

How Can We Better Address Values and Interests that Underlie Conflict in a Dispute Resolution Process?

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'How many mediators have been part way through a mediation and had one of the parties react strongly in some way ... possibly through anger or tears ... and have thought: 'that's a sensitive issue ... that's hitting something a bit deep—a 'nerve'.

Interests and Values

Most of us would be familiar with Fisher and Ury's treatise on negotiation, 'Getting to yes',² and their recommendation to focus on 'interests' not 'positions'. They say that the basic problem lies not in the conflicting positions, but in the conflict between each side's needs, desires, concerns and fears. The sensitive issue that I just referred to above may be an insight into their 'interests'. 'Interests' motivate people, and each side usually has multiple 'interests'.

Others in the ADR literature refer to the need to understand 'values'. They say that values are 'our rules for the road'.³ Values determine what behaviours and paradigms we regard as acceptable. They colour our perceptions of morality, justice, sound practice, and fair play. They underline our decision making about goals as well as our methods of achieving them. They affect our sensitivities. We can express values as, (in order of those to which we have the least to most commitment):

- preferences;
- opinions;
- beliefs; and
- principles.⁴

For the purposes of this article, I will use the following terms interchangeably: values, interests, beliefs and perceptions. Basically, the idea is to shift from a problem-based approach to a party-prioritised one, where the parties' needs and preferences are examined, as a means to solving a problem.⁵

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2. R Fisher, and W Ury *Getting to Yes: negotiating an agreement without giving in* (Sydney: Random House, 1991).

3. H Cornelius, *The Gentle Revolution* (Chatswood: Simon and Schuster, 1998).

4. Ibid.

5. G Goh, 'Psychometric Analysis: The Winged Seraph in the Pandora's box of dispute resolution?' (2002) 13 *Australasian Dispute Resolution Journal*.

Some values are held consciously, such as views about gun control. But many times values are taken for granted. These unconscious values emerge only when personal views are challenged, or someone is asked to reflect on why they chose to act in a particular way. They are often expressed in very personal terms.

Most people hold certain core values quite strongly, such as honesty and self-preservation. But we cannot presume that other people hold the same values as we do, or that they give them the same priority, or even that they should. We are constantly refining our own preferences, opinions, and beliefs in light of every day experience and information. These are our more lightly held values. Core values usually require life-changing events to dislodge.

According to Fisher and Ury,⁶ the most powerful interests are basic human needs. If you can take care of basic needs, you increase the chance of reaching agreement and, if an agreement is reached, of both sides keeping to it. Basic needs they mention include:

- security
- economic well-being
- a sense of belonging
- recognition
- control over one's life

They refer to the basic interests underlying negotiations in Northern Ireland, where protestant leaders tended to ignore the Catholic's need for recognition, for being treated as equals; whereas Catholic leaders tended to give little weight to the Protestants need to feel secure.

Cornelius⁷ suggests that there are eight gender-linked values but, in my opinion, given some similarities with the Fisher and Ury interests, they are not unique to gender-linked issues. They can be a general source of miscommunication and conflict:

- equality
- status
- agreement versus a competitive approach
- feeling versus action and objects
- interdependence versus autonomy

In the field of environmental and natural resource management and planning, which is my area of expertise, some of the 'interest' challenges that we deal with are:

- fair procedures for decision making e.g. including adequate time and information to ensure genuine community input
- fair and equitable allocation of assets – timber, water, or land lease or permit
- public versus private interests and how to define what is in the public interest
- sustainability and intergenerational equity reflecting long term versus short term perspectives
- a resource such as water being seen as a human right, using criteria such as availability, water

6. R Fisher and W Ury, above n 2.

7. Cornelius, above n 3.

quality, physical and economic accessibility, non-discrimination against marginalised areas and peoples, and accessibility of information⁸

- non-use intrinsic values versus use in relation to conservation and protected areas⁹

In times of conflict, when a particular value is called into question, values may express as opposite polarities—people tend to move into their ‘conflict corner’ and play out the conflict as a win/lose game. However, winning when another is losing ‘sows the seeds for resurrection of the conflict’. Long term solutions are usually those that acknowledge and accommodate each others’ values. It is not necessarily the differences in values per se that lead to conflict, but rather the claim that one value should dominate or be applied generally even by those who hold different values. Values are our guide to what feels right for us. Problems arise when we use our values to dictate what’s right for others.¹⁰

It’s important to recognise that behind opposed positions lie shared and compatible interests, as well as conflicting ones. Recognising others’ differences helps to forge more meaningful and productive relationships based on mutual respect.

So, in a mediation, how does one identify interests, values, beliefs? Once identified, then what?

