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Dobermans and diplomats: seventeen strategies for re-opening hopelessly deadlocked negotiations.

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DOBERMANS AND DIPLOMATS: SEVENTEEN STRATEGIES FOR RE-OPENING HOPELESSLY DEADLOCKED NEGOTIATIONS[1]

Outline

This paper attempts to set out seventeen common strategies used by skilled "problem-solvers" to re-open negotiations between deadlocked disputants. It raises the question of where such knowledge can be included in the already over-crowded lifelong education of lawyers (and diplomats, mediators, negotiators and parents).

Introduction

What do "Lawyers" do?

Describing what lawyers do has always been difficult - a vague description of daily tasks with no unifying theme. Generic work descriptions are even more elusive today due to the diversification of employment of law school graduates[2]; the escalating fragmentation of groups of lawyers such as country, suburban, boutique, city, specialists, and generalist[3]; the loss of "legal" monopolies to other work groups; and the insightful studies of commentators who can find few unifying themes in "legal" work.[4] One common suggestion is that all lawyers are "problem-solvers",[5] (though obviously skilled helpers sometimes become part of the problem, rather than part of the solution).[6]

The concept of problem solving itself can be broken down into many categories - such as the three sub-tasks of:

- Problem defining
- Brokering contacts with expert "solution" service providers
- Occasionally providing expert "solution" services

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2 L. Armytage & S. Vignaendra, *Career Intentions of Australian Law Students* 1995 (Sydney, Centre for Legal Education, 1996).

3 See R. Abel, "Between Market and State: The Legal Profession in turmoil", (1989) 52 Modern L. Rev 285; "The Decline of Professionalism?" (1986) 49 *Modern L Rev 1;* D. Weisbrot*, Australian Lawyers* (Melbourne: Longman Cheshire, 1990); "The Changing Nature of Australian Legal Practice: Some Implications for Education and Practical Legal Training Providers" (APLEC Conference: Canberra, 1993); "Competition, Co-operation and Legal Change" (1993) 4 *Legal Educ Rev 1*; Lord Chancellor's Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training* (London, 1996).

4 W. Twining, *Blackstone's Tower: The English Law School* (London: Sweet & Maxwell, 1994); *Legal Education and Professional Development - An Education Continuum - Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Chicago: ABA, 1992) - the McCrate Report; J.H. Wade, "Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges" (1994) 5 *Legal Educ Rev* 173; C. Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem-Solving" (1984) 31 *UCLA L Rev* 754; "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or The Law of ADR" (1991) 19 *Florida State UL Rev* 1.

5 *Ibid* Twining at 168-171; 176--178.

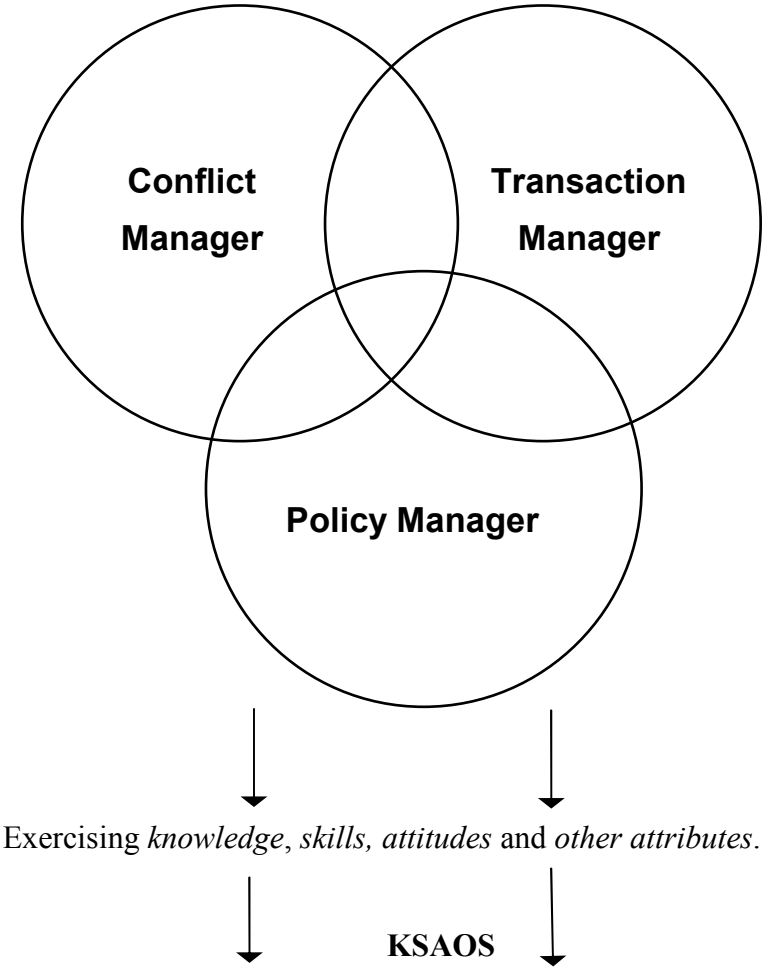
6 G. Egan, *The Skilled Helper: A Problem-Management Approach to Helping* (California: Brooks/Cole, 1994).

