

Collaborative Negotiation and  
New Roles for Lawyers and Judges  
- a US and international perspective

Kenneth Cloke

*"When I'm getting ready to reason with a man,  
I spend one third of the time thinking about myself --  
what I'm going to say --  
and two thirds thinking about him  
and what he is going to say."*

Abraham Lincoln

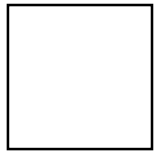
# Dimensions of Negotiation



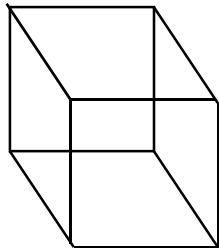
= 0 Dimensions = Impasse



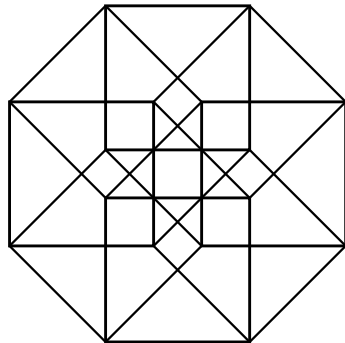
= 1 Dimension = My Position – Dictatorial,  
*Power*-Based, Ultimatums and Fiat



= 2 Dimensions = Both Positions –  
Adversarial, *Rights*-Based, Competition and  
Compromise

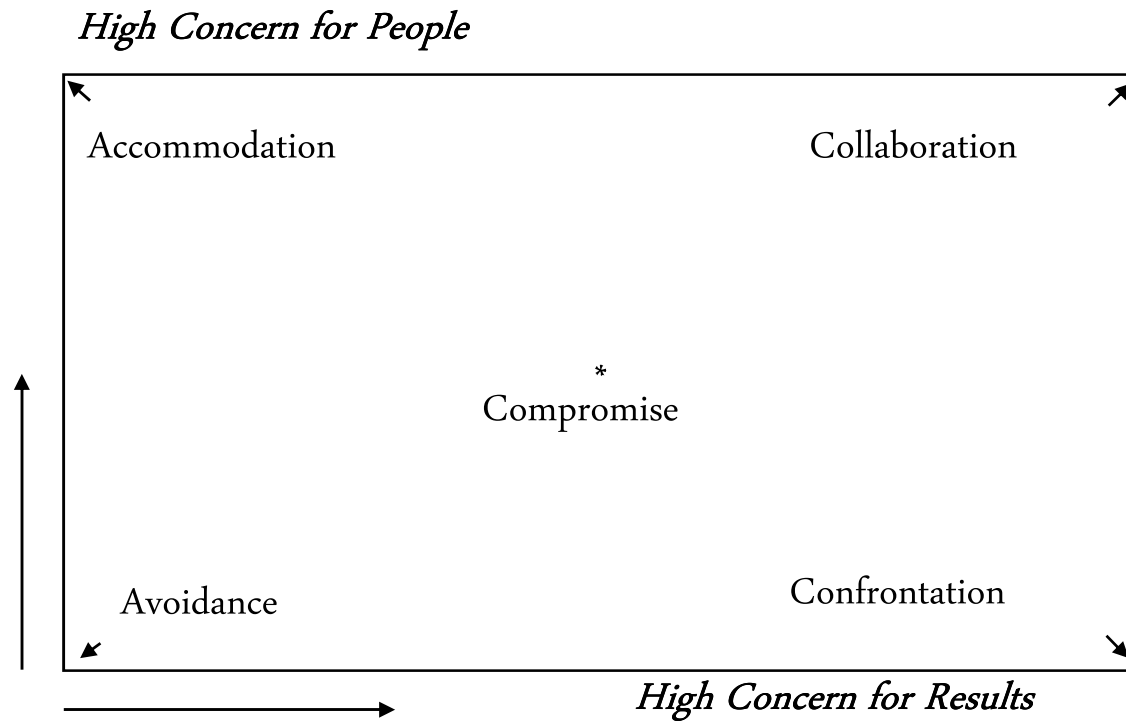


= 3 Dimensions – Shift from Stating Positions to  
Satisfying Interests – *Interest*-Based,  
Collaborative and Oriented to Mutual Gain

