INTEREST-BASED NEGOTIATION a.k.a. PRINCIPLED NEGOTIATION:
Improving Settlement Prospects in Estate Disputes

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Introduction:

I have been given the task of talking about "The Art of Principled Negotiation" and its practical application to estate disputes. My intention is to deliver some useful information about how to make estate negotiations and mediations more productive through the application of principled negotiation. My vantage point will be that of a mediator who has worked with counsel and their clients to resolve a variety of estate-related disputes including support claims, will challenges, issues on intestacy, quantum meruit claims against estates and objections to the passing of accounts. This paper is informed by my experiences and observations in that capacity.

Principled Negotiation = Interest-Based Negotiation:

Let me begin with the term "principled negotiation." The thesaurus will match the word "principled" with synonyms like *honourable*, *righteous*, *upright*, *ethical*, *just* and *moral.* It will indicate that its antonym is *unethical*. These are dangerous associations.

Principled negotiation is <u>not</u> morally superior. It is simply a bargaining approach using a frame of analysis that distinguishes between "positions" and "interests." What this means is that principled negotiation promotes settlement by responding to what is most important to the people involved. It does this by moving from demands or fixed stances (positions) to the real concerns that underlie or motivate those stances (interests).

For example, when a beneficiary challenges the passing of accounts, the quantum of the executor's compensation is the tip of the iceberg. Ninety percent of what is really going on lies beneath the surface. The filed objection is the position. The underlying motivations and concerns are generally more complex and constitute the interests. Anyone who has ever handled such a file instinctively recognizes that this is so and knows that understanding the objector's interests (as opposed to the position) is critical to resolving the objection.

Principled negotiation does not restrict bargaining to the exposed ten percent of the iceberg. It attends to the submerged ninety percent as well. It moves beneath the monetary demand to find out more fully what the dispute is about. Then it looks to see whether there are ways to resolve the dispute other than (or in addition to) adjustments to the trustee's compensation.

Notice that I do not say that the monetary component of the dispute magically disappears. Almost all estate disputes have a monetary component but when we look at them through the lens of interests we see what else is going on. Money is a convenient proxy for many things at law. When we work with interests, we "peel the onion" to explore what the proxy stands for.

I have been working as a mediator and teaching related skills and topics since 1989. My experience is that the distinction between positions and interests is the single most powerful aspect of principled negotiation. It is often the difference between impasse and resolution.

Most people think that the notion of interests originated with Roger Fisher and Bill Ury, the authors of *Getting to Yes*. They certainly packaged and marketed the concept with great success, but others identified it before them. I'm almost embarrassed to admit that I first encountered the idea in a Dale Carnegie speaking course in the early 1980's.

Carnegie was born in Missouri in 1888. As a salesman, he learned that sales weren't made by pressure and clever talk emanating from the salesman. Instead, they were made when people (customers) saw that their needs were taken seriously and could be met. In 1936, Carnegie codified his experience in a best-selling book, *How to Win Friends and Influence People,* where he articulated the notion of interests. "Talk in terms of the other person's interests," he stressed.

Laugh if you like, but when I practised law my ability to settle clients' cases increased exponentially once I applied that little concept: talk in terms of the other person's interests. As an advocate I had to consider what the other side wanted to get results for my own client. To me, this notion is as useful today as it was in the 1930's.

Fisher and Ury added valuable concepts beyond interests to their negotiation analysis. I'm sure we are all familiar with them – options (ways meet interests), alternatives (self-help remedies away from the negotiating table) and objective criteria (impersonal principles independent of the negotiators). Yet, the concept of interests is pre-eminent and vital, so many of my colleagues and I prefer to use the term Interest-Based Negotiation (IBN), instead of principled negotiation. This frees us from the

evangelical or dogmatic overtones that imply criticism of apostates and can get negotiations off to a bad start. We're not concerned about who is righteous; we're concerned to get the job done.

