Step 6. Assess the Impediments to Resolving the Conflict

"The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy."
—Martin Luther King, Jr.

"If a man emprys his purse into his head, no man can take it away from him. An investment in knowledge always pays the best interest."
—Benjamin Franklin

In this chapter, you will learn...

- Fourteen important factors that impede the resolution of conflicts.
- What you can do about each impediment.

When participants in a conflict realize that they need help resolving it, that usually means that they have already tried, and failed, to handle it themselves. Thus, a central step in any conflict diagnosis is to determine what factors are impeding resolution of the conflict.

As we saw in Chapter 9, one important reason that conflicts fail to be resolved is that the competition cycle is easy to trigger, and, once this happens, the conflict tends to escalate out of control. Thus, a diagnostician should always look for evidence of pressure in the conflict toward the competition cycle.

However, legal and social science scholars and conflict practitioners have recognized a number of other, more specific factors that contribute to difficulties in
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**Impediments to Resolving Interpersonal Conflict**
- Motivation to seek vengeance
- Meta-disputes
- Mistrust
- Vastly different perceptions of reality
- Overcommitment and entrapment
- Lack of ripeness
- Jackpot Syndrome
- Loss aversion
- Linkages
- Conflicts of interest among team members
- Excluded stakeholders
- Disempowered disputant
- Unpleasant disputant
- Competitive culture or subculture

The most important of these are listed in this chapter, along with some strategies that a conflict diagnostician or dispute resolution practitioner can use to ameliorate the situation.

**MOTIVATION TO SEEK VENGEANCE**

A disputant who is motivated to seek vengeance is likely to sacrifice the advantages of cooperation to punish the other side. This phenomenon often occurs after a conflict has been in a competitive cycle and has escalated and spread. Disputants have many reasons to seek vengeance (Kim and Smith 1993). Some may believe that revenge is necessary to rectify an injustice that has been perpetrated on them. Disputants often seek revenge to resurrect a sense of self-worth that has been damaged in the conflict. And disputants may believe that punitive action must be taken to prevent the other disputant from wreaking further havoc. As a conflict becomes increasingly competitive, disputants tend to experience the other disputant’s conduct as motivated by hostility or hatred; thus, they are more likely to see the behavior as unjust and humiliating and are more and more likely to respond by wanting revenge.

It can be difficult to admit to vengeful feelings, because they are considered socially unacceptable in many circumstances. For that reason, disputants often rationalize vengeful feelings and actions as being defensive. For example, in eth-

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nic conflict, an “ethnic cleansing” often is rationalized, not as an act of revenge but, rather, as a response to perceived threats to property rights or personal safety.

The motivation to seek vengeance is a difficult impediment to deal with. Often, legal disputants with this motive categorically reject seemingly rational and cooperative approaches to resolving the conflict in favor of potentially damaging and expensive litigation. These disputants feel that, if only their story were told, the authoritative judge would agree with them that the other disputant deserves to be punished. Frequently, that isn't the case, and the vengeful disputant is deeply disappointed with the adversarial approach to conflict resolution. Other vengeful disputants may feel justified in resorting to extra-legal measures, such as threats, intimidation, and violence. Still others recognize that their behavior is counter-productive but can't resist taking measures that are unpleasant to the other side.

In negotiations between separated spouses, a husband insisted on receiving the lion’s share of the marital property “because you wanted the divorce, not me.” When it was suggested that he would probably not receive as much in court as he was demanding, and would have to pay thousands in attorney’s fees to litigate, he said that he was aware of that but didn’t care. Later, in mediation, he confided to the mediator that, when he sat face to face with his wife, he was unable to resist making demands he knew were unlikely to be met: his anger toward his wife was so overwhelming that he just couldn’t help himself. After a long period of cooling off, this husband was able to reach agreement with his wife in mediation, but only by using a format in which she was not physically in the same room but, instead, participated via conference call. The mediation almost fell apart when, after all the major financial issues had fallen into place, the husband refused to give his wife back her guitar. “I promised myself I would learn to play it after the divorce,” the husband rationalized. He was able to relent and agree to return the guitar only after his wife had hung up the telephone and he could speak with the mediator alone.

Assuming that the disputants can be convinced, or coerced, into participating, mediation has proven to have particular power in helping reorient disputants away from vengeful behavior and toward more constructive approaches to conflict resolution (McEwen & Milburn 1993). Kim and Smith (1993) recommend, in any conflict resolution process, that steps be taken to support the self-worth of each disputant, that vengeful feelings be carefully diagnosed (since they are often hidden), and that apology be encouraged whenever possible. A skilled mediator will often structure the negotiation to create these opportunities for coping with vengefulness.

META-DISPUTES

Meta-disputes (see Chapter 9) are disputes about the way a conflict is being handled. Unresolved and escalating conflict breeds meta-disputes, and, the more such disputes there are, the more difficult and conflicted the disputants’ relationship.

Following is a classic and common example of how a meta-dispute can develop:

The disputants are spouses who are separating and headed for a divorce. Right now, they aren’t angry, just sad and confused. After the husband
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moves out, the wife, in an effort to protect herself and behave rationally, goes to a lawyer. After a brief initial client interview, the lawyer, having minimal information about the wife's situation, and seeking to protect the wife's legal rights while he conducts an investigation, advises (1) that the wife change the locks on the house (just in case the husband decides to hide assets); (2) that the wife stop talking to her husband (a very common recommendation to protect the client from accidentally jeopardizing her case); and (3) that the lawyer file a petition for divorce (so that the requisite paperwork is in place). The next day, without any warning, the husband receives an intimidating visit from the sheriff, who serves him with divorce pleadings. The pleadings are accompanied by twenty-five interrogatories that ask, among other things, about his past five years' sexual partners and whether he has been hiding assets. The wife has no knowledge of these inquiries, having only briefly glanced at the documents after they were sent, and the lawyer sees these questions not as personal accusations but merely as “boiler plate” materials he sends to all the spouses of his divorce clients to ensure that he exercises due diligence in representing the client. The husband calls the wife in shock and anger, only to have the wife refuse to speak to him. He rushes over to the house and finds the locks have been changed. The husband is outraged—there are now at least four new “hot” conflicts—over the locks, over the sudden appearance of “the law” at his door, over the insulting interrogatory questions, and over the wife's refusal to talk.

