# The Mediation Process

## Practical Strategies for Resolving Conflict

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*Chapter Ten*

# Uncovering Hidden Interests of the Disputing Parties

People negotiate because of interests they want to have satisfied. The negotiation process may be considered to be a game (Cross, 1977) in which one or more parties engage in an educational process, a decoding process, and a bargaining process to present and discover interests and trade promises to meet those interests.

## Difficulties in Identifying Issues

Parties in dispute rarely identify their interests in a clear or direct fashion. This lack of clarity occurs because parties

1. Often do not know what their genuine interests are
2. Are pursuing a strategy of hiding their interests on the assumption that they will gain more from a settlement if their genuine goals are obscured from the scrutiny of other parties
3. Have adhered so strongly to a particular position that meets their interests that the interest itself becomes obscured and equated with the position and can no longer be seen as a separate entity, or
4. Are unaware of procedures for exploring interests

I will discuss each of these obstacles to identifying interests.

### *Lack of Awareness of Interests*

Negotiating parties often misperceive what their interests really are. Misperception may result from external factors, such as law,

tradition, or advice from friends, that describes how the negotiation game is to be played and completed, or from confusion in the negotiators themselves. In Chapter Nine, I cited a case in which two parents are struggling over the question of who should have legal custody of their child after a divorce. Both parents are excellent child rearers and nurturers, and they are equally qualified to raise the child. They are fighting over a specific solution, sole legal custody, and in the process are damaging their relationship and indirectly harming the child. They each see their interest, and that of the other parent, defined as gaining legal custody of the child. Each parent views settlement outcomes narrowly because of advice from attorneys and relatives and traditional ideas about custody settlement arrangements. In reality, their interests are having time with the child, being involved in decisions about how the child is to be raised, having the chance to go on vacation with the child, and so on. The struggle is over a position—the demand for sole legal custody of the child—not over ways to meet the real substantive, procedural, and psychological interests of each parent. Unless genuine interests are addressed, the parents will remain caught, negotiating over positions that can result only in a win-lose outcome.

In the Whittamore-Singson case, the clinic director may not realize that his interests might be best served by a solution in which the doctor would not leave the clinic until the term of the contract expired, and that such an arrangement could benefit both the clinic and the medical practitioner. Shifting from a focus on compensation for breach of contract and acknowledging the need to satisfy a range of interests—stability at the clinic, cost containment, avoidance of disruptive working relationships, prevention of patient loss, retention of a valued employee, among others—may open new opportunities for problem solving.

### *Intentional Hiding of Interests*

A second reason that interests are difficult to identify is that negotiators often intentionally obscure them. This strategy is often executed by parties with the expectation that it will result in increased gains or better outcomes in negotiations. Parties often see interests, and the degree to which they are met, in terms of positions along a continuum of options. Particular outcomes are more satisfactory or meet more needs than others. Therefore, each party obscures his or her real interests on the continuum of possible settlement options as a means of leveraging the greatest number of concessions from an opponent. Neither party wants to publicly present his or her real interests, or the particular point on the bargaining continuum at which he or she is willing to settle, for fear that they might receive less than they might if their real needs remain unknown.



In the Whittamore-Singson case, Whittamore may be reluctant to disclose how important his interest in staying in town and being near his children really is. He may fear that an untimely revelation of his true interests may reduce his leverage, which is based on Singson's fear that he might leave the area and eliminate the clinic's claim to any compensation. Revealing his interests might give Singson undue power to force a high level of compensation.

### *Equation of Interests with Positions*

A third reason that interests are difficult to identify is that in heated conflict, parties may begin to gradually equate the satisfaction of an interest with a particular position. Separation of the interest from the position becomes difficult. This phenomenon poses a serious challenge to negotiators who are attempting to back off hard-line positions and seek mutually acceptable solutions.

In the Whittamore-Singson case, the clinic director may see financial compensation for violation of the contract as *the* way to meet interests, ignoring the possibility of identifying specific interests and developing a customized solution to satisfy each of them. Unfortunately, the former approach is commonly found in disputes such as divorces, personal injury cases, insurance claims, and so on, where interests (substantive, procedural, or psychological) are often reified into financial solutions. Although financial settlements may satisfy some interests, they rarely address the specific interests—respect, an apology, acknowledgment of harm or inconvenience, and so on—of the parties.