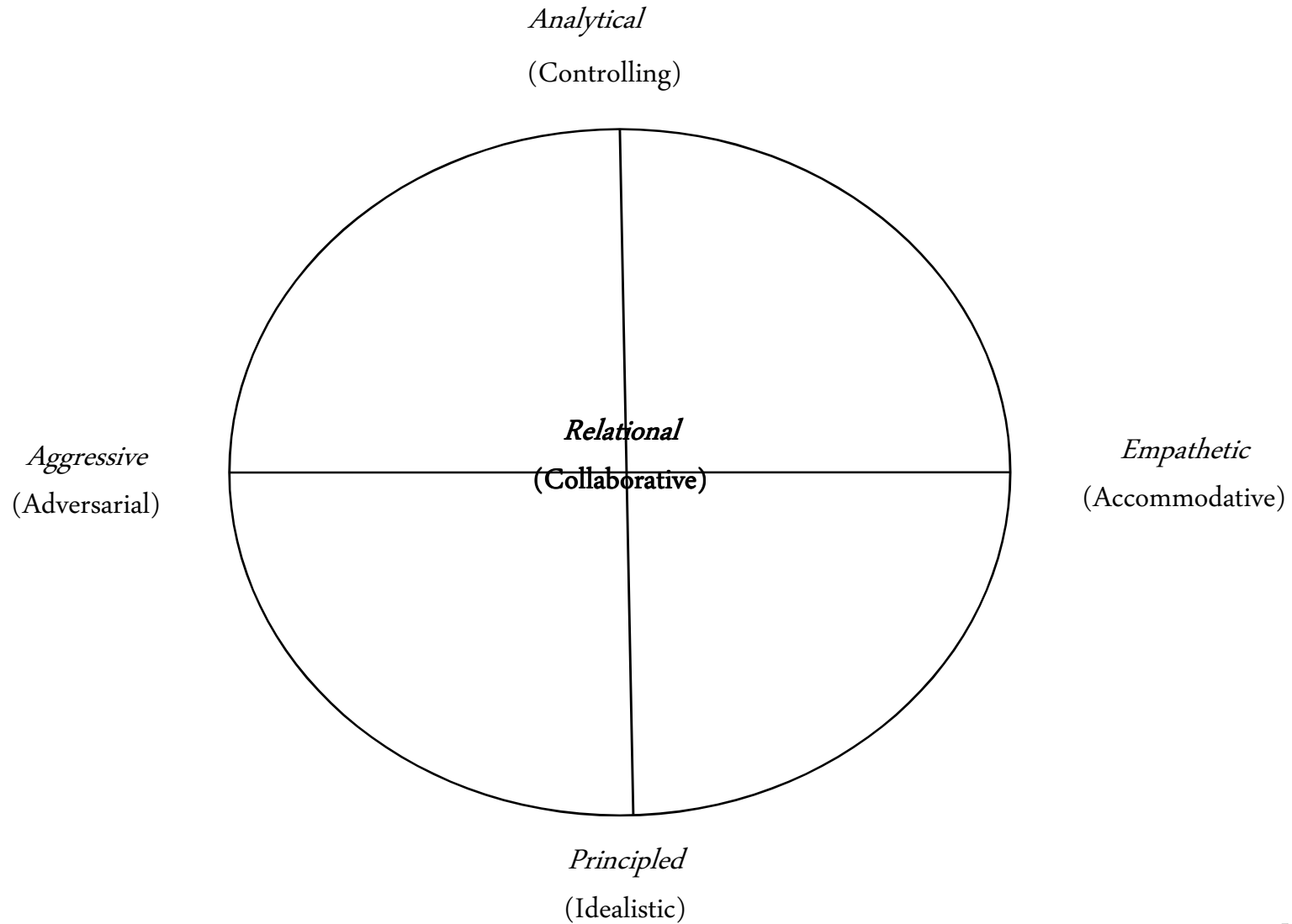


= 4 Dimensions – Synergy, Innovation, and  
Ownership – *Relationship*-Based, Increased  
Satisfaction, Teamwork and Partnerships

# Negotiation Strategies



# 5 Approaches to Negotiation



# 3 Approaches to Negotiation

<u>Accommodative</u>	<u>Aggressive</u>	<u>Collaborative</u>
Participants are friends	Participants are adversaries	Participants are problem solvers
The goal is agreement	The goal is victory	The goal is a wise outcome
Make concessions	Demand concessions	Separate people from problems
Be soft on people and problems	Be hard on problems and people	Be soft on people and hard on problems
Trust others	Distrust others	Proceed independent of trust
Change your position easily	Dig into your position	Focus on interests, not positions
Make offers	Make threats	Satisfy interests
Avoid having a bottom line	Mislead as to your bottom line	Disclose, discuss your bottom line
Accept one-sided losses	Demand one-sided gains	Invent options for mutual gain.
Search for what they will accept	Search for what you will accept	Develop options to choose from
Insist on agreement	Insist on your position	Insist on criteria
Try to avoid a contest of wills	Try to win a contest of wills	Try to base results on standards.
Yield to pressure	Apply pressure	Yield to principle, not pressure.