The best way to deal with meta-disputes is to prevent them in the first place. A cooperative conflict cycle minimizes meta-disputes by encouraging free and open communication and by protecting the disputants from negative attributions of one another's behaviors. Once meta-disputes begin to accumulate, it is hard to avoid conflict escalation unless they're dealt with directly.

Often, meta-disputes reveal themselves to be misunderstandings, but they can be hard to untangle without the help of a neutral third party, such as a mediator. In the preceding divorce example, a mediator could help the husband understand that the wife's actions were the result of “standardized” tactics on the part of the lawyer, not motivated by ill will on the wife's part. A mediator could also help the wife appreciate the impact that the actions had on the husband. Often, a sincere apology from someone in the position of the wife can open many doors to removing the impediment.

MISTRUST

Trust and mistrust were considered in detail in Chapter 10. Mistrust and low levels of trust are the engines driving conflict escalation: low levels of trust create the suspicion, circumspection, and defensive tactics that promote inefficiency, bad feelings, and disputants' efforts to undermine one another. Mistrust is created by competitive conflict, and it is fed by vengeful behavior and meta-disputes. Obviously, tactics that build trust (discussed in Chapter 10) are vital in countering mistrust and facilitating the resolution of conflict.
Chapter 11

VASTLY DIFFERING PERCEPTIONS OF REALITY

When disputants have dramatically differing perceptions of the facts or law that underlie the conflict, they usually have trouble achieving resolution without help. If each person has a strong, honest belief that his or her point of view is the correct one, then it is difficult to convince the person to decide otherwise. Rational individuals are not likely to settle a dispute for a lot less than they think they would get if the dispute were resolved in a court.

When differing perceptions are the result of factual or legal error or insufficient information, they are very easy to resolve through processes that clarify facts or law, such as nonbinding evaluation. For example, if the parties disagree about how to place a value on the pain and suffering of an accident victim, they can each present a summary of their evidence before a group of individuals selected from a jury pool to render a nonbinding opinion. The trouble is that many differing perceptions of reality arise not out of error or ignorance but, rather, out of the perceptual distortions inherent in the competition cycle, and nonbinding evaluation processes do little to counteract them. A disputant in an escalating competition who has staked his or her ego on a position usually interprets reality to be consistent with his or her judgmental attitude toward the other disputant. The key to removing such an impediment to conflict resolution is to find a way for the disputant to back away from his or her extreme position without losing face. An example from child custody mediation is helpful:

Two parents were referred to child custody mediation in a midwestern urban court system. The father was suing for full custody and wanted to terminate all unsupervised visitation between the six-year-old child and the child's mother. In the initial interview with the mediator, the parents' acrimonious relationship was immediately obvious from body language and the hostile words they exchanged.

The mediator asked the father why he believed that the mother should lose all rights to time alone with the child, and the father replied that there had been physical child abuse. The mother adamantly denied that any child abuse had taken place. The mediator recognized that somewhere in the conflict was probably a vast difference in perception. Pressed further for details by the mediator, the father said that the mother had not actually committed the abuse but had stood by and allowed someone else caring for the child to abuse him. The father finally admitted that the only incident of which he was actually aware involved the child, left with a baby-sitter while the mother ran an errand, being hit with some snowballs by a much older boy. The father then softened his position somewhat and argued that this incident proved the mother's poor judgment in her selection of a babysitter. Ultimately, with the mediator's gentle assistance, the father came to acknowledge that completely cutting the child off from his mother would be counterproductive under the circumstances. The child's mother offered

2 Such a proceeding, known as a summary jury trial, is discussed in text Chapter 6.
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an agreement to involve the father in the choice of the child’s caregivers; in fact, however, having had the opportunity to express his angry and mistrustful feelings, the father abandoned his demands for control in this area, and the parents were ultimately able to reach a shared parenting agreement.

OVERCOMMITMENT AND ENTRAPMENT

A disputant “overcommits” when he or she pours so much time, money, and energy into preparing for a battle that it is seemingly wasteful to back out of the project. The result is that the disputants feel trapped.

To model this phenomenon, social scientist Martin Shubik developed the Dollar Auction Game (Rubin, Pruitt, & Kim 1994, 111–12). A dollar bill is auctioned off to a group of bidders. The rules award the dollar bill to the highest bidder, but both the highest and second-highest bidders must pay the amounts of their bids to the auctioneer: if the highest bid is $1, the winner just breaks even and the second-highest bidder loses the amount of his or her bid. Thus, the game simulates the reality that negotiations often involve significant and mounting costs to the disputants. The bidding generally starts out low and brisk, but, as the bidding approaches $1, bidders begin to fear that they will end up with the second-highest bid. Some bidders drop out, but a few stick with it, in the hope that they will be the highest bidder. As the bidding exceeds $1, the issue is no longer winning but cutting losses. Thus, the bidding tends to continue past the $1 break-even point as each bidder tries to avoid being the second-highest bidder. As the bidding continues, however, it is believed that the entrapped bidders shift their focus from minimizing losses to ensuring that they lose less than the other side (Rubin, Pruitt, & Kim 1994, 111–13)—in other words, a motive to harm the other party appears. According to Shubik, the winning bid for the $1 bill is often $5 or $6.

How does overcommitment and entrapment appear in real-life interpersonal conflicts? Consider the following example, adapted from a real trial, with the details modified to preserve client confidentiality:

Acme, a large national real estate brokerage business, contracts with Dolores Merriweather to act as an agent. She begins with plenty of enthusiasm but not a whole lot of skill, and, after a year or so, her production drops off to a barely adequate level. Eventually, Acme’s regional manager, Grant Beasley, encourages her to look elsewhere for a career. Thereafter, Dolores continues to act as an Acme agent, but she finds that support from the agency, formerly spotty at best, becomes inadequate.

