

# When and How to Negotiate

Denise Madigan

Gerard McMahon

Stephanie Rolley

Lawrence Susskind

*The National Institute for Dispute Resolution, in conjunction with the Harvard Program on Negotiation, has produced a manual entitled: New Approaches to Resolving Local Development Disputes. In addition to "when and how", the manual uses six cases to illustrate recent efforts at mediated negotiation, outlines a step-by-step guide to using mediated negotiation, and lists sources of support for use of the technique.*

*"Mediated Negotiation" is a term used to describe the role of a mediator in public disputes. A "mediated negotiator" is someone who is concerned with the traditional elements of mediation such as fairness and process, as well as with the quality of the outcome. This term readily applies to planners. In the following excerpt from the National Institute for Dispute Resolution, some valuable pointers are given about how to identify a case ripe for a mediated settlement, how to handle the negotiation, and how to evaluate the outcome.*

## When To Try Mediated Negotiation

Not all local public disputes are amenable to or appropriate for negotiation. In some cases, a concerned party or decision-maker will want to use traditional administrative, legislative, or judicial processes to make controversial decisions or handle complex disputes. And even when these processes may seem less than perfect, mediated negotiation is not always the best alternative.

Experience over the last ten years suggests that there are certain characteristics of disputes which make them more or less appropriate for mediated negotiation.

## Questions To Ask Before Negotiating

There are several questions which should be asked before launching a mediated negotiation to resolve a local public dispute.

*"Are the likely parties to the dispute numerous diverse, and hard to identify? How much power do they have to block implementation of any potential agreement OR of any future activities that may have been planned?"*

In situations where the parties are numerous diverse, and hard to identify, a mediated negotiation may be difficult to organize, but may also be the best way to address the concerns and secure the support of the involved parties. Typically such parties are frustrated by their lack of access to other decision-making or dispute resolution processes. They haven't the resources, clout, or expertise to gain entry to board rooms or court rooms, yet their cooperation and support may be essential to the success of a project or policy. By including these people in a mediated negotiation, all are more likely to understand each others' concerns, and to treat the decision or proposal as a JOINT problem requiring joint solving and support.

In addition, there may be parties whose cooperation is not critical to THIS particular project, but whose long run cooperation might be useful in a number of other projects. Including them in negotiations about which they care a great deal but over

This article is excerpted from a paper titled, *New Approaches to Resolving Local Development Disputes*, developed under grant from the National Institute for Dispute Resolution. The paper will be published by NIDR later in 1986.

Denise Madigan, Gerard McMahon and Stephanie Rolley are research associates with the Public Disputes Program of the Program on Negotiation at Harvard Law School. Lawrence Susskind is director of the Program and a professor of planning at MIT.

which they have very little immediate influence may be wise: their support and good will may be secured for other projects in the future.

*Are the parties willing to negotiate? Do they have incentives to negotiate?*

There is much debate in the mediation literature about the appropriate "timing" of negotiations. Some people argue that mediation only works when a conflict is "ripe," that is, when the parties have squared off and are ready to do battle.

In contrast, mediation can work not only to respond to disputes that have erupted, but also to preempt disputes before they emerge. The decision about "when" to introduce mediation involves a tradeoff. In the early stages of conflict, the parties have not yet publicly committed themselves to positions; they are therefore freer to make concessions without losing face. But in the very early stages of conflict, the parties may not yet recognize or understand the relevant issues. They may also feel little immediate incentive to resolve their differences.

In the later stages of conflict, the parties may have incurred substantial costs (or losses) doing battle. As delays or lawyers' fees mount, the parties may be more interested in resolving their differences than they were months before. Thus, the incentives to negotiate may be greater later in a dispute. On the other hand, the parties may become more firmly rooted to their positions as time passes. If they have made their demands public, they may be very reluctant to relax those demands in the course of negotiations.

In the end, the mediator and the parties should be sensitive to the dynamics of the conflict. Mediation can work in the very early or very late stages of conflict, as long as (a) the parties have an incentive to negotiate, and (b) they have not publicly locked themselves into positions.

*"Is there a controversial value judgment at the heart of the dispute? Are fundamental principles in opposition?"*

In some cases, it may be appropriate for a judge or arbitrator to render a "verdict" in a dispute. Where fundamental notions of right and wrong are involved, and where people are reluctant to compromise these notions, mediated negotiation is unlikely to work. Imagine anti-abortionist and pro-choice proponents negotiating a settlement on federal abortion rights policy. It is highly improbable.

