Agency: Teaching Negotiators to Analyze Conflit Structure and Anticipate the Consequences of Principal-Agent Relationships

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TEACHING NEGOTIATORS TO ANALYZE CONFLICT STRUCTURE AND ANTICIPATE THE CONSEQUENCES OF PRINCIPAL-AGENT RELATIONSHIPS

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This essay assumes that becoming a creative, reflective practitioner of negotiation requires more than mastering negotiation techniques or strategies. It may be possible—but we think highly unlikely—that a professional negotiator will not 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 unlikely that a professional negotiator will never encounter a situation where back table negotiations between the principal party and the agent representing that party disrupt the primary negotiation. There is no way to equip students with a set of discrete skills for managing these kinds of challenges. Instead, they need to learn to understand the structure of the negotiations *and* the structure of the conflicts being addressed by negotiations. This essay 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 primary attention on the interactions among the parties involved in the actual negotiation. Such courses also tend to either isolate the negotiation process from the social context within which it is embedded, or assume that students need only know about one small piece of the social context (e.g., the legal system or the business world). Students of negotiation 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[1] or social problem affects the negotiation process. What do we

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1. Some students of negotiation will protest that they are not dealing with *conflicts*; they are helping people address problems or differences. This may be true. In some settings we are not talking about using negotiation to address deeply embedded, intractable social conflicts. On the other hand, the difference between a conflict and a dispute or "mere problem" can be quite small; it is

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. For example, a negotiation may take place in a corporate setting, in a family, in the legal system, or in a 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 are not even allowed to be raised 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.[2] 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 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.

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a matter of the perceptions of the parties, and it is useful for all students of negotiation to understand the way the nature of the conflict—including its relative intensity—impacts a negotiation process.

2. The structure of a conflict should not be confused with the structure of negotiation, as described by Korobkin, which is also an important issue to be considered in educating negotiators. RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 33-220 (2002). 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.

3. *Id.* at 1.

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 essay will use the terms interchangeably.

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

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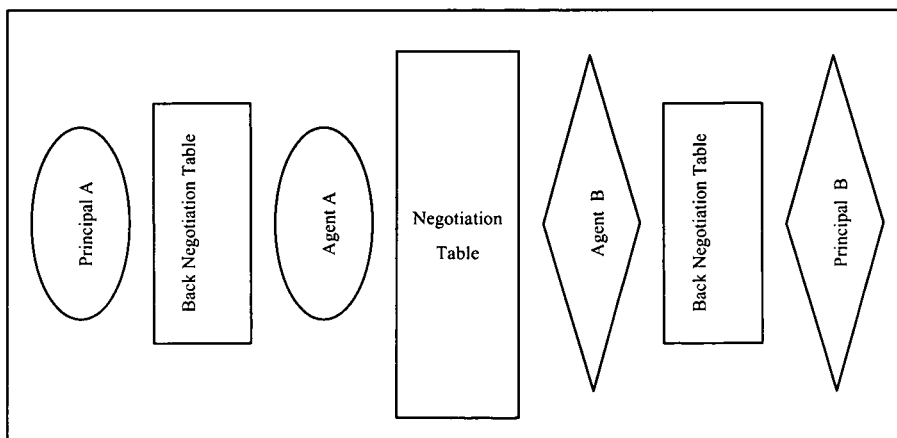
4. This diagram and many of the ideas in this essay were greatly enriched by Jayne Seminare Docherty's conversations with Ron Kraybill (Eastern Mennonite University), Frank Blechman (independent consultant), and Carol Gowler, whose unpublished thesis examines the back table negotiations in a conflict between an ethnic minority group and a military regime.

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 the students 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. Similarly, recognizing that the interests of the agent and the principal sometimes differ, we can familiarize students with the ethical and professional standards regulating their relationships 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. Students 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 impact 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 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 behind the table negotiations actually jeopardize the central negotiation. 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

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

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 the case described in *What's in a Frame?*[6] in this volume, 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 growth management 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 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.

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 resign as a 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

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6. Marcia Caton Campbell & Jayne Seminare Docherty, *What's in a Frame? (That Which We Call a Rose by Any Other Name Would Smell As Sweet)*, 87 MARQ. L. REV. 769 (2004).