### *Lack of Awareness of Procedures for Exploring Interests*

The final reason that parties often do not directly explore interests is that they are not used to thinking in terms of interests and are

not aware of procedures for discovering and discussing them. This often proves to be an insurmountable obstacle in high-tension negotiations.

These four factors—lack of awareness of interests, intentional hiding of interests, equation of interests with positions, and lack of awareness of procedural approaches to interest discovery—are often significant blocks to progress in negotiations and may produce deadlock.

## Procedures for Identifying Interests

Negotiators and, if necessary, mediators use two general types of procedures to identify the interests of disputing parties: indirect, low-profile procedures and direct, high-profile procedures.

*Indirect procedures* are used when parties take a positional bargaining approach to negotiations or try to obscure interests by adhering to rigid positions. Such procedures are also employed when parties seem unsure of their interests, and the trust level is not high enough to merit direct exploration of their needs.

Mediators use *direct procedures* to preempt (Saposnek, 1983) parties from engaging in positional bargaining or to move them toward interest-based bargaining once positional negotiations have begun. Direct procedures are used for the first purpose when parties

1. Are not locked into the process of positional bargaining
2. Are not committed to absolute positions
3. Are aware of the need to separate the identification of interests from adherence to particular positions
4. Are willing to examine their interests explicitly because the trust level is high enough for mutual exploration
5. Have delegated to the mediator the authority to design a structured interest exploration and identification procedure

If parties are already engaged in positional bargaining, direct procedures may be used to identify interests when less direct methods (such as open-ended questioning about interests) have failed; to prevent parties from hardening their adherence to positions; or to manage a large number of parties or issues that are making negotiations cumbersome.



Before exploring direct and indirect moves to identify and explore interests, it is important to note attitudes that lead to a productive exploration of interests.

## Positive Attitudes Toward Interest Exploration

Regardless of whether positional or interest-based bargaining is being used, an understanding of interests on the part of negotiators can promote more productive outcomes. Identification of interests is facilitated by open attitudes toward interest exploration. These would include the beliefs that

- All parties have interests and needs that are important and valid to them
- A solution to the problem should meet the maximum number of interests of each party
- Interests can be traded to achieve the most satisfactory combination
- There is probably more than one acceptable solution to a problem
- Any conflict involves compatible interests as well as conflicting ones

Negotiators who hold such attitudes or beliefs about negotiation will be able to make the transition to a focus on interests more easily than disputants who take a narrow view of bargaining.

The critical task facing negotiators at this stage is to gain an understanding of each other's interests. The first step toward doing so is developing an awareness that interests are important. Most negotiators do not distinguish between a solution or position and the specific interest it is designed to satisfy. This linkage prevents creative problem solving.

A mediator may assist parties in overcoming this perceptual block. Before beginning actual interest exploration, mediators can work with parties to change their attitudes and awareness and to encourage acceptance of diverse interests. This can be accomplished through a variety of indirect and direct moves. Indirect moves include modeling behavior that promotes desired attitude change. To increase awareness of the importance of interests, a

mediator may state, "All needs and interests of parties are important and valid to them," "We are looking for a solution that allows everyone to have as many needs met as possible," or "There is probably more than one solution that will meet the needs of all parties." Mediators may intervene at even subtler levels by modeling an attitude of expectancy and hope (Freire, 1970). The mediator's expressed attitude often encourages a more conciliatory climate.

Mediators can also confront the need for attitude change more directly. They may explicitly spell out the differences between issues, positions, interests, and settlement options. Or they may state that if a solution cannot be found that meets at least some of the interests of all parties, there will be no settlement. Usually, the more explicit the mediator is about the need for attitudinal change or increase in awareness, the greater the possibility of confrontation between intervenor and disputants. At this point, most mediators prefer low-level, indirect interventions to explicit and direct confrontation over attitudes.