IAMA Mediation Techniques

The 10 step Institute of Arbitrators and Mediators Australia (IAMA) Mediation process, used by mediators accredited through the Practitioner’s Certificate in Mediation and Conciliation, is well designed to address interests and values. One of the reasons that I wrote this article is as a reminder that, as trained mediators, we should be watchful for values, interests, and beliefs that underlie a conflict, as these are clues to how to make a good and lasting agreement.

Some of the techniques we regularly use in mediation elicit interests and values. We use them but may not realise why they are so important, or how to make the most use of them.

The IAMA Practitioner’s Handbook,¹¹ for example, emphasises mediator communication and listening skills with a reminder that ‘good listening is not the same as agreeing. Cornelius advises to ‘listen to peoples’ language’.¹² The following techniques can be used to identify and confirm individual values and interests:

- roundups – which summarise the discussion and progress,
- paraphrases – which summarise, reframe, and reflect on what’s happening
- transitions – which clarify, describe feelings, probe, offer a hypothetical
- reframes – detoxify language to change perception and context of the dispute, and

8. K Assaf, B Attia, A Darwish, B Wardam, and S Klawitter, *Water as a human right: The understanding of water in the Arab countries of the Middle East - A four country analysis* (Berlin, 2004). See also J Scanlon, A Casser, A and N Nemes, *Water as a Human Rights?*, IUCN - The World Conservation Union, Gland, Switzerland and Cambridge, UK, 2004.

9. C Winter and M Lockwood ‘The Natural Area Value Scale: A New Instrument for Measuring Natural Area Values’ (2004) 11 (1) *Australian Journal of Environmental Management*, 11 - 20.

10. Cornelius, above n 3.

11. The Institute of Arbitrators & Mediators Australia, *The Practitioner’s Certificate in Mediation and Conciliation Handbook* (Melbourne: IAMA, 2002).

12. Cornelius, above n 3, 3.

- even taking notes – to show that we are listening, and respectful of the parties’ interests. Some of the phrases that mediators often use are a way of getting to values:
‘Let me see if I’ve got this right.’
‘So you feel that it’s really important to preserve your status?’
‘So you want to keep relationships among staff harmonious?’
‘So do I understand that it’s not having the same job back that is the issue, it’s more that you want to work outside?’
‘How did you decide that?’

Good communication with the mediator builds trust in the process and helps the other party hear and understand what is being said. To resolve a dispute, the parties also need to hear and understand each other through direct and constructive communication. Role reversal, standing in another’s shoes, is an excellent method of facilitating that to happen.

Identifying Values at each Stage of the IAMA Process

Preparation or Intake

This stage assesses suitability of the case for mediation. Will parties be entering it in good faith? Even this gives an idea of their values—basic respect for others, greed and so on. Some of the questions we ask at this stage about their motivations, what they hope to achieve, their feelings, and ideas about best and worst outcomes give an insight into needs, fears, perceptions and values.

In multiple party mediations, it’s worthwhile spending a fair amount of time on this stage.

Statement Taking

Questions such as those above can help elicit reasons and perceptions behind the dispute. It’s up to the mediator to identify (if not verbally, in notes) some common themes that arise, noting for example if a party feels they are not being treated fairly or their work is undervalued.

During statement taking, the mediator should be trying to make a note of any common ground or options as they arise or are apparent. Shared interests are latent in most negotiations, but may not be immediately obvious, or maybe they are so obvious that the mediator forgets to note or mention them. For example, parties may agree on certain facts, agree on the need for confidentiality, want the dispute settled amiably, express concern for well-being of parties, want to preserve the relationship, or seek opportunities for cooperation. If nothing else, they may want to finalise the issue. These can be expressed as ‘common ground’. Another may be a ‘process’ need, that is, to be heard by the other party in the mediation—revealing an underlying need for respect or procedural justice. It’s important to build on these positives.

Agenda Making

In agenda setting, one uses neutral language to clarify and validate issues and interests where possible. Neutral language not only detoxifies language but can be used to focus on mutualising the issues, setting in place an agreed way of investigating the issues.

Exploration

This stage is about communication, realisation, appreciation and genuine understanding of each other's, underlying needs and concerns, and shared responsibility for past and for future actions. Techniques such as reframing can refocus from power, rights, and positions to interests—from differences to common interests. Phrases such as 'He's not going to see the children unless he changes his ways,' reframed as, 'Could you tell him why it is difficult for you to let the children visit their Dad,' extract those underlying needs and often ultimately common interests, such as the welfare of the children.

Private meetings

In this stage the mediator individually asks for each parties' impression about progress and how an issue could be resolved. This is a key stage at which values and interests can be uncovered or checked. The mediator, using some of the clues provided through exploration, can seek more detailed explanation of interests and ask for the party to think about the interests of others. Through reality testing entrenched positions, underlying needs and interests of parties are identified and can be overtly addressed. 'As I understand it, your interests as a construction company are to get the job done quickly. You can hardly expect the other side to listen to your interests and discuss the options you suggest if you don't take their interests into account.'

Option Generation, Selection and Negotiation

This where we separate the act of inventing options from the act of judging them. In exploring options, we are expanding the pie, brainstorming/lateral thinking, depersonalising solutions and separating ownership from the idea. In generating possible options for resolving a dispute, it's important to concentrate on the real needs or desires of the parties. The parties usually make sure that some of the proposed options are consistent with their values.

Mediators could be more aware of, and intentional in incorporating values into objective criteria. It's easier to preserve a relationship if objective standards are applied when assessing options. So each issue can be framed as a joint search for objective criteria to reach a solution based on principle, not pressure. Parties need to be open to reason about which criteria to apply. They should seek measurable criteria that can help justify one solution versus another. Differences in values, culture, experience and perceptions may lead parties to disagree about relative merits of different standards. Total agreement on criteria and standards is not necessary but it is one tool to help find a better agreement.

Some of the standards or criteria that might be applied are: fairness; equity; efficiency; scientific merit; best mutual benefit; least cost/time to improvement; best impact on relationship; industry practice; accepted principles; benchmarks; and BATNA (Best Alternative to a Negotiated Agreement).

In any dispute, but particularly a multiple party dispute, using standards can contribute to using time more efficiently.

Independent standards can allow discussion in relation to fairness of a proposal and can protect parties from being taken advantage of, and to help save face.

Agreement Writing

Not only should one check off points of the agreement against the agenda, but a mental check against values and needs that have arisen, is likely to make for a more lasting agreement.

Multiple Party Conflicts

Conflicts in the area that I work in—planning, natural resource management, and public policy—usually involve multiple parties. Issues are often related to:

- uncertainty regarding long-term effects
- possible irreversible impacts
- complex information needs or limited information
- interrelated aspects, multiple issues
- reliance on expert science

Stakeholder characteristics include:

- Multiple parties
- Claim by some to represent the public interest e.g. government or conservationist
- Role of government may be ambiguous
- Not all issues affect each party

More in-depth intake may be beneficial in these situations to establish roles, procedures, interests, and appropriate representatives. In-depth personal interviews may be required.¹³ According to Susskind,¹⁴ the more complex the issue, the more need for careful analysis of interests that are shared or can be creatively dovetailed.

Value collisions are particularly likely to occur at times when society's attitudes are in a state of flux, as people struggle with defining new boundaries of acceptable behaviour. Expectations are changing so rapidly they don't know where they stand. Conflict resolution skills and techniques for handling these value collisions are like 'life rafts'.¹⁵

An example of this 'state of flux' in the area of natural resource management is related to the 1996 Australia wide Council of Australian Government's water reform agenda, a sweeping series of reforms related to the water industry. In the recently announced National Water Initiative, the Government has acknowledged that these changes have not gone well.¹⁶ Tisdell¹⁷ suggests that the COAG objectives are likely to be in conflict with each other and also with views of the community. For example, objectives

13. R Charlton and M Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (Sydney: Lawbook Co, 2004).

14. LL P Susskind, and J Thomas-Larmer, *Negotiating Environmental Agreements: How to Avoid Escalating Confrontation, Needless Costs, and Unnecessary Litigation* (Washington: Island Press, 2000).

15. Cornelius, above n 3, 20.

16. Commonwealth of Australia 2004, National Water Initiative: Discussion Paper. Available at <www.coag.gov.au>.

17. J Tisdell, J Ward and T Grudzinski, *Irrigator and Community Attitudes to Water Allocation and Trading: A Comparative Study of the Goulburn Broken and Fitzroy Catchments* (Technical Report 01/5, 2001).

of maximising income generated from available water supplies, ensuring an equitable and fair distribution of water, meeting environmental flow requirements and accounting for local economic and social impacts, may be difficult to achieve simultaneously. It is not surprising then that these reforms have generated years of misunderstanding, confusion, and conflict in some parts of the country.

Conclusion

Mediators need to 'tune in' to parties' underlying interests and values in order to facilitate lasting agreements. In each stage of the IAMA 10 step mediation process there are opportunities to identify interests and values using specific communication skills. Investing time in eliciting values early in the process means that they can be confirmed, understood and acknowledged by all parties, and addressed at later stages. Interests and values incorporated into option generation and assessment of options through agreed criteria can be face-saving and efficient, particularly in multiple party mediations. In multiple party mediations this early investment will contribute to ensuring that all parties' interests are acknowledged and reflected in the agreement.

* This article is based on a paper presented to the Queensland Chapter of IAMA, November 2004.