(Based on work by Roger Fisher & William Ury)

# What We Negotiate

## *Quantities*

## *Qualities*

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Time

Relationships

Money

Trust

Space

Intimacy

Possessions

Self-Esteem

Action

Meaning

Power

Community

Personal Gain

Mutual Gain

Winning/Losing

Democracy/Participation

How much do I get?

How good can it get?

# Some Questions in Negotiation (1)

<b>Goals:</b>	What does each side want?
<b>Alternatives:</b>	What will each side do if no agreement is reached?
<b>Interests:</b>	What are the parties' real interests?
<b>Options:</b>	What creative ideas can be developed to meet each of the interests of the parties?
<b>Standards:</b>	Are there objective criteria or standards that will help the parties agree on what is fair?
<b>Communication:</b>	What can be done to improve each side's communication regarding its concerns?
<b>Relationship:</b>	What can be done to improve relational trust and make the next negotiation less difficult?
<b>Reality Testing:</b>	Is the agreement realistic? Will it work for both sides? Will it last?
<b>Contracting:</b>	Do the parties accept the agreement as theirs?
<b>Commitment:</b>	Do both sides agree to try to make it work?



## Some Questions in Negotiation (2)

<b>Process:</b>	Did the process feel fair to both sides? What can be done to improve it?
<b>Problem Solving:</b>	Are the real problems being addressed? What can be done to make sure that they are?
<b>Residue:</b>	Are there obstacles to collaboration that are left over from the negotiation process? How can they be resolved?
<b>Chronic Conflict:</b>	What are the sources of chronic, repeated conflict?
<b>Systems Design:</b>	What can be done to improve the systems that are generating chronic conflict?
<b>Behaviors:</b>	Were the parties behaviors helpful? If not, how can they discuss them openly and correct them?
<b>Trust:</b>	What can be done to rebuild trust?
<b>Feedback:</b>	What did each side do that was destructive, useless or counter-productive for the other side?
<b>Evaluation:</b>	What can be done to improve the next round of negotiations?

# Examples of Adversarial Tactics (1)

- **Overreacting:** behaviors aimed at making you feel that you are being unreasonable, so you will back down.
- **Raising False Issues:** using a non-issue or minor concession framed as a major concession, in order to appear fair in seeking a major concession from you.
- **Tantrums:** behaving badly in the hope that you will give up and give in
- **Good Guy/Bad Guy:** attempt to make you think the 'good guy' is on your side against the 'bad guy', to get you to accept the good guy's deal.
- **Escalating Demands:** every time you concede or agree to something, they ask for more. Attempt is to get you to agree quickly and under pressure in order to avoid more demands.
- **Grinding:** exerting continual pressure to extract the maximum from you. Mirror-image of escalating demands. Also known as “nickel & diming”.

## Examples of Adversarial Tactics (2)

- **Swarming:** creating confusion so you will agree before you can think, by overwhelming you with information at high speed, often manipulating facts and numbers in a way that makes the deal look reasonable at first glance, when it actually isn't.
- **Creating Artificial Deadlines:** used to create pressure on you when in fact, there is no real reason for the deadline.
- **Bluffing:** also known as lying, this strategy is aimed at having you believe something that would get you to agree to the other negotiator's terms
- **Delaying:** finding excuses to put off negotiations to test if you are desperate, and/or to make you think they are not very interested, so you will accept anything.
- **Bottom Lining:** making you think they will not negotiate beyond a certain point.
- **Insulting:** undermining you personally in an attempt to make you feel intimidated, or to trigger you so you are less confident and more emotional.