But in some cases, disputes are less concerned with ethical or moral judgements and more concerned

with differences in preferences. Party A wants to open a shopping center and party B wants to eliminate traffic from the neighborhood. These disputes may end up being ill served by narrow legal determinations of right and wrong, especially since there may be ways to make all the parties BETTER OFF by taking a broader look at the dispute. (Perhaps Party B allows Party A to introduce a variety of shops in the shopping center, in return for an agreement changing two-way traffic to one-way traffic in the neighborhood. B gets more variety in his enterprises and A gets reduced traffic and the convenience of the center.) Mediated negotiation can enable the parties to look at ALL the issues in a dispute, and thus attempt to reach WIN-WIN solutions that take the broader issues into account.

*"Are the stakes great enough to justify the cost of a mediated negotiation?"*

The scope of any dispute resolution process should be consistent with the scope of the issues involved. The techniques described in this handbook may be applied to a wide variety of situations. Associated costs will vary according to the techniques used and the scope of the issue. For example, you probably do not want to launch a 10-month negotiation effort with 50 parties just to resolve a dispute over a traffic light.

Discussions involving the installation of one traffic light should involve little cost and time. However, plans for citywide installation of a new traffic management system may warrant negotiations between the city, citizens, the business community and local developers.

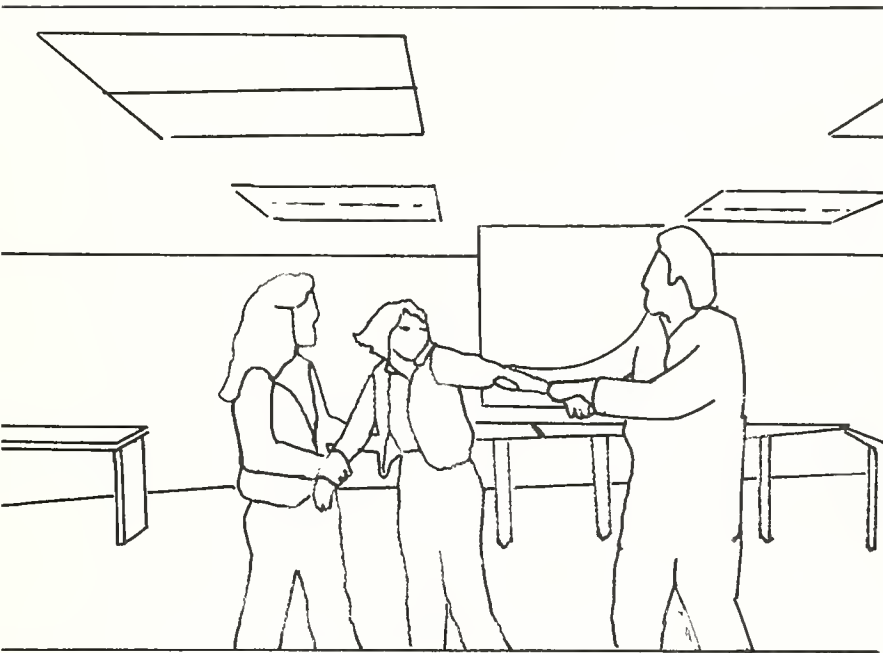
*"Does the general public care about the outcome of the dispute?"*

In some cases, local disputes are purely "private" affairs. The general public is unlikely to worry about how two neighbors resolve their boundary disputes; the public doesn't care who "wins" the fight, and it won't care whether the neighbors ever speak to each other again. But there are a host of public disputes which affect a large segment of the community and which affect relationships within the community. In such cases the public is likely to care about the actual decision (or agreement) and the way that decision (or agreement) was reached.

Mediated negotiation is especially attractive for these kinds of disputes. Unlike public hearings or other public "advisory" processes, citizen representatives can shape the final decision in a mediated negotiation. And unlike litigation, mediated nego-

ready to do battle

negotiation incentives



tiation encourages cooperation and communication, thus promoting better relationships in the community in the long run.

#### How To Negotiate Effectively

If you decide to participate in a mediated negotiation, you should spend some time thinking about your negotiation skills and strategies. Though we cannot, in a few pages, train you to be effective negotiators, we can suggest some questions for you to consider as you plan your negotiation strategy. Additional suggestions for effective negotiations are presented by Fisher and Ury in their bestseller *Getting to Yes*.

*"What are your INTERESTS? What is it you really care about most?" "What are the other parties' INTERESTS as well?"*

Fisher and Ury, in *Getting to Yes*, describe the popular story of two children arguing over an orange. The children's mother enters the room, and witnessing the conflict, decides to resolve it in Solomon-like fashion: she simply cuts the orange in half.

The first child takes her half of the orange, peels it, and discards the peel, saving the fruit for orange juice. The second child takes her half of the orange, peels it, and discards the fruit, saving the peel for a cake she is baking.

Had the mother thought to ask the children what they wished the orange for, she would have understood each child's underlying interests. Each child initially stated she wanted the entire orange, when in fact she really only needed a part of the orange. A better solution would then have emerged: peel the orange and give the entire peel to one child and the entire fruit to the other.

