

Negotiation Theory

Introduction/Overview

Negotiation involves two or more people or groups who try to reach an outcome that will meet their respective interests. Ideally, this outcome should be better than what either side could do on their own.

Dispute Intervention can be defined as “assisted negotiation.” How does negotiation theory and dispute intervention intersect? Parties who have been unable to work out a resolution on their own, have, in effect, proven themselves unable to negotiate effectively and would benefit from the assistance of a competent neutral who has the skill to assist them in their negotiation. The value the assigned officer brings to the table is an ability to assist the parties to manage the negotiation process effectively.

Roger Fisher’s and William Ury’s bestseller *Getting To Yes* gives the reader, and the mediator, a proven framework for negotiating systematically and effectively. In what was most likely a “win-win” negotiation, the authors and the publisher decided to make the ideas accessible to anyone who engages in negotiation, from the grade school student to the corporate CEO. *Getting to Yes* remains a top seller, and has been featured on BusinessWeek’s “Long-Running Bestseller” since it was originally published in 1982.

The Seven Elements

The ideas in *Getting to Yes* were generated by Fisher and Ury and their colleagues at the Harvard Negotiation Project (HNP) at Harvard Law School. One of the many contributions HNP scholars have made to the field of negotiation theory and practice is the introduction of the “Seven Elements of Negotiation Theory” or the “Seven Elements” for short. The Seven Elements provide negotiators with a framework to prepare, conduct and review negotiations systematically.

This section of the manual defines each of the Seven Elements and shows how each Element can assist the mediator (to assist the parties) at each stage of the mediation process. Following each definition is a working assumption; an example of a problem that a mediator might face; the potential cause of the problem; and possible approaches and guidelines to deal with these challenges.

1. Interests

In traditional, hard-bargaining negotiations, negotiators stake out positions, making demands upon each other. A position specifies one way in which a party has determined their interests can be met. By definition, positions are fixed and inflexible; they evoke only limited response: acceptance, rejection, or perhaps incremental movement toward compromise. Positions offer little room for creativity, leaving parties' real interests largely unmet.

Fisher and Ury, after studying and participating in thousands of negotiations, identified a way to get around the self-limiting nature of traditional bargaining. By getting people instead to explore interests—the needs underlying their positions—whole new avenues of ways to meet those interests open up. Interests are what each party hopes to achieve in mediation, describing the goals, hopes, and needs behind a party's involvement in mediation. The mediator's role is to help parties define and understand their own interests and the interests of the other party. Once this is done the mediator can help the negotiators (i.e. the parties) jointly problem-solve and develop an agreement. The better an agreement meets the parties' interests, the stronger the agreement.

- **Working Assumption:** Behind every position is a set of interests. Focusing on interests enables the parties to engage in creative problem-solving and find solutions that work for both parties.
- **Problem: Parties Focus on Their Position Rather than Their Interests and Seek Concessions:** Parties often recognize only one solution to their problem and advocate for that single solution (i.e., their position). They often build room for concessions into their initial offer in order to seem reasonable. Their goal is often to “win” by making fewer concessions, drawing more concessions from the other party, or coming to resolution closest to their initial offer. Even if this approach is “successful,” value is left on the table and, often, the relationship is harmed in the process.
- **Cause: Parties Are Used to Win-Lose Bargaining:** Parties often assume they are at odds with the other party in mediation. They therefore strive to “win” and, sometimes, for the other party to “lose.” Because most parties come to the table with opposing positional offers, they will assume that their interests are opposed. With a competitive approach, parties often damage the relationship in the process. The mediator's role, therefore, is to help the parties understand their own individual interests and point out shared interests where “common ground” exists.
- **Approach: Use Interest-Based Bargaining to Achieve Win-Win:** Carefully deciphering interests from positions will enable parties to recognize shared interests and opportunity for mutual gain. Recognizing interests helps parties understand why they are making their initial demand (position) in the first place. Once interests have been identified, the mediator can help parties think individually and together about possible options to satisfy each party's interests.

