

CHAPTER 15

CONTRIBUTED PAPERS

I. MEDIATION GUIDELINES BASED ON A BARGAINING STRENGTH MODEL OF NEGOTIATIONS

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This presentation is based on Chapter 8 of A. Goldman & J. Rojot, *Negotiation: Theory and Practice*.¹ Both of us had separately published books on the subject of negotiations in 1991, and at an Academy meeting in 1995, upon discussing our respective plans to revise those books, we decided to embark on a joint effort with expanded attention to areas such as cultural variables and the application to mediation of the principles underlying our analysis.

Several propositions are at the foundation of our approach. One is acceptance of the notion that there is nothing as practical as a good theory. To that end our book relies on several fundamental models of decision theory, psychotherapy, the identification of fundamental cultural variables, and a cost-benefit analysis of bargaining strength. This presentation shows how mediation can find guidance from the latter model.

The justification for seeking mediation guidance from our cost-benefit model is the proposition that the settlement of negotiated disputes ultimately turns on the balance of the parties' respective bargaining strengths. Our cost-benefit analysis of bargaining explains that bargaining strength is a composite of the parties' respective perceptions with regard to seven bargaining strength elements (see list below), and that an eighth and unifying element of bargaining strength is the element of perception. A corollary principle is that mediation involves the clarification and modification of the parties' perceptions. Accordingly, by understanding the nature and relationships among the bargaining strength ele-

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¹Kluwer Law International, 2003.

ments, we can discover how mediation can be performed more efficiently and more effectively.

The elements of bargaining strength are the parties' perceptions of:

1. Offer to Meet the Other's Needs (OMON)
2. Probability of Performance (POP)
3. Accrued Costs of Bargaining (AC)
4. Data Accuracy (DA)
5. Best Alternative to the Proposed Agreement (BAPA)
6. Costs of Impending Bargaining (COIN)
7. Predictive Accuracy (PA)

Because perception is the core element of bargaining strength, "what counts in bargaining is not reality; what counts is the parties' perception of reality. The elements of bargaining power exist only to the extent that they are perceived as existing in the minds of the transaction participants."² Thus, mediation intervention, if it is to have any impact, must assist each party in ascertaining the other side's perceptions of the elements of bargaining strength and in reassessing their own perceptions of those elements.

An additional proposition upon which our book takes its guidance is that although we aim for reasoned decisions, human rationality is limited; it is "bounded" by the inability of the human mind to bring to bear all relevant information and possible courses of action, to weigh all potential consequences, and to confine analysis to objective considerations.³ Mediators can attempt to help parties detect and correct errors, broaden the scope of what they weigh, and heighten their rational assessment, but in the process they should accept the fact that their rationality, too, is bounded by the same limitations.

Our bargaining strength model showing the relationships among the elements uses both an algebraic and a graphic representation as follows:

²A. Goldman & J. Rojot, *Negotiation: Theory and Practice* (The Hague, The Netherlands: Kluwer Law International 2003), at 44.

³The theory and consequences of bounded rationality are explained at *id.*, pp. 24–32.