This (admittedly overquoted) example illustrates how parties become deadlocked over positions when they fail to express or consider the interests behind those positions. In many disputes, there may be several ways to satisfy each party's concerns, not just those ways reflected in each party's opening statements.

As you enter a negotiation, try to identify what it is that you really care about in the negotiation. Try to distinguish your most important from your least important concerns. (You may find it useful to concede on the least important concerns in order to secure the more important ones.) Once you've done this for yourself, then try to do the same for the other parties. Try to imagine what their most and least important concerns are. If you can develop proposals to satisfy their most important concerns which cost you little, you will win their support and move the entire group towards a mutually beneficial agreement.

*"What are your ALTERNATIVES to a negotiated agreement?" "What are the other parties' alternatives?"*

In any negotiation, you should spend some time evaluating your alternatives to the negotiation. What is your best alternative if negotiations fail? Can you win your case in court? Can you persuade the key decision-makers on your own? Will you lose friends?

Your "best alternative to a negotiated agreement" (or BATNA as Fisher and Ury express it) can be a useful yardstick for evaluating proposals made by other parties. Should someone offer you a settlement less attractive than your best alternative, you should probably not settle. On the other hand, if someone makes a proposal that is better than your best alternative, you should think twice before rejecting it. Consider the negotiation an OPPORTUNITY to do better than your non-negotiation alternatives.

It also pays to think about the alternatives facing the other parties in the dispute. Unless you can make a proposal that beats their own BATNA's, you are

unlikely to secure their agreement. Moreover, the better their alternatives, the more effort you may have to make to accommodate them in a settlement.

*"Can you work together to BRAINSTORM some creative OPTIONS without committing yourself to these options?"*

Negotiations are often most productive when the parties work together to "brainstorm" or invent options. According to the authors of *Making Meetings Work*, Michael Doyle and David Straus, unfettered brainstorming often leads to unusual and highly creative solutions to problems.

But the inventiveness of brainstorming sessions can be limited if the parties feel they will be bound by all the suggestions they make. People will hesitate to make creative, "off the top of the head" suggestions before they've had a chance to analyze each suggestion completely.

Consequently, a skilled facilitator or mediator will encourage the parties to invent options freely at different points during a negotiation, if only to stimulate creative thinking. Analysis of the options can then take place at a later point in the negotiations.

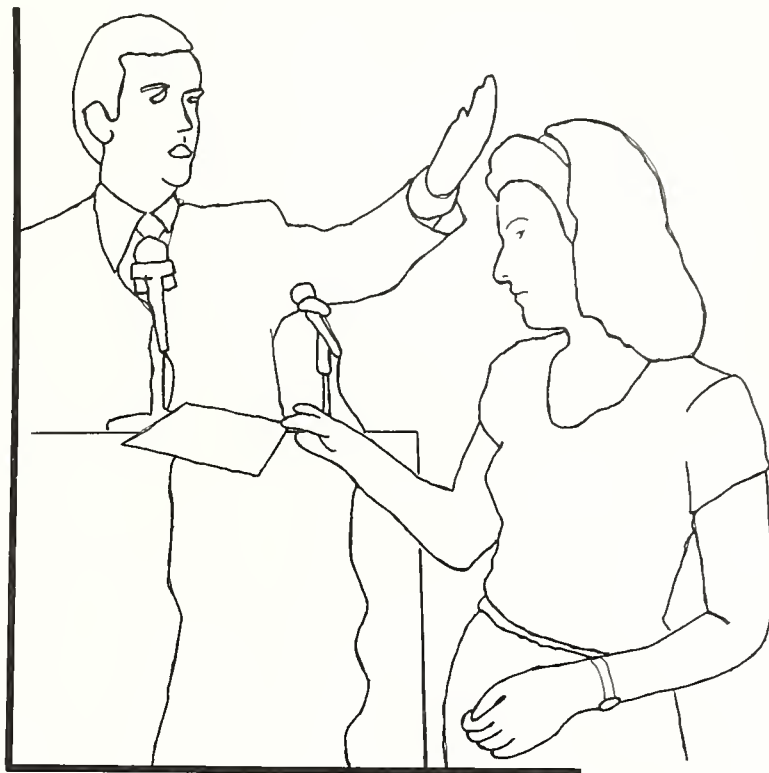
*"How well are we COMMUNICATING with each other? How well are we LISTENING to each other?"*

In the highly charged atmosphere of negotiations, it is often easy to misunderstand the other parties and to be misunderstood by them. If you do not understand what each other cares about, you will have an extremely difficult time framing proposals that are acceptable to each other.

It therefore makes sense to test, periodically, the accuracy of communications taking place in the negotiations. You can double check by asking the other parties to restate for you what you just said. You might do this in a non-offensive way by saying, "I think we may have misunderstood each other. What did you think I was saying?" Likewise, you might offer to restate their previous statements in order to doublecheck your listening skills. You can say, "I'm sorry, but I may have misunderstood you. Did you mean to say that...?"

*"How stable or secure are the other parties' COMMITMENTS to the final agreement?"*

It is often tempting to believe commitments are firm when a very attractive proposal is on the table. If you stand to benefit a great deal from a proposal, you may be reluctant to ask the other parties one last time, "Yes, but do you PROMISE to do such and



such?"

Nevertheless, it is usually wise to *secure* everyone's else's commitments before you agree to sign the final proposal. If you can persuade the other parties to sign contracts, post bonds, or make public promises, terrific. But if you can only count on their word to secure their commitments, then take the time to study the commitments they have made. Make sure they have promised to do things they CAN, in fact, do. And try to make sure they have as little incentive as possible to renege on their agreement.

*"What is happening to the RELATIONSHIPS between the parties in this negotiation?"*

If you were haggling with a rug vendor in a Turkish bazaar while on vacation, you might not be concerned about the impact your negotiations were having on your relationship with the vendor. Odds are, after the vacation ends, you will never see that vendor again. In addition, it is probably unlikely that he will ever speak of you to someone else who knows you or does business with you.

But relationships in communities may be a much different story. In a public dispute in your own community, you may care a great deal about your reputation and relationships with the other parties.

Fisher and Ury urge negotiators to "separate the people from the problem." This is, in part, a purely practical issue. The other parties are unlikely to agree to anything if you spend all your energy

separate people from problem

offending them. In addition, the issues at the heart of the dispute are probably complex enough to demand your full attention.

courteous, honest, fair

But there is another reason for separating the people from the problem. It protects you from parties who would try to exact concessions from you in return for their good will. If you are courteous, honest, and fair with each other, then good will should naturally emerge from the negotiations (or at the least, little damage should be done). Don't allow yourself to be blackmailed into giving in because someone threatens to cut off communications with you. Keep the discussions focused on your legitimate interests, and away from personalities.

In the end, regardless of how you may feel about the other parties, most of you will have a common goal. You will want to see the dispute resolved to everyone's satisfaction as soon as possible. And if relationships are improved in the process, so much the better. The negotiations will have generated both immediate and long run benefits.

*"How will the agreement be viewed by the community at large? Will it be viewed as LEGITIMATE?"*

perception of the agreement

Throughout this manual, we have been describing local PUBLIC disputes in which public officials are involved. These officials must worry about the public's perception of any agreement they accept, because they serve at the pleasure of the public.

Even if you are not a public official, you too should care about the public's perception of the agreement. If the public feels the final agreement is unfair and illegitimate, public representatives may actively try to undermine the agreement.

There are, of course, many ways to evaluate the fairness and legitimacy of the final agreement. It may help everyone to agree on some standards of fairness in the course of the negotiations, to ensure that the final agreement conforms to those standards of fairness. (Fisher and Ury describe this as establishing "objective criteria.")

In addition, the public is likely to be less critical of any agreement which is generated by an "open and fair" process. If all parties with a legitimate stake in the dispute have been allowed to participate in the negotiations, then the rest of the community may be hard pressed to criticize the final agreement.

### How To Identify A Good Agreement

As mentioned above, there may be many ways to evaluate a good agreement. One way is based on

the content of the agreement. Another is based on the process by which it was generated.

Roger Fisher and Larry Susskind, in their work at the Program on Negotiation at Harvard Law School, suggest there are several characteristics to look for in a "good agreement." Though these characteristics do not, by themselves, prove that a final agreement is good or appropriate, they do provide a starting point for evaluating the final agreement.

- *The agreement should be better than the alternatives to no agreement faced by the other parties to the agreement.* If it is not, then the parties who have "forgone" their better alternatives in order to secure the agreement should have done so voluntarily.
- It is not possible to make the agreement better without hurting another party. Negotiations should not be concluded if there is another, more elegant, agreement that will leave some even better off at no expense to anyone else.
- The agreement is feasible and stable. All necessary parties are committed to its implementation. Where performance of the agreement depends upon uncertain events in the future (e.g., elections or judicial rulings), then contingent agreements or renegotiation provisions are included in the agreement in order to prevent the entire agreement from unravelling.
- The process for reaching agreement did not harm relationships between people who will have to live or work together in the future. Relationships should improve as a result of the negotiations, not deteriorate.
- All parties to the agreement are satisfied with the agreement. No one should feel "taken." In addition, the community at large should feel that the agreement is legitimate and that a good precedent has been set.
- The agreement should account for the latest scientific, technical and general knowledge related to the situation. The outcome should be as "wise" as possible.
- And finally, the agreement should be reached in a timely and cost-effective manner. The parties involved should feel that negotiations were the most efficient and least costly method available. □