## Indirect Procedures for Discovering Interests

I have discussed several indirect and direct moves to induce change in negotiators' attitudes toward interest identification and exploration. I now turn to an examination of procedures for discovering interests.

Mediators may use many of the communication tools outlined in Chapters Seven, Eight, and Nine to identify interests. Particularly helpful tools are active listening, restatement, paraphrase, summarization, generalization, fractionation, and reframing. When used alone or in combination, these tools help disputants and the mediator to decode and uncover interests that are intentionally or unintentionally obscured by negotiators.

One particularly common combination of these tools is the process of *testing* (Moore, 1982b). Testing requires a negotiator or mediator to listen carefully to another negotiator's statements and then to feed back the interest that he or she hears expressed. Through trial and error, the listener can gradually gain an understanding of the other negotiator's needs.

Another method of identifying interests is *hypothetical modeling*



(Pruitt and Lewis, 1977), in which the negotiator or mediator presents a series of hypothetical settlement options or proposals to another negotiator. The questioner does not ask for commitment to, or acceptance of, any of the proposals, but merely an indication of whether the proposal is more or less satisfactory than others under consideration. Repeated proposals that contain a variety of solutions to satisfy another's interests can increase a mediator's or negotiator's understanding of needs to be met without ever having to confront interest identification directly. This approach is often used when a party is hiding interests or when there is not enough trust to explicitly reveal interests.

## Direct Procedures for Discovering Interests

Fisher and Ury (1981) advocate direct *questioning* about interests. They suggest that when a disputant presents a position to another party, the recipient or the mediator should directly ask the presenting party why this position is important. Carefully worded questions that demonstrate genuine concern for understanding the other party's perception of the situation can be used to encourage revelation of important interests.

Because the intervenor has credibility as an impartial party, disputants may be more open to directly identifying and discussing their interests with him or her than with another party. The mediator plays a valuable role in this situation because he or she can help the parties explore the substance and salience of each other's interests while minimizing the risks of full disclosure to an adversary. These conversations are often held during a caucus.

Another common procedure is the *interest-oriented discussion.* The mediator in this process requests that disputants refrain from discussing issues or positions and focus instead on the general interests or elements that would make a settlement satisfactory. Through careful questioning, the mediator moves the parties from a discussion of general interests to more concrete and explicit interests.

*Brainstorming* is a process in which items are rapidly generated by a group. Brainstorming separates generation from evaluation, giving the group multiple options to consider. (See Chapter Eleven for instructions on how to conduct a brainstorming session.) Brain-

storming can be conducted by negotiators in joint session or in caucus. The procedure is one of the most common direct moves to identify interests.

Brainstorming was used to identify the interests of parties in a complicated dispute over water supply to an urban area. The mediators carefully divided the thirty-two negotiators into groups of eight. Each group had members who represented diverse views on the questions of water supply, containing at least one water supplier, one consumer, one environmentalist, and one person from the agricultural or rural community. The groups were instructed to list without evaluation the various interests that would have to be met if an agreement were to be reached. A mediator and a recorder worked with each small group to record the interests on a wall chart that everyone could see. These lists were then presented to the entire group to educate all negotiators about the general interests that would have to be addressed.

## Positions, Interests, and Bluffs

A mediator's involvement does not mean that parties will be candid about their interests. Parties may engage in bluffing activity. "A party to negotiation is engaged in bluff when he asserts or implies that he will do what he does not intend to do at the time the assertion is made" (Stevens, 1963). Bluffs may also involve a party's misrepresentation of interests to convince another disputant that only a settlement with certain criteria will meet the party's needs. In ideal negotiation situations, bluffing is not possible because all disputants have accurate knowledge of the interests, settlement options, power, and preferences for behavior of the other parties. In reality, however, these variables are not known (or not completely known), and bluffing is common. This seems to be the case especially when there is no external deadline or factors that force the parties to be candid and to come to terms with their differences.

To work, bluffs must be credible. One party must be perceived by another to have the authority, capacity, and will to carry out a threatened action in order to satisfy a particular interest. Mediators should probe and question parties in joint session, but more often in a caucus, to determine if a threat or a position is a genuine stance that represents the party's true intentions or is a bluff



to mislead an opponent. If the latter is true, the mediator should assess with the bluffing party (1) the long-term effect a bluff will have on the relationship of the parties and (2) the potential cost to the negotiators of letting the bluff go unchallenged by the mediator. This last outcome can have drastic effects on negotiations if the parties reach an impasse based on a false claim.

If in the process of position and interest exploration a mediator discovers that a party has been bluffing and sending inaccurate messages about his or her interests, and this appears to be having detrimental effects on the negotiation process, the mediator may decide to help the bluffing party shift from the artificial posture toward a more accurate presentation of his or her interests. Procedures used by mediators for this purpose are persuasion and rationalization (Stevens, 1963). Persuasion and rationalization refer to activities designed to influence or control the course of actions or operations of another negotiator, alter a party's preferences, or change how a party perceives the negotiation environment. A rationalization is a logical and plausible argument for a shift in position or approach. A rationalization for a change of position may be presented to a negotiator engaged in bluffing, to other concerned parties, to observers, or to a negotiator's constituency as a means of explaining a shift in position or to stress the importance of heretofore undisclosed interests. The rationalization may be presented by the negotiator or by the mediator. Ideally, the negotiator makes the presentation, because it will increase his or her commitment to the move. However, in some disputes, the negotiator may need to save face (Brown, 1977). In such a situation, the mediator may want to present the newly identified position, interest, or move to help explain or share the responsibility for the shift.

Regulatory negotiations between certain industry groups, a public utility commission, and consumer advocates provide an example of how mediators use persuasion and rationalization to help bargainers identify genuine interests and avoid impasse. One issue facing the negotiators was how they were to pay for mediation. Industry representatives believed that participants in the negotiations should "pay to play." They took the hard-line position that if public interest groups did not contribute toward the costs of mediation, then they should not be represented. The public consumer

advocates indicated that they could not afford to contribute and intimated that if they were required to pay, they would boycott the negotiations and attack the proposed settlement later when it was presented to the public utility commission for consideration.

The mediators saw that each interest group was escalating its threats (and bluffs) to push the other party to accept its position. The mediators, in reflecting on the industry group's interests, asked its representatives whether they saw payment as a party's indication of commitment to the process and assurance that the party would not sabotage or delay settlement. The industry representatives replied that they did. The mediator asked the consumers why they believed they need not pay. The consumer advocates replied that because theirs was a nonprofit group, it did not have assets to fund the process, and that in principle, advocacy groups should not have to fund alternative regulatory negotiations when they would normally have free access to the regulatory hearing process.

The mediators asked the industry group if it was reasonable or fair to insist that groups lacking funds pay to participate. They also asked the consumer groups if they could find a means other than a financial contribution to indicate that they were committed to the process and were bargaining in good faith. The consumer group representative made a public statement that she was committed to the process and asked if, in return, the industry groups would allow a nonprofit group to have a place at the table. The rationalization that made it possible to disconnect financial contributions from good-faith bargaining enabled the parties to reach agreement.

## Interest Identification, Acceptance, and Agreement

Once the mediator and the negotiators have identified the interests of the parties, they will confront one or more of the following situations. Interests may be (1) *mutually exclusive* in that satisfaction of one party's needs precludes the satisfaction of another's interests; (2) *mixed* in that the parties have some compatible and some competing needs; or (3) *compatible* in that they have similar and nonexclusive needs. A particular case illustrates how the division of interests applies.

An author was working on the staff of a research organization, preparing a book that would describe state-of-the-art practice in a



human relations field. He had worked for many months on the project and was pleased with the product. As the book neared completion, the organization's director issued a memorandum informing the staff that in the future, no individual authors' names would appear on publications produced by the agency. The author responded with a countermemorandum that argued in favor of having the author's name on the book, citing the precedent of other agency publications.

In this dispute, it appeared that the positions of the parties were mutually exclusive. A careful examination of the interests, however, indicated room for cooperation. Both parties had *compatible interests* in that they wanted to see the book published and distributed. Publication would financially and professionally benefit both. The parties also had *mixed interests*. The research organization was opposed to the author taking all the credit for the work. The director sought to build his agency's credibility and wanted the book to be seen as an agency product. He was not willing to give away all the credit but was willing to share it. He also wanted the staff to enjoy working for the agency. The author, meanwhile, wanted to take credit but was not willing to push the issue so far that he risked losing his job.

There was clearly a mixed set of interests that allowed for competition and cooperation, but both parties believed that incompatible or exclusive interests predominated in the dispute. The director wanted the agency's name on the cover and sought to have the work identified as a team project. The author wanted only his name on the cover. It seemed like a win-lose dispute.

The parties agreed to negotiate on the issue of identification of authorship. They acknowledged that they had a common interest in publishing and distributing the book as soon as possible. The author accepted that the agency should get credit for sponsoring the research as long as he was given credit for producing it. The director conceded that the author was the primary researcher for the book, but he wanted the team that had performed some of the preliminary work to be given credit also. The author agreed that this was fair and suggested that he include this point in an acknowledgments section at the beginning of the book. His proposal was accepted.

The process of deciding what was to go on the cover was more difficult. Both parties acknowledged that they wanted a particular

name on the cover. A variety of options were explored. The final decision was that both the agency and the author would be credited on the cover. The agency's name was to be in larger type, and the author was to be identified by his agency title. The two parties agreed that their interests were satisfied by this solution.

This case study illustrates several approaches that mediators can use to work with the interests of disputing parties. First, the mediator should work with the parties to jointly identify interests. A party's willingness to identify and explore his or her interests and those of others does not necessarily mean that he or she agrees with the needs of other disputants. Creighton (1972, p. II–8) makes explicit the difference between acceptance of information (emotions, in this case) and agreement. "You express acceptance when you say: 'I understand that you feel such-and-such a way about this topic.' You express agreement when you say: 'You couldn't be more right, I feel that way too.' In the first you accept that the other person feels the way he does, but in agreement you *ally* yourself with the other person."

At this stage, the mediator should be more concerned with negotiators accepting information about interests than with obtaining agreement. Although agreement with the interests of other parties greatly facilitates a party's progress through later negotiation stages, agreement at this point is not mandatory. Parties can accept that others have interests that are different from theirs and still search for mutually acceptable solutions.

Next, the mediator should identify and make explicit compatible or complementary interests. This enables the parties to change their assumptions about the conflict's purity, builds a habit of agreement, and promotes cooperation. Finally, the mediator should focus on mixed and mutually exclusive interests. I will discuss measures to handle such interests in later chapters. Using a process of interest-based bargaining, trade-offs, and compromise, the mediator can help parties to progress and agree on even the most difficult of incompatible interests.

## Framing Joint Problem Statements in Terms of Interests

During the process of discussion of parties' issues, an individual party's interest will often be revealed, identified, or defined. Mediators generally restate for each party the interests that they have heard and then proceed to the next task of problem solving: framing joint problem statements. This is another way of defining an issue, but in a manner that incorporates the individual and joint interests that the parties want addressed.



Joint problem statements include the interests of both or all parties in one comprehensive statement. For example, the mediator in the Whittamore-Singson case, after having both parties articulate their interests and restating them back, might encourage the parties to reframe those interests as a new issue in the following manner: "How could we state this problem in a way that identified both of the sets of interests that you want to satisfy?" After further discussion, the doctors might arrive at the following framing: "How can Dr. Whittamore remain in town, maintain his relationship with his children, and continue to practice medicine, while at the same time the clinic minimizes staff disruptions due to strained relations between the spouses, continues to have Whittamore provide medical services to its patients, and preserves the terms of the contract that were designed to protect the clinic from patient loss, unexpected staff recruitment costs, unpredictable employment conditions, and competition from doctors that it had helped to establish in the community?"

As can be seen from the above, joint framing includes all parties' interests and often enables negotiators to commit to work on a common problem because they believe that their needs will be respected, if not met by, the solutions that will be developed. Once agreement is reached on the joint problem statement, the parties can proceed to explore the issue and interests in more detail; look for objective standards, criteria, or principles that could provide a framework for a solution; generate specific settlement options; or construct a package agreement. More will be said about these activities in subsequent chapters.