Guidelines for Neutrals

- Refocus the conversation from positions towards interests. Be explicit about what you are doing as a mediator, i.e., that you would like to understand the goals, fears, hopes and needs of each party in order to help them meet those interests.
- Keep in mind that parties might be unclear about the concept of positions versus interests at first. Be sure to summarize the interests they have expressed early on such as “wanting this to be over” or “to be compensated fairly for the work performed” so the party

gets a better idea of their interests.

- Also keep in mind that parties may need time to trust you as mediator and the mediation process before they share their interests. Parties often hesitate from sharing their interests for fear that this information will be used against them later. Earn the parties trust first by demonstrating active listening, adherence to confidentiality and demonstrate consistent behavior over time.

2. Options

Options are possible solutions that will meet both parties' interests. The mediator's role is not to generate options for the parties but rather to work with the parties to generate their own ideas for resolution. Having the parties generate their own options creates self-determined outcomes, which leads to more durable agreements between the parties. When discussing options, the mediator's role is to help the parties separate option generation (often called "brainstorming") from option selection. Options can be best generated and selected when all parties are clear about their interests.

"Options Are Formed on the Table."

- **Working Assumption:** Options should meet all parties' interests. Generating multiple options will give parties more to choose from and create the most gain for each party.
- **Problem: Value is Often Left On the Table:** Parties often accept or reject an initial proposal before fully exploring all possible options. Exploring options creates opportunities to expand the terms in a way that becomes even more attractive to both parties. Without option generation, parties lose the opportunity to explore solutions that might increase mutual gain at little cost to the other.
- **Cause: The Process Seems Unnecessary:** When parties are at odds, generating options can seem like a pointless task. Similarly, when agreement has been reached, parties often stop seeking additional options because they conclude they are "done".
- **Approach: Separate the Process:** When exploring options, it is essential to separate the process into two distinct phases for the parties.

Phase I: Option Generation - Once the parties have defined their interests, parties should brainstorm as many options as possible without evaluation. Options, even those that seem far-reaching, might lead to additional ideas that are appropriate and add value to an agreement. It is essential that evaluation be held for a later time in this process. If parties begin to evaluate in the brainstorming process, remind them that there will be time for evaluation at a later point. Be explicit and transparent with the parties about this process.

Phase II: Option Evaluation - Parties can now begin to discuss the merits of each idea, evaluating the pros and cons. Specifically, the evaluation should focus on how each option meets or does not meet the parties' interests. Encourage the parties to work together to bring the aspects of each viable option into a well-crafted agreement. Keep in mind that when a party says "no" to a particular option it is because the party believes that the proposal does not meet their interests. Ask them how they would change the option to meet their interest more effectively.

Guidelines for Neutrals

- Continue the option generation process even after it seems you have found grounds for agreement. Ending the process before fully exploring options might leave value on the table.
- If necessary, consider selecting an alternate space for option generation. The purpose is to encourage parties to approach the mediation with a different frame of mind. This is might take the form of meeting in a separate room or taking a walk outside with the parties.
- You might want to ask the parties to serve a “consultants” to their own dispute. This activity involves asking each party (usually in private session) to pretend that they have been brought in to provide advice to the parties in dispute. What advice or suggestions would they give (to themselves) that might resolve the situation?

3. Alternatives

Alternatives define courses of action a party can take either by themselves or with a third party, if agreement is not reached with the other party in mediation. A critical component of a successful mediation is asking both parties to research what they will do should they not reach an agreement in mediation. Any agreement should be better than what they can do on their own, i.e., BATMA- Best Alternative to a Mediated Agreement).

“Alternatives are Formed away from the Table.”

