

"Negotiation"

By Deborah Lynn Zutter

Introduction

Every lawyer negotiates daily. In fact, statistics demonstrate that fewer than 5% of actions commenced by filing in court registries are actually concluded by trial. Surely this means that lawyers are effective negotiators. Perhaps. The statistics could also mean that clients abandoned the matter before trial for various reasons, including lack of funds, reconciliation, non-defence by the defendant, or concern over the consequences of trial. Another explanation for the significant disparity between actions filed and actions resolved by trial may be that actions are commenced because this is the only way to achieve a particular end, such as divorce or probate.

The preceding twenty-five years have witnessed the significant development of theories of social conflict, negotiation and dispute resolution. Legal academics and social scientists are endeavouring to comprehend the complexities of conflict. As this body of knowledge expands, more information is available to lawyers to draw upon as they assist clients to resolve disputes.

This paper focuses on negotiation as one dispute resolution process. Family law disputes are used to illustrate concepts. As the discussion merely provides a brief overview of negotiation and social conflict theories, those who desire a deeper understanding are encouraged to read and reflect upon the referenced books and articles that are listed at the end of the paper.

Duty to Negotiate

In addition to the ethical requirements imposed by law societies to not pursue vexatious litigation, family law lawyers are required to negotiate by statute:

Duty of legal advisor

9(2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

The traditional approach to negotiation has tended to be a competitive one in which lawyers and spouses use tactics to maximize gains. There are various explanations for this predisposition.

A family dispute is among people in close relationships involving strong bonds. Disputes in these contexts tend to breed the more intense emotions of anger, hatred and contempt.

A divorce or separation is experienced as the "death of a dream". As spouses heal, they pass through stages of anger, depression, bargaining, denial and acceptance. Angry spouses often chose to litigate and give instructions to their lawyers that prolong and transform the conflict.

There are currently higher rates of education and more knowledge about the rights and responsibilities of each spouse. When individual knowledge is combined with a high level of institutionalization of marriage conflicts, it is more likely that a spouse will perceive a grievance and make a claim. The extent to which claims become conflicts is directly related to the ability to access automatic remedies and the certainty of recovery. There are fewer conflicts where automatic remedies are available or where claims are discouraged.

Winning by exerting power is common in our culture. From the crib, to the playground, through pre-school, school and graduate school, at work and with our spouse, each of us experiences again and again the expediency of one person contending and the other yielding. Sometimes the dispute is resolved. On other occasions, not only is the dispute unresolved, the contentious tactics have been responded to with contentious tactics. The conflict has escalated.

“...escalating conflict often reaches the point where both parties find the further use of contentious tactics either unworkable or unwise. If yielding is also ruled out, as it frequently is, the solution to stalemate must eventually be found in problem solving...”

Problem solving negotiation, including such specific applications as “four-way meetings” and “collaborative law” are discussed in this paper. There are other processes. Careful attention must be paid to assessing both the appropriateness and the cost-effectiveness of any dispute resolution process on a continuing basis throughout the life of the file. At the August 1999 meeting of the National Canadian Bar Association, the following resolution was passed unanimously.

Legal counsel has a positive, continuing obligation to canvass with each client, in a fully informed manner, all available dispute resolution processes.

III. Theories about Conflict and Negotiation

“Conflict means perceived divergence of interest, or a belief that the parties’ current aspirations cannot be achieved simultaneously”. It is this belief that frequently causes persons who are experiencing a marital breakdown to hire a lawyer as the decision to separate is being contemplated.

Each person has a preferred and consistent response to conflict. Although researchers have identified 16 responses, avoiding, yielding, contending and problem solving are the most common descriptions of conflict style. These can be conceptualized by a party’s “concern for the other’s outcome” or “cooperativeness” compared to “concern for one’s own outcome” or “assertiveness”.

APPROACHES TO CONFLICT

Notwithstanding a predisposition to select a particular conflict style, there are factors that can influence the choice of strategy with which to respond to a given conflict.

A high concern for one’s own outcome together with a low concern for the other’s outcome will encourage contentious tactics such as making threats, imposing a deadline and using persuasive arguments. This is the use of power to force the other spouse to yield. In the aftermath of the collapse of the family unit, clients often adopt a strategy of I’m going to get all I can! The risk with this strategy is that it may cause the conflict to escalate.

A high concern for the other party’s outcome together with a low concern for one’s own outcome leads to yielding. It is a “lowering of one’s own aspirations and settling for less than one would have liked”. Some family law clients select this strategy. This may be the “guilt-ridden” client. It may be a client who places a high value on relationships. This could also be a client who, having assigned a low value to one issue is willing to yield in the expectation of being acknowledged when addressing another issue. As with contending, there is a risk that this strategy may cause the conflict to escalate due to the fear of appearing weak.

Taking no action or withdrawing is avoidance. This response to conflict is encountered in family law disputes. It may be that this client is denying the existence of the conflict and therefore the marital breakdown. Or, the client may be waiting for the other spouse to make a move.

When both clients have moderate to high levels of cooperativeness and assertiveness, a problem solving strategy is indicated, providing the strategy is perceived as feasible. The objective with this strategy is to find a mutually acceptable outcome. It too has risks: of image loss (being perceived as “weak” for making a concession), position loss (revealed objectives may be used against the client) and information loss (losing the element of surprise should the matter not settle).

There are several arguments in favor of problem solving. This strategy reduces the likelihood of escalation. The use of problem solving by one spouse does not pose a threat to the other spouse. Because it is psychologically incompatible with heavy contentious tactics, its use may deescalate the conflict. Finally, problem solving “encourages the discovery of compromises and integrative options that serve both parties’ interests”.

Although an initial strategy may have been selected, rarely is that strategy used to the exclusion of all others. Thus it is possible that contenting can evolve into problem solving.

IV. Problem Solving Negotiation

Problem solving has both a narrow and a wider meaning.

A. The Wider meaning of Problem Solving

In its wider meaning, "problem solving can be defined as any effort to develop a mutually acceptable solution to a conflict". There are three possible outcomes of problem solving: compromise, agreement on a procedure for deciding who will win, and integrative solutions. Disputants perceive each of these as fair. These outcomes are depicted in the preceding table collectively as problem solving.

Compromise is defined as "an agreement reached when both ... concede to some middle ground".

There are times when spouses cannot compromise and are unable to reach an integrative solution. A fair outcome can be reached by agreeing on and then applying a procedure that is random, where only one spouse will win. Deciding on a procedure for who will keep the family pet on separation may be the only way to reach a fair solution when it is impractical to divide the time with the pet as one spouse is moving to Saskatoon and the other to Ottawa. The couple may agree to decide by coin toss. They could also decide to ask their minister to make a decision. Although there will be only one "winner", as the spouses have mutually agreed on a procedure that they both consider fair, the spouse who does not keep the family pet will accept the result as "the luck of the draw" rather than experiencing it as giving up or being bullied into.

An integrative solution combines the objectives of both disputants. The outcome is usually much better than a compromise. "Agreements involving higher joint benefit are likely to be more stable...[and] because they are mutually rewarding, integrative solutions tend to strengthen the relationship between the parties."

Five types of integrative solutions are available:

Expanding the Pie. When the dispute is about a resource shortage, search for ways to increase the available resources. "Inherent costs" (I must live within 30 minutes of my employment.) are distinct from "opportunity costs" (I would move out of the house if I had somewhere to live.) Where there are inherent costs, expanding the pie may not be viable. Where the matter is one of opportunity costs only, look for creative ways to meet housing needs.

Ask:

- How can each get what s/he wants?
- b. Does the conflict hinge on a resource shortage?
- c. How can the critical resource be expanded?

Nonspecific Compensation. One spouse gets what s/he wants while the other is compensated in some unrelated manner. Usually the spouse whose "demands are granted" provides the compensation.

Leslie will move out of the house providing Pat will give up the Orlando condo.

Ask:

- a. What does Leslie value that Pat can supply?
- b. How valuable is this to Leslie?
- c. How much is Leslie hurt by conceding to Pat?

Note: It is believed that while goods and money can be traded OR love and status can be traded, neither goods nor money can be traded for love or status.

Logrolling. Each spouse concedes on issues that are of low value to oneself and high priority to the other. Logrolling is similar to nonspecific compensation in that the spouses are compensated for making concessions.

Casey wants joint custody of the children, 1/2 of the value of the family home and 1/2 of Kim's pension. Joint custody is Casey's highest priority. Kim wants to keep the entire pension, the family home, and have sole custody. The pension is Kim's highest priority.

Ask:

Which issues are of higher priority and which of lower priority to each spouse?

Compare these lists – Are some issues of high priority to Casey while of low priority to Kim?

Casey will give up 1/2 the pension if Kim will agree to joint custody. Another technique will be used to resolve the issue of the division of the family home.

Cost Cutting. One spouse gets what s/he wants while the other's costs are reduced or eliminated.

Typically the spouse who concedes is compensated by receiving something in return that is directly related to the cost. Objectives are explored in reaching the outcome.

Chen wants the children for the entire Christmas school break. Christmas is important in Chen's family and this year is special as many relatives from overseas will be visiting. Christmas has little significance to Lyn. Not having the time with the children is the big problem.

Ask:

- a. What costs are there to Lyn in meeting Chen's objectives?
- b. How can those costs be eliminated or mitigated?

Also ask, what are the costs to Lyn and to Chen and how can these be eliminated or mitigated?

The spouses agree that Lyn may take the children to Malaysia for the entire month next August and that Chen will have the children for the entire Christmas break except for one day when the children are with Lyn.

Bridging. While neither spouse achieves their initial demands, a new option is devised that satisfies the most important objectives underlying those demands.

Sam is a director and attends promotional events regularly. There are days when Sam hopes to reconcile with Hwee. Hwee knows the relationship is over and does not want to socialize with Sam. Hwee is a producer. The opening for the movie that they collaborated on is next month. They both must attend. If either attends with another, the gossip will be too much. Hwee is also concerned that Sam, a very relaxed person, might embarrass them both by wearing the wrong thing.

Ask:

- a. What are each party's objectives?
- b. What are the priorities among those objectives?
- c. How can both sets of high priority objectives be achieved?
- d. Also ask, which objectives are essential?

Keep in mind that there are objectives underlying objectives, therefore, ask why is a specific objective important?

As underlying objectives emerge, be alert for different meanings or values that each party is applying to the same word.

They agree to accompany each other to the opening, Hwee will select their outfits, and Sam will stop calling Hwee and suggesting that they do things together.

B. The Narrow Meaning of Problem Solving Negotiation

In its narrow meaning, problem solving negotiation is synonymous with "principled negotiation". Compromise is excluded from this definition of problem solving and is treated as "positional bargaining". Choosing who will win is listed by Fisher, Ury and Patton as one way of getting past a stalemate. The narrow problem solving approach emphasizes collaboration in which the spouses are highly assertive and highly cooperative. "Interest-based bargaining" is used to reach a "win-win" outcome. Made popular by Fisher and Ury, principled negotiation encourages disputants to negotiate in the following manner:

1. Separate the people from the problem. Rather than treat the person as "bad", focus on the problem. A failure to understand may be due to a lack of information or a different perspective. Avoid letting one's worst fear provide an explanation for the other spouse's behavior.

Focus on interests, not positions. Desires, hopes, fears, needs and concerns are interests. Interests motivate people; they inform positions. A client's position is that client's solution for realizing his/her interests. There is usually another way for that client to realize his/her interests. Some interests are mutual or compatible, others are conflicting. Each client has multiple interests. "As the purpose of negotiating is to serve [the client's] interests...explain to [the other spouse] what those interests are." Acknowledge the other spouse's interests. Be flexible.

Invent options for mutual gain. Use brainstorming to list multiple options before assessing their viability. Beware of the four obstacles to creative outcomes: "premature judgment; searching for the single answer; the assumption of a fixed pie; and thinking that 'solving their problem is their problem'."

Insist on Using Objective Criteria. Where interests are conflicting, look for standards that may apply and select a solution based on that objective standard, independent of the will of either spouse. Use trade-offs to “split the difference” between the results of equally attractive, but differing standards.

