

**What do you bring to the table?
How to be an Effective Participant
in IEP/IFSP Facilitation and Special
Education Mediation**

Eva M. Soeka

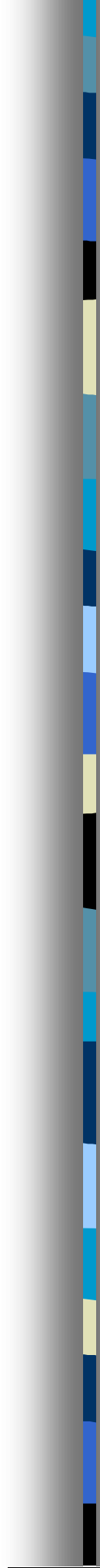
**Director and Associate Professor of Law,
Marquette University Center for for Dispute
Resolution Education
and
Graduate Program in Dispute Resolution**

CADRE

**4th Annual Symposium
December 7, 2006
Washington, D.C.**

Notice of Copy Right

Copyright © 2006. Eva M. Soeka. All rights reserved. No part of this manual may be reproduced in any form or by any electronic or mechanical means, including information storage and retrieval systems, without permission of Eva M. Soeka, Director, Marquette University Center for Dispute Resolution Education, P.O. Box 1881, Milwaukee, WI 53201-1881.



“Anyone can become angry—
that is easy;
but to be angry
with the right person,
and to the right degree,
and at the right time,
and for the right purpose,
and in the right way--
that is not
within everybody’s power
and is not easy.”

-Aristotle-

BUSINESS

Collective Bargaining
Management (TQM)
Organizational Development
Negotiation

COMMUNICATION

Cross Cultural
Gender
Interpersonal
Family Systems

LAW

Labor
Pretrial Practice
"The Litigation Crisis"

SOCIOLOGY

Community Building
Group Conflict

DISPUTE RESOLUTION
(Interdisciplinary)

Theology
And
Philosophy

PSYCHOLOGY

Anger/Frustration
Individual and Group Conflict
Family Counseling

POLITICAL SCIENCE

Political Philosophy
International Relations (Shuttle Diplomacy)
Self-determination