# 48 Laws of Power and Lawyers

Among the recommendations in *The 48 Laws of Power* by Robert Greene are the following toxic, power-based ideas, each of which generates chronic conflicts:

- Conceal your intentions
- Court attention at all costs
- Get others to do the work for you, but always take the credit
- Learn to keep people dependent on you
- Use selective honesty and generosity to disarm your victim
- Pose as a friend, work as a spy
- Crush your enemy totally
- Keep others in suspended terror: cultivate an air of unpredictability
- Do not commit to anyone
- Play a sucker to catch a sucker – seem dumber than your mark
- Play the perfect courtier
- Play on people's need to believe to create a cult-like following
- Control the options: get others to play with the cards you deal
- Discover each man's thumbscrew
- Be royal in your own fashion: act like a king to be treated like one
- Create compelling spectacles
- Think as you like but behave like others
- Despise the free lunch
- Strike the shepherd and the sheep will scatter
- Preach the need for change, but never reform too much at once

# 12 Ways of Negotiating Collaboratively

1. Be soft on the person and hard on the problem
2. Encourage active, empathetic and responsive listening by both sides
3. Be inclusive, share control and power
4. Search for interests and ways of creatively combining them
5. Acknowledge needs, interests, and emotions
6. Reframe the problem as an “it,” rather than as a “you” or a “them”
7. Focus on the future rather than the past
8. Look for ways of making systems, processes and relationships more collaborative
9. Always act in ways that are consistent with integrity and improved relationships
10. Expand the pie – ask what each side would want in exchange for agreeing to what the other side is requesting
11. Make your “no” positive by identifying what you would need to turn it into a “yes”
12. Stop the negotiation when it isn't working and fix it

# Questions to Reveal Interests

- Why do you want that?
- If you could have anything, what would you want?
- Help me understand why that is important to you.
- What concerns do you have about this?
- What's the real problem here?
- What would be wrong with...?
- Why not do it this way?
- What are your fears/hopes/wishes?
- What would you do if you were in charge?
- What are your goals for the future?
- What would be wrong with accepting the other side's proposal?
- What would your proposal be if they were willing to meet your interests?
- What could the other side do to make their proposal acceptable to you?

# Questions to Develop Criteria

1. How can we decide which option to choose?
2. How can we accomplish what you want?
3. What makes that solution fair?
4. How did you arrive at that idea?
5. What is the theory behind that?
6. How do other people handle that problem?
7. What would happen if you went to court?
8. Would expert opinion be of any help?
9. What is it you are trying to accomplish?
10. How have you resolved this problem before?
11. Is there another alternative you can think of?
12. Why do you think that will/won't work?
13. What would you need to resolve this dispute?
14. What do you think your opponent wants?
15. What would make you feel that you both have won?

# Paradigm Shifts in Collaboration

1. The shift from being reactive and responsive to being proactive and preventative;
2. The shift from focusing on problems to focusing on vision;
3. The shift from tactical to strategic thinking;
4. The shift from routine to continuous improvements;
5. The shift from individual to team decision making and responsibility;
6. The shift from management and control to leadership and empowerment;
7. The shift from assistance and affiliation to partnership and alliance;
8. The shift from focusing on quantity to focusing on quality;
9. The shift from apathy and cynicism to engagement and commitment;
10. The shift from power and compromise to interests and collaboration;
11. The shift from private defiance to public dialogue;
12. The shift from to personalities and judgments to systems and evaluations.



# What Collaborative Negotiation is *Not*

- A Panacea
- Peaceful
- Conflict free
- Untroubled
- Quick
- Soft on problems
- Touchy-feely
- Co-optation
- Capitulation
- Indecisive
- Only for experts
- Automatic
- Surrender
- Permanent
- Easy or smooth

# Techniques to Reduce Resistance

1. Begin by giving *yourself* an honest appraisal.
2. Don't take it personally.
3. Try to anticipate their reasons for resistance and build solutions into your proposal.
4. Ask the other side why your proposal is unacceptable and what could be done to make it more acceptable. Offer trade-offs.
5. Ask about, listen to, and acknowledge their concerns.
6. Search for underlying issues and hidden agendas.
7. Offer unilateral concessions without any expectation of return.
8. Share control over outcomes.
9. Be willing to reassess and reformulate your proposal.
10. Take "baby steps" to resolve difficult issues.
11. Create tentative agreements, experiments, and pilot projects.
12. Ask for feedback, model how to receive it, and offer your own.
13. Thank the other side, and compliment them for their ideas.
14. Put yourself in their shoes, then try to discover a way out.
15. Tell the truth. Speak the unspeakable.
16. Surface and discuss covert behavior, and be unwilling to engage in it yourself.
17. Look for ways of improving communication, process, and relationship.
18. Find ways for the other side to satisfy their interests and save face.
19. Go slow. Don't try to force a conclusion.
20. Give in. Start over from scratch.

# What Reduces Trust

- Mixed messages
- Lack of a coherent vision or workable strategy
- Incongruence between actions and intentions
- Contradictions between formal and informal rules
- Competition over scarce resources
- Perceived hostility
- Dysfunctional systems or structures
- Changing rules or paradigms
- Divided leadership
- Personal anxieties or fears
- Lack of clarity regarding roles and expectations
- Boundary violations, or lack of respect
- Behavior that is unethical or lacks integrity
- Self doubts projected onto others
- Unresolved conflicts

# What Builds Trust

- Honesty about yourself
- Openness about problems
- Unconditional respect
- Clarity about boundaries
- Consistency over time
- Actions based on vision or values
- Collaboration and joint action
- Empowerment of others
- Teamwork, joint participation
- Listening, empathizing
- Dependability in crises and hard times
- Congruency between words and actions
- Social interactions
- Curiosity and asking open-ended questions
- Personal sharing, especially about mistakes
- Willingness to sacrifice something important
- Sincere apologies

# Successful vs. Average Negotiators

## **In the Planning Stage:**

- Twice as many options per issue were considered;
- 3.5 times as much consideration of anticipated areas of agreement;
- Twice as many comments about long-term implications;
- Much more likely to set upper/lower limits (vs. single point objectives);
- Less reliance on a planned sequence for addressing issues.

## **In Face-to-Face Behavior:**

- Five times less use of irritators (posturing or presenting one's own position as more "fair" or "reasonable" and others' positions as "unfair" or "unreasonable");
- Half as many immediate counter-proposals;
- One quarter as many defend/attack responses;
- Four times as likely to state reasons for disagreement, or criteria;
- Twice as likely to test understanding through paraphrasing, reflecting and summarizing;
- Engaged in arguments half as frequently;
- Emphasized interests and/or criteria vs. positions.

## **In Post Mortem:**

- Twice as likely to review the negotiations and discuss what worked, what did not and why;
- More likely to discuss to improve the process the next time

[Source: Macmillan Bloedel, *Getting to Yes and Beyond*]

# 10 New Roles for Attorneys and Judges (1)

1. **As Consultants:** Attorneys and judges may be needed not only to engage in battle with the opposition and decide cases, but to help prevent future disputes -- not simply by drafting documents, but consulting on ways of decreasing the amount and level of conflict.
2. **As Teachers:** Every conflict raises the possibility of learning from mistakes, but as long as the emphasis is on shifting blame, the real lessons of the conflict cannot be appreciated. Attorneys and judges can teach about conflict, and what might have been done better.
3. **As Coaches:** As long as attorneys act as champions and advocates, or judges as deciders, it is difficult for them to also act as critical coaches. Attorneys or judges can honestly tell parties what they did wrong, or might do better next time.
4. **As Informal Problem Solvers:** Rather than write vicious letters to opposing counsel or impose formal solutions, attorneys and judges can initiate informal conversations that are oriented to solving the problem, rather than fixing the blame.

## 10 New Roles for Attorneys and Judges (2)

5. **As Ombudsmen:** Attorneys and judges can serve as advisors on institutional problems, and can help create organizational learning.
6. **As Mediators:** Attorneys and judges can act as mediators in many cases, and where they can't, they can bring a degree of civility to conversations, even when there are intense disagreements.
7. **As Reconcilers:** Attorneys and judges can encourage parties not only to settle their disputes, but to reach full resolution, including forgiveness and reconciliation.
8. **As Conscience:** Attorneys and judges can remind parties of their own ethics, beliefs and principles, and ask them to do the right thing, even if it means taking less or surrendering poorly founded claims.
9. **As Translators:** Attorneys and judges can translate what each person is saying and make sure they are understood by the other side.
10. **As Collaborators:** Instead of acting adversarially and aggressively, or authoritatively and autocratically, attorneys and judges can encourage collaboration, consensus and teamwork on both sides.

*I learned the true practice of law.*

*I learned to find out the better side of human nature*

*and to enter men 's hearts.*

*I realized that the true function of a lawyer*

*was to unite parties riven asunder.*

Mahatma Gandhi