- **Working Assumption:** Parties who know their Best Alternative To a Mediated Agreement (BATMA) will help parties asses what they should or should not agree to in mediation.
- **Problem: Parties Fear that They Might Do Better Elsewhere:** Regardless of whether this is actually true or not, parties often feel this way during the mediation process. Without exploring one’s alternatives prior to the mediation, it can be hard to know what the party will do if there is no agreement.
- **Cause: Agreement is Reached Without Knowing What Else was Available:** With nothing to compare the current proposal to, it is hard for parties to know what to say yes to and what to walk away from. Both choices (agreeing or rejecting the deal) are made out of fear when parties do not know what they could do if they do not reach agreement.
- **Approach: Mediators Can Encourage Parties to Research Their Own and the Other Parties’ Alternatives:** Knowing one’s alternatives (and the other party’s alternative) before entering a mediation provides a benchmark for what each party should or should not agree to. Parties should never agree to something that is worse than their BATMA.

Guidelines for Neutrals

- Ask each party what they will do if they do not reach an agreement. This is often done later in the process during a private session.
- If possible, ask each party to research and enhance their BATMA prior to the mediation.
- If one party threatens another party with their BATMA (e.g., suing them, going public with information, etc.), ask the party (in private session) how going to their alternative best suits their needs and interests. Keep in mind that they are in mediation in the first place

because they have hope they will create a better outcome for themselves with the other party in mediation. Also be prepared to ask them why they are in mediation if their BATMA is so strong?

- Explore with them whether going to their BATMA really is the best thing for them. Remind them that mediation is an opportunity for them to “trade hope for certainty.”

4. Objective Standards

Objective standards are external measures that help both parties determine a point, or at least a range, of fairness in mediation. Objective standards can be: market value, outside expert opinion, law, precedent, industry regulations, etc. Mediators ask parties to define objective standards in order to generate and evaluate options and alternatives. Objective Standards can also serve as options for parties to consider.

- **Working Assumption:** Referring to objective standards can create a sense of fairness, grounding options within standards outside of the control of either party.
- **Problem: Parties Make Proposals Based on Subjectivity Which Often Turn the Negotiation Into a Contest of Wills:** Without consulting external standards for fairness, parties will not be able to determine the true value of the issue in dispute. The problem is that a mediation becomes a contest of will rather than a search for a fair agreement. Without objective criteria, parties are vulnerable to tactics such as pre-planned demands or concessions.
- **Cause: Parties Focus on their Own Desires, Forgetting About Others' Need to be Treated Fairly:** Parties often forget that the other party wants to be treated fairly in mediation as well. Mediations fail when parties neglect to review objective standards with one another, grounding the basis for their proposals in a legitimate source outside of their control. No one wants to feel “taken.”
- **Approach: Utilize Objective Standards to Ground the Discussions:** It is important to for the mediator to raise and address objective criteria explicitly in mediation. Parties can refer to standards to either push back on an unfair proposal or to defend their own. Using external standards can introduce a range that can help parties reach agreement while strengthening the relationship based on fair conduct.

Guidelines for Neutrals

- If possible, ask parties to research and bring in objective standards for discussion in the mediation. Examples of Objective Standards include: law, precedent, regulation, industry standards, external evaluations, etc.
- The use of objective standards themselves must often be discussed in mediation. Parties may find that objective standards provide them with some possible options for agreement, such as what other parties in the same industry to resolve similar disputes.
- Neutrals should encourage parties to make decisions based on the objective standards, not pressure. Ask each party what objective standards they can reference to justify how their proposal is fair to both parties. Ask how they would justify the decision that they are asking the other party to make.

5. Communication

Communication is the exchange of thoughts, messages or information by speech, signals, writing, physical cues or other actions between the parties. Communication should be effective, efficient and authentic. The mediator's role is to assist the parties to listen well and send messages that are received in a manner that was intended and vice versa. The mediator's job is to help parties communicate effectively by using such skills as reframing, clarifying, and summarizing.