Interest-Based Negotiation and Estate Disputes:

The good news is that within the universe of available disputes, estate issues are highly suited to IBN because they are so rich in human and material concerns. Frankly, I can't think of another kind of dispute with so many interests operating in so many dimensions. Unlike personal injury disputes where one is often simply quantifying an injury or even wrongful dismissal cases which can quickly become limited to the amount of notice an employer must pay, estate disputes have many and varied interests which I call "working material" for the negotiator or mediator. The more interests, the more there is to work with. The more there is to work with, the greater the scope for settlement.

I urge you not to artificially limit or dismiss these varied interests when trying to settle estate disputes. Instead, consider the interests as gifts. Not only do they make for intriguing settlement prospects, but they significantly increase your chances of reaching resolution if you understand how to recognize, respect and respond to interests. And therein lies the secret. If you want to increase your effectiveness as a negotiator or mediator in estate matters, I encourage you to brush up on your ability to work with interests and master these three R's of IBN. My experience is that even a general awareness of interests makes a difference whether or not the negotiators take

deliberate or explicit steps to address them. Once a person is aware of the phenomenon of interests, he or she automatically begins to respond to them.

My impression is that most estate counsel have more than a general awareness of interests. Good estate counsel are instinctively attuned to them. Perhaps this is why they are well suited to trusts and estates work. To help such counsel (and mediators) further improve their prospects of settling estate disputes, I offer the following observations and insights concerning interests and IBN:

Effective Use of Interests in Estate Disputes – A Baker's Dozen:

1. As part of your general awareness of interests, cast your net broadly: interests come in many different shapes and sizes in estate disputes.

No matter what anyone says, estate disputes are not "just all about money in the end". They do, of course, involve money (often astonishing quantities of it) but they are also an opulent blend of psychological, procedural and substantive concerns. If you can recognize these different types of interests, you will be in a better position to deal with them. You will see which ones can be reasonably satisfied in a time-bounded mediation and which can only begin to be satisfied.

Consider these interests:

i **Psychological Interests** (people's feelings & emotional reactions): *The old bugger only left me $1,000. He never did deserve me as his son.*

ii **Procedural Interests** (how things happen): *We don't understand why you went to a lawyer right away. You never even contacted us after Emily died.*

iii **Substantive Interests** (the subject matter, the "what" of the dispute): *I'm afraid you've overestimated the value of her house. That neighbourhood's gone down in the last 10 years and I don't think it will be worth anything like $450,000.*

These different interests suggest different problems, some of which are more amenable to fixed-time negotiation or mediation than others:

i How can the heir assert his self-esteem and recover from his father's negative judgment;

ii How to ensure direct dealing among the people involved, with an open information exchange;

iii How to arrive at a reasonable value for an important asset that will be credible in the eyes of all concerned.

2. TRY NOT TO JUDGE OR EVALUATE INTERESTS. OPT INSTEAD TO UNDERSTAND THEM.

Interests vary from person to person and can be highly idiosyncratic. Alice may really care about Aunt Edna's lace collection while you consider it dust-collecting clutter. Fred may have a thing about grammar and may red-circle perceived errors in

each letter from the institutional trustee, while you regard him as ridiculous or obsessive.

In IBN, the first step is to understand what the interests are without evaluating them or judging the people involved. This is tricky because society at large and the legal profession in particular condition so many of us to categorize and evaluate. IBN asks you to defer that instinct in favour of openness and curiosity. What is it about the lace collection? And are we talking the entire collection or certain identified pieces? And why does Fred keep that sharpened red pencil at his desk after all? What's that about?

In a time-bounded negotiation or mediation, it often seems more expeditious to evaluate so that people can "move on" and resume their own agendas. This is an understandable impulse but it may not ultimately be effective.

Once, before talking about offers or ways to settle a dispute I asked respondent's counsel to tell me what was important to the claimant. I wanted to make sure that he and I had heard the same things in the joint meeting because my perception was that the claimant's concerns were clear and easy to meet. "Sure I can tell you," counsel replied. "But I will also tell you why she's all wrong." That lawyer had a deal for his client easily within reach but risked losing it because he refused to acknowledge the relatively low-cost items that the other side was looking for – as if critiquing them would make them go away.

3. BE CAUTIOUS ABOUT DISMISSING ANOTHER PERSON'S INTERESTS, ESPECIALLY TO THEIR FACE. IN THE SHORT TERM YOU WILL FOSTER RESISTANCE & RESENTMENT. IN THE LONG TERM YOU WILL EARN YOURSELF A CRITIC.

Even in this day of internet and the instantaneous transmission of information, the grapevine still operates. We've all got stories to tell and we seldom refrain from telling them – to other people, of course, not to the person directly involved.

The other day I heard a story about a mediator from the client's vantage point. It made me sit up and take notice. The client had been fired. She went to mediation to settle her severance package. During the mediation, the client started to feel uncomfortable. It seemed to her that she was giving up too much and getting too little, but she couldn't put her finger on just what was wrong. So she mentioned it privately. "This doesn't feel right," she told the mediator. "There's something seriously wrong about the way the company is treating me." Then she looked to the mediator who replied, "It doesn't feel right? Grow up. What did you expect? This has nothing to do with what's going on here."

In the pressure of the moment, the mediator interpreted the employee's concerns as irrelevant, unimportant or irrational and directly dismissed them. The file settled but the mediator earned a detractor for the employee reports a lingering feeling of being "violated" as a result of her exchange with that mediator.

4. KNOW THAT EVEN IF YOU CAN'T SEE OR RECOGNIZE AN INTEREST, IT IS OPERATING, SOMETIMES POWERFULLY SO.

Negotiators and mediators vary in their ability to detect or see interests, particularly when it comes to psychological interests which can drive an entire negotiation from underneath the table. Some of us detect psychological interests more easily than others. My husband who does labour relations mediation calls this "practising psychiatry without a licence". I just call it attending to what people say and do – or don't say or do.

In one mediation involving estranged members of a family, a client casually mentioned something that happened years ago and indicated how much he resented it. He made the remark once, then twice, then three times. It became what we call a "recurring reference" and it had a direct connection to the present day dispute: a family obligation ostensibly taken on under pressure. Although the client never carried out the obligation, he convinced himself that he had and devised an elaborate system of contra-accounts by way of justification. But, as far as the other side was concerned, the obligation was outstanding. So the parties and their lawyers got into a tug of war: *You must do it.* ***I did do it****. You must.* ***I already did.***

When I met privately with that client's counsel I mentioned the recurring reference. "Didn't you hear what he said?" I repeated the client's remarks. "He said it right in front of everyone. Don't you see? It's the key to what's going on. That's what's really bugging him. It's not about elaborate contra-accounts at all."

The lawyer blinked at me. "No," he said. "I don't see it. Frankly, I think you're making it up. Besides I don't have training in psychology. What they (the other side) need to understand is that he simply is not going to do more." So counsel condoned his client's fantasy that the obligation was fulfilled.

5. ACCEPT THE FACT THAT NOT ALL INTERESTS CAN BE STATED OUT LOUD.

Working with interests requires tact and discretion. Negotiators and mediators have to listen for what people say, what people don't say and *what people cannot bring themselves to say*. Sometimes clients bring interests to the table that they do not want to say out loud, at least not in the presence of the other side. The trust company does not want to admit that this is the most costly estate it has handled in years and that it lost a valuable employee over the matter. The adult child who receives her share of the estate in trust while her siblings get theirs free and clear may not be able to articulate her reaction to her dead father's insult.

Sometimes clients bring interests to a mediation that have not worked their way up from the subconscious to the conscious mind. In one case, the wife of the deceased resisted any compromise that would lead to settlement because although she couldn't say so, she felt responsible for her husband's death. She needed to hold someone else accountable and convinced herself that she would do this by holding fast to her position. It took many hours of mediation before the bereaved wife was able to explain her resistance to herself and the mediator.

6. ALL CLIENT INTERESTS MAY BE LEGITIMATE, BUT NOT ALL CLIENT INTERESTS ARE EQUAL. AS A MEDIATION PROGRESSES, CLIENTS NEED TO BE ABLE TO REFINE AND RE-ORDER THEIR WISH LISTS.

Even seasoned negotiators bring an amalgam of facts, feelings, queries and fears to the table, not a clear, ordered set of interests. It is during the process of negotiation and mediation that these become clearer and take on an order of importance. They have to because the reality of most negotiations is that not every party will get all of his or her interests met all of the time. (IBN does not guarantee that all interests will be satisfied. It only promises to satisfy as many interests as possible, where "possible" is defined through interaction with the other negotiators.) So clients have to be prepared to adapt.

As clients see what is likely and how the other negotiators are approaching the situation, they refine and revise what they think is achievable and important.

Recall the objector to the accounts who wanted the executor's compensation reduced. Suppose that underneath the legal procedures, there are the following interests – educating the executors about their proper duties (*they should know better*); getting a bigger share of the estate for myself (*why not?*); getting possession of the Muskoka chair that Aunt Faith and I used to sit in and read when I was a little girl (*I miss her*).

The objector may start out strong on policing how the trustees carried out their duties but as the mediation progresses and she gives and gets feedback from the mediator, she realizes that she would much rather just have the Muskoka chair. That's really what is most important to her. Adjusting the executor's compensation is important too, but its importance has receded in light of the possibility of getting something of personal value. And as for teaching the executor's a lesson, well…

It is the job of counsel and the mediator to help clients identify, refine, order and re-order their interests as the process unfolds.

7. ALL CLIENT INTERESTS MAY BE LEGITIMATE, BUT NOT ALL CLIENT INTERESTS ARE CONSISTENT.

Because estate disputes are so emotionally charged, clients may have interests that pull in opposing directions, without even realizing it. In one mediation, sister A was adamantly against settlement of any kind because any readjustment of the estate would violate the father's will "and what could be more important than honouring my dead father's wishes". At the same time, the stress of the dispute was disrupting her sleep, her family life, her self-employed consulting work. She wanted things over and done with NOW. Sister A had to appreciate that her two interests were diametrically opposed to each other and that as long as she insisted on the exact division set out in the will (a division which gave her substantially more than Sister B), she would perpetuate the dispute.

Coming to grips with opposing personal interests can be disappointing and deflating. Nevertheless, it is what sister A had to do if she wished to move towards settlement. IBN does involve choices, some easy, some hard. (See also No. 11.)

In Table I at the end of this paper, I have set out a framework for identifying, categorizing and sorting individual interests. I invite counsel to help their clients identify what matters to them in terms of results (substantive interests), process (procedural interests) and feelings (psychological interests) before attending mediation. Then, I suggest that clients try to arrange their concerns in order of importance and spot inconsistent concerns that pull in opposite directions. Once a client has made his or her own list, I suggest that they consider what matters to the other side(s) in the mediation. Of course, a client can only hypothesize about the other side at this point but this is a start and an important rehearsal for what mediation is gong to require: an amalgam of all interests not just a one-sided list. (See No. 8.)

The framework in Table Ican be used to prepare clients for mediation but it is important to remember the fluid nature of interests once the process gets going. A snapshot of interests taken before mediation begins may be very different from a snapshot taken part way through or towards the end once clients have had a chance to refine, readjust and reorder their concerns as a result of the give-and-take. For this reason, the initial analysis of interests must be considered as a preliminary guide only, just as a factum can never fully anticipate the arguments or emphasis required when arguing an appeal before the judge and in the presence of opposing counsel.

8. A ONE-SIDED LIST OF INTERESTS IS JUST ABOUT AS GOOD AS HALF A MAP. TO REALLY KNOW WHERE YOU ARE GOING IN NEGOTIATION OR MEDIATION YOU HAVE TO CONSIDER THE COMBINED INTERESTS OF EVERYONE AT THE NEGOTIATION TABLE.

In my experience, a majority of people come to a mediation focussed on their definition of the problem and their solution to that problem. For instance, to a Canadian family the problem may be a remote cousin in the Ukraine whose dependent's relief application strikes them as gold-digging. They don't accept the assertion that their father secretly made cash transfers for years, cash that the Ukrainian cousins relied upon in a tough economy. So they begin by focussing their efforts on defeating what they see as an opportunistic claim.