Although the writer finds the concept of micro and macro problem-solving to be a helpful redefinition of self and "legal" role, it has been criticised for vagueness.[7]

Certainly, this redefinition of a lawyer or a general medical practitioner as a "problem-solver", has led to a number of interesting new projects at medical schools (and to a lesser extent, at a few law schools).[8]

The ubiquitous influence of management theories has also influenced the attempt of lawyers and law schools to rediscover themselves. The roles of a wide range of people known as "lawyers" arguably come under the headings of "conflict manager", "transaction manager" and "policy manager" formerly known as litigator, conveyancer and politician.

The Three Roles of "Lawyers"



[7] Twining *supra* note 4 at 176 - 178.

[8] See D. Cruickshank, "Problem-Based Learning in Legal Education" in J. Webb & C. Maughan, *Teaching Lawyers' Skills* (London: Butterworths, 1996).

Again, these three general job descriptions throw out dramatic challenges to the curricula, goals, materials, methods, assessment and staff used in legal education. The study of individual and group psychology, economics, philosophy, anthropology, philosophy, and theories of conflict become at least as important as rule memorisation, research methods in the law library, and inductive and deductive reasoning.

Some commentators and researchers have attempted to systematise the behaviour of lawyers.[9] This work is very unsettling to the tasks of legal education - whether pre-university, at university, post graduation, and lifelong continuing education. "For what purposes should what be taught in what sequence to whom by whom using what methods in what milieux with what resources and with what feedback."[10]

Working harder and faster is unhelpful if we do not know what goals are appropriate. Having platitudinous goals such as "thinking like a lawyer" are misguided as there is little systematic study, (except for random anecdotes), on how any competent or incompetent lawyer thinks.

However, if a lawyer is viewed predominantly as a problem-solver or conflict manager, then a startling range of learning and skills open up outside the walls of a traditional law library and law school. This paper will illustrate this proposition by systematising a common task of a conflict manager - namely attempting to re-open jammed negotiations, whether between businesses, nations, governments, individuals or families.

One of the clear roles of negotiators, mediators, lawyers, managers, parents and human beings, is to attempt to re-open jammed negotiations. Lawyers, negotiators, managers and mediators are paid to be competent, even expert, at recommencing communications and negotiations which have reached a stalemate or a tense stand-off.

Escalation and Stalemate

The word "escalation" is used to describe changes which often accompany unresolved conflict. This concept of "escalation" indicates a number of changes in the conflict, including increased pressure from one or all parties, and increased number and intensity of competitive tactics used, often in action and reaction.[11]

Additionally, in the cycle of escalation (cause → effect → cause etc), there is usually a pattern of structural and psychological transformations.

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[9] Eg. McCrate Report, *supra note 4;* A. Sarat & W. Felstiner, "Law and Strategy in the Divorce Lawyer's Office", (1986) 20 *L & Soc'y Rev* 93; *Divorce Lawyers and their Clients* (New York: OUP, 1995); J.K. de Groot, *Producing a Competent Lawyer: Alternatives Available* (Sydney, Centre for Legal Education, 1994); see Cruickshank *supra note 8;* M. Fitzgerald, "Competence Revisited: A Summary of Research on Lawyer Competence" (1996) 13 *J of Prof Legal Educ* 227. R. Korobkin and C. Guthrie, "Opening Offers and Out-of-Court Settlement: A Little Moderation May not go a Long Way" (1994) 10 *Ohio State JDR* 1; R.H. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict" (1993) 8 *Ohio State JDR* 235; R.J. Lewicki, et al *Negotiation* (Boston: Irwin 2006); ALRC, *Managing Justice*, Report No 89 (Canberra: AGPS, 2000) ch 2; P.C. Kissam. *The Discipline of Law Schools: The Making of Modern Lawyers* (Durham: Carolina Academic Press, 2003).

[10] Wade *supra* note 4 at 173 expanding Twining.

[11] D. Pruitt & S.H. Kim, *Social Conflict-Escalation, Stalemate and Settlement* (New York: McGraw-Hill, 2004).