SOURCES OF DISPUTE RESOLUTION SYSTEMS

WESTERNIZED SOCIETIES

- Emphasis on rights conferred by law, including constitutions

NON-WESTERNIZED SOCIETIES

- Emphasis on social consensus, moral persuasion, balance

DEVELOPMENT OF DISPUTE RESOLUTION SYSTEMS

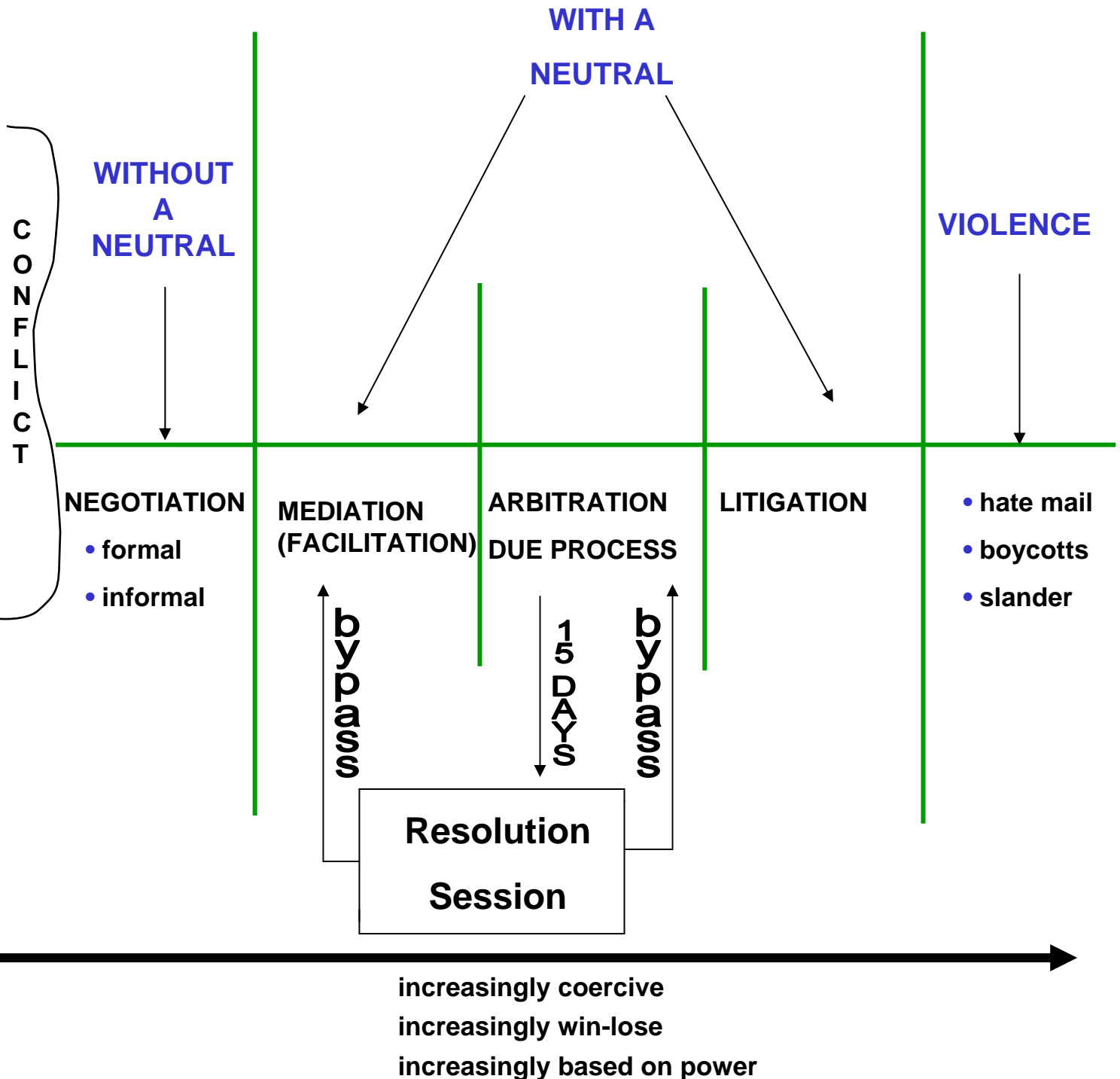
COMMUNITY-BASED

- **Mediator**, friend, village elder, wiseman
- **Africa**, “moots”
- **China**, People’s Conciliation Court (“litigation is always second best”)
- **Middle East**, village mediators

RELIGIOUS-BASED

- **Mediator**, priest, rabbi, religious official (wisdom comes from God)
- **Jewish rabbinical councils**
- **Quakers**, Book of Discipline
- **Catholic**, “sanctuary”, diplomatic relations, family disputes

DISPUTE RESOLUTION SPECTRUM AS APPLIED TO SPECIAL EDUCATION



FORMS OF DISPUTE RESOLUTION

Without a Neutral

NEGOTIATION

A bargaining relationship between parties with a conflict or perceived conflict of interest

* positional or interest-based

With a Neutral

MEDIATION

Facilitated negotiation, i.e., a third-party neutral assists the parties in reaching a resolution, usually in the form of a written agreement.