- **Working Assumption:** Parties who communicate well have the opportunity to clarify interests and intentions, and increase the chance that their proposal will satisfy the other party's interests.
- **Problem: Parties Fail to Fully Understand One Another:** Parties often do not reach agreement because they do not understand the other party's interests and the proposed options. Parties often have a difficult time listening to one another, especially in a situation where there is a perceived conflict. Parties often assume they understand the other party's point of view and intentions when this is rarely the case.
- **Cause: Parties Focus More on Speaking than Listening:** Parties often conclude that the other party does not agree with them because they did not explain their point clearly. In this case, neither party fully hears or understands the other—in a typical conversation, people actually hear two voices- the other party's and their own internal voice deciding what to say next.
- **Approach: Utilize Active Listening Skills:** Ask open ended questions and give each party time (and some more time) to answer. When they are finished, before responding, take the opportunity to reframe what you heard in a way that articulates to them that you've understood them. This enables them to feel heard and recognized, provides them with the opportunity to correct you if you misunderstood them, and keeps the conversation moving forward, because they will be less likely to repeat themselves. When a party expresses an interest in the other and portrays a clear understanding of what the other is saying, the mediator's need to facilitate communication between the parties will be less immediate.

Guidelines for Neutrals

- Your role as mediator is to facilitate and encourage communication between the parties. Model active listening skills throughout the process. Help the other party understand that you are committed to understanding their point of view, including their interests, proposed options and alternatives to resolution. It will likely be reciprocated and practiced within the mediation between the parties.
- Encourage the parties to listen to and understand each other. Talk with parties about the following ideas and solicit their input:
 - Listening is not the same as waiting for the other person to stop speaking so you can say something.
 - You can indicate understanding without agreement—be explicit about this
 - Try to speak only for yourself- how you felt, what you observed, etc. Do not make accusations or attribute motives to the other party
 - Think about what you want to say before you say it. Consider the different ways your message can be interpreted and ensure that your message, and your intentions, are clearly understood

6. Relationship

Relationship refers to the state and quality of interaction between parties. It is the mediator's job to ask the parties what they want to do about the working relationship and help the parties chart a course toward continuing or ending the working relationship.

- **Working Assumption:** Separating the people from the problem helps both parties improve both the outcome and define their working relationship (whether the relationship continues or ends).
- **Problem: A Negative Relationship Impacts the Mediation Process and the Outcome:** An unhealthy relationship between the parties will negatively impact the mediation process. When trust, open communication and patience are missing, parties will seek to end the process as quickly as possible. If they meet again at a later date for a separate issue, chances are they will revert to the same hasty and inefficient process as before.
- **Cause: Parties Often Combine Substance and Relationship:** When parties disagree with one another, they often make that disagreement personal. Attacking the party along with the problem results in poor communication, resentment, and a process where neither party feels comfortable or is willing to spend the time to reach the best possible agreement.
- **Approach: Address the Importance of a Good Working Relationship:** A mediator's job is to encourage the parties to be hard on the issues and soft on the people. The mediator should ask the parties what they want to do with relationship – should it continue or end? Clarifying this will help the parties work towards a common purpose. The mediator should encourage both parties to view the other side a collaborator, working together or “co-laboring” toward a shared solution.

Guidelines for Neutrals

- Ask the parties to describe their *current* relationship. Also ask them what a *future* (ideal) relationship might look like. Follow-up by asking what they can do to close the gap between their current and future relationship.
- Listen carefully to what the parties want to do about their working relationship. Even if they want to end their relationship, remember that this is a shared interest that might be leveraged toward the parties reaching an agreement in the end.
- Even if the parties want to end their relationship, ask them about the value of treating this relationship as long-term—this is a small world.

7. Commitment

Commitments are statements of what each party will or will not do both at the beginning and end of the dispute intervention. Commitments should be realistic, operational and clear. Commitments may range from: how the parties agree to conduct themselves during the mediation, a written contract at the end of the session, a verbal agreement, an agreement to continue discussions, or a handshake. The mediator's role is to help parties discuss and commit to process issues early in mediation and commit to substantive issues later in the mediation.