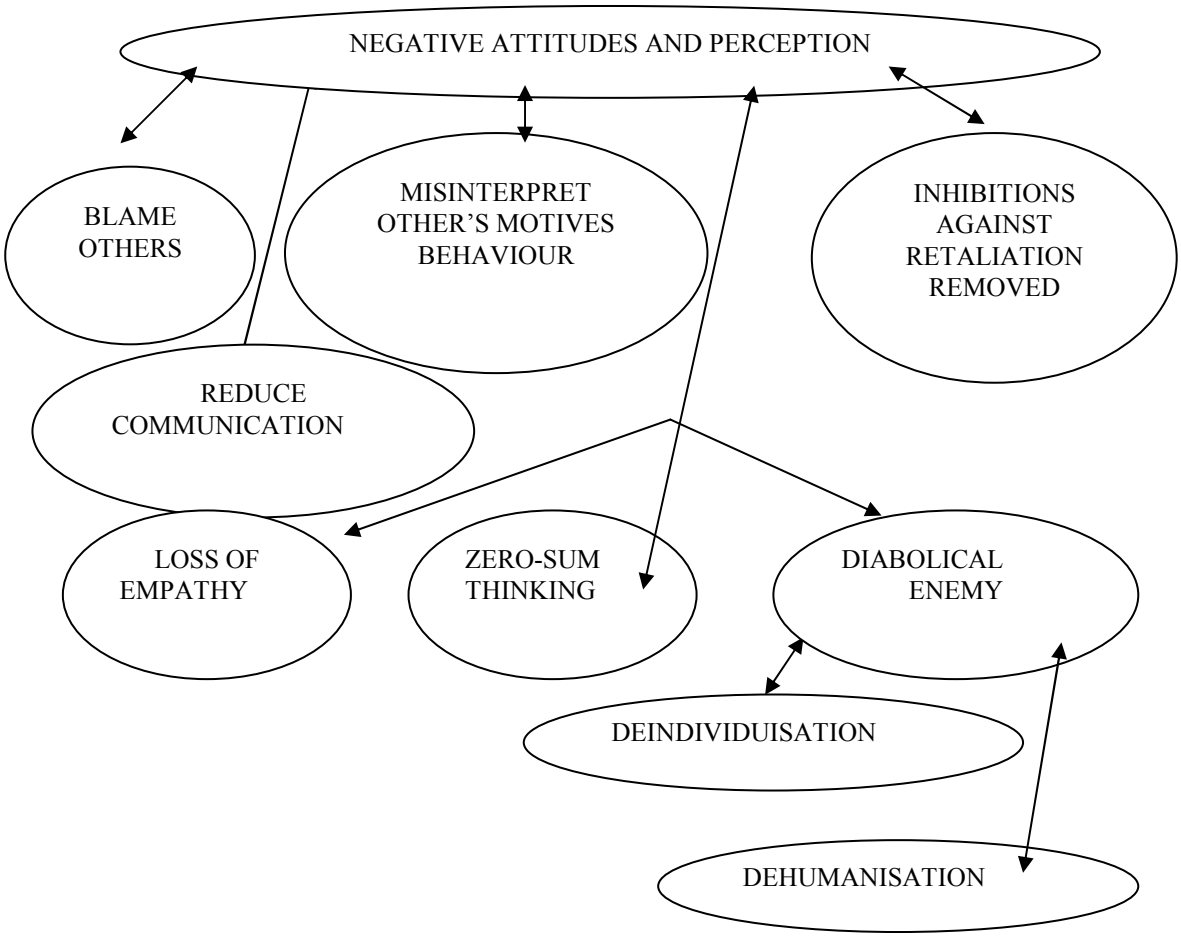
These are difficult to reverse – the "toothpaste is out of the tube"; or the "genie is out of the bottle".[12]

Structural transformations which often cause and follow "escalation" of conflict include:

- **Competitive Norms, Group Think, and "Right Thinking" Dominate.** (This is the correct analysis of the conflict… We believe…"" "All good managers / unionists / Christians / Serbians know that …"; "Don't read those books, that propaganda").
- **Vested Interest Groups.** (Groups of people emerge who gain status and money from the conflict eg. union leaders, expert witnesses, lawyers, weapons manufacturers, army leaders etc.).
- **Moderates are Drawn into Opposing Camps.** (Doves become hawks; "I was willing to talk to them until they did …").
- **Entrapment.** ("We have invested too much in this fight to withdraw now"; "We have already paid $40,000 in legal fees"; "We have already lost 57,000 troops").
- **Militant Leaders Appointed.** ("Let the lawyers decide"; "Fred is not much of a manager, but at least he will stand up to them" etc.; "President X will kick some heads").
- **Group Cohesiveness.** ("We must not show any weakness or division"; "Either you are for us or against us"; "We meet behind closed doors"; "We have sworn allegiance to …" etc.).
- **Efficient Division of Labour in the Group.** ("We have set aside two employees to prepare the documents"; "Mary is the fundraiser; Joanne is the publicist; the lawyers are preparing an avalanche of paper; our rent-a-crowd is ready for the demonstration" etc.).

[12] Pruitt & Kim *supra* note 11 at 210.

Psychological or *emotional* transformations which often cause and follow escalation of conflict include:



Despite the entrenched nature of these escalated conflicts, all such conflicts eventually reach "stalemate". That is, one or more of the parties, or factions within the parties, to the escalated conflict perceive that further efforts to prevail are "unworkable" and/or "unwise".[13] "Whatever the reason [one or more parties reach] the grudging realisation that it hurts more to continue the conflict than to settle it".[14]

Challenges to the task of re-opening jammed negotiations?

The task is difficult because people in long term conflict usually do not want to attempt to re-open negotiations if those attempts involve loss of position, image or information. That is, they do not want to be, or be perceived to be, weak. The negotiator wants to give out *double* messages of aggression and peacemaking. For example, lawyers commonly say on the telephone "Before our clients start up World War III again, should they talk first?" Words are important. Experienced lawyers do *not* usually say "My client would like to avoid World War III, can we talk?" This

[13] Pruitt & Kim, s*upra* note 11 at 172.
[14] *Ibid* at 173.

raises the other major difficulty in this process of re-opening jammed negotiations - it requires uncommon skills and character.

This paper identifies a range of strategies and skills to re-open negotiations. These are based predominantly on the work of Pruitt and Kim.[15] Examples are given particularly from the writer's practice as a mediator and as a family lawyer.

Seventeen possible methods to re-open negotiations are:

- Back channel contacts
- Use of intermediaries
- Giving conciliatory signals
- Superordinate goals
- Expressing vigorous "no surrender" on interests
- Willingness to discuss procedure
- Admitting flexibility on specific solutions
- Refusing to make any unilateral concessions
- Identification of division between hawks and doves
- Acknowledgement of other's interests
- Mild threats or consequences
- Clear rejection of unacceptable past solutions
- Assembly of an expert problem solving team
- Rewarding others for any helpful initiatives
- Keeping communication open
- Prioritising of interests
- Filing a formal claim

No doubt there are a number of other strategies to re-open deadlocks. A negotiator or facilitator who has a large repertoire of available interventions becomes a powerful person - like a tennis player with a wide repertoire of shots.