* generally interest-based

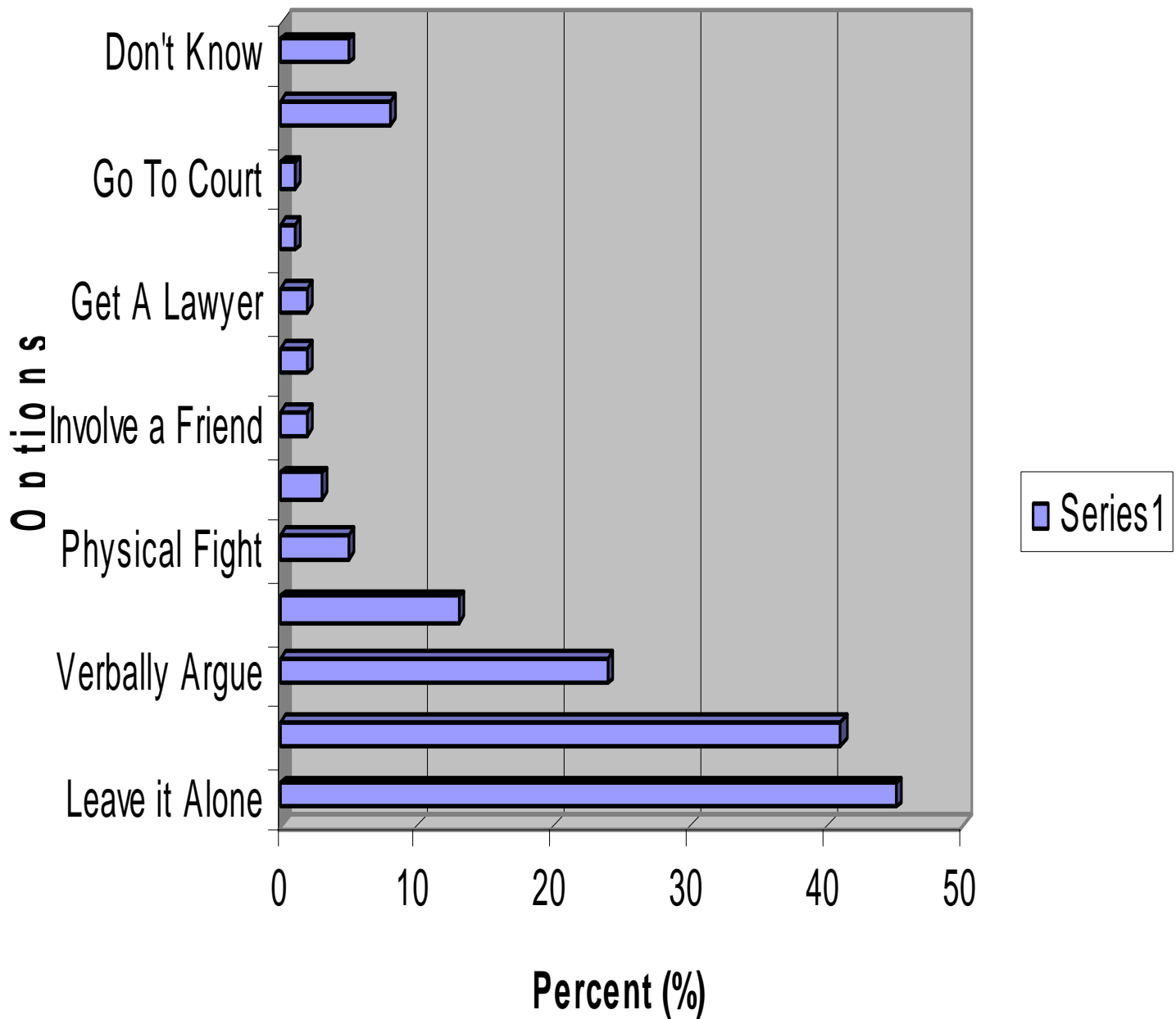
ADJUDICATION

A neutral decision-maker imposes a decision upon the parties.

- (1) Arbitration (private forum)
- (2) Litigation (public forum)

* positional

When You Are Involved in a Disagreement, Argument, Grievance, Fight, or Problem... What Do You Do?



DEVELOPMENT OF A DISPUTE

Amorphous

Structured & Defined

**C
O
N
F
L
I
C
T**

Initial Negotiation
or Mediation
Session

“Brokering”
Effectively

Emotional Context

DISPUTE

- Stakeholders are defined
- Stakeholders identify and define issues
- Stakeholders identify positions on issues

Emotional Context

- Emotionally Charged
- Ill-Defined
- Poorly Structured

AGREEMENT

Felstiner, Abel & Sarat, “The emergence and transformation of disputes.”

Stages in the transformation of an “injurious experience” – into a dispute:

Step 1. NAMING. A person perceives an injurious experience.

Step 2. BLAMING. The person perceives the injurious experience to be the fault of someone or something.

Step 3. A DISPUTE IS BORN. The claim is rejected, or perceived to be rejected, fully or partially.

