# Interest-Based Negotiations

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## Interest-Based Negotiations

During a divorce, many people become very "position-based", articulating their settlement proposals in terms of labels, and lose sight of the goals that they hope these positions will achieve.

Interest based negotiations help divorcing spouses to identify their goals, *i.e.,* to remain a meaningful part of their children's school life as well as weekend life, or to be able to have financial security at the end of the divorce, as opposed to the single option that would traditionally be set forth in a settlement offer. There may be *many* ways to accomplish the underlying goals, *not just one single way*.

**Expanding the Options:** By having each divorcing spouse define his or her goals, mediators can begin to generate multiple settlement options that could accomplish the goal. This helps the divorcing spouses see that there isn't just one way to settle, and gives everyone more bargaining room at the table.

Many people think that mediation is all about compromise. This is only partly true. A true "win/win" situation occurs when both parties accomplish their most important goals with fewer compromises, and compromising more on their less important goals.

As a result, it helps if each person can *prioritize* his or her goals. It may be that each spouse needs to compromise on some of his or her less important goals (which may be more important to the opposing party) in order to make sure the most important goals are accomplished.

Here's the breakdown:

- Win/lose outcomes—one winner, one loser. Competitive.
- Impasse outcomes—no agreement or resolution.
- Compromise outcomes—some parties give up some of their goals to obtain others. Accommodation.
- Win/win outcomes—all parties feel their interests have been satisfied

By way of illustration, here's how a position can be articulated in terms of the underlying goal:

| **Position** | **Interest** |
|---|---|
| "I want Wednesday night overnights" | I want to be involved in parenting my child during school time as well as vacation time. I don't want to be stuck being a "Disneyland Dad". |
| "I don't want to pay spousal support" | I want to be financially secure, and to be able to retire when I'm ready. |

**Positional bargaining vs. interest based bargaining** is a fundamental shift in thinking which lets go of the labels in favor of the bigger picture. By way of example[1]:

| **Positional Bargaining** | **Interest Based Bargaining** |
|---|---|
| Assumes: resources are limited, and solution will require compromise or someone giving up something | Assumes: resources not limited, look to "added value" as well as non-monetary solutions |
| Attitude: parties will come in firmly rooted in their position (think "label"), which they think is THE solution | Attitude: problem-solver, not winner/loser. Looks to win/win outcome. |
| How do they reach agreement? When they meet enough of an opponent's interests to induce settlement. Often, parties leave with an agreement, but are still dissatisfied. Represents | How do they reach agreement? By identifying the issues and goals of each party, and working through them.<br>3 types:<br>1) substantive: issues such as |

[1] Adapted from *The Mediation Process*, Christopher Moore (2002), Wiley/Jossey-Bass.

| | |
|---|---|
| compromise or giving up rather than working out a joint solution. [2] | money and time are often central<br>2) procedural: behavior & session are civil and organized. Focuses on mutual interests and a plan for implementing<br>3) psychological: emotional and relationship needs—respect, mutual positive regard |

Can you see the inherent problems in positional bargaining? It's typically positional bargaining that brings people to impasse and litigation.

**Interest-Based Negotiation** seeks to *enlarge the range of alternatives* so that the needs of all parties are addressed and met to the greatest extent possible. This is the basis of most mediation. It also works best when:

- Parties have at least a minimal level of trust in each other;
- Parties have some mutually interdependent interests;
- Equal, but not necessarily similar, means of influence exist, or the party with the superior power is willing to curtail the exercise of power and work toward a cooperative solution;
- Parties have a high investment in a mutually satisfactory outcome; because of mutual fear of potential costs that might result from impasse
- Parties desire a positive future relationship.

When parties cannot identify their issues:

- They may not know what their genuine interests are;
- Are hiding their interests in favor of "strategy";
- Are so set in their "position" that the interest itself is obscured;
- Are unaware of procedures for exploring interests.

It's up to the mediator to convey a positive attitude toward interest exploration:

- It is in each party's enlightened self-interest that the other party is also satisfied with the ultimate agreement (opposing party will be more cooperative in the future, and more likely to abide by agreement, for example);
- In order to settle, both parties must sign the agreement, so both must be satisfied. Divorcing spouses needs to have an agreement the other party will sign;
- All parties have interests and needs that are important and valid to them;
- A solution to the problem should meet the maximum number of interests of each party;
- Interests can be traded to achieve the most satisfactory combination;

[2] See examples on 72 of *The Mediation Process*, Christopher Moore (2002), Wiley/Jossey-Bass.