- **Working Assumption:** Parties can better ensure the quality of an agreement by postponing commitment on substantive issues until the end of the process.
- **Problem: Parties are Not on the Same Page or Commit Too Early:** Committing to aspects of an agreement before fully exploring interests and options can lock up the process. When commitment is made too early, parties can become rigid and stuck to those commitments, especially if concessions were made to get them there. An offer is often seen as a commitment—this can deter parties from making offers or generating options.
- **Cause: Lack of Communication and Limited Focus:** If parties have not explicitly expressed the degree to which they are seeking agreement at the start of the mediation, frustration from miscommunication may develop as they realize they are not able to meet one another's expectations. If they commit too early, before fully exploring interests and options, value can be left on the table, or they may be unable to accept a reasonable trade in options.
- **Approach: Discuss Degree and Postpone Commitment:** Neutrals should talk with the parties about their expectations/abilities for commitment early in the mediation process to prevent miscommunication. They should also attempt to discuss all aspects of the mediation, especially interests and options in full, prior to making any commitments. Postponing commitment until the end of the process creates greater opportunity for mutual understanding and maximum gain.

Guidelines for Neutrals

- Talk with parties about process commitments and substantive commitments. Process commitments include "how much time can you dedicate to the mediation process" and do you have the authority to enter into an agreement?" Substantive commitments include an exchange of resources including money, time or other items that can be measured.
- Encourage parties to commit early to process and only make substantive commitments at the end of the mediation.
- Mediator should remind parties when necessary that process commitments can be added and modified by agreement and that any options proposed during the negotiation should be considered tentative until both parties sign off on any final agreement.