Hard as it may be, the single most important improvement that clients and counsel could make in their preparation and participation is to spend some time considering the interests of the other side. This is a very challenging thing to accomplish and a matter of some delicacy. It involves dismantling a cherished version of the story. It often also means letting go of attribution, those comforting negative conclusions about the opposite side.

Naturally, clients are preoccupied with their own concerns. This is not surprising given the intimate, personal nature of these disputes and the family context in which they occur. But if counsel is not careful, he or she ends up reinforcing that preoccupation which must be surrendered for settlement to take place. When counsel

identifies too closely with the client's cause and fails to give adequate consideration to the needs of the other side, the mediation stalls. It needs to move beyond opposing sets of concerns that pull against each other. This is where counsel and the mediator can be most useful. They can tactfully but persistently encourage clients to consider other realities.

Looking at the interests of the other side need not be done out of a sense of altruism. It can be done purely out of enlightened self-interest. The pragmatic reality is that only by satisfying at least the priorities of the other side does a negotiator get what he or she wants. That's the process of negotiation. People on the other side of the table do not unilaterally do things as a general rule. They compromise and give value because they can see a meaningful exchange, something they get in return. As an example, if one side wants to have access to the deceased's residence to prepare it for evaluation and eventual sale, then the occupying beneficiary has to understand how his or her own living requirements can be met and what the long-term implications are. The opposite side has a role to play here. In mediation, solving the other person's problem is not just the other person's problem. It becomes *your* problem too.

9. WHEN THE INTERESTS OF THE NEGOTIATORS ARE COMBINED SOME INTERESTS – BUT NOT NECESSARILY ALL –ARE GOING TO CLASH.

In Table II at the end of this paper I have set out a framework for analysing interests once they are combined: A + B, not A independent of B.

Table II shows that some of the combined interests will be common interests. For instance, everyone may agree that the estate is of modest proportions and it is to their common benefit to minimize litigation costs. Common interests tend to drive settlement.

Other interests will be mutually exclusive. A and B may want separate and different things. Mutually exclusive interests can be compatible and may provide convenient trade offs. One person can give what I call a low-ticket item in exchange for what the other side considers a high-ticket item. In one case, a sub-set of beneficiaries wanted to have their travel costs covered as a "matter of principle" (high ticket item). The executors wanted to finalize the distribution of the estate and were willing to readjust their compensation to pay those expenses (low ticket item).

On the other hand, mutually exclusive interests may be incompatible. For example, A might genuinely want to restore and continue a familial relationship with B. B, however, may wish to punish A. Their interests don't intersect or foster a fruitful exchange.

Then there are opposing interests, ones that work against each other. These often require direct compromise where everyone gets less than they want. (See No. 10.)

The point here is that until you can survey the complete mediation territory by means of combined interests (without evaluating or judging) you do not really know what the prospects for settlement are. Table II is an extension of "talk in terms of the

other person's interests". It requires the negotiator to look at the negotiation through a wide angled lens instead of down the tube of a microscope. This kind of analysis is very different from arriving with a fixed problem definition and corresponding pet solution and trying to convince people to buy in.

10. Interests can help you resolve a distributive problem more easily and elegantly.

A distributive problem is one where there is a limited quantity of something to be distributed and the more one person gets, the less there is for the others. Estate disputes almost always have a distributive component: how to allocate the quantum of a finite estate when there is a question of the validity or interpretation of a will or a support claim. The words of the deceased cannot simply be followed like a fixed mathematical equation. The interests have to be considered.

Substantively each beneficiary wants to get as much as he or she can. But psychologically and procedurally there are often shared interests such as being treated fairly and being able to influence the decision on how to distribute what is available.

But what is fair? Beneficiaries can only arrive at consensus on fairness if they forgo the mantra, "It's mine." They have to look at things through the eyes of the others involved. When they do (and I've seen it happen many times) all parties arrive at a way to share the estate based on what "feels right" even though it's not a perfect

distribution. They use abstract fractions or proportions or other objective principles that take the personality out of it, and they redistribute what is available in new ways.