In anger, Dolores finally ends her contractual relationship with Acme and consults a lawyer. Some weeks later, Acme’s regional manager receives a letter from the lawyer, stating Dolores’ contentions that Acme systematically withheld commissions from buyers who worked with Dolores but consummated a deal with another agent. The lawyer demands $50,000 in immediate settlement damages. Acme’s house counsel hires outside counsel to defend the accusations. Initial interviews with Grant and his staff produce rolling eyes and guffaws: Dolores was a poor agent and they were lucky to finally have her gone. Grant convinces the attorneys that Dolores
does not have a leg to stand on—the client files will prove it. Thus, Acme’s lawyer contacts Dolores’ lawyer and informs him that Acme refuses to consider negotiation.

Dolores then sues Acme, seeking compensatory damages of $100,000 and unspecified punitive damages. Acme’s counsel then conducts more extensive interviews with Acme’s personnel and discovers that the case is not as black and white as it first appeared. Dolores was a poor agent, to be sure, but she is able to make an argument that her lack of immediate revenues was due to her building up goodwill for Acme. Grant is absolutely convinced that the argument is silly, but it might play with a jury. Also, substantial legal research must be conducted in light of ambiguities in the contractual relationship between Acme and Dolores.

As Acme’s legal bill approaches $10,000, Acme’s lawyers receive word from the regional office that Dolores’ client files have been archived; it will take at least eight weeks to retrieve the materials. Another several thousand dollars are spent contesting numerous preliminary motions brought by Dolores’ attorney. Ten weeks later, the regional office managers begin to express some doubts about whether they know the actual location of about 60 percent of the client files in question. Without the client files, the likelihood of Acme’s prevailing in litigation is called into a bit more doubt. In fact, the “outrageously high” demand Dolores’ lawyer made eight months ago (for
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$50,000) is starting to look almost attractive; however, now that the legal bill is around $20,000, Acme sees as the only rational choice to press on—there's still a pretty good chance that it will win.

As trial approaches and Acme's legal team perfect their legal research and factual analysis, the probability of winning at trial becomes more and more uncertain. Pre-trial requests for legal rulings in Acme's favor have either failed altogether or have been rebuffed by the motions judge as being premature. As the trial date approaches, it becomes evident that the client files are unrecoverable. Grant's job is on the line; if he admits that the client files are lost, he believes he is likely to lose his job. At least if the case is tried, and Acme wins, he will have total vindication; if it is tried and Acme loses, he is not very much worse off than if the case settles. Besides, Dolores' initial demand of $50,000 in damages, initially seen as ridiculous, has now been withdrawn. Dolores' legal team has spent hundreds of hours preparing the case and sees no reason not to take a chance with litigation.

The trial takes two weeks. Each legal team sends two lawyers and a paralegal to the courthouse for twelve- to fourteen-hour days. At the end of trial, the jury awards Dolores $40,000 in compensatory damages and $200,000 in punitive damages. Acme also has $40,000 in legal fees and spent hundreds of employee hours preparing the case. Moreover, the case has substantial precedential value: it means that Acme will have to recompute the commissions of every entry-level agent in its pool. The computation itself will cost thousands of manpower hours and potentially cost the company billions. Dolores has spent over $55,000 in lawyer's fees as well.

Overcommitment is a toxic combination of inattention and fear of losing face. It is insidious, it happens inch by inch, creating entrapment by degrees. The best ways to combat entrapment are to make disputants attentive to the process of commitment and to avoid the loss of face issue that comes with it. Rubin, Pruitt, and Kim (1994, 114–16) recommend four tactics designed to avoid overcommitment and entrapment.

First, before entering into a negotiation, it helps to set some boundaries on how much the disputant will lay on the line. By setting limits, the conflict participant establishes a sort of “trip wire,” which alerts him or her to the potential danger of entrapment. For example, in the Acme example, the attorneys for Acme might have been instructed to invest no more than $5,000 in legal research and then to meet with Acme personnel to decide what to do next.3

Second during the negotiation, one can schedule “points of decision,” at which the decision to stay involved is periodically reevaluated. This tactic counteracts the tendency to ignore issues of cost-effectiveness until overcommitment has already occurred. For example, the Acme legal team could have scheduled bi-monthly teleconferences with the board to discuss progress to date, costs, and possible decisions to settle.

3 One kind of limit, called the Best Alternative To a Negotiated Agreement (BATNA) is discussed in Chapter 13.
Third, attention should be paid, during analysis of whether to continue committing resources to a conflict, on the costs, nonmonetary and monetary, of continuing the conflict. Any evaluation of the merits of continuing a dispute should always include cost estimates. In the Acme case, it would have been helpful if the legal team had been required to estimate the costs of each step of the process and to report to the Acme board whenever the estimates seemed to be in question.

Fourth, it’s very useful to build in ways to save face wherever possible. As entrapment builds, the participants continue to persist in the dispute to avoid loss of face. In the Acme case, it would have been useful to have members of the corporate structure not associated directly with the regional office involved in the decision making, so that Grant’s psychological and personal needs did not interfere with decisions made for Acme as a whole. Also, if possible within the participants’ professional roles, Grant’s esteem could have been supported directly, perhaps by reassuring him that his position was not in jeopardy despite the snafu. If Grant were a generally competent individual, he could even be made responsible for overhauling the client-file storage and retrieval system: this move could preserve his image and benefit the company as a whole.

LACK OF RIPENESS

Often, resolving a conflict is perceived as costly, difficult, scary, or intolerably unpleasant—and sometimes it is. Many times, disputants won’t confront the work needed to resolve a conflict until they feel there is no other alternative. This characteristic of conflict is called “ripeness.”

Dean Pruitt and Paul Olczak, who write about seemingly intractable conflict, list the following sources of ripeness (Pruitt and Olczak 1995, 68-69):

- The disputants are at an impasse and failing to resolve the conflict is doing significant continuing damage. Pruitt and Olczak refer to this phenomenon as “hurting stalemate.”
- “Recent catastrophe or near catastrophe”—a consequence or near-consequence of the conflict—stuns the participants into the need for immediate resolution.
- “Impending catastrophe or deteriorating position”—the parties in the conflict become aware that failing to resolve the conflict is creating the likelihood of imminent disaster.
- The presence of an “enticing opportunity”—an opportunity arises to resolve the conflict that could yield terrific benefits but is available “for a limited time only.”