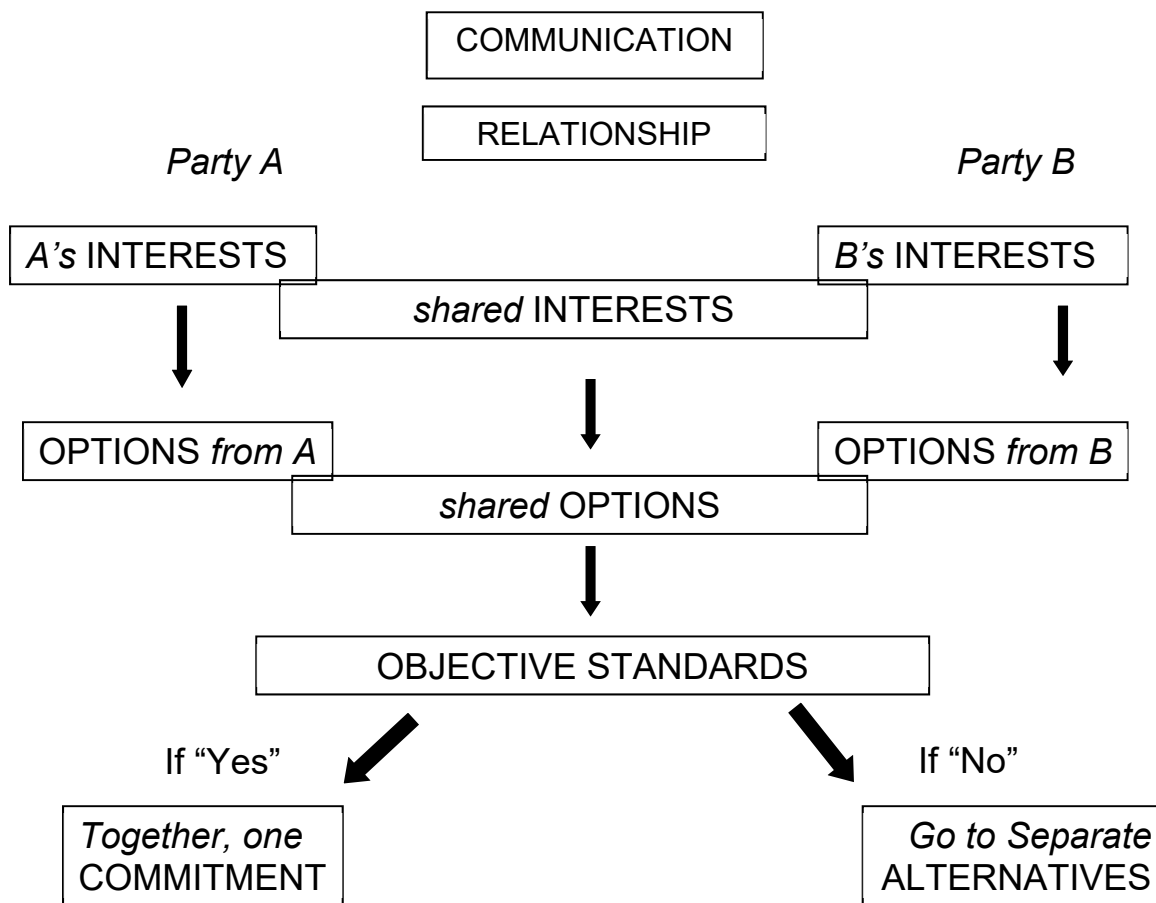
Negotiation Preparation Checklist

The following checklist may be provided to parties in advance to assist them in preparing by considering the elements of negotiation.

The following checklist is designed to help you prepare by clarifying your goals and priorities in advance of meeting. Please take a moment to answer these questions for yourself.

- 1) *Interests* (i.e., hopes, goals, needs, concerns, motivations) - What interests are you hoping to have satisfied? What do you think is important to the other party? Imagine the dispute intervention was a success - what goals of yours would be met as a result?
- 2) *Options for agreement* - What would be considered a good outcome for you and for the other party? If you were not a party to this dispute and you were asked to suggest some options for resolution that all parties might accept, what would you propose? (These possible terms should meet the interests of both parties.)
- 3) *Alternatives to reaching an agreement* - What will you do if you do not reach an agreement with the other party? What do you think the other party will do if an agreement is not reached? How well do you think these separate outcomes meet your interests compared to what you might do together?
- 4) *Objective Standards* (examples include - laws, precedents, industry norms) - What standards of fairness apply to your situation? How do you think a neutral (arbitrator, court, administrative judge, etc...) would rule on your matter and why? What have other people in your industry done when faced with a similar situation?
- 5) *Communication* - What messages do you want to send and have understood by the other party? What questions do you have for the other party at the mediation? What do you think the other party wants you to understand?
- 6) *Relationship* - Define the quality of the relationship between the parties. Should it continue or end? On what terms should it continue or end?
- 7) *Commitment* - Are you prepared to enter into an agreement? Does the agreement have to be enforceable from your point of view? Do you need to check in with anyone else before committing to an agreement?
- 8) *Other* - Please identify any other issues that you think need to be discussed. It's sometimes helpful to think of the mediation as a meeting and it's your job to create an agenda designed to cover the topics that you think need to be addressed.

Probation Officer as Negotiation Consultant



DISPUTE INTERVENTION NOTE SHEET

INTERESTS - what motivates each party to negotiate; their goals, hopes, needs.

Party A's Interests:

Party B's Interests:

OPTIONS - what the parties could do together to meet their interests. Possible solutions.

ALTERNATIVES - what each party can do on their own to meet their interests. BATMA.

What Party A would do if no agreement:

What Party B would do if no agreement:

OBJECTIVE STANDARDS - standards of fairness recognized by both parties.

Industry standards, precedents, company policies, laws, expert opinions, etc...

RELATIONSHIP - the quality of the interaction - the level of trust.

Describe current relationship:

Describe future ideal relationship:

COMMUNICATION - how messages are sent and received by parties (current/preferred)

Describe the quality of their communication:

How they would like to communicate:

COMMITMENT - what each party will and will not do. Their agreement.

Process: (e.g., amount of time at table, commitment to seek win-win outcome...)

Substantive: (Options in action - exchange or payment of time, money, resources, etc...)

Notes: