

# NEGOTIATION: THEORY AND PRACTICE

SECOND EDITION

(REVISED AND EXPANDED EDITION.  
ORIGINALLY PUBLISHED AS UNDERSTANDING NEGOTIATION.)

MELISSA L. NELKEN

*Professor of Law*

*Faculty Chair, Center for Negotiation and Dispute Resolution*

*University of California*

*Hastings College of the Law*



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# **DEDICATION**

To Ron, who makes it all worthwhile.

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## PREFACE TO SECOND EDITION

In addition to revising and updating the existing chapters from the first edition (originally published as *Understanding Negotiation*), I have added two new chapters to this edition, one on culture and gender in negotiation and one on multiparty negotiation. Although the first edition dealt with issues of culture and gender in limited ways, I decided that the challenge of teaching about them in a negotiation class would be better addressed in a separate chapter. In addition, many negotiation teachers include a multiparty or team negotiation at the end of an introductory class, as an example of the next level of challenges in learning about the subject. To incorporate such an exercise into the book's coverage, I have added a chapter that focuses on some distinguishing characteristics of multiparty negotiations, including coalition formation and dissolution; teams; representing groups; and common procedural issues that arise in the multiparty context.

My thanks again to my students at Hastings, who teach me new things about negotiation every semester; to my colleague and Center for Negotiation and Dispute Resolution Director Chris Knowlton for her willingness to read drafts and to talk about important issues for negotiation teachers; to Beverly Taylor for secretarial assistance; and to Jolynn Jones of CNDR for making a completed manuscript a reality in record time. A sabbatical leave and a summer research grant from Hastings enabled me to complete this project, for which I am grateful.



## PREFACE TO FIRST EDITION

This is a book about negotiation for law students and lawyers. In addition to covering general negotiation topics such as distributive and integrative bargaining, it focuses on issues of special importance to lawyers, including the lawyer-client relationship and ethical issues that arise in negotiations. It also pays particular attention to the psychology of negotiation, from both a cognitive and a psychodynamic viewpoint. By combining introductory explanatory material with selections from a wide range of authors in each chapter, I have designed the book to be used as the primary text in a law school negotiation course, or as a reference for lawyers interested in learning more about negotiation from a variety of perspectives. I have tried to include excerpts from articles and books that are excellent but not widely known to lawyers, as well as from standards in the field. I have omitted certain other works, such as Fisher, Ury and Patton's *Getting to YES*, because they are already so familiar and easily found in inexpensive paperback editions.

When law students think about negotiations, they often imagine a scenario in which adversaries compete: Who will get the contract to supply XYZ Corporation's widgets? How much will Defendant pay Plaintiff to settle his employment discrimination lawsuit? Such scenarios fit the standard case law model of law school instruction, which assumes an adversary system in which each side hires a zealous advocate to fight for it. But does this model actually fit the reality of lawyers' negotiations? In one sense, all too well, since law-trained advocates tend to carry over the "win/lose" mentality of the classroom and the courtroom to negotiations. In another sense, a singular focus on "besting" the other lawyer in a negotiation may result in losing sight of larger goals of the parties, such as maintaining long-term working relationships. It may also damage a lawyer's ability to work effectively with other lawyers in resolving disputes.

Much of the negotiation literature of the last twenty years has focused on the relative merits of a "win/lose" versus a "win/win" orientation in negotiation, what I refer to in this book as distributive versus integrative bargaining. In reality, few negotiations fit neatly into one or the other category. Much of the skill of negotiation lies in assessing the nature of a particular conflict, the interests of the parties, and the personalities of their representatives in order to select the most productive approach to resolving that dispute. I use the word "select" to suggest that as a negotiator, you can and should develop a flexible style that will vary depending on the situation you find yourself in. How to start developing such flexibility is the subject of this book.

The book is organized in much the same way as the course I teach on negotiation. The first chapter, on the background and context of legal negotiations, can be used as an introduction to the subject or, towards the end of the class, as a vehicle for encouraging critical thinking about dispute resolution systems

in general; the special characteristics of lawyers' negotiations; and cultural aspects of negotiating and of American negotiation theory. The next three chapters introduce distributive and integrative bargaining and analyze the tension between them. I then turn to psychological aspects of negotiation; lawyer-client issues; and ethical dilemmas. These three topics, of course, permeate any consideration of negotiation. I have put them in separate chapters for purposes of analysis; but the materials covered in them could certainly be introduced at an earlier stage, as specific issues come up for discussion in class. The final chapter focuses on mediation as a form of facilitated negotiation — one that lawyers can learn from in order to improve their own negotiating skills, as well as a resource that they can turn to in the event of an insuperable impasse in negotiations. In addition, as court-annexed alternative dispute resolution becomes more common, lawyers will be more regularly exposed to mediation as an extension of and an adjunct to private settlement negotiations.

In the chapters that follow, I have adopted one simplifying convention based on my own teaching experience. I treat negotiations as two-sided, rather than multi-sided, and do not discuss group negotiations and the complex dynamics of coalition-building and coalition-breaking that characterize them. Although I often include a group negotiation at the end of my four-unit beginning negotiation course, I do so primarily to call the students' attention to their next big challenge in learning about negotiations. To my mind, the topic is one that can be addressed adequately only after mastering the basic material covered here.

I want to thank my hundreds of negotiation students, law students and lawyers alike, who have helped me refine my thinking about negotiation over the past twenty years. They have been generous with their reflections and insights about the ways they approach, avoid, and deal with conflict in negotiation, and they have taught me a great deal about the intricate interweaving of the personal and the professional in the experience of negotiating for a client. A sabbatical leave and a summer research grant from Hastings gave me the time I needed to complete this project. Beverly Taylor provided superb secretarial assistance from beginning to end; and John Borden of the Hastings Law Library and Adrienne Leight, Hastings class of 2003, researched and helped clean up loose ends during the final months. I am grateful for their assistance. My negotiation colleagues Chris Knowlton, Howard Herman, Bea Moulton, and Maude Pervere read and commented on early drafts of several chapters. Their thoughtful suggestions have certainly improved the final version; and I appreciate their input.



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