11. IBN DOES NOT NECESSARILY PRODUCE A GOOD OPTION AND A BAD OPTION WHERE THE CHOICE BETWEEN THE TWO IS OBVIOUS. IT MAY PRODUCE TWO ROUGHLY EQUIVALENT OPTIONS, EACH OF WHICH ARE LESS THAN IDEAL.

Recall sister A in No. 7 who wanted to carry out the letter of her father's will and still have the dispute resolved. The reality of that negotiation was that sister B was not going away. She was not about to fold up her tent and say, "You're right, Sister A. You get more than I do. In fact, why don't you have it all?" In the face of the mediation reality, sister A had to decide whether to agree to a modified distribution of her father's estate which she labelled as a betrayal, or whether to hold firm to the exact terms of the will, in which case she would be subject to the stress of an unresolved dispute.

It was a tough decision for sister A. She eventually chose resolution through redistribution.

12. RELAX! NOT ALL INTERESTS REQUIRE YOU TO "DO SOMETHING".

Sometimes negotiators are reluctant to acknowledge another person's interest because (a) they fear that it automatically follows that they must satisfy the interest;

(b) they actually don't know how to satisfy it; or (c) they can't relate to it. Yet some of the most important interests that people bring to estate mediations are the easiest to satisfy – and many of them don't cost a cent. Respect is a big one, being treated and listened to with respect. All that takes is a bit of time and some effort.

Sometimes clients want to talk about things that seem irrelevant to the legal and practical issues and people get impatient. But the extra ten or fifteen minutes may pay big dividends. I'm not talking about endless obsessing or destructive remarks or the uncontrolled talk of a person who suffers a form of mental illness. I'm referring to the stuff of everyday life. Ordinary conversation that might not appear to have "relevance" or "a point". Sometimes clients also bring pictures of the deceased to the mediation and want to talk about the person who was once an important part of their life. It costs nothing to be present and engaged in that conversation.

13. NEVER UNDERESTIMATE THE IMPORTANCE OF "RELIEF" IN AN ESTATE DISPUTE. THE PURSUIT OF RELIEF (IN MEDIATOR-SPEAK "CLOSURE") IS AN ALMOST UNIVERSAL INTEREST ON ALL SIDES OF THE TABLE.

It is easy for us as professional participants to overlook how difficult it is for clients to show up and sit across from family members, friends or acquaintances with whom they are now in dispute. They may once have loved their fellow disputants. Or they may have always despised them, now more than ever. Whatever the case a mediation is a very stressful event. The clients may put on a brave front. They may

even be openly cordial and courteous. But, make no mistake: they are not having a good time. I have had had clients say how hard they expected mediation to be and thank me "for making this easy to do",

The most significant, recurring interest that I have seen on all sides of the table is the desire for relief, for getting things over and done with. This does not mean that anything goes. It does not mean that one party bulldozes the other. But what it does mean is that lawyers and mediators have to facilitate the process in the sense of "making it easy to do."

Once, I was signing up one side of an estate dispute to the settlement. "Just think," I said, "Tomorrow morning you'll be having your cup of coffee and this will all be over. How good will that feel?" "You have no idea," replied the beneficiary. "I'm beginning to feel that way already and it is *very* good."

What does a mediator do about interests?

Just as I use the Myers-Briggs Type Indicator[1] all the time in my work by applying my knowledge of personality type, I am constantly applying the notion of interests to move the parties towards settlement. This is so whether or not the word "interests" ever trips from my lips. Interests are simply an integral part of the job and while I'm working with them I don't necessarily talk about them.

[1] A psychological instrument developed by two American women and based on the work of Carl Jung that reliably identifies sixteen different personality types. The theory of the MBTI is that people are born with innate preferences and that these preferences show themselves again and again in ordinary, everyday behaviour.

In the live demonstration that is part of this program, the mediator will take the next step and help the parties generate options to meet some or all of their interests and, if possible, create a bigger pie to share. Before generating options, I find it helpful to scope out the combined interests of the parties. This overview lets me work with the parties to build a picture (first individually and then collectively) of how the overall dispute can be resolved.

I generally do not ask people to make commitments to solve only one part of the dispute without letting them see how it relates to the other elements of the dispute. So, I would not ask our fictional objector to compromise on the executor's compensation without letting her get a sense of what will happen to the Muskoka chair. Instead, I work with her and the other parties to sketch out a potential resolution that includes all of the components (substantive, procedural and psychological interests). If the sketches of both sides converge and there is willingness to move forward, then I continue to work with lawyers and clients to refine that sketch and ultimately convert it into minutes of settlement. Thus, there may never be a formal exchange of "offers" but rather an ever-tightening settlement proposal to which all sides contribute.

I should clarify that by focusing this paper on interests, I do not mean to suggest that interests provide a complete solution to these controversies. Estate disputes also have "rights-based" aspects and the mediator must attend to those as well. Clients' legal rights and entitlements are important, especially when there is

pending or threatened litigation. An interest-based mediator still considers the strengths and weaknesses of each client's case, helps clients evaluate their risks and perform cost/benefit analyses with their counsel, and discusses matters of proof, process and cost. For your further information I provide an extract from the 3rd edition of *Bypass Court: A Dispute Resolution Handbook* which discusses how a mediator adds value to a negotiation.

Helpful Analytical Frameworks:

No's 7 – 10 from my "Baker's Dozen" reviewed how interests may be categorized and combined in the process of working towards settlement. The following two tables incorporate these ideas into templates that can be used before and during an estate mediation.

Table I walks people through individual interests. Table II considers the effect of amalgamating the interests of all concerned. For simplicity of presentation, both tables reflect a bi-lateral negotiation. They need to be extended for multi-party disputes which will generate more permutations and combinations when the interests are combined.

If you find these tables helpful, feel free to reproduce then and use them as needed. Just remember that a snapshot taken before mediation is going to look very different from a snapshot taken part way through or towards the end of the process. Interests tend to be fluid and people revise, refine and re-order them as the mediation unfolds.

Table I: IDENTIFYING INDIVIDUAL INTERESTS

POSITIONS	FACE-OFF POSITION(S) OF A:	FACE-OFF POSITION(S) OF B:
INDIVIDUAL INTERESTS	WHAT MATTERS TO A IN THE NEGOTIATION:	WHAT MATTERS TO B IN THE NEGOTIATION:
	Substantive (results):	Substantive (results):
	Procedural (process):	Procedural (process):
	Psychological (feelings):	Psychological (feelings):
	WHAT MATTERS AS SORTED BY A:	WHAT MATTERS AS SORTED BY B:
	Most to least important: 1. 2. 3. 4. 5. 6.	Most to least important: 1. 2. 3. 4. 5. 6.
	A's own conflicting interests:	B's own conflicting interests:

Table II: Combining Negotiators' Interests

Combined Interests	Interests A + B have in common: 
	Interests of A + B that do not intersect: 
	Interests of A + B that conflict: 

Conclusion:

Some counsel and mediators consider IBN to be "soft", "flaky" or "touchy-feely". I've come to suspect that this is because IBN acknowledges the existence of psychological interests which can be intimidating or down-right baffling at times. Even so, the discomfort of some with psychological interests should not stand in for a full critique of IBN. IBN does not ask that people become credulous or naïve. It does not overlook the hard realities of negotiating or suggest that all things are possible. It simply asks negotiators to consider realities beyond the ones they privately inhabit so that they can negotiate with eyes more fully open.

A former mediation student of mine put it very well: Interests are like electricity: just because you don't see it, doesn't mean it isn't working. I would add that like electricity, interests can also be dangerous if not handled properly.

Interests abound in estate disputes where lawyers and mediators will find some of the most powerful human motivators. By recognizing, respecting and responding to the diverse interests of the people involved, they can harness that energy for a more effective process and outcome. Thus, it pays to renew one's acquaintance with interests from time to time.

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