The above seventeen will be discussed in turn.

1. Back Channel Contacts[16]

While the official and public negotiators are posturing, threatening and expressing righteous indignation, unofficial meetings can take place in coffee houses (not necessarily in Vienna). The back channel personnel may be friends, relatives or technicians (eg. accountants in family feuds).

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[15] Pruitt & Kim, *supra* note 11.
[16] *Ibid* at 188-9.

They have no authority to settle and they speak "as individuals" *not* for the organisations or tribes. The back-channel meeting may have a real or feigned secretiveness - "I don't want my relatives to know that I've phoned you, but I would like to meet to see if anything can be done about this disastrous situation".

If the people at the back-channel meeting brainstorm some possible processes, solutions, or reframe the problem, then the official and public disputants may be able to explore publicly this ray of sunshine - without loss of image, position or data.

However, official negotiators may vigorously seek to undermine back channel contact (not just as a "good cop - bad cop" strategy). This is because some official negotiators are insecure, or unskilled, or want the personal kudos of arranging agreement, or have monetary or psychological needs to continue the long term conflict.

For example, the writer has been involved as a mediator between two charities arguing over large sums of money used for the care of seriously ill children. Certain individuals in the "anti-professional" faction vigorously prohibited their constituents from speaking to members of the "professional" faction on any social occasion. They clearly feared that in social conversations, the less embittered new members of their own organisation might fashion solutions.

Similarly, in a recent cross-cultural commercial negotiation about the ownership and use of land, be writer attempted to open back-channel discussions with Japanese corporate officers. The official local negotiator, a large Australian accountancy firm, heard about these attempts and (predictably) "prohibited" any of his client's officers from talking to people who did not have "authority to settle". Secrecy may sometimes be essential! Lack of authority to settle is the very reason why this strategy may be successful.

2. Use of Intermediaries

Use of an intermediary is one powerful possible intervention in a deadlock situation. The intermediary may act on his/her own initiative, actual or feigned – "I would like to talk to you both as I am very concerned about the damage you are inflicting on one another, and upon other bystanders."

Or may insert personal interests as an added form of "authority" – "If you each fail to make some constructive offers in the next month, I will withdraw my vote/subsidy/weapons supply/testamentary provision etc from you." Or may be approached by one party as a person perceived to have moral authority, neutrality and wisdom by the other disputant(s).

For example:

a. When enquirers discuss the possibility of mediation over the telephone, one of the writer's first questions is "how can mediation be raised with the other side without a loss of face?" After some discussion, a trusted uncle, accountant or manager is identified who could be asked to approach all the disputants to recommend mediation. This is a process intermediary to facilitate another process intermediary.

b. At the writer's university, one manager has a recurrent, and very successful, strategy used for entrenched conflicts between staff members. He whispers in the ear of one of a group of respected and grey haired academic colleagues. This go-between "casually" shuttles between the conflicted individuals or groups over coffee and lunches, listens, helps to define the problems, defuses intensity, and encourages the disputants to brainstorm potential solutions. The manager thereby gratefully avoids his necessary fall-back role of imposing a solution upon the disputants.

c. Of course, there is now a world-wide proliferation of voluntary and mandatory mediation schemes particularly in areas of employment, discrimination, personal injury, family, native land and workers compensation disputes.[17]

It should be emphasised that problem-solving intervention by an intermediary is not a popular option (like going to a dentist), for a variety of complex reasons. However ironically, when chosen or mandated, the various types of mediation seem to have fair to very good outcomes on a variety of measures of "success".[18]

3. Conciliatory Signals[19]

A conciliatory signal is a small, often subtle, comment or action which indicates a willingness to be helpful, even co-operative. It may amount to a minor act of politeness or kindness amidst a long term battle.

One function of these signals is that it may create cognitive dissonance[20] for both the sender and receiver. The dehumanised and deindividualised opposition ("management", "union"; "corporate pigs"; "greenies"; "typical male"; "typical woman") may momentarily behave as a reasonable or even a kind human being. The demonised stereotype may momentarily "act out of character".

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[17] See L. Boulle, *Mediation, Principles, Process Practice* (Sydney: Butterworths, 2 ed 2005); C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass: San Francisco, 2003); H. Brown and A. Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell, 1993); F Mosten; *A Lawyer's Guide to Mediation: Increasing Skills and Profitability in Family Law Practice* (Chicago: ABA, 1996).

[18] Eg. J.B. Kelly, "A Decade of Divorce Mediation Research - Some Answers and Questions" (1996) 34 *Family and Conciliation Court Review* 373-385; Legal Aid and Family Services, *Research/Evaluation of Family Mediation Practice and the Issue of Violence* (Canberra: Commonwealth of Australia, 1996); L. Moloney, T. Fisher, A. Love & S. Ferguson*; Federally-Funded Family Mediation in Sydney - Outcomes, Costs & Client Satisfaction* (National Centre for Socio-Legal Studies: La Trobe University, 1996); *Federally Funded Family Mediation in Melbourne - Outcomes Costs and Client Satisfaction* (National Centre for Socio-Legal Studies, La Trobe University, 995); S. Bordow & J. Gibson, *Evaluation of the Family Court Mediation Service,* Research Report No 12 (Family Court of Australia, 1994); J.M. Brett, Z. Barsness and S.B. Goldberg, "The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers" (1996) 12 *Negotiation J* 259; E. Plapinger and D. Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (New York: CPR, 1996).