Conditions Favoring a Negotiated Settlement

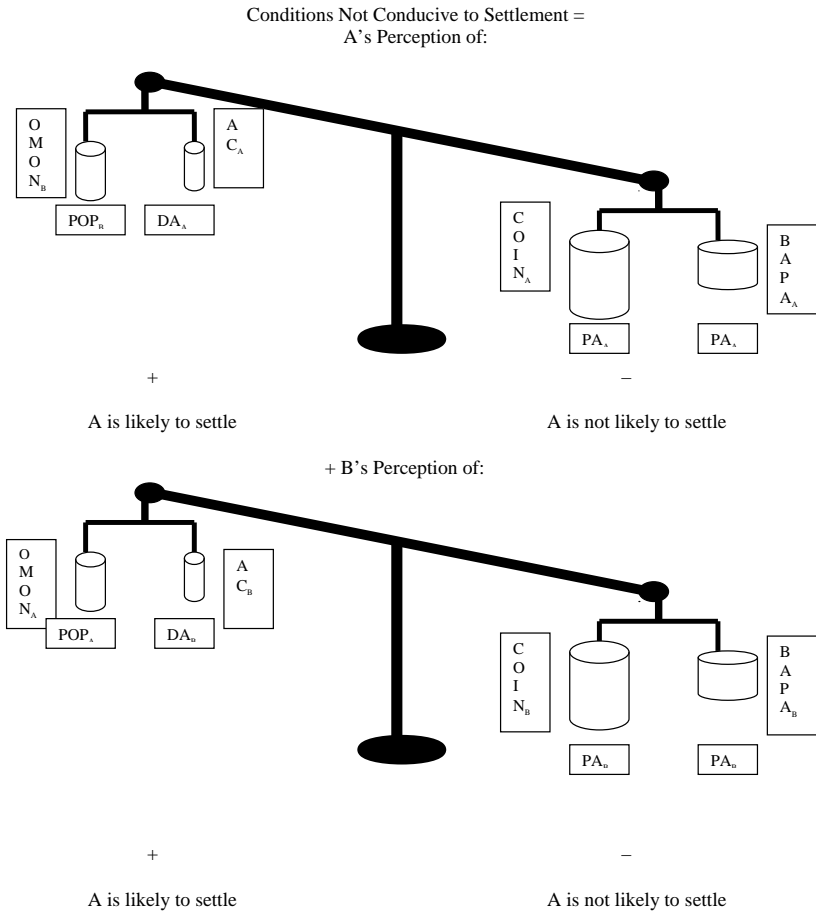
$$P_A [POP_B(OMON_B) + DA_A(AC_A)] > P_A [PA_A(BAPA_A) + PA_A(COIN_A)]$$

and

$$P_B [POP_A(OMON_A) + DA_B(AC_B)] > P_B [PA_B(BAPA_B) + PA_B(COIN_B)]$$

The graphic representation in Figure 1 poses those relationships in the type of situation confronting a mediator—one in which one or both parties do not have a rational basis for settling.

FIGURE 1. Graphic Representation of Bargaining Strength Model



To understand how this model reflects bargaining strength elements and interrelationships, and how the model can provide guidance for a mediator, we need to examine more closely why focusing on the elements of bargaining strength can provide insight for the mediator.

As previously noted, perception (P in the model) is the pervasive variable of bargaining strength. One question a mediator should ask, therefore, is: Whose perceptions are involved in the transaction? Only then can a mediator begin to understand what needs are fueling the transaction, as in addition to those of the persons whose interests legally are at stake, the negotiators' own needs may shape their perceptions. (Of course, revealing perceived distinctions between the needs of the legal parties and those of their advocates can be a delicate ethical and balancing problem for a mediator.) In some mediations there are public interests or unrepresented parties' interests also at stake, as in the situation of child custody disputes or, to use the labor relations context, in national emergency disputes. In addition, mediators ought to recognize that they, too, often have an interest in the outcome. Thus, many mediators think that reaching a settlement is the only form of mediator success—why else should parties pay for their services? However, as we shall see, there are situations when a mediator best serves the parties by helping them realize that settlement is not in the offing and that they should abandon the bargaining efforts in favor of an alternative transaction that will better satisfy their needs. That is, reaching a settlement is not the only form of mediator success.

Much of what a mediator does is to assist the parties in bringing their perceptions closer to reality. Often mediators help parties identify their needs (emotional, physical, and fiscal). One method is by encouraging them to question their own assumptions and reconsider the other's contentions in light of their respective values and priorities. Mediators can also identify and help parties weigh relevant legal standards and encourage or suggest creative solutions. In some instances, mediators are able to offer impartial expertise respecting the reliability, completeness, or accuracy of data that are shaping the parties' perceptions. Mediators also often enable parties to vent and defuse their emotions as prelude to facing reality or as an alternative to exacerbating their relations with the other side. Similarly, mediators can curb emotional momentum that otherwise might cause a party to prematurely abandon bargaining efforts. When successful, each of those medi-

ator inputs reshapes the parties' perceptions of the bargaining strength elements.

In theory, the "facilitative mediation" style avoids mediator intrusion into the parties' decisions because the mediator confines her or his efforts to helping parties identify their needs and communicate their positions and proposals. However, the bargaining strength model demonstrates that if a facilitative mediator has any impact upon the dynamic of the parties' interactions, the parties' perceptions are modified by the intervention and, thereby, their relative bargaining strength is altered. Hence, in reality, facilitative mediation, if effective, is intrusive.

We also learn from the bargaining strength model that helping bring the parties' perceptions closer to reality need not lead to settlement. In any rational bargaining decision, the other side has no reason to settle unless the settlement will meet its needs better than they can be met through other actions. Thus, the bargaining strength model shows that side A moves closer to settlement to the extent it perceives that the other's offer, B's offer ($OMON_B$ in Figure 1), will meet A's needs. And, of course, the converse is true of B's incentive to settle. That is, if there is any hope of voluntary settlement, B must perceive that A's offer ($OMON_A$ in Figure 1) will do at least something to meet B's needs. One way mediators assist in changing the parties' respective perceptions concerning the extent to which a settlement will meet their needs is to help parties discover common and compatible needs in order to increase the value of their respective offers without cost to themselves. A mediator can also clarify positions that have become confused or are misunderstood so that a party can more easily recognize the extent to which a proposal will meet its needs. Additionally, a mediator can verify data to enhance (or diminish) the perception of the value of the other's offer.

The bargaining strength model makes it clear that the weight of a promise to meet needs is dependent on the other's perception of the likelihood that the promise will be fulfilled—the element of the probability of performance (POP). A mediator can alter the perception of the other's probability of performance by serving as a potential public witness to the obligations and, thereby, increase the likelihood that the promisor will not renege. Mediators can also help parties identify legal devices such as escrows, bonds, security interests, confessions of judgment, arbitration provisions, and the like, that efficiently substitute comparable values in the event of non performance. Additionally, mediators can overcome

the variety of potential risk and choice assessment distortions that have been identified by social psychologists. This includes helping the parties to overcome the influence of agenda sequence in making choices, offering neutral framing of issues, posing questions and proposals that avoid indirect verbal suggestions, encouraging statistical analysis to combat differences in preferences respecting loss aversion, and utilizing devices such as decision trees to reduce the potential decisional impact of such distorting influences as redefining, anchoring, prominent points, or being caught in a game.⁴

Bargaining always involves transaction costs (Accrued Costs (AC) in the bargaining strength model) that are wasted if there is no settlement. Social psychologists have demonstrated that generally people take greater risks to avoid losses than to make gains.⁵ Accordingly, a mediator can remind parties of their investment in the bargaining effort—an investment that will be lost if a settlement is not achieved. Data Accuracy (DA) is the modifier of accrued costs and, normally, a mediator's only available input respecting this bargaining strength element is to remind a party to recheck its cost calculations.

In most bargaining situations instead of reaching a negotiated settlement with the other side, alternative avenues are available for resolving the conflict. When involved in collective bargaining the alternatives are maintenance of the status quo or resort to economic warfare in the form of work stoppages, boycotts, workforce migration, or the like. Sometimes interests arbitration is another available alternative to a negotiated collective agreement. When the transaction is a grievance covered by a collective agreement, labor-management arbitration is, of course, the normal alternative dispute resolution mechanism for American and Canadian work forces. If the dispute concerns a statutory claim, the alternative may be an administrative or court procedure. Whatever it is, the more attractive a party's perception of such alternative or alternatives to a proposed negotiated settlement, the lower the other side's bargaining power. As seen in the above presentation of the bargaining strength model, this element is identified as the Best Alternative to the Proposed Agreement (BAPA).

The bargaining strength model serves to remind mediators that needs are not always best fulfilled through a negotiated settlement

⁴*Id.* at Chapter 7.

⁵*Id.* at pp. 162–64.

with the other party. In order to promote settlement, a mediator can help identify potential adverse consequences of non-settlement. That is, reduce the party's perception that it has an attractive best alternative to the other side's proposal. One way to accomplish this is to provide a reality check respecting the perceived benefits of alternatives to non-settlement such as by reminding the party to weigh the reduced present value of expected future benefits. On the other hand, as previously observed, sometimes a mediator's greatest service to the parties is to help them recognize that no deal is the best resolution. The bargaining strength model shows that the best course of action is to pursue that best alternative to the proposed agreement if the cost of impending negotiations (COIN in the model—including the cost of the mediator's continued services and the time and effort needed to educate and communicate with mediator) outweigh expected improvements in the joint value of the offer to meet the parties' needs, modified by the probability of performance, plus the prospective cost of meeting the other side's needs.

The foregoing is meant to be illustrative rather than exhaustive. Although mediation, like negotiation, is an art, its practitioners can benefit from operating within theoretical frameworks. Our bargaining strength model can serve as a mediator checklist in searching for additional ways to aid the parties in developing a better understanding of the potential impact such efforts will have on the prospects of settlement.