- a failure of connection, collaboration, or community; an inability to understand our essential interconnectedness and the universal commonality of the human spirit;
- a lack of acceptance of ourselves that we have projected onto others; a way of blaming others for failures in our own lives;
- a boundary violation; a failure to value or recognize our own integrity or the personal space of others;
- a way of getting attention, acknowledgment, sympathy, or support by casting ourselves as the victim of some "wrongdoer;"
- the continued pursuit of our own false expectations; the desire to hold on to our unrealistic fantasies;
- a lack of listening; a failure to appreciate the nuances in what someone else is saying;

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<sup>4</sup> See generally Kenneth Cloke, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* (San Francisco: Jossey-Bass Publishers, 2001).



- a result of secrets, concealments, confusions, conflicting messages, cover-ups, and what we have failed to communicate;
- a lack of skill, effectiveness, or clarity in saying what we feel, think, or want;
- the urgent voice of a new paradigm; a demand for change in a system that has outlived its usefulness;
- the incomplete expression or misunderstanding of a paradox, enigma, duality, polarity, or contradiction;
- a threatened interpretation of difference, diversity, or opposition, which ignores the essential role of polarity in creating unity, balance, and symbiosis; or
- an inability to learn from past mistakes; a failure to recognize them as opportunities for growth, learning, and improved understanding.

Among all sources of conflict, identity plays an often implicit but pervasive role. Whether a dispute is simply over how much we're willing to pay for a souvenir, or what arrangements we're willing to agree with in a child custody battle, how we identify ourselves or what the issues in the dispute say about our identity are often at the heart of conflict. A challenge to our competence, integrity, or self-worth is extremely threatening and can create intense interpersonal conflict. If we agree to the seller's asking price and pay too much for the souvenir, does this mean we are less intelligent, too "soft," or generally lacking in business acumen? If we don't receive full custody of the children, does this mean we are a bad parent or that the children love us less?

People have many different identifications including, for example, cultural values, education, ethnic origin, gender, group affiliations, language and dialect, economic class, geographic location, hobbies, national citizenship, personal values, professions, race, religion, self-interests, sexual orientation, social status, wealth, etc. Two people who seem quite different thus may have many things in common and can relate to one another through their shared identifications. However, in situations of abuse of power, betrayal, blaming, discrimination, disrespect, hatred, humiliation, ignorance, intolerance, misallocation of resources, violation of rights, violence, etc., a person's multiple identifications can be collapsed into a single identity that is "miniaturized"<sup>5</sup> and stereotyped. This, in turn, can result in a range of manifestations of interpersonal or intergroup conflict.

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<sup>5</sup> Amartya Sen, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* at i (New York: W.W. Norton & Company, Inc., 2006).