While extremely useful, shortcomings with Fisher and Ury’s approach have been identified since its introduction in 1981. Fisher and Ury’s strong criticism of “positional bargaining” gives the impression that it “wrong” to compromise. In reality, compromise may be a legitimate strategy to adopt following a process in which the spouses recognized each other’s objectives, developed options, then encountered stalemate in selecting which objective criteria were applicable. Compromise may also be legitimate in single issue disputes, where “expanding the pie” is not an option. Of critical significance is Fisher and Ury’s failure to warn negotiators that “splitting the difference” can be manipulated. A negotiator who anticipates the likelihood of resorting to “splitting the difference” may make an exaggerated initial proposal, and continue to propose incremental compromises that will result in an outcome that is biased in that negotiator’s favour. Finally, many useful negotiating strategies, such as trading-off issues (nonspecific compensation) are omitted.

Useful Problem Solving Tactics

One of the challenges of using problem solving is getting the information necessary to develop integrative solutions when trust is often at its lowest between spouses. Ask questions. With client consent, give away some information in the hopes of having this behavior reciprocated. Ask the other spouse to indicate preferences among proposals. Answers will provide clues about priorities.

The application of the following three skills are particularly important in any meeting that has a goal of problem solving:

Establish an atmosphere conducive to problem solving. Select a location that is convenient for both, that is physically and emotionally comfortable, and that provides another room for private meetings between each lawyer and client. Set a time that is both adequate and convenient. For example, a too early start may result in a parent arriving stressed as a result of trying to get children off to school and arrive at the meeting.

Listen actively. Not only does this involve using body language to demonstrate listening, it also entails asking questions to ensure clarity, and summarizing from time to time to check for accuracy.

Ask open questions. The opposite of closed questions By “access” do you mean that Tia will only see the children on weekends?, open questions encourage responses that disclose more information. What do you mean by the term “access”? Open questions often begin with what, when, who, and how.

Compromise

Where a matter is not amenable to settlement by either deciding who will win or an integrative solution, compromise may be utilized. The following tactics apply to compromise.

The ambit claim. This is the extreme initial claim. While this extreme claim can anchor the negotiations in favour of the spouse making the ambit claim, there is the risk that the ambit claim will be received as an insult, whereupon the negotiation could abruptly end.

The first offer. Two methods are available for making the initial offer. In high/soft or low/soft opening offers, the offer is as far from the spouse’s preferred outcome as possible, without being insulting. This form of offer allows for significant latitude in negotiation.

In reasonable/firm opening offers, the offer is close to the spouse’s preferred outcome. There is less room for variation from this form of offer.

The “trick” is to signal which form is being utilized. Often reasonable/firm opening offers are prefaced by language such as: “In light of the special circumstance of this couple...” or “After careful consideration, in the hopes of settling this matter without acrimony, and keeping in mind the recent cases of”

Timing the offer. The tendency to devalue what the other spouse has offered early in the negotiation is known as reactive devaluation. Consider a dispute over how to divide a couple's annual three weeks at their Whistler time-share condominium. An opening offer to alternate years may be rejected due to this phenomenon. When a reasonable offer is made too early there is the sense that the solution is too easy, that something must be hidden. In response to this attitude, some negotiators deliberately avoid making any early offers.

Responding to the offer. While it is always possible to reject an offer and make a counter-offer, another approach is to indicate the aspects of the offer that are agreeable and those that are not. A response to the offer to alternate the use of the Whistler condominium annually could be: While we agree with the concept of sharing the condo, my client would like to use the condo every winter.

If...then. A safe way to package an offer may be to suggest a proposal that is linked to another, in a tentative manner. If you were willing to give my client the two summer weeks each year at the condominium, then I would encourage my client to agree to you having the winter week at Whistle every year.

Another illustration of this tactic is: If we were to agree to your client having the use of the condo during the winter, what would your client be prepared to give up?

Agreement in principle. Some spouses may be amenable to agreeing to a broad principle before addressing details. We can agree to the principle of sharing the Whistler condo equally. While one way to achieve this is to alternate each year, another way could be for each spouse to take one week, to place the third week in the rental pool, and to divide the rental income equally.

Crossing the last gap. Each spouse may resist making the last concession. One may feel that he is bargaining against himself. The other may be afraid of appearing weak. There are several tactics to draw from:

- expand the issues: avoid negotiating over money only. Insert negotiations over how and when the sum will be paid, allowing for a spouse to "win" or save face;

- assign the benefit of what is left unresolved over to another. For example, give the use of the third week at Whistle to the couple's daughter; or

- split the difference.

V. Contending as a Negotiation Strategy

A. Positional Bargaining

"Positional bargaining" is juxtaposed with "interest-based bargaining". There is a "win-lose" outcome to positional bargaining. This is a competitive approach to negotiation that is also referred to as "adversarial negotiation", "competitive negotiation", "zero-sum bargaining" and "distributive negotiation". It is an attempt to "win" a dispute by exerting pressure over the other spouse.

Consistent with the "adversarial" label, users of this strategy are depicted as abrasive and inconsiderate, of putting relationship last.

How can you expect me to negotiate with that low-life lying cheat?

They employ contentious tactics such as threats, stonewalling, bluffing, guilt trips, inflation of claims and personal attacks.

If Leslie doesn't agree to my proposal by Wednesday, I will not pay the mortgage.

There is a tendency to take a position and to adhere to it, without regard to either spouse's underlying objectives.

I want the children one half of the time, and not a minute less!

In an effort to persuade the other lawyer off his/her position, the positional bargainer creates doubt.

Our proposal is so reasonable I am confident that any judge who hears this case will order costs against you.

Problems with Contending

Contentious tactics may escalate conflict with the result that no outcome is reached. Threatening to “take you to court” may lead to court! Proposing one-sided solutions can result in the other spouse and lawyer leaving the negotiation and becoming more entrenched. Negotiations will be more difficult to reopen due to a lack of belief in their likelihood of success.

Where an outcome is reached following contending, it is probable that the spouse with more power has imposed his/her solution. There is little joint benefit to such an outcome as there is a rigidity of thought that is incompatible with creative outcomes. Nor is an outcome reached through contending likely to have achieved resolution. The conflict may continue over a different issue.

Tory may have succeeded in imposing a low amount of spousal support. When Tory needs Pat's consent to take the children out of the country, Tory won't get it without a fight.

