

Consequences of Principal and Agent

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Editors' Note: What's going on away from the negotiating table? How does the relationship between your counterpart and her principals impact you? Docherty and Caton Campbell explain how the structure of the agency relationship, for you and for the other side, can dramatically impact negotiation behaviors and outcomes. This chapter is related to Nolan-Haley's on Informed Consent, but also relates to chapters on team negotiations, particularly Bellman's on internal discord within a team.

This chapter assumes that becoming a creative, reflective practitioner of negotiation requires more than mastering negotiation techniques or strategies. We think it highly likely that a professional negotiator will encounter negotiation situations where the parties differ in type—e.g., an individual negotiating with a corporation or a corporation negotiating with a local community group. It is also highly likely that a professional negotiator will encounter situations where back table negotiations between the principal party and the agent representing that party disrupt the primary negotiation. There is no way to equip negotiators with a set of discrete skills for managing these kinds of challenges. Instead, negotiators need to understand the structure of the negotiations operating at the same time as the conflicts being addressed by negotiations. This chapter offers some tools for analyzing both the conflict and the negotiation process when it involves agents negotiating on behalf of others.

Negotiation courses usually focus their primary attention on the interactions among the parties involved in the actual negotiation. Such courses also tend either to isolate the negotiation process from the social context within which it is embedded, or to assume that negotiators need only know about one small piece of the social context (e.g., the legal system or the business world). Negotiators should be encouraged to step back from the negotiation process and think more broadly about the social context within which they are operating. To this end, it is useful to consider how the structure of the larger social conflict or social problem affects the negotiation process. Some students of negotiation will protest that they are not dealing with *conflicts*; they are helping people address problems or differences. We would counter that the difference between a conflict and a dispute or “mere problem” can be quite small. It is often a matter of the perceptions of the parties; therefore, it is useful for all students of negotiation to understand the way

the nature of the conflict—including its relative intensity—affects a negotiation process.

What do we mean by “social context” and “structure of the larger social conflict?” Negotiation is a process for managing or resolving conflicts that emerge in a particular social context.¹ For example, a negotiation may take place in a corporate setting, in a family, in the legal system, or in an institutional, governmental, or community setting. In each of these cases, the context or setting of the conflict carries certain norms, rules, and expectations—some formal and some informal—about how a negotiation process will be managed. Who needs to be at the table? What kinds of issues are negotiable and what kinds of issues may the parties not even raise in negotiation? How will the parties comport themselves during the negotiation?

Every social conflict, no matter the context within which it emerges, can also be said to have a structure. The structure of a conflict should not be confused with the structure of negotiation, as described by Korobkin,² which is also an important issue to be considered in educating negotiators. When we talk about the structure of a conflict, we are referring to features of the conflict such as the number and nature of the parties and the quality of their relationships. This contrasts with the dynamics of a conflict, which looks at changes in the parties' relationships and interactions over time. Think of the “structure of a conflict” as a still photograph of the actors and their relationships taken at a given moment and the “dynamics of a conflict” as a film of their interactions. The structure of a conflict can change as a conflict progresses so structural analysis needs to be done in an iterative manner. Conflict structure includes the *number of parties* involved. Is this a two-party conflict or a multi-party conflict? Structure also includes *the nature of the parties*. Are the parties in the conflict individuals or corporate entities? If they are corporate entities, are they tightly or loosely organized? The number of parties and their nature are only two aspects of conflict structure, but we can use them to illustrate why negotiators should learn to think about the relationship between the structure of a conflict and the negotiation process.

Negotiation is defined as an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behavior or allocate scarce resources in a way that will make them better off than they could be if they were to act alone.³

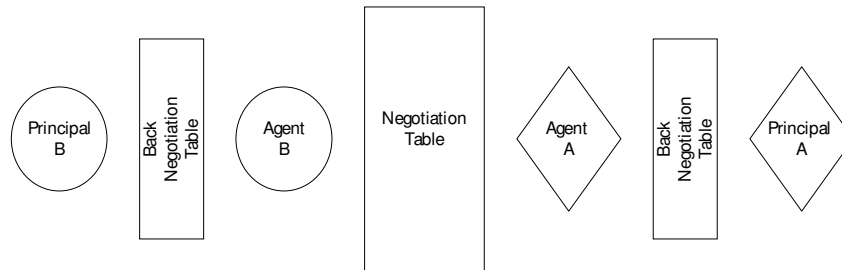
This definition of negotiation references the basic elements of negotiation—parties, issues, goals, and interactions. Like many commonly used definitions of negotiation, it does not address the context of the negotiation encounter, but it is a useful place to start.

When thinking about a negotiation process in the abstract—negotiation as an ideal type—we usually think of two parties even though we know that real life often presents us with multi-party negotiations. We are also inclined to think of parties as negotiating on their own behalf. Again, in real life, we know that parties may be represented by others who negotiate on their behalf. In some contexts, particularly when working with multi-party, community-level negotiations, professionals talk about parties and their representatives. In other settings, particularly law or business, the literature refers to the parties as *principals* and their representatives as *agents*. This chapter will use both sets of terms.