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.
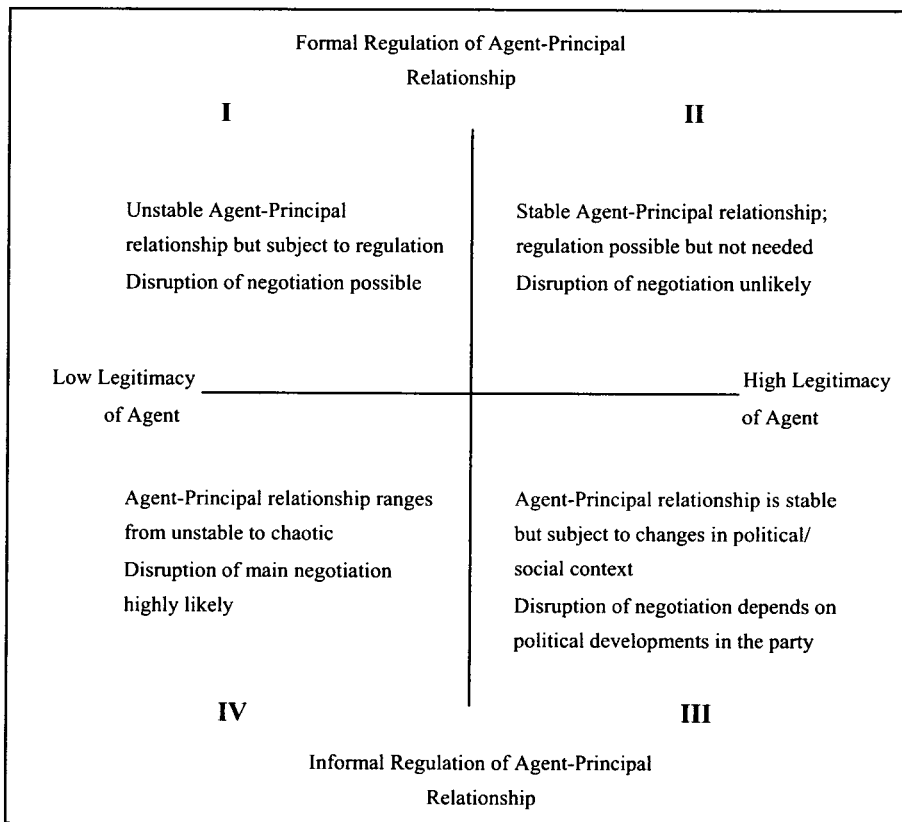
The more political a relationship is between representative and party, the more others involved in the negotiation need to focus on the question of legitimacy. Legitimacy enters into a negotiation at several points. Each person involved in the negotiation must be seen as a legitimate negotiating partner 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 it 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).

FIGURE 2: LEGITIMACY AND FORMALITY OF PRINCIPAL-AGENT
RELATIONSHIP

Formal Regulation of Agent-Principal Relationship	
I	**II**
Unstable Agent-Principal relationship but subject to regulation Disruption of negotiation possible	Stable Agent-Principal relationship; regulation possible but not needed Disruption of negotiation unlikely
Low Legitimacy of Agent	High Legitimacy of Agent
Agent-Principal relationship ranges from unstable to chaotic Disruption of main negotiation highly likely	Agent-Principal relationship is stable but subject to changes in political/ social context Disruption of negotiation depends on political developments in the party
IV	**III**
Informal Regulation of Agent-Principal Relationship	

In addition to the legitimacy of other representatives and the formality of their relationships with their respective parties, good negotiators should have some understanding of the way the *nature* of the party impacts their back table negotiations. Some parties can move quickly, while others need significantly more time to validate or reject proposed agreements. This is not *always* a stalling tactic; it may be an honest reflection of the complexity of the party's internal organization or a reflection of the party's culture.

For example, non-native representatives will probably see a Native American representative in our case as potentially able to deliver constituents, but the tribal representative will almost always disavow the ability to speak for anyone but himself as an individual. It is common to hear tribal representatives say something like, "I represent the X people, but I speak only for myself." A tribal representative's ability to deliver constituents depends on extensive and lengthy back table discussions with tribal members, some of which can take months. This is something that non-native negotiators have great difficulty with since temporal efficiency is a hallmark of good negotiations in the business, legal, and administrative worlds.

Developing a table such as the following can help a negotiator pay attention to the structural factors that shape back table negotiations between a representative and his party. A blank version of this chart can be filled in for a particular case. The negotiator should always remember to map her own party on this diagram so that she examines the structural factors that are shaping her own back table negotiation.

Type of Party	Nature of Structure	Speed with which it can act	Coherence of goals
Corporation	Highly organized Hierarchical	Quickly—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	Slowly compared to corporations Quickly 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 slowly— 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 essay. 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 an agreement.