C. Benefits of Contending

Despite their defects, contentious tactics are sometimes useful as precursors to, or in conjunction with, problem solving. They can bring a reluctant adversary into negotiation or reduce that spouse's goals to a realistic level that allows discovery of a solution. They can help to persuade adversaries that their own contentious tactics are not likely to succeed, encouraging them to shift to problem solving. Contentious tactics can sometimes contribute to the development of win-win agreements by sharpening understanding of their user's key concerns.

D. Responding to Contending

One response to contentious tactics involves ignoring or putting up with them. Over time, ignoring or accepting will become less palatable and could eventually lead to the end of the negotiation. Another reaction to contending is to respond in kind. Not only does responding to contentious tactics with contentious tactics run the risk of the conflict escalating, it seldom encourages problem solving. Rather than respond or ignore, consider one of the following tactics.

Recognize the tactic, name the tactic, and insist on negotiating about the use of that tactic in the negotiation.

Jay, you have just threatened us with court. I want to be clear. Threats are the way we will negotiate?

Go to the balcony. Control one's own behaviour by suspending the inclination to respond to an attack or a refusal. Instead, reflect on your client's objectives.

Step to their side. It is important to defuse the other spouse's anger, fear, hostility and suspicion. This is achieved by listening, acknowledging and agreeing where possible.

Reframe. When the other lawyer or spouse takes a hard-line position, redirect them to the challenges of meeting each spouse's objectives.

Toni: I'd rather go to jail than pay spousal support.

Problem solving lawyer: I can understand that each of you has strong feelings about what has occurred and how to uncouple. I am here to find ways to do this that will meet your objectives as well as my client's .

Build them a golden bridge. Don't push the other spouse and lawyer to negotiation. Look for opportunities to involve them in the process and address their needs in the design of the negotiation process. Look for face-saving ways to do this.

Problem solving lawyer: What are your thoughts about scheduling the meeting for an entire day? On the one hand, we should be able to get everything addressed. On the other hand, it may be easier for either or both clients if we break the four-way meeting into two half-days.

When the refusal is to negotiate at all, ask open questions in an effort to understand the objection to negotiation. Perhaps the relationship has been abusive and the other spouse is unable to be in the same room with the client. It may be possible to address concerns about negotiating by being flexible about how

the negotiation occurs. In this example, counsel could be in the same room while their clients were elsewhere and accessible by phone.

Use power to educate. If the opposing spouse and counsel continue to resist problem solving, make it hard for them to continue to refuse. Rather than threatening or pushing, educate them by asking reality-testing questions and informing them of your options if the spouses are unable to reach a consensual outcome. Stress that your client has a goal of mutual satisfaction.

Separate the people from the problem. There are many tactics calculated to annoy or disempower. Consider: the cell-phone left on; taking calls during the negotiation; placing chairs inappropriately; providing uncomfortable chairs or inadequate refreshments; rifling through paper while someone is talking. Instead of responding with anger, insist on having whatever is occurring that is counterproductive to a problem solving negotiation remedied before the negotiation continues.

Phony Facts. "...Do not let someone treat your doubts as a personal attack...A practice of verifying factual assertions reduces the incentive for deception, and your risk of being cheated."

The good guy/bad guy routine. This is a common form of manipulation used by a negotiating team. After dealing with the bad guy, it may be tempting to make a concession to the good guy. Don't.

Escalating demands. "A negotiator may raise one of his demands for every concession he makes on another. He may also reopen issues you thought had been settled. The benefits of this tactic lie in decreasing the overall concession, and in the psychological effect of making you want to agree quickly before he raises any more of his demands...When you recognize this, call it to their attention and then perhaps take a break while you consider whether and on what basis you want to continue negotiations."

Psychological Traps

Researchers have uncovered aspects of human psychology that inhibit rational problem solving. While these are innate and difficult to counter, being aware of them will allow the professional problem solver to consider whether a problem is a psychological trap and if so, how it might be addressed.

Anchoring. There is tendency to overrely on the first information received. That information may be in the form of a statement, a trend, a past event or an offer. The first offer in a negotiation can become an anchor if it is responded to by bargaining down (or up) from it. Anchoring is a widespread and difficult to overcome psychological trap. Try to consider a problem from different perspectives. Before discussing the matter with others, do your own analysis to avoid becoming anchored by their ideas. Be open-minded in receiving options from others. Finally, prepare well before negotiating. A well-prepared negotiator is less susceptible to anchoring.

Loss aversion. Losses generally loom larger in the mind of a client than do gains. Giving up \$2,000 has a greater impact than receiving \$2,000. This is particularly evident when the retention of the status quo is an option. A spouse will weigh the disadvantages of any alternative to the status quo more heavily than its advantages. This systemically different evaluation of concessions made and concessions received suggests that the most effective concessions a lawyer and client can make are those that reduce or eliminate the other spouse's loss. Increasing already large gains will add little value. Some research suggests that loss aversion applies to assets that are held for use and not to assets that are held for exchange. Thus, loss aversion may apply to the family home but not to the utility company shares owned by the spouses.

Status Quo. This is the trap of "keeping on keeping on." There is a strong bias in favour of the status quo. Not only does this outcome require less energy, the consequences of selecting it are known. What is not known, are the opportunities that are missed by selecting a different outcome. Do not let the status quo be the only option; look for others. Put all options, including the status quo, through an assessment of how well each option meets the client's or the spouse's objectives.

Posing the Wrong Question. The manner in which an issue or proposal is framed at a negotiation can have a huge impact on the outcome. Reflect on your responses to the following:

May I eat at the negotiation?

Shall we continue negotiating while I eat?

People tend to accept the problem the way it is framed. Resist accepting the initial “frame” and actively look for different ways of framing the problem.

Gains over Losses. When combined with the psychological trap of risk aversion, the manner in which a question is framed becomes critical. Researchers have found that people are risk-averse when the problem is posed in terms of gains, but risk-seeking when the problem is posed in terms of avoiding losses.

Consider the following two choices regarding a \$600,000 family asset pool:

This plan will ensure the continuing ownership \$200,000 of the family assets.

This plan has a one-third probability maintaining ownership of the entire \$600,000 but it has a two-thirds probability of ending up with nothing.