Because negotiation is a process driven by communication, any increase in the number of persons involved—adding more parties or involving agents acting on behalf of principals—complicates the process. We all know what happens in the game of telephone; the more a message gets passed around, the more likely it is to

be distorted. When messages must go from principal A to agent A; from agent A to agent B; from agent B to principal B and back again, we have more places where messages can get distorted. If we throw in principal C and agent C, or even more parties and their agents, the communication problems become daunting indeed. Figure 1 diagrams a relatively simple negotiation with two parties represented by agents.⁴

Figure 1: Interconnected or “Embedded” Negotiations



When teaching students the art of negotiating on behalf of others, we can focus on the problems that might arise between agents and principals and give them skills to prevent or overcome those problems. Thus, noting that an agent who does not understand her client’s interests and positions might miss opportunities for an integrative agreement, we can make our students practice interviewing skills that will help them uncover the client’s interests. Noting the serious problem of poor communication between principal and agent, we can teach active listening, clear presentation, and other communication techniques. We can emphasize the need for establishing informed consent between the negotiator and the client. [Nolan-Haley, *Informed Consent*] Similarly, recognizing that the interests of the agent and the principal sometimes differ, we can familiarize negotiators with the ethical and professional standards regulating their relationship with clients.⁵

These are all valid parts of a good negotiation curriculum, but they are not enough to develop highly skilled reflective practitioners of negotiation. Negotiators also need to learn that introducing principal-agent relationships into a negotiation establishes a set of interconnected negotiations. Principal A and agent A have a set of “back table negotiations” and so do principal B and agent B. The negotiations at the table intersect with and affect the negotiations behind the table and vice versa. Put another way, conflicts between principals and their agents impact the conflicts between the parties to the central conflict and vice versa.

Sometimes agents and their principals use this structure of interconnected negotiations for strategic purposes. Parties can buy time in the primary negotiation by dragging out their back table negotiations. The agent can also use an absent principal as an excuse for taking actions (“my client made me say this”) or for

declining offers from the other party (“I’m sorry, but my client won’t let me accept this offer”). On the other hand, there are times when problems with the back-table negotiations actually jeopardize the central negotiation. [Wade, *Tribe*] Highly skilled negotiators need to understand why this happens and how they can work with these problems.

The back table negotiations are difficult enough when the agent is representing a single individual (say, one spouse in a divorce negotiation). They become extremely complicated when the parties are collective entities (say, corporations, community groups, warring militias, or unions). Yet, efficiency and cost-saving concerns dictate that most negotiations involving collective entities are carried out through representatives.

This is one place it really pays to understand the structure of the larger conflict, because structural factors help determine just how difficult the back table negotiations are likely to become. We have already alluded to the regulatory mechanisms that govern (more or less formally) some principal-agent relationships. However, in many cases these controls do not exist, because representatives of parties are selected through political processes. Their roles as agents in a negotiation are socially and politically negotiated, as is the evaluation of their performance, their ability to continue in the role of agent for a sustained period, and their ability to deliver on any negotiated agreements.

For example, in *What’s in a Frame?* in this book, we described a case in which a city proposed a highway extension right through an area considered sacred ground by a local Native American tribe. [Caton Campbell & Docherty, *Framing*] Using the same example here, we might convene a multi-party negotiation involving a coalition of five Native American tribes, elected officials from the city and adjacent counties, developers, a variety of activist groups (including environmentalists, Native American rights groups, and anti-sprawl groups), the state’s congressional delegation, and a large federal agency. Obviously, these parties will need to send representatives to negotiate on their behalf, and the negotiation process will need to be designed to accommodate multiple back table negotiations. In a case this complicated, a facilitator or mediator (or a team of facilitators and mediators) may be hired to help manage the negotiation. However, good negotiators should not rely solely on a facilitator or mediator to help them navigate a complex, multi-party negotiation process. Party representatives can be far more effective if they understand why back table negotiations are so important and why those negotiations might stymie the primary negotiation.⁶

Two structural factors can increase or decrease the possibility that conflicts between parties and their representatives will negatively affect the main negotiation. Negotiators should learn to ask the following questions about each representative in a negotiation:

- How formal and structured is the relationship between the principal and the agent?
- How much legitimacy does the agent have?

Some principal-agent relationships are contractual and regulated. An agent is hired to negotiate on behalf of party A. Party A may fire the agent at will, and may also be able to hold the agent accountable for his performance according to the contractual agreement. Party A may also be able to file a complaint against the agent with a professional body, and/or sue the agent. For his part, the agent may quit as representative for party A and may have rights to sue if party A fails to meet contractual obligations. The relationship is professional, not personal; it is contractual, not political. In other words, it is formal and highly structured.

In other cases, however, representatives may be selected through a variety of political processes, ranging in formality from voting to volunteering. A union representative is elected. She must keep a close eye on her constituency lest she not be re-elected, and there are formal mechanisms for recalling her if the rank-and-file members feel that she is not representing their interests. This is a formal and structured process, but it is messier than a contractual relationship. Even less formal and structured are relationships between parties and representatives when the parties are loose coalitions or voluntary membership groups. In these cases, representatives often volunteer to speak for the group or they may be selected based on their personal charisma. If the group is informal and voluntary, the membership of the group may be subject to fluctuations so that the representative may have difficulty presenting a coherent position. Furthermore, there are few if any formal mechanisms for the group to remove a volunteer from the negotiation table.