In legal disputing, ripeness is often created by the proximity of trial. A trial usually has many unexpected twists and turns; it is expensive, time-consuming, and emotionally harrowing. As a trial date approaches, disputants formerly noted for their intransigence often find heretofore hidden flexibility in their negotiating positions. The common practice of “settling on the courthouse steps”
illustrates the truth of the proposition that, for many litigants, trial is the impending catastrophe needed to spur them into settling their legal dispute. However, it is less expensive, less harmful to relationships, more efficient, and more constructive to find a way to ripen a legal dispute before the participants have invested the considerable time and money required to prepare for a trial.

Sometimes, disputants perceive the possible development of a competition cycle as the impending catastrophe needed to create ripeness. Many divorce mediation clients enter the mediation process expressing fear that, if they cannot resolve the issues around their divorce themselves, the case will be run away with by the lawyers. Although these disputants’ perceptions about lawyers may not be wholly accurate, their conceptualization of the competition cycle as impending catastrophe is laudable. It allows resolution of the conflict while it is still in a cooperative cycle.

If disputants appear to be intransigent, a conflict diagnostician can look for sources of ripeness that the parties have overlooked, develop strategies to create awareness of existing sources of ripeness, or even, as appropriate, develop strategies to create sources of ripeness. If possible, this effort is better done before a competition cycle begins, by educating the disputants to the likely damage that would be done if the conflict were to escalate, thus encouraging the perception of a competition cycle as an impending catastrophe. In our example of the real estate commissions dispute, a conflict diagnostician could have alerted the parties to a hurting stalemate by calling their attention to the escalating legal costs, for example, and the uncertainty of outcome. In recent years, U.S. presidents have attempted to create enticing opportunities for the resolution of difficult international conflicts by engineering special time-limited summit negotiations.

**JACKPOT SYNDROME**

The Jackpot Syndrome, identified by prominent law professors Frank Sander and Stephen Goldberg (Sander & Goldberg 1994), involves apparently irrational behavior by a disputant who is risk-tolerant. Disputants afflicted with this syndrome believe that they have a chance of “winning big” if they hold out and refuse to settle. The irrationality comes because their chances of actually getting the big payoff are miniscule. For example, consider a disputant who believes he has a shot at winning tens of millions of dollars if he takes his grievance to court. The other side believes that his chances of being struck by lightning are better than his chance of winning the litigation, yet, dazzled by the thought of riches beyond the dreams of avarice, he persists in the lawsuit.

An apparent case of Jackpot Syndrome should be carefully diagnosed. If the disputant is not clear about the apparent worthlessness of the case, he or she needs to be educated: rather than Jackpot Syndrome, this is a case of differing views of reality. Of course, if the conflict is marked by mistrust among disputants, a neutral or an advocate of the misinformed disputant will have to be the bearer of the bad news. Some cases of apparent Jackpot Syndrome arise from a litigant’s failure to appreciate the truly hopeless position he or she is in if he or
she tries to go to court. Nonbinding evaluation processes can be of great help in making the disputants aware of their true interests in settling the dispute amicably. In other cases, apparent Jackpot Syndrome is, in reality, a disputant bent on vengeance: his or her focus on the high payoff is a rationalization for behavior really meant to punish the other disputant. In the case of true Jackpot Syndrome, a visionary mediator, or another conflict resolver, can sometimes intuit the psychological needs underlying the disputant’s compulsion to gamble and can find creative ways to meet those needs. This tactic allows the disputant to have his or her needs met but act rationally in the conflict. However, sometimes a case of Jackpot Syndrome can be resolved only through litigation: the disputant will agree to participate in no other process, and, in fact, such a disputant gains independent satisfaction from rolling the dice in court. To persuade such an individual to settle out of court, one must make a case for the proposition that the benefits of settlement outweigh the intrinsic satisfaction the disputant gets from gambling.

LOSS AVERSION

Loss aversion is the propensity of many people to prefer to gamble on an uncertain outcome rather than to take on a certain but manageable loss. For example, imagine a dispute over a fender-bender. Mary, whose car suffered the most damage, sues Ernie for $10,000. Mary then demands $2,000 to settle the case. Ernie may prefer to chance court, rather than to take on a definite loss of $2,000, even if he is likely to lose more than $2,000.

Loss aversion is the complement of Jackpot Syndrome; it involves people who would rather gamble, knowing they have a good chance of losing, than give up a sure thing of lesser value. As with Jackpot Syndrome, if the loss aversion amounts to ignorance, a good approach is to educate the disputant about the real chances and costs of litigation.

Loss aversion may also be a coverup for an identity issue. It may be difficult to settle a case because of the loss of face that attends agreeing to pay a settlement. The disputant may prefer to take his or her chances and gamble on a big loss, rather than admitting he or she did wrong upfront. If this issue is lurking behind a disputant’s intransigence, establishing face-saving measures (such as payment without an admission of liability or an agreement not to make the settlement public) may be helpful.

LINKAGES

A linkages problem (Sander & Goldberg 1994) occurs when the conflict under consideration is interlinked with other conflicts and other parties. The implications of settlement may be hard to clarify or may overwhelm the stakes in the current conflict. It may seem safer just to avoid settlement altogether. For example, in the real estate commissions dispute example described earlier in this
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In the current chapter, the outcome of the dispute had the potential to affect commission arrangements across the nation. The pending dispute had received media coverage in trade newspapers and was being followed by the specialized legal community that dealt with real estate commission contracting. At one point in the dispute, Acme’s leadership met to consider settlement but concluded that settling would make them appear “soft” and would leave them vulnerable to attacks by other agents. As things turned out, however, the litigation produced an outcome that made Acme even more vulnerable.

Class action lawsuits and similar massive conflicts involving multiple parties and incidents present prime examples of linkages. Consider, for example, the tobacco litigation that occurred in the last half-decade of the twentieth century. Individual tobacco firms were in danger of incurring dangerous precedents whether they settled or litigated. In an effort to create more certainty and limit losses, the companies offered a broad-based settlement with limited future liability in exchange for huge initial financial outlays. Among individual litigants, politicians, and advocacy groups, there were so many conflicting interests that the broad-based settlements could not be accepted. The tobacco litigation is still being resolved, on the whole, one case or class of cases at a time.