[19] *Conciliatory Signals* in Pruitt & Kim *supra note* 11 at 212.

[20] L. Festinger, *A Theory of Cognitive Dissonance* (Stanford: Stanford University Press, 1957). Cognitive dissonance is a sense of awkwardness when feeling, beliefs and behaviour are not in harmony.

During long term conflicts, the writer has seen the following "conciliatory signals" re-open problem solving negotiations:

a. Unsolicited, a mother sent copies of school reports of about children's improved academic progress to the father after years of vitriolic communication.

b. A man sent a two sentence "thank you" note to his estranged spouse for an act of kindness she had shown to his mother.

c. A lawyer carried a bottle of wine and some glasses into a tense commercial negotiation and placed them conspicuously at the end of a board room table. When asked what he was doing, he replied "That's to celebrate when this dispute is finally over".

Some cultures have a tradition of use of the small gift and its power to both prevent conflicts, and to re-open jammed communications. Another powerful conciliatory signal is an indirectly or directly conveyed qualified "apology".[21] For example, during an intense conflict between a logging company and a government forestry department, a lawyer commented" "My client acknowledges that there has been very poor communication between the two groups in the past. Is there any way to avoid repeating those mistakes now?"

4. Superordinate goals

It is common during a stalemate for a disputant to announce to the media, or to one of the parties on the other side that "despite our differences, we do have a number of things in common". These speeches, letters or diagrams may need to be repeated at strategic moments by key parties on all sides of the conflict in order to challenge entrenched beliefs, emotions and language about rivalry.

Examples of attempts to emphasise common or overarching goals are "Despite our history of differences, we both agree that:

- Our dispute is scaring new customers away
- We want our children to flourish
- We want restoration of civil order
- Our armies/lawyers are getting richer
- Judges will not understand the complexity of our disputes
- While we fight, our competitors prosper
- We will have to work together in the future"

[21] Most people in high conflict are reluctant to make an "apology". However, as defamation lawyers know, there are at least eleven forms of "statements about the past" which fall moderately or dramatically short of a "mea culpa" or "it was all my fault". See Russell Korobkin, "Psychological Impediments to Mediation Success: Theory and Practice" (2006) 21 *Ohio State J on Dispute Resolution* 281, 306.

5. Expressing willingness to discuss procedure ("Negotiating about negotiating")

Moderate members from each side can often reopen negotiations on *procedural* topics. A request for better negotiation procedural rules is not usually interpreted as weakness. The implication can be preserved that "we will still be tough when and if the *substantive* negotiations resume".

Lewicki has set out a useful list of preliminary procedural topics to begin a thaw between entrenched negotiators.

- "Determining a site for a meeting (changing the site or finding a neutral location).
- Setting a formal agenda outlining what may or may not be discussed and agreeing to follow that agenda.
- Determining who may attend the meetings. (Changing key negotiators or representatives may be a signal of the intention to change the negotiation approach.)
- Setting time limits for individual meetings and for the overall negotiation session. (As we have pointed out, progress in negotiation is often paced according to the time available; therefore, setting limits is likely to yield more progress than not setting them.)
- Setting procedural rules, such as who may speak, how long they may speak, how issues will be approached, what facts may be introduced, how records of the meeting will be kept, how agreements will be affirmed, and what clerical or support services are required.
- Following specific dos and don'ts for behaviour (e.g., don't attack others).
- Finally, the parties may agree to set aside a short period during negotiations to critique how they are doing."[22]

6. Vigorous "no surrender" on interests

This strategy consists of one or both parties making public or discrete statements that whatever solution is reached, it *must* incorporate certain vital interests. The speaker has thereby communicated that (s)he is willing to move off an initially preferred solution, as long as any suggested alternative embraces her/his interests and goals.

For example, after long stalemates in conflicts:

a. A wife who had insisted that she must receive *ownership* of a large historic house, stated that she must have complete *access* to that house for her daughter's 21st birthday celebrations.

b. A government official who had refused adamantly to allow a forest to be logged, said "whatever the solution, these kinds of trees must be preserved for future generations." This interest identification allowed agreement in

[22] R.J. Lewicki, D.M. Saunders & B. Barry *Negotiation* (New York: McGraw-Hill, 2005) 450.

principle and a new range of solutions based on replanting and selective cutting to be proposed.

c. In Australia in 1996, a inevitable stalemate was reached between the Federal Parliament and pro-gun lobby groups over a government proposal to ban hand guns and automatic weapons. Federal politicians publicly and frequently restated their interests in language such as:- "We must prevent another massacre ever taking place"; "We must keep high powered weapons away from potentially angry people." This appeared to be a successful strategy as it was difficult to disagree with the stated interests, as compared to the initially contentious solutions.

7. Flexibility on Specific Solutions

This is a signal given by one or both of the disputants that there may be several acceptable solutions, not just the single historical entrenched demand. This is often coupled with a restating of interests.

Examples:

HISTORIC DEMAND	EVENTUAL INDICATION OF FLEXIBILITY
* "My client wants $1 million"	"My client will only consider a settlement which is at least at the mid-range of figures for an injury/marriage of this kind."
* "He cannot see the children"	"There will need to be some clear safeguards and changes in place before he sees the children."
* "Her valuer is entirely unacceptable"	"I am seriously concerned that her valuer will escalate the conflict as he does not have experience valuing this type of business".
* "He cannot, in any circumstance, take the antique furniture"	"Almost all of those antiques are of special sentimental value to me."