This leads to the problem of reliability. Can any given agent “deliver” on a negotiated agreement? How accurately is any given agent representing the interests and positions of the parties? Will the back table negotiations—which may take the form of a vote in the case of a union or may be a lot messier and more difficult to track in the case of ad-hoc voluntary organizations—support the agreement reached at the negotiation table? It is usually, but not always, safe to assume that an agent representing a party through a contractual relationship has checked carefully with the party before affirming any agreement. In more political relationships between a party and its representative, it is much harder to predict whether the back table negotiations will support the agreements reached at the main negotiation table.

The more political a relationship is between representative and party, the more others involved in the negotiation need to focus on the question of legitimacy. Legitimacy enters into a negotiation at several points. Each person involved in the negotiation must be seen as a legitimate negotiating partner by the other negotiators, otherwise negotiations cannot proceed. In the case of agents negotiating on behalf of principals, there is an added legitimacy question: does Party A accept the agent representing Party A at the table as a valid representative? Thus, looking at a multi-party negotiation involving representatives of larger parties we can ask: how legitimate is any given representative at any given moment?

Legitimacy or the lack thereof may be related to the way the agent was chosen. If, in the case described above, the Bureau of Indian Affairs appoints representatives for the coalition of five tribes, those representatives will probably have low legitimacy. They may even need to take much more hard-line positions in the negotiation to compensate for their “tainted” appointment. That does not mean we can assume the tribal representatives will have high legitimacy if they are selected from within. Internal conflicts within and among the tribes may distort the selection process. Furthermore, the legitimacy of any representative may change over time and may be affected by the negotiation process. An agent may gain legitimacy by succeeding in the negotiation or lose legitimacy by failing.

Taken together, the formality of the agent-principal relationship and the agent’s legitimacy with the party help determine whether agent-principal conflicts (problems with the back table negotiations) are more or less likely to disrupt inter-party negotiations. We can use the formality/informality continuum and the low legitimacy/high legitimacy continuum to create a model that illustrates the likelihood that conflicts between a party and its representative will derail a negotiation (Figure 2).

Type of Party	Nature of Structure	Speed with which it can act	Coherence of goals
Corporation	Highly organized Hierarchical	Quick—once the necessary component parts become involved	Very coherent—clear, widely shared standards for measuring success (i.e., bottom line)
Government Agency	Hierarchical Organized, but may have some incoherence in the system because of competing mandates and the influence of political actors on policies and Standard Operating Procedures	Slow compared to corporations Quick compared to community organizations and other political groups	May be confused by competing mandates and shifting political scene
Community Organization—e.g., Neighborhood Association	Semi-structured Democratic and therefore open to change	Relatively slow—needs time to build consensus through democratic processes	May not be fully coherent and may lack shared standards for measuring success
Native American Tribe	Frequently subject to internal conflicts between “progressive” and “traditional” factions Culturally more likely to work by consensus rather than majority vote	May be very slow, particularly if tribe works by consensus and deliberation	May be difficult to discern because of internal conflicts

There are many negotiations that do not require the level of analysis outlined in this chapter. However, when faced with a complex negotiation involving different types of parties using representatives, looking at the structure of the larger conflict and the nature of the parties can be a very helpful process. It assists a negotiator in setting realistic expectations about such basic factors as how long a negotiation will probably take and the likelihood of ratification of an agreement reached at the primary negotiation table. A negotiator who understands the pressures and opportunities created by a counterpart's back table negotiations can also

craft more creative proposals by incorporating the needs and interests of the agent and her principals into each round of discussion.

Endnotes

¹ Among the contextual features that negotiators should learn to assess is the relative stability or turbulence of the environment in which they are negotiating. For more on this issue see JAYNE SEMINARE DOCHERTY, *THE LITTLE BOOK OF STRATEGIC NEGOTIATION: NEGOTIATING DURING TURBULENT TIMES* (2005).

² RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 33-220 (2002).

³ *Id.* at 1.

⁴ This diagram and many of the ideas in this chapter were greatly enriched by Jayne Seminare Docherty's conversations with Ron Kraybill (Eastern Mennonite University), Frank Blechman (independent consultant), and Carol Gowler (Conflict Transformation Program, Eastern Mennonite University).

⁵ For attorneys, this would include a working knowledge of, among other things, *THE MODEL RULES OF PROFESSIONAL CONDUCT* (2004).

⁶ Multi-party negotiations can be greatly enhanced by the type of pre-negotiation work described in Jayne Seminare Docherty, *Negotiation, One Tool Among Many*, Chapter 65 in this volume. Intervenors may offer parties training in negotiating, as well as engaging in data gathering and fact-finding to help parties arrive at a coherent picture of which issues will be covered in the negotiations and what will not. Also see Bernard Mayer, *Allies in Negotiation*, Chapter 69 in this volume.