Linkages are a reality of many interpersonal conflicts. An effective conflict diagnostician deals with linkages by performing detailed interests analyses to determine the nature of each interdependent relationship affecting the conflict. Sometimes, linkages can be turned to advantage—for example, by providing other dimensions on which a constructive outcome can be fashioned. For example, rather than hashing out the real estate commissions dispute in court, perhaps Dolores, who was struggling as an agent, anyway, could have been receptive to a consulting deal that gave her a lucrative position working with Grant and Acme’s house counsel to redesign their agency agreements and client file storage system. Dolores could receive a good salary and valuable experience in the industry, and Acme could prevent such disputes from arising in the future by improving its contracts and record-keeping functions.

CONFLICTS OF INTEREST AMONG TEAM MEMBERS

Nondisputants can put a variety of barriers in the way of conflict resolution. Constituents, agents, and other influential parties can all impede the otherwise effective work of disputants.

Constituents often have interests that conflict with those of others on their disputant’s team. Some examples of this phenomenon were presented in Chapters 6 and 8, when we discussed the S-B Corporate transaction. Sue, the officeworker for S Corporation and a constituent, is likely to give less than her full attention to the work needed to make the transaction work—she’s overworked and just wants the whole transaction to “go away.” Similarly, agents and advocates may have interests that conflict with their principals. In the real estate commissions dispute, Grant, the regional manager and agent for the disputant, has a personal interest in
Conflicts of interest among members of a negotiation team can ruin settlement efforts. 

Eye Wire Collection, Getty Images—Eye Wire, Inc.

Conflicts of interest among members of a negotiation team can ruin settlement efforts. This personal interest—in not losing his job—creates an irresistible urge to conceal the truth and to convince the rest of his team to pursue litigation; after all, he reasons, he can't lose much more by litigating and being fired if they lose than he can by settling and probably being fired, anyway.

Individuals who are not participating in the negotiation may also have conflicts of interest with members of either or both teams. Following is an example that involves identity conflict (see Chapter 7):

A skilled and experienced facilitator for a state public health agency related a saga involving efforts to create standards for improving consumer protection against fraudulent claims by weight-loss businesses. These standards were promulgated through a process of negotiation between interested stakeholders. The facilitator’s responsibilities were to ensure that the proper parties were involved in the decision-making process, to structure a series of meetings to create a likelihood of settlement, and to protect the state’s interests in properly meeting the objectives required by its public health and consumer protection laws.

The facilitator identified a number of state agencies, industry representatives, and consumer health advocacy groups who were likely to feel the need to be heard on the issue. A problem ensued that involved a certain advocacy group. With its “cultural history” of advocacy, its approach was to characterize its work as a struggle against victimization by “forces of evil” at work in government and private industry. The group could not be seen as cooperating with “the enemies,” else its identity as a champion...
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of the oppressed would be threatened. The facilitator was at a loss for what to do: the advocacy group seemingly refused both to participate and to be left out of the negotiation. The group preferred a milieu of struggle and revolution; peaceful negotiation itself was antithetical to their core identity. The facilitator dealt with this seemingly intractable situation by publicly honoring the group’s commitment to consumer health protection, graciously inviting the group to participate in the negotiation process, and then quietly proceeding without them when they refused to participate.

Conflicts of interest can sometimes be treated as separate interpersonal conflicts, subject to creative resolution. When advocates and agents have clear conflicts of interest with their disputants, sometimes they must withdraw from representing the disputants to prevent the conflict of interest from doing harm to those they ostensibly represent.

EXCLUDED STAKEHOLDERS

Another group of people who frequently impede the smooth resolution of a conflict are those who are not at the negotiation table but feel they should be. In a complex conflict, sometimes the disputants are difficult to identify. There may be a number of advocacy groups, each of which claims to be an interested party. Or, within a single group of disputants, there may be conflict over who should be physically performing the negotiation of the conflict.

Any individual who feels a need to contribute to the resolution of a conflict but who isn’t invited to do so, is likely to feel slighted about the lack of consideration. This psychological sting typically prompts the person who has been left out to dislike any settlement being considered (in a phenomenon closely related to reactive devaluation), and this person will often seek to sabotage the settlement process. Following is a common example from divorce mediation:

A divorced mother and father go to mediation to resolve issues concerning the parenting of their two children. They work in mediation for a number of sessions and are in the process of developing what appears to the mediator to be a logical and workable parenting plan. Part of the plan involves the children going to the father’s house after school two days a week. When the fourth session begins, the father announces that the plan they are negotiating is unacceptable. The father offers no real substantive reasons for his rejection of the parenting plan, until he finally admits that his current wife has refused to perform any of the transportation that the agreement requires. Everyone is completely surprised by the developments, because, until they entered mediation, the wife presented herself as devoted to the children and willing to do everything she can to be an exemplary stepmother.

When a conflict diagnostician uncovers an excluded individual, often the most effective way to deal with the situation is to include him or her in some
meaningful way in the negotiation. Imagine, for example, if the stepmother case had instead gone this way:

In the initial session, the mediator uncovers the presence of the stepmother and her apparent involvement in parenting. She also notes a degree of friction between the stepmother and the children's mother. She recommends involving the stepmother in the mediation process to prevent the possibility of sabotage and develops a plan with the parents for how to involve her. She carefully prepares the mom and dad for how she will involve the stepmom and why it is important to make sure she feels involved. She reassures the mom that the stepmom does not have any actual decision-making authority—they are the parents, not her—and wryly asks the mom to keep her tongue firmly bitten throughout the next mediation session.

The stepmom is invited to the next mediation session. The mediator welcomes the stepmom to the session and comments that she has heard from the parents how important she is to the lives of the children. Without telling the stepmom that she will have any power to make decisions about the evolving parenting plan, the mediator validates the stepmom's importance in making the parenting arrangements work and compliments the stepmom on her commitment to the children's welfare. When invited to share her opinion regarding how she can help make the parenting arrangements work, the stepmom herself notes that she is home in the afternoons and could provide transportation. She also asks that the father give her increased authority to discipline the children when they are at Dad's house and Dad is not at home. The final parenting plan, negotiated by the parents without the stepmom present, incorporates both these suggestions and expressly notes that the stepmom suggested them. Feeling a strong sense of psychological ownership of the arrangements, the stepmom works hard to keep the parenting plan, as a whole, working smoothly.

DISEMPOWERED DISPUTANT

A disempowered disputant is a disputant who feels he or she has insufficient power in the relationship with the other disputant.4 A disempowered disputant fears coming to agreement, because he or she is afraid to be taken advantage of and doesn't know how to protect him- or herself. Often, the disempowered disputant cannot assess the utility of a proposed settlement, because he or she lacks essential knowledge. A disempowered disputant is very likely to dig his or her heels into the sand and become paralyzed.

A seeming paradox is that a very powerful disputant in negotiation with a very disempowered disputant often benefits from conferring power on the latter. This is particularly the case if the more powerful disputant loses more in the failure to reach agreement than the less powerful disputant.

Spouses enter mediation at the behest of the husband to resolve issues around their separation and eventual divorce. The husband has been active.

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4 Power in interpersonal conflict is covered in Chapter 13.
Step 6. Assess the Impediments to Resolving the Conflict

in the business world and negotiates for a living. He has also handled the family finances. The wife has stayed home and raised the children. When they are asked to describe their goals, hopes, and dreams for the future, the husband responds with a specific proposal concerning who will get the house, where the children will live, and how the assets will be divided. He asserts that he has considered the wife's best interests in his analysis and that his proposal is fair. The wife, on the other hand, has no goals she is able to express and wants the mediator to tell her whether the husband's proposal is fair. The mediator refuses to do this, stating that this is not an appropriate function for a mediator and suggesting that the wife receive legal advice to help her gain the knowledge she needs to assess the fairness of the proposal and to clarify her own goals.

Three days later, the husband telephones the mediator in a frantic state: his wife has abandoned mediation and has retained her parents' lawyer, who does not even specialize in divorce law. The mediator comments to the husband that individuals who do not feel comfortable negotiating on their own are poor candidates for mediation but that she would suggest some options to facilitate an effective alternative. The mediator, then hearing from the wife, offers her the option of bringing the lawyer to mediation to help her negotiate, but she adamantly refuses all further efforts to participate in her own negotiation, even given assistance of counsel.

A conflict diagnostician who finds a disempowered disputant impeding settlement should look at ways that the disputant can be empowered. As will be seen in Chapter 13, often the most effective form of empowerment is the conferal of knowledge. The disempowered disputant gains an enormous amount of knowledge by having the conflict effectively diagnosed for him or her. With a complete conflict diagnosis, the disputant can decide effectively whether it is in his or her best interests to settle a conflict.

UNPLEASANT DISPUTANT

Some disputants are so irritating that no one wants to please them. Their unpleasant personalities generate intense hostility in those who have to deal with them. They push conflicts into a competitive cycle by directly generating enmity between the participants. Helping the irritating person may feel psychologically intolerable to the other participants (contrent interdependence results). Sometimes, the problem is "goodness of fit"—a disputant is only unpleasant to a single other disputant—but sometimes the unpleasant disputant is decried almost universally as impossible to work with.

Obviously, if a conflict diagnostician discovers this impediment operating, one possible solution is to put distance between the disputant who is inciting hostility and the other conflict participants. One way to make this happen, if the unpleasant disputant is able to acknowledge the impediment, is to hire an agent or advocate to act in the disputant's place. Another way is to create physical or technological distance. If face-to-face negotiation is too provocative, one might
try the telephone; if the telephone is still too incendiary, letters or e-mail may work better. Mediation can help in such negotiations if it is structured so that the mediator acts as a “shuttle diplomat,” meeting with the disputants separately and providing a communication conduit between them. (This mediation technique, called “caucusing,” is discussed in text Chapter 3.) Another way to manage a difficult disputant is simply to become aware of the ways in which the disputant annoys the other participants and to create awareness of and insight into the problem. Other participants in the process may be able to control their tempers long enough to obtain a resolution that is in their self-interest.

COMPETITIVE CULTURE OR SUBCULTURE

A competitive culture or subculture breeds competitive conflict escalation in numerous ways. The invisible veil discussed in Chapter 3 is at work in certain cultural or subcultural groups, whose members are expected to behave competitively, are very skilled in adversarial conflict behavior, and are usually in the habit of doing so. Alternative ways of behaving are misunderstood, decried, or ridiculed. Efforts to create a cooperation cycle are met with efforts to exploit the opening thus created. It is difficult to deal with conflict in such an environment without retreating to the self-protective illusion of competition.

The most common competitive subculture is the legal subculture. Lawyers are inculcated in the ways of competitive conflict resolution, as we saw in Chapter 3. Clients who access lawyers and the judiciary to have their disputes resolved typically see the dispute resolved through competitive processes, although recent reforms in the legal educational system are beginning to create inroads into this cultural belief system.
Step 6. Assess the Impediments to Resolving the Conflict

Obviously, trying to establish a cooperative relationship within a competitive culture or subculture involves one of two approaches: either creating enough incentive for the other disputant to break cultural traditions or moving the site of the conflict out of the competitive setting. Both of these approaches are used for legal disputes. There is an increasing trend toward so-called collaborative lawyering, an effort to create a noncompetitive subculture within the legal subculture (Tesler 1999). Additionally, the movement toward using mediation to resolve legal disputes is a clear effort to move these interpersonal conflicts outside of a competitive subculture and into a clearly noncompetitive subculture for resolution.

Table 11-1 briefly summarizes the impediments to settlement that have been discussed in this chapter.