In studies, 70% of respondents would choose “a”, the “less risky” outcome. Now consider the following choices:

This plan will result in the loss of two-thirds of the family asset pool worth \$400,000.

This plan has a two-thirds probability of resulting in the loss of the entire family asset pool, but has a one-third probability of obtaining the entire asset pool worth \$600,000.

80% of respondents preferred a solution like “d” where the outcome was framed as avoiding losses. To counter this trap, work at framing issues and problems in a manner that is consistent with your client’s objectives. Ask if an outcome under consideration would be different if the problem or issue was framed differently.

Optimistic overconfidence. Each spouse will tend to be too sure of his/her chances of success, as well as his/her ability to impose a solution. This leads to a belief that s/he can prevail and therefore need not make concessions. There is also the tendency to attribute less initiative and imagination to the other spouse. As the nature of this psychological trap is to undervalue those aspects of the dispute of which each spouse is relatively ignorant, one way to attempt to counter overconfidence is to obtain and provide information. Another intervention is to pose questions such as: What would happen if...?

Neglecting Relevant Information. In any decision making process, it is important to consider the base line or rate. Having identified the base line, consider all relevant information. In a dispute over how long a 45 year old spouse who has been a homemaker will need support, review employment statistics. Look for hidden or unacknowledged assumptions. Factor all of this information into the decision making process.

I only want what’s fair! Just as fairness has different meanings to different people, it is likely to be ambiguous as between separating spouses. There is a tendency to link fairness to a reference point. In determining the reference points, previous transactions can be informative. The rules of “fairness” exhibit a bias in favour of retention of the reference point. Thus, “to deprive somebody of something which he merely expected to receive is a less serious wrong, deserving of less protection, than to deprive somebody of the expectation of continuing to hold something which he already possesses.” However, a reference point can be influenced by how the problem is framed. Framed one way, the reference point might be zero; framed another way, it may be the status quo. Consider identifying the reference point for each spouse, drawing out of each spouse his/her attributes of “fairness”, and be alert to the trap of favoring the reference point.

Certainty effect. Outcomes that are uncertain are often undervalued. Putting this another way, outcomes that are certain are weighted higher than warranted relative to uncertain outcomes. As a result of this, there is an unwarranted resistance to making a strategic concession when the outcome is unknown. Remind yourself of your client’s objective and ask whether a possible strategic concession is being undervalued. Act accordingly.

Sunk Costs. It is tempting to continue to pour more money and time into an option once it has been selected without reassessing the viability of doing so. Lawyers and clients who have selected a dispute resolution option such as “going to trial” can find themselves in this trap. New information makes “going to trial” less attractive, yet money and time have been invested in pursuing trial. One method of overcoming the trap of “protecting earlier costs” is to have another person objectively review the option. Is it realistic to continue pursuing that option? If not, get out of the trap.

Dramatic Event. The tendency to focus repeatedly on one dramatic event allowing that event to influence rational decision making is also known as the “recallability trap”. Family law clients are particularly susceptible to this. Recognizing it as a psychological trap is the first step towards countering it. Thereafter, it is helpful to work through the decision-making process. What are the client’s objectives? What are the alternative ways of attaining those goals? What are the risks associated with each alternative? Given that the dramatic event is in the past, how can the client move forward?

While the foregoing discussion is intended to alert negotiators to psychological traps commonly encountered, knowledge can be used defensively or proactively. Thus, it is possible for an informed negotiator to employ a psychological trap as a negotiation tactic. For example, a negotiator may purposely set an initial offer up as an anchor.

Preparing to Negotiate

"Before every meeting, prepare. After every meeting, assess your progress, adapt your strategy, and prepare again. The secret of effective negotiation is that simple; prepare, prepare, prepare."

The underlying assumption for the following discussion is that the lawyer prepares and then the lawyer prepares with the client. Even where the model of negotiation selected is lawyers only, without the presence of the spouses, meeting with the client in advance is essential.

Certainly the extent of preparation must respect the limitations on a lawyer's time as well as most client's finite ability to pay legal costs. In many cases, thorough preparation for negotiation will result in settlement. For those issues that remain outstanding following the negotiation, the preparation for the negotiation need only be updated for subsequent dispute resolution processes. What new information has impacted on the range of possible outcomes? What dispute resolution process is appropriate at this time?

A. The Law

Prior to the negotiation, review the relevant statutes and the applicable cases. Applying the facts as you know them, work towards a goal of informing yourself about:

1. the range of outcomes suggested by law;
2. the factors that could vary those outcomes; and
3. how the identified factors could vary the outcomes.

Write this down. It will be useful at the negotiation.

Meet with your client and explain the outcomes suggested by law given the facts as you understand them. This is an opportunity for:

1. the client to correct misunderstandings and supply information; and
2. you to inform your client about the range of outcomes if the matter proceeds to trial.

Most clients are concerned about legal costs. What information about costs and disbursements would assist your client during the negotiation? The preparation meeting with the client is an opportune time to provide information about legal costs.

What are the Client's Objectives?

It is tempting to fit a family law client's dispute into a box. After all, experienced lawyers have encountered the issues before. They can anticipate fairly accurately the range if not the exact results of a trial. What is the point of taking the time to identify the client's specific objectives, particularly when there is a risk of the client confusing the lawyer with a mental health professional? The answer lies in social science.

Describing the problem, clarifying objectives, and coming up with good alternatives form the foundation of good decisions. In well over half of all decisions, a good job on these three elements will lead quickly to a good decision.

"Objectives" are those fundamental hopes, needs, concerns, aspirations and goals that inform decisions. They form the basis for evaluating the alternatives that will be considered at the negotiation. They may lead to more and more creative outcomes. They are individual. "Different people facing identical situations may have very different objectives."

Judy, 33, is separating from Peter after 8 years of marriage. She stayed home. The family assets are worth 1.5 M. Peter earned \$400,000 last year. Her objectives are to succeed on her own. She believes that there is a future in natural medicine and wants to set up her own ginger farm. Her priority is to get as much money from the settlement as possible so she can invest it in "Judy's Ginger". \$700,000 net of tax sounds fair. While she isn't interested in receiving support from Peter, she would appreciate accessing his business acumen from time to time.

April, 33, is separating from Troy after 8 years of marriage. She stayed home. The family assets are worth 1.5 M. Troy earned \$400,000 last year. Her objectives are financial security. She knows it's a big bad world out there and really prefers the society life that they have been enjoying for the last few years. She wants a fully paid for, furnished, luxury condo in downtown Edmonton, a share portfolio worth \$250,000, continuation of the membership at the Royal Glenora Club (paid by Troy's firm) and monthly support of \$4,000. An annual "round-the-world" first class air ticket would be nice too, but she won't press.

What are the client's hopes? Which of those have the highest priority? Which are on the "wish list"?

What does the client need? How will those needs change over time? As there may be layers of needs, ask what's important about keeping the family car? Having the debts paid? Having a share portfolio worth \$250,000? (Note: A lawyer's assumptions about why the client needs the portfolio may be very different from the client's reasons. Check assumptions.) Which needs are essential?

What is the client concerned about? Why? What is the worst possible outcome? What does the client want to avoid? What assumptions is the client making with regard to these fears?

What are the client's aspirations and goals? This year? In 10 years? Do any of these appear to conflict? What does the client really need?

In making these lists, it will be useful to:

- separate the lists for the client's objectives from the client's list of objectives for the children;
- priorize the objectives from most to least important; and
- identify which objectives are essential.

"The most powerful [objectives] are basic human needs." These are security, economic well-being, a sense of belonging, recognition and control over one's life. These human needs will form part of every family law negotiation. Anticipate how they can be met for each spouse.

To the extent that resources permit, it is useful to anticipate the spouse's objectives, particularly those that the client believes must be met. How do the spouse's assumed objectives integrate with the client's objectives. Which are mutual or identical? A quick and final resolution. Which are complementary? She doesn't want his golf club membership. He always hated the cabin. Which are apparently in opposition to each other? They both want 60% of the family assets. In respect of these conflicting objectives, which of the five integrative problem solving solutions will you use at the negotiation?

Alternatives and Chances of Success

Once the objectives have been identified, in collaboration with the client, generate several detailed alternative outcomes. What are the consequences for each outcome? How does each outcome meet the client's objectives? How do they meet the spouse's objectives? In attempting to select the wisest outcome, beware of the psychological traps of anchoring and status quo.

The chances of success ("risks") will vary with each alternative. In reviewing these risks with the client, it is likely that objectives will be refined or uncovered.

Keep in mind that the purpose of identifying alternatives at this point is to prepare for the negotiation. Resist becoming fixed on one alternative. There will be new information at the negotiation that will influence any alternative. Until confirmed at the negotiation, the "spouse's objectives" are merely assumptions.

What are the Causes of the Conflict? Why Has the Matter Not Settled?

It is always useful to anticipate the causes of conflict. In preparing for negotiation, lawyers ought to analyze the causes of the conflict, develop an hypothesis and decide on how to act given their hypothesis about why the matter has not settled.

The client is the first source of information about the causes of the conflict. What is the client's explanation about why the matter has not settled? From the lawyer's objective perspective, what are the causes of the conflict?

There are various theories about the causes of conflict. The following causes and suggested interventions were developed by Christopher Moore. In which of the following categories of causes of conflict does the client's explanation fit?

1. Is this a data conflict? A data conflict is characterized by a lack of information, misinformation, different views of what is relevant, different interpretations of data, or different assessment procedures. If the lawyer is muttering things like I would settle this one! or If I was in their shoes, I would..., these may be clues that there is a data conflict. Perhaps your assessment of the dispute is informed by data that is different from the spouse's lawyer.

It is highly likely that neither the client nor the other spouse have all the information that each requires. In fact, it is so rare for both parties to have full and complete information, the system of discovery has evolved to facilitate and encourage the exchange of relevant information. With the client's involvement, prepare two lists:

- a. What information do we need?
- b. What information do we have that they need? What information will assist in informing them about the client's objectives?

Note that a competitive negotiation strategy would suggest withholding this information, whereas a problem solving negotiation strategy encourages exchanging information.

Lawyers are skilled at managing information and can often resolve a data conflict quickly and efficiently.

2. Is this a Relationship Conflict? Marriage breakdowns are relationship conflicts. They are characterized by strong emotions, misperceptions or stereotypes, poor communications or miscommunication, and repetitive negative behavior.

One of the strongest sources of conflict arises from the reality that one person decided to leave the relationship first. This has a twofold impact. Typically the person who decided to leave has moved through several of the stages of healing and is behaving "normally". The spouse who was left is feeling rejected, may be in the early stages of healing and is not behaving "normally". Lawyers are confronted with difficult questions at this point. Is the client emotionally capable of giving instructions? Of identifying objectives? Of negotiating? Is negotiating a short-term "without prejudice" agreement addressing essential details for the next few months the most appropriate dispute resolution process?

Settling aspects of the relationship conflict may be essential before the negotiation over substantive matters can occur.

3. Is this an Interest Conflict? Interest conflicts are caused by perceived or actual divergence over substantive, procedural and psychological interests. Most family law negotiations are focused on substantive interests: the division of the family assets; how the spouses will parent their children; and their financial responsibilities to each other. Use integrative problem solving tactics to resolve these disputes.

Procedural interests will focus on when, where and how the spouses reach their substantive outcomes. Take into account your client's procedural interests in planning for and conducting the negotiation. Some of the client's anxiety about the negotiation can be reduced by addressing procedural interests. For example, if your client is most alert in the morning, schedule a morning negotiation.

Lawyers will resist dealing with psychological interests with good reason. They are not trained to do so. Nevertheless, psychological interests will inevitably surface during a negotiation between separating spouses. A lawyer's current practice may be to ignore tears and respond to anger with anger. How is this working? What might work better, particularly for the client?

4. Is this a Structural Conflict? Structural conflicts are caused by destructive patterns of behavior or interaction, unequal control, ownership, or distribution of resources, unequal power and authority, geographic, physical, or environmental factors that hinder cooperation, and time constraints. Lawyers can and do balance power between spouses. This is particularly helpful in traditional marriages that have been characterized by a division of labor resulting in one spouse controlling the majority of the resources.

5. Is this a Value Conflict? Value conflicts are caused by differing ways of

valuing life, ideology, religion, ideas and behavior. Separating spouses frequently express differing values. It is unlikely that either spouse will change his/her values. Identifying a value conflict in advance may allow a lawyer to spot it quickly at the negotiation, to draw it to the attention of the spouses and to propose that they recognize that their values are different and unlikely to change. This allows the spouses to “agree to disagree” and carry on with the negotiation.

E. Structuring the Agenda: Recognizing Areas of Agreement and Identifying Issues to be Settled

In any dispute there are often areas of agreement. Identifying these agreements and listing them early in the negotiation builds momentum in the problem solving negotiation. It confirms that these two people are able to agree and gives hope that the negotiation will be successful.

Toni and Terry had always planned to leave their collection of Acadian artifacts to Toni’s nephew, Drew. They are childless. One of Drew’s ancestors was Acadian. Now that they are separating, Toni is afraid that Terry will want to sell the artifacts. Both lawyers have spoken and Terry’s lawyer has indicated that Terry wants to give the Acadian artifacts to Drew now. Notwithstanding the conclusion of their relationship both Toni and Terry are expressing agreement with regard to their Acadian artifacts. Knowing that they can agree about one matter will give them momentum as they address other matters.

What are the issues that need to be addressed at the negotiation? A lawyer’s first draft of an issue list for a typical family dispute may resemble the following:

Whether Jane will keep the house? Who will have custody? How much spousal support will Tim pay?

More neutral phrasing will create an effective Agenda without igniting Tim. In stating the issues, be mindful of psychological traps such as posing the wrong question and gains over losses. The issues listed in the final Agenda may be:

What will be done with the family home? What will be the parenting arrangements? How will spousal support be addressed?

Both lawyers will want to plan the Agenda before the negotiation. In addition to identifying areas of agreement and careful phrasing of issues to be settled, other points to consider in building the Agenda for the negotiation are:

“...it often makes sense to put easier issues earlier in an agenda. This is because the success of problem solving is to some extent cumulative, in that earlier achievement establishes the impression that later achievement is possible”; and

it may be prudent to establish a ground rule that all agreements are tentative until all issues have been fully discussed.

F. Strategies for the Negotiation

When the preparation for the negotiation has included identifying the Best Alternative to a Negotiated Agreement (BATNA), both lawyer and client will recognize if the negotiation is proceeding towards a settlement that should be rejected. Knowing this in advance will avoid being overwhelmed by a disparity of power or simply being ground into acceptance.

Having identified your BATNA, what strategies will be adopted for the negotiation? What is each lawyer and each client’s preferred conflict approach? Contending? Avoiding? Yielding? Problem Solving? What factors indicate a different approach? Assuming that a decision has been made to participate in a problem solving negotiation, what lawyer and client behaviors will encourage a successful negotiation? Are contentious tactics anticipated? How will they be dealt with?

There are occasions when the most thorough preparation and the best intentions do not culminate in settlement. Before leaving the negotiation room endeavour to list the (tentative) agreements that were reached and list the issues that need to be resolved. The next step will be to decide on the dispute

resolution process to use next. Rather than trying to reach a decision on the dispute resolution process at the end of a disappointing negotiation, agree that the lawyers will speak with each other within the next week.

Following an inconclusive negotiation, debrief. What happened? Why? What psychological traps were at play? What was learned at the negotiation? How can that information be used to assist the client in settling the dispute? What is the next step? Generally, what lessons were learned about negotiation?

G. A Need for Change

There is an aspect of life that is frequently overlooked in family law agreements. People and their relationships are dynamic. It is unlikely that a parenting plan developed for a 4-year old will be appropriate when that child is 14. Counsel can assist those clients who may need to accommodate changes over time.

1. Normalize. Warn clients that some aspects of the agreement they have reached may need to be revisited as time passes. Only in rare cases, is the need to change a result of bad faith.
2. Plan for Change. Develop with both spouses and counsel a strategy for anticipating and dealing with change. Include regular opportunities for the exchange of information. If negotiation doesn't work, what will be the next dispute resolution process utilized?

Negotiation Models

Lawyer – Lawyer

Clients are physically excluded in a lawyer – lawyer negotiation model. This negotiation can occur by phone or in person. The extent or limits of authority to settle must be expressed at the commencement of the negotiation. There are occasions when this model is appropriate.

1. It is the most efficient way to attend to procedural details, such as:
 - a. Whether to negotiate?
 - b. How to structure the negotiation?
 - c. What information is to be exchanged in advance of the negotiation.
 - d. Who will participate in the negotiation.
 - e. Setting the Agenda for the negotiation.
 - f. Where an action has been commenced in a court registry, what steps to take in the action pending the negotiation.
 - g. Singling an intention to use problem solving.
2. It may not be possible or practical for the spouses to be physically present at the negotiation.

The spouses may be in different locations. When this is the case, consider the possibility of using video or phone conferencing.

It may be prudent to not include the spouses in the negotiation where there has been a significant power disparity or a history of spousal abuse. This is a decision to make with the client.

3. It is counsel's preferred model.

Regardless of the reason for selecting the lawyer – lawyer model, consideration should be given to arranging for the client to be readily accessible during the negotiation so that information can be checked, assumptions can be corrected, and instructions can be obtained.

Following a successful negotiation, debrief. What happened? What strategies and techniques worked? What could be improved upon? Generally, what lessons were learned about negotiation?

The Four-Way Meeting

Both lawyers and both clients participate in the “four-way meeting” model. Other persons may attend for various purposes. One or more professionals who possess information that the spouses will need to make decisions may be included for relevant portions of the negotiation. Either spouse may choose to bring a

support person. There are various roles for a support person. Some merely attend and leave the negotiation with the spouse, sitting in the waiting room during the negotiation, being available to the spouse during breaks. Other support persons come into the negotiation and participate to varying degrees. Caution is recommended when bringing a support person into the negotiation room. Lawyers, clients and the support person must be clear on why the support person is entering the room and what the support person's role will be. In some situations, the support person can be the agent of reality, assisting the client to manage his/her emotions, to comprehend what is occurring in the negotiation, and to make wise decisions.

The presence of the spouses at the four-way meeting allows:

1. final decisions;
2. full exchange of information;
3. correction of misapprehensions;
4. checking assumptions;
5. exploration of each spouse's objectives;
6. creative generation of alternative outcomes;
7. opportunity for each lawyer to persuade the other spouse and lawyer about why a particular result is appropriate in this matter; and
8. selection of outcomes that incorporate each spouse's essential objectives and are within the range indicated by the applicable statutes as interpreted by the courts.

Collaborative Law

The collaborative law negotiation model builds on the four-way meeting model by adding two innovations.

It is interdisciplinary. Teams of professionals work with the spouses and children. Lawyers are partisan representatives for their clients. Other professionals are involved as determined by the means and needs of the family. Divorce coaches assist spouses individually to cope with "divorcing". Financial planners are non-partisan, working with both spouses. The child specialist assists the children, linking the children with the negotiation and assisting them to address their concerns.

The Collaborative Family Law Agreement ensures commitment. Both lawyers and both spouses enter into a written agreement about how they will negotiate. Before entering into the agreement, it must be stressed that a client's refusal to permit his/her lawyer to disclose all relevant information will result in the lawyer ceasing to act for that client thus abruptly concluding the collaborative law process. The essential clauses of the agreement are:

- a. should the collaborative negotiation process fail, each lawyer will retire from the dispute and each client will have to retain another lawyer;
- b. contentious strategies and tactics will not be used. Rather, lawyers and clients agree to work collaboratively, working with integrity and honesty for the best interests of the family;
- c. all relevant information will be disclosed;
- d. if an action has been commenced, no steps will be taken during the negotiation. If an action has not been commenced, it will not be during the negotiation;
- e. the content of the negotiations will remain confidential; and
- f. while lawyers may retire from the collaborative family law matter for various reasons, they will retire from the case if they become aware that their client is not keeping the spirit of the agreement.

The terms of the Collaborative Family Law Agreement require a solicitor-client relationship that is different than the traditional relationship. For this reason, a unique Solicitor-Client Agreement must be entered into between each collaborative family law lawyer and client before the Collaborative Family Law Agreement is signed.

The concept of collaborative law negotiation is new and it is evolving. Aspects of the foregoing model may change as experience is gained in working with the model. For example, mediators can be added to the team and used to assist the spouses to negotiate discreet issues in dispute.

Several groups of family lawyers and mental health professionals in Canadian and American jurisdictions have been developing this process. A website describing collaborative law is located at .

Whether or not there is a collaborative law team in the lawyers' jurisdiction, if both lawyers and both spouses are willing, they may create their own collaborative family law agreement prior to commencing to negotiate.

As the collaborative negotiation model is based on a problem solving strategy, the process of reaching integrative outcomes needs to be understood by the lawyers. Mediation training is recommended.

Quick Tips

On those occasions when time discourages a more thorough review of this paper, the following tips may facilitate your negotiation.

Timing. You need to consider the best time to negotiate and give yourself and your client enough time to negotiate.

Open. Be open. You may not have considered the best result. You may get what your client wants by being willing to meet the objectives of the other spouse and the suggestions of her lawyer.

Prepare. "Know what success looks like." In addition to finding out what your client's objectives are, find out as much as you can about the other spouse's.

Courtesy. "You can catch more flies with honey than vinegar." You are unlikely to receive information or be heard if you are rude. On the other hand, being courteous encourages people to work with you, to provide you with more details and to hear what you have to say.

Listen. "God gave us one mouth and two ears. In negotiation we should use them in proportion."

Authority. Be sure you know the limits of both your authority and that of opposing counsel.

Objectives. Seek out the objectives of both spouses. These are the keys to an enduring resolution.

Traps. Remember that you, opposing counsel and each spouse are subject to psychological traps. Be wary of them, particularly anchoring, the status quo, loss aversion and neglecting relevant information.

IX. Conclusion

Negotiation is a skill that can be learned. In their role of professional problem solver, lawyers have ongoing opportunities to hone negotiation skills.

The expanding body of research into negotiation and social conflict has begun to explain the manner in which conflict is an integral part of our social reality. Different strategies for responding to conflict are available and appropriate for certain purposes. Although an individual may have a predisposition to a specific conflict resolution strategy, that predisposition can vary as context and need dictate. There are a variety of explanations for the emotional manner in which many family law clients behave. Despite intentions to be rational, lawyers and clients are subject to psychological traps that inhibit negotiations.

This article has touched on some of the research that is available. An effort has been made to inform effective negotiation practices. As is evidenced by the emergence of collaborative law, it is possible for lawyers and clients to develop a negotiation process that is responsive to the unique needs of a particular dispute.

For Further Reading:

Boulle, Laurence. *Mediation: Principles, Process, Practice*. Sydney: Butterworths, 1996.

Boulle, Laurence. *Mediation Skills and Techniques*. Sydney: Butterworths, 2001.

Fisher, Roger and others. *Getting to Yes: Negotiating an Agreement Without Giving In*. (2nd ed.) Sydney: Random Century Australia (Pty) Limited, 1991.

Hammond, John S. and others. *Smart Choices: A Practical Guide to Making Better Decisions*, Boston: Harvard Business School Press, 1999.

Kahneman, Daniel and Tversky, Amos. *Barriers to Conflict Resolution*. New York: Norton & Co., 1995.

Miller, Richard E. and Austin Sarat. *Grievances, Claims, and Disputes: Assessing the Adversary Culture*. 15 *Law & Society*, 525-567.

Moore, Christopher W. *The Mediation Process: Practical Strategies for Resolving Conflict*. (2nd ed.) San Francisco: Jossey-Bass, 1996.

Provis, Chris. "Interests vs. Positions: A Critique of the Distinction." (1996) 12 *Negotiation Journal*, 305-323.

Pruit, Dean and Peter Carnevale. *Negotiation in Social Conflict*. Pacific Grove, Calif.: Brooks/Cole Publishing Company, 1993.

Rubin, J. and others. *Social Conflict: Escalation, Stalemate, and Settlement*. 2nd ed. New York: McGraw Hill, 1994.

Ury, William. *Getting Past No: Negotiating Your Way from Confrontation to Cooperation*. Sydney: Bantam Book, 1991.

Wolksi, Bobette. "The Role and the Limitations of Fisher and Ury's Model of Interest-Based Negotiation in Mediation." (1994) 5 *Australian Dispute Resolution Journal*, 210-221.