METHODS OF BARGAINING

INTEREST BASED

Win-win
integrative
collaborative/cooperative
non-zero-sum
value creating

POSITIONAL

Win-lose
distributive
adversarial
zero summing
value claiming

FIVE BASIC ELEMENTS OF INTEREST-BASED NEGOTIATION*

1. **Separate the people from the problem;** that is focus on the issues before you, not the parties. Work on relationship independent from issue.
2. **Focus on interests not positions.** Positions are what you want, interest are why you want them.
3. **Invent options for mutual gains.** The more one of the parties can lay out several options and be creative and flexible in the creation of those options, the more that party takes control of the negotiation.
4. **Insist on using objective criteria.** This takes the emphasis off the positions and on to a third party standard which can again focus the parties on a problem-solving technique. Eg., bluebook, comparative salary data, actuarial tables.
5. **Know your best alternative to a negotiated agreement (BATNA).** The reason you negotiate with someone is to produce better results than you could obtain without negotiating with that person. You need to know what result you would obtain if you did not engage in the negotiation. BATNA presents the best standards for evaluation of settlement offers.

*From Fisher and Ury, *Getting to Yes* (Boston, Houghlin, Mifflin, 1981)

TACTICS OF POSITIONAL BARGAINING

ATTACKS

- Personal threats or criticisms to undermine authority or legitimacy
- *Classic:* “I’d like to speak to your supervisor.”

STONEWALLING

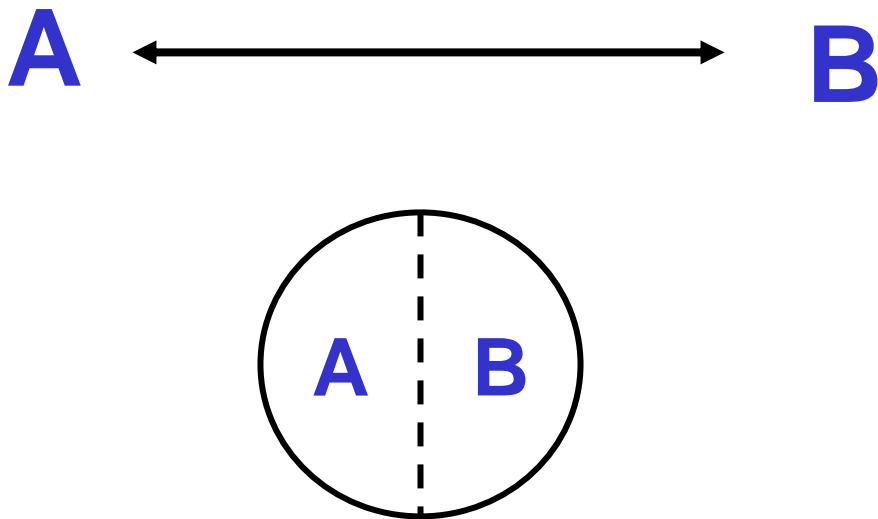
- Refusal to continue discussion
- *Classic:* “It’s company policy.”

TRICKS

- Manipulation of information, usually data
- *Classic:* “We’ve closed 100% of the claims this year.”
(There were only 3 claims this year.)

SIMPLE CONFLICT

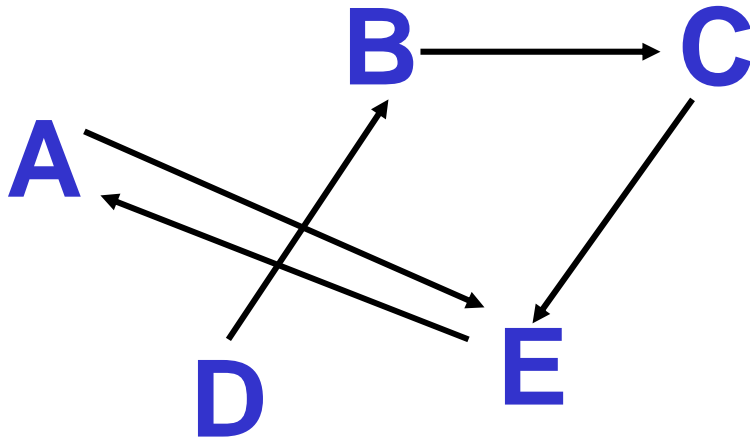