<table>
<thead>
<tr>
<th>IMPEDIMENT</th>
<th>EXPLANATION</th>
<th>EXAMPLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Motivation to seek vengeance</td>
<td>A disputant wants retribution against another participant more than he or she wants a settlement.</td>
<td>Knowing she will lose in court, a plaintiff pursues a lawsuit because of the inconvenience she knows it will cause the defendant.</td>
</tr>
<tr>
<td>Meta-disputes</td>
<td>Conflicts and disputes that relate to how the main conflict is or has been handled.</td>
<td>During a labor dispute, one side accuses the other of unfair practices.</td>
</tr>
<tr>
<td>Mistrust</td>
<td>A disputant believes that the other disputant is likely to use a settlement process as an opportunity for exploitation.</td>
<td>During the Israeli-Palestinian conflict, the Israeli government is unwilling to take the word of Palestinian leadership that they will take care of anti-Semitic terrorists; as a result, Israel takes violent action against Palestinian militants.</td>
</tr>
<tr>
<td>Vastly differing perceptions of reality</td>
<td>Each side believes a completely different version of the situation.</td>
<td>An employee files a grievance, claiming discrimination on the basis of gender against her supervisor, who believes that no gender discrimination has taken place.</td>
</tr>
<tr>
<td>Overcommitment and entrapment</td>
<td>A disputant's team commits so much time, resource, or psychological energy to a competitive position that they feel that to settle would be a waste or would create intolerable loss of face.</td>
<td>After committing $50,000 to preparing for trial, a plaintiff refuses an eleventh-hour offer to settle for an amount the plaintiff originally felt would be in his best interests.</td>
</tr>
<tr>
<td>Lack of ripeness</td>
<td>One or both teams have not yet come to believe that there is an urgent need to settle.</td>
<td>An auto accident plaintiff has filed suit, the case is scheduled for trial in fifteen months, and the plaintiff’s legal team sees no harm in letting the case sit. They use the requests for settlement discussions by the other side for strategic advantage, hoping that playing hard to get will sweeten the eventual outcome.</td>
</tr>
<tr>
<td>Jackpot Syndrome</td>
<td>One of the parties is willing to take a huge risk that he or she will lose for the opportunity to obtain a huge recovery.</td>
<td>A plaintiff sues for $10 million and refuses to settle, despite her attorney's warning that she's unlikely to beat the defendant's latest offer.</td>
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**TABLE 11-1** Summary: Impediments to Cooperative Settlement of Interpersonal Conflict (continued)

<table>
<thead>
<tr>
<th>IMPEDIMENT</th>
<th>EXPLANATION</th>
<th>EXAMPLE</th>
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<tbody>
<tr>
<td>Loss aversion</td>
<td>A disputant would rather gamble on a likely huge loss than pay out a smaller</td>
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<td></td>
<td>loss now.</td>
<td>A defendant, faced with an offer of settlement if he pays $25,000, prefers to try the case although his lawyer warns that he's very likely to</td>
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<tr>
<td></td>
<td></td>
<td>lose more than that.</td>
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<td>Linkages</td>
<td>Settling this case will affect other situations in unpredictable or damaging</td>
<td></td>
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<td></td>
<td>ways.</td>
<td>A prosecutor refuses to accept a plea-bargain offer from a defendant accused of accounting fraud— even though the evidence in the case is</td>
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<td></td>
<td></td>
<td>weak— because of the slap-on-the-wrist message that might be sent to others with similar cases pending.</td>
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<tr>
<td>Conflicts of interest among team</td>
<td>A settlement that addresses the interests of one team member well does a bad</td>
<td></td>
</tr>
<tr>
<td>members</td>
<td>job of addressing the interests of another team member.</td>
<td>A mother refuses to settle a pending child custody case with her child's father because civility with this man enrages her present husband.</td>
</tr>
<tr>
<td>Excluded stakeholders</td>
<td>One of the important stakeholders in the conflict is left out of the</td>
<td>During negotiations over custodial arrangements for a teenager, parental efforts to institute visitation arrangements fall apart when the</td>
</tr>
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<td>negotiations and therefore sabotages efforts to complete a settlement.</td>
<td>teenager refuses to go to the mother's house as specified in the agreement.</td>
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<tr>
<td>Disempowered disputant</td>
<td>A disputant feels overmatched during a conflict and is fearful that agreeing</td>
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<td>to a settlement will harm him.</td>
<td>A major corporation can't convince a frightened consumer to settle a warranty claim despite the honest beliefs of corporate counsel that</td>
</tr>
<tr>
<td></td>
<td></td>
<td>they have bent over backwards to accommodate the consumer.</td>
</tr>
<tr>
<td>Unpleasant disputant</td>
<td>A disputant, or a member of the disputant's team, is so unpleasant that settling with her leaves a bad taste.</td>
<td>A defendant can't bring herself to settle with the plaintiff; the latter has made the defendant's life so miserable that the defendant finds giving her any sort of satisfaction to be intolerable.</td>
</tr>
<tr>
<td>Competitive culture or subculture</td>
<td>A disputant or negotiator comes from a culture or subculture in which</td>
<td>In a dispute over baseball salaries, both owners and players believe that competition is the primary blueprint for conflict management.</td>
</tr>
<tr>
<td></td>
<td>competition is the primary blueprint for conflict management.</td>
<td></td>
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**EXERCISES, PROJECTS, AND “THOUGHT EXPERIMENTS”**

1. Conflict journal.
   a. Consider each of the impediments to resolving conflict that are listed in this chapter. For each, determine whether it is applicable to your main conflict and, if so, how it applies. List and describe all the impediments to resolving the main conflict cooperatively.
   b. Now rate the importance of each impediment on a scale of 1 to 10, with 10 designating an impediment you consider to be critical in preventing the resolution of this conflict.
Step 6. Assess the Impediments to Resolving the Conflict

- In your journal, brainstorm some strategies and tactics you could use to overcome each of the impediments you found.

- Are any of the options you came up with in exercise c risky in any way? Consider the possible damaging effects of each option.

- If you decide that the benefits clearly outweigh the risks for one or more of the strategies and tactics you brainstormed in exercise c, try implementing the strategy and/or tactic to see if you can overcome the impediment to resolution. Write in your journal about how well the strategy or tactic worked and what applying it has taught you about conflict diagnosis and conflict resolution.