8. No Unilateral Concessions

This is a powerful face saving strategy for the person who has backed himself/herself into a corner by insisting over years that there is only *one* possible solution - mine.

The message of tit for tat is conveyed by party, lawyer, business associate or relative. "If *x* is going to move off his/her historic offer, (s)he must be given something in exchange," or "we do not expect you to budge any more than us. Do we have anything of value which we could exchange?"

This strategy can be very helpful for a wide range of entrenched conflicts including nuclear disarmament or custody disputes. For example, after a lengthy stand-off, one parent makes a small unilateral concession on the time of pick-up of a child together with the clear statement that (s)he expects help with homework in exchange.

A minor risk-taking move by one party which attracts an appropriate response from the other, provides encouragement to try a series of small trust-building exchanges. However, one double cross or perceived double-cross by either will again escalate the conflict and the stereotype that the other is unreasonable, crazy or vindictive.

9. Identify Division between hawks and doves

This is another potentially very successful strategy for saving face and re-opening jammed negotiations. One disputant speaks to the other directly or through an intermediary. The message is - "It's not my fault that I'm being so unreasonable and entrenched. You need to understand that I'm trying to satisfy a whole team, some of whom want to fight to the death (the hawks), and others who are eager at least to explore a range of possible solutions (the doves)." To this speech may be added the confidential or pretended confidential plea - "If we ever are going to reach a settlement, you'll have to help me satisfy both the hawks and the doves in my camp."

It should be emphasised that this speech may be entirely orchestrated or may reflect one disputant's real position. Either way, it can still be very effective to help break the deadlock. It may provide a new perception about a totally belligerent negotiator, and may create for a moment, a joint problem solving team. What can be done about the hawks? Sometimes a subtle message hides the request "Please be patient with me and my rhetoric. I need time to placate my hawks, then to control and isolate them."

I have seen this strategy used successfully in epic disputes, where the "hawks" on one side were:

- ***(a)*** Middle managers fearful of losing their jobs if they took responsibility and made a decision to settle.
- ***(b)*** Parents who wanted to punish a son-in-law in a custody dispute.
- ***(c)*** Senior lawyers or valuers who had given professional opinions about money, and who "refused" to allow a client to settle on any basis other than their own expert evaluation (sometimes referred to as "duelling experts' syndrome").[23]
- ***(d)*** Middle managers in organisations who insist upon following policy rules to the letter.
- ***(e)*** A belligerent tenant, who went on holidays, thus enabling the remaining parties to settle the dispute in his absence.

10. Acknowledge Other's Interests

Often in the "fog of war", or the "blindness of involvement", entrenched negotiators cannot accurately articulate what is important to the "other side". Obviously, a fundamental negotiation skill is to listen, and then to demonstrate to the other person

[23] J.H. Wade, "Dueling experts in Negotiation and Mediation" in Honeyman & Schneider (eds) *The Negotiator's Fieldbook* (ABA, 2006).

that (s)he has been heard by attempting to re-state what has been said.[24] This basic skill provides another strategy for recommencing negotiations between entrenched disputants. For example, one party says to the other:

- "I recognise that you would like enough money to buy a 4 bedroom house".
- "I acknowledge that you don't want to be marginalised as a parent".
- "Correct me if I'm wrong, but I understand that you are interested in three particular concerns, namely...".
- "You see the facts this way…".

The process of listening and reframing may also help to clarify ubiquitous rhetoric such as "it's a matter of principle"; "I'm not going to give in"; "it's your fault…".

Such acknowledgement does not suggest surrender, but rather a willingness to listen, to be corrected and to understand the other's interests and feelings.

11. Mild threats or Consequence

It is sometimes possible to break a long-standing deadlock by one or both disputants making a mild threat such as "If we both continue to come up with no solution then:

- "We will settle at the door of the court in 2 year's time".
- "My lawyer insists that I conduct a full scale investigation into your business affairs".
- "We will both be distracted from our work for the next 2 years and our competitors will overtake us"
- "Both our families will be subpoenaed to appear in court and face public humiliation at the hands of aggressive lawyers".
- "Our supporters will see us as incompetent parents/managers/people".

This strategy is dangerous as it readily appears to be a tired repetition of the past history of threats and counter threats. The subtle differences are that the tone is not hostile, there is often an element of *mutual* harm and the consequences are not presented as cataclysmic, but still painful. Somehow the "threatened" consequences are presented as systemically inevitable (distraction from work; alienation of relatives; investigation by tax officers; escalation by hawks, the children will become alienated from us both), rather than as an *intended* or *chosen* harm (eg. "I'll cut off access"; "I'll sue you for damages"; "I'll ensure that you are reported to the tax authorities".)

12. Clearly Reject Unacceptable Past Solutions

Strangely, an unwillingness to even negotiate may be altered by insisting that a particular solution proposed in the past is totally unacceptable and should not be even

[24] See G. Egan *The Skilled Helper: A Problem -Management Approach to Helping* (California: Brooks/Cole, 1994, 5th edition); H. Mackay, *Why Don't People Listen* (Sydney: Pan, 1994); K. Slaikeu, *When Push Comes to Shove - A Practical Guide to Mediating Disputes* (San Francisco: Jossey Bass, 1996); R. Bolton, *People Skills* (Sydney: Simon & Schuster, 1987).

mentioned again. “We are willing to talk again but want to clarify that proposed solution *X* was, is and forever will be totally unacceptable. We should look for answers among the various alternative solutions which are available”.