- There is probably more than one acceptable solution to a problem;
- Any conflict involves compatible interests as well as conflicting interests.

The key to resolution is to link the solution to the underlying issue to be solved.

Here's an intervention to generate options for settlement in individual meetings with divorcing spouses (first) and in a 4-way conference (second):

Step 1:
- Convince them that they have options—many spouses will come into the room completely entrenched in their positions
  - Make sure they feel heard;
  - Get them to commit to listening to other options—not to agree, but to explore. Remind them that listening is not the same as obeying
  - BATNA (best alternative to a negotiated agreement);
- Detach parties from unacceptable positions.

Step 2:
- Help parties develop options: strategies and procedures
  - Building block approach, "baby steps"—small components are easier to deal with than big issues. Keep breaking impasses down into smaller components that are easier to settle.
  - Agree on formula for settlement—agree on how to approach
- Types of settlement options
  - Collaboration—interest-based negotiations & option generating
    - "logrolling"—trading off issues which are more important to the other party
    - "alternation"---trading off times for privileges
    - designing a new way –orange argument (one wants the peel, the other wants the fruit)
  - Bargaining on positions—proposals and counter proposals

How to generate options:
- Begin with what's already agreed or working
- Develop objective standards for an acceptable agreement
- Open discussion
- Brainstorming
- Nominal group process—brainstorming, but each makes own list, then discuss in subgroups
- Plausible hypothetical scenarios
- Model agreements—how did somebody else do it?
- Linked trades—trading one issue for another since parties value issues differently
- Deciding a procedural solution to a substantive agreement (e.g., posting a bond)

- Package agreement
- Using outside experts or resources

Help them assess options for settlement:
- Reviewing their interests
- Assessing how these interest are met by solutions developed in session
- Determining costs/benefits of selecting or rejecting the solutions
- Determining BATNA (best alternative to a negotiated settlement)
- "tweaking": Beginning process of modifying/trading (etc.) options to reach a final settlement

Part of being a good mediator, especially for parties that are not represented is helping people understand the settlement range. As the mediator you're not setting the settlement range, but helping clients explore win/win options within the range established by the mediation participants.

Recognition of settlement range
- Moderation of inflated expectations:
- If you were in the other party's situation, would you accept the proposals?
- Is the offer fair? Would other people perceive it as such?
- Is the demand you're making in line with other court decisions or settlements?
- Do you have the power to force this issue?
- What are the benefits to you of pursuing your present course? Are there any risks?

BATNA—examples of what happens if you win/lose or give up a specific issue?[3]

**The danger of adopting this as a mantra:** never forget that the "interests" described in the techniques above are merely a rational, logical, sensible set of interests, and that people involved in conflict, particularly divorce conflict, may have non-rational "interests" as well. Revenge, reparations for hurt feelings, apologies, shame, guilt, embarrassment, public perceptions, the list goes on indefinitely. Simply appealing to the logical component often won't be sufficient to complete a settlement or overcome impasse. It may be that the parties are not yet ready to contemplate a true resolution of the conflicts at hand, or it may be that you need to explore these other non-monetary, non-rational benefits.

**Example:**

Position: "I don't want to pay spousal support."

Intervention: ask why, and what they're feeling about it

[3] Source: adapted from Christopher Moore, *The Mediation Process*, 2nd Edition, Wiley/Jossey-Bass (2002)

Response: “I am really angry at my spouse. He/she has betrayed me, refused to work [every bad thing divorcing spouses can think of]

Intervention: reframe and rephrase what divorcing spouses have said, making divorcing spouses feel heard before making suggestions of any kind. Then address the emotional interest (fear about financial security, not wanting to be taken advantage of, anger) and attempt to get to underlying emotion, “so you are afraid of _____ happening”. Get a “yes, you understand” indication from the spouse, and then go to the interest-based negotiations intervention: “Would you be open to exploring options that would satisfy your need for safety [security, whatever the concern is] and at the same time would allow you the possibility of an ongoing relationship with your ex-spouse?”

Address the fear, offer to come up with a solution that addresses fear and also creates the possibility for settlement and ongoing cordial relationship.

By going beyond a party’s stated goal, and uncovering the interest behind the goal, you can help open up the range of settlement possibilities and help the parties to reach a mutually acceptable agreement with the fewest possible compromises.