2. Identify as many impediment(s) to conflict as you can find in the following fact situation and suggest tactics that a conflict diagnostician could recommend for overcoming each impediment:

Tilly and Tom Tenant rent a rowhouse from Lonny and Lisa Landlord. The Tenants and the Landlords recently made a deal whereby the Tenants would paint the interior of the rowhouse and the Landlords would pay for the supplies. The Tenants did the painting, then presented a bill for supplies to the Landlords—$800. In the opinion of the Landlords, the Tenants spent at least five times as much for these items as they should have. The Landlords had recently painted their own, much larger home for about $300. Unbeknownst to them, the Tenants had never painted a house before and had been led into buying the expensive supplies by getting some bad advice from a salesperson at a high-end paint store. Lonny Landlord, in reply to the bill, left a nasty message on the Tenants’ answering machine. “How dare you?” he said. “Your claim is absolutely ridiculous. It’s a slap in the face.” Several words and phrases inappropriate for polite company followed. Tilly Tenant listened to the message as she was giving her four-year-old and six-year-old snacks after school. “Outrageous,” she thought, utterly shocked. “They know we have young children! What an unfeeling, inhuman thing to do—leaving such a message!” She expressed her rage and sadness to her husband, who vowed to get back at the Landlords for their abusive telephone message. Tilly saw a legal services lawyer the next day. He advised her to withhold rent and, if threatened by the Landlords, to claim that they were being forced out of the rowhouse by the Landlords’ abusive behavior. Thus, the following month’s rent check was for $26.50. This outraged the Landlords, who filed for an eviction. In landlord-tenant court, the parties were referred to mediation. However, the mediator was unable to make any headway with the dispute. The Landlords, without benefit of legal assistance, felt uncertain about whether to accept any proposed settlements, because they weren’t sure whether they were being “taken,” so the mediator suggested that the mediation go into recess to allow the Landlords to get some legal advice. Unfortunately, instead of talking to a lawyer, Lisa Landlord talked to
Chapter 11

her brother, who was firmly of the opinion that one should never cooperate with one's adversaries. When the parties returned to mediation, proposals that seemed reasonable to Lonny Landlord were unacceptable to Lisa Landlord (who wanted to avoid ridicule from her family) and vice versa. Finally, after a short break, the Landlords were able to agree to propose paying the Tenants $650 to cover most of their paint expenses and to terminate eviction proceedings. Unfortunately, during the recess after the previous session, the Tenants had also been discussing the dispute with their family relations. One of them had suggested that the Tenants hold out for many thousands of dollars on the basis that the epithet-ridden telephone message had damaged the Tenants' young children. Thus, the mediation ended in impasse. Later, when the Tenants were evicted, Tilly Tenant commented to her husband that, although she knew her chances of such a huge recovery were small, she had felt that the opportunity was worth the risk of losing altogether.

3. Write an essay discussing the following questions, or use them as a basis for discussion or debate: “Which of the impediments to resolution do you believe are currently operating to prevent resolution of the Israeli-Palestinian conflict? What can world leaders do to overcome these impediments?”

4. Refer back to the definitions of mediation and nonbinding evaluation set forth in Chapter 1. Consider each impediment to settlement individually. Which of these two ADR processes do you think would be best at overcoming each impediment to settlement? Why? Justify your responses. Compare your answers with those of other students. If your opinions differ, discuss the reasons for your differences.

5. Write about, discuss, or debate the following questions: “Should it be an attorney's role to discover the impediments to cooperative settlement? Or should an attorney merely be a litigation specialist? Should there be attorney-specialists who litigate and others who hold themselves out as nonadversarial specialists who would evaluate impediments? What would be the advantages and the disadvantages of such a two-tiered system of lawyering?”

6. Is there a conflict of interest for lawyers between overcoming impediments to conflict—and serving the client’s best interests effectively—and maintaining a busy litigation practice? Imagine yourself to be a lawyer. A client comes to you, contending that he was cut out of a deal for royalties on a compact disc produced by his band. The disc is hugely successful and he is out several million dollars. He wants to sue for breach of contract. Litigation would be long and expensive, and your client would most likely lose. Assume for this exercise that the client has enough funds to pay any legal fees he incurs in litigation. Settling out of court is a possibility. Consider each of the following statements. If your advice to the client about the costs and benefits of litigating were limited to the statement, would you be behaving ethically? Why or why not?
Step 6. Assess the Impediments to Resolving the Conflict

a. “I could represent you in court, and, if we win, you’ll get at least $10 million and up to $7 million after fees and expenses are deducted. I advise you to do it.”

b. “I could represent you in court, and, if we win, you’ll get at least $10 million and up to $7 million after fees and expenses are deducted. Whether you’ll win is uncertain, given the contract you signed. It’s up to you whether to go to court.”

c. “I could represent you in court, and, if we win, you’ll get at least $10 million and up to $7 million after fees and expenses are deducted. But, given the contract you signed, there’s very little chance you’ll win, and, if you lose, you’ll be out $2 to $3 million in fees and expenses. It’s up to you whether to go to court, but, as your attorney, I’d advise you to seriously consider settlement.”

d. (Assume that you have made statement c but the client is still committed to going to court. You respond with the following statement.) “You know, many times, disputants want to go to court for a chance at a big recovery, despite the fact that the chance of that recovery is very small. I just want to warn you that I think you may be hurting your own financial interests very severely if you litigate this matter. You have about as much chance of winning as you do being struck by lightning. I’m still willing to try the case for you, but I’d urgently suggest you think twice about it.”

7. Play the Prisoner’s Dilemma game. Computerized versions are available at the following websites:


d. You Have Found the Prisoner’s Dilemma (Grobstein & Dixon 1994), http://serendip.brynmawr.edu/playground/pd.html


In what ways does the Prisoner’s Dilemma accurately reflect real life? In what ways does it not reflect reality? What does the play of this game tell you about the conditions needed for cooperation to occur? How could you set up negotiation to create conditions that promote cooperation? If you use the Princeton University game, try each of “Albert’s strategies.” Which of Albert’s strategies best reflect reality in the legal setting, and why? What strategies work best for you when dealing with each of Albert’s strategies?
Chapter 11

RECOMMENDED READINGS