This message communicates strength, may placate hawks in one’s own negotiating team, warns about the potential exasperation caused by recycling rejected solutions, and yet indicates some flexibility.

The writer has seen this strategy used successfully in the following deadlock situations:

- “Whatever other discussions we have, in absolutely no circumstances will I contemplate moving the children from their present schools for the next 2 years.”
- “These assets can be divided. However, if we resume negotiations, my client will not accept the continued involvement of his wife in the business in the long term. To even raise that possibility again will be inflammatory and unrealistic.”

13. Assemble expert problem solving team

This is a time-honoured approach to a deadlock. One or both disputants announces publicly that a team of experts has been or will be assembled to study the problem and come up with a range of alternatives and recommendations. Such a statement:

- Shows that the problem is being taken seriously
- Creates time for passions to cool, perspectives to change and for zealots to move onto other conflicts.
- Removes individuals from the negotiations who are clumsy communicators, or who need to rationalise their hostile feelings and past aggressive behaviour.
- Reserves some power to the disputants to accept or reject the report of the expert team.
- Gives the disputants a period of time to attend to other business, or get on with their lives.
- Raises the possibility that the expert team will discover new data, interests and creative solutions.
- Raises the possibility that the team may be able to recommend preventive or management systems for *future* conflicts.

The writer has seen this approach used constantly in law firms and universities where there is deadlocked conflict over promotion, distribution of money, allegations of cheating and methods of evaluating staff performance. It is also a relatively common method to attempt to break up “duelling valuation experts” in large matrimonial property disputes. However, there are potentially serious disadvantages with the over-use of this strategy in organisations and communities which actually leads to an

escalation of the deadlocked conflict. ***These disadvantages include the perception that "expert teams" (or dreaded committees):***

- Provide a convenient excuse for inept negotiators to avoid difficult situations.
- Provide a means of putting a conflict on the shelf for a long time in the hope that disputants will give up.
- Are not experts at all. Rather they will gather only biased data, and then process that incomplete information through their inexpert process and values.
- Will manage their process so badly that they will create a whole litany of new grievances based upon a series of predictable failures - to consult widely, to be polite, to be unbiased, to question vigorously, to collect adequate evidence, to report quickly, to write clearly, to justify recommendations.
- Will have their months of hard work and considered recommendations totally ignored by the disputants.

Despite these considerable risks when assembling expert teams, the process may still *re-open* conversation, at least temporarily, with new dynamics.

14. Reward Others for Helpful Initiatives

This strategy represents the other side of the coin to sending subtle conciliatory signals while trying to avoid sending a message of weakness. Whenever a member of the "opposition" does anything helpful, then an effort is made to express thanks or be helpful in return. This act encourages repetition of a co-operative cycle, and undermines dehumanised and demonised stereotypes of the opposition.

Examples of "rewarding" an act of helpfulness include:

- A lawyer's letter which begins "Thank you for sending us a summary of your client's goals. It was helpful to gain some understanding of your client's perspectives. We will send a similar document to you within the next 14 days."
- "Thank you for looking after the children for an extra two nights while I was ill last week. Your flexibility in that crisis was appreciated."
- "I appreciate the way you return phone calls so promptly. I will try to do the same for you."

15. Keep Communication Open

This strategy is often closely associated with "back channel contacts."[25] It may appear to be platitudinous and somewhat ridiculous to suggest this approach where disputants have been in a long term deadlock. However, the suggestion has subtle and powerful applications.

[25] See *supra* text above note 15.

Features of long term conflict and of a conflict spiral are that disputants gather tribes of supporters around them, psychological states of the tribes change[26], moderates in a tribe become hawks, dehumanisation and deindividuation take place (eg. "typical male", "fascist cop"; "fat-cat bureaucrat" etc.).

Knowing these standard dynamics will occur, a wise conflict manager will preserve a line of communication ready for the "eventual" settlement.

For Example:

- A family lawyer friend has this following routine in her experienced repertoire. She sometimes advises clients that their conflict over property or children has escalated, and will continue to escalate for another two years particularly if a gladiatorial lawyer is "on the other side". Therefore the client must preserve a line of communication with his/her partner ready for the "right moment to negotiate". The client is coached to send birthday cards, school reports and to be polite to his/her partner. One or two years later after a particularly aggressive and expensive round of public posturing and litigation, the client is told to organise a candle light dinner. At that dinner, the client expresses concern about his/her own lawyer's rampant aggressiveness and expense, (a variation of the good cop/bad cop negotiation routine), and an agreement is reached between the clients.

16. Prioritise Interests [27]

This approach involves one or both parties acknowledging the deadlock, but nevertheless agreeing to list issues from most important to least important from his/her team's perspective. The disputants then agree to return to the negotiating table with their respective lists of priorities in the hope that trade-offs are possible in the light of this new information.

This prioritising approach has the benefits that:

- It requires self examination and self insight in each negotiating team.
- It commonly will clarify claims and the interest behind claims (and often will create constructive conflict within negotiating teams).
- The exercise reflects the negotiation reality that rarely does one party achieve *every* goal; and therefore to identify that which can be given up is realistic.

One disadvantage is that merely participating in the exercise may be perceived to be a caving in on an original position "everything is important" - "we will surrender nothing".

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[26] Eg. Pruitt and Kim *supra* note 11 at ch. 6 and *supra* text above note 11.

[27] See Pruitt and Kim s*upra* note 11 at 196. In conflict management terminology, prioritising interests is sometimes called "logrolling" and "bridging".

This exercise is often helpful in the writer's experience in matrimonial property disputes where each party wants to "win" on the issues of valuation (my values, not yours); percentage (higher percentage to me, lower to you); timing (property transferred sooner versus property transferred later); debts (you pay the debts; not me); periodic payments (low or none versus high); particular assets ("I want the furniture, *versus,* my mother gave it to me"). When a mediator asks each disputant (and team of supporters) in private, "what is most important to you in order of priority?", some helpful differences emerge. For example, males often want the valuations of their experts accepted as a first priority; whereas females often want a percentage division at least in the mid-range as advised by their experts. This leads *eventually* ("the right offer at the wrong time is the wrong offer"), to a predictable swap - "my valuation(s) for your mid range percentage".

17. Make a formal claim

This is a common strategy used by lawyers which has some benefits and some clear disadvantages. Where negotiations drag on and appear to be getting nowhere, then one, or all disputants prepare formal claims and file them in a court or tribunal. In this situation, the claimant is not formalising a claim with the aim of obtaining a third party decision, but rather to gain from some of the incidental procedures attached to filing.[28]

The step of filing a formal claim potentially provides these benefits:

1) "A series of sanctioned deadlines for the exchange of information, backed by a mandatory process of disclosing requested information (by discovery or subpoena).
2) A series of official forms to complete by certain deadlines which may create a degree of sworn clarity about positional claims, counter claims, alleged facts and evidence to support the alleged facts.
3) Usually, an additional pressure to settle due to requirements to spend money, shift paper, lose work time, and inconvenience associates and relatives.
4) A degree of time, ritual and orderly process whereby passions may cool (or whereby the grieving process may operate).
5) An ultimate deadline (the door of the court) to complete negotiations and terminate procrastination about the final "loss".
6) An extensive code of ethics governing reasonable behaviour during conflict".[29]

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[28] See J. Wade, "In Search of New Conflict Management Processes" (1995) 10 *Australian Family Lawyer* 23-28; J. Wade, "Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge" (2001) 18 *Mediation Q* 259.

[29] *Ibid* Wade pp 27-28.

7) The involvement of an expert lawyer or conflict manager who brings the new perspective of "this is how these conflicts normally are settled".

8) The convenience of eventually embodying the settlement in a consent order rather than in a "mere" contract. A consent order can be quickly supervised by a court if there are problems with performance whereas an alleged breach of a contract may take years to be listed before a judge.[30]

However, the potential disadvantages of this filing strategy are also many. They include:

a) Filing a formal claim may well be interpreted as another unreasonable and confrontational step in the long-standing dispute. The "filer" may reinforce his/her image as someone who is an enemy worthy of destruction.

b) Because of scarce resources, most courts are engaging in aggressive case management practices.[31] Therefore the disputants will lose control of the *timing* of negotiations and will be pushed quickly towards an actual hearing.

c) Following the previous disadvantage, the disputants may be pushed quickly into a series of procedural appearances before a judge or third party decision-maker, and perhaps even a final hearing before a judge. The litany of notorious disadvantages of placing the "resolution" of conflict in the hands of a third person may be far too great for one or both of the disputants to risk.[32]

d) In some cultures, (particularly certain Asian cultures), filing a formal claim is considered to be a form of public insult and foolishness. It necessarily adds a layer of offence to an existing history of dysfunctional communications.

Conclusion

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[30] Consent or contested orders commonly include a clause such as "With liberty to apply within 14 days in relation to performance of these orders."

[31] K. H. Marks, "The Interventionist Court and Procedure" (1992) 18 *Monash ULR 1*; G.L. Davies & S. A. Sheldon, "Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale" (1993) 3 J of *Judicial Admin* 111; *Australian Law Reform Commission*, *Review of the Adversarial System of Litigation* (Issues Paper 20, 1997); D.A. 1pp, "Reforms to the Adversarial Process in Civil Litigation" (1995), 69 *Aust LJ* 705; 790.

[32] Eg. Lack of judicial time and resources, uncertainty, lack of judicial expertise and patience, expense for parties, judicial tendency to split differences, judicial need to follow precedent and avoid floodgates, process abuse, publicity for disputants, inconvenience to witnesses who are associates or friends, loss of business secrets, reporting to governmental, tax, social security, and immigration investigative bodies etc. See Aubert, "Competition and Dissensus: Two Types of Conflict and of Conflict Resolution", (1963) Vol VII *Conflict Resolution* 26; Wade "Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge" *supra* note 28.

This paper has set out seventeen standard strategies in a negotiator's repertoire for recommencing communications where a deadlock has occurred. These strategies are essential to the daily work of litigation lawyers, managers, politicians and diplomats - otherwise known as "conflict managers".

This smorgasbord of approaches raises again the questions of when and how should such knowledge be acquired by "lawyers" and other professional groups of politicians, diplomats and parents. Redefining lawyers by labels such as "conflict managers" opens up vistas of basic knowledge and skills which need to be mastered somewhere and at sometime, in a profession already challenged by ubiquitous multi-skilling and by the pace of social change.[33]

[33] *Supra* references in notes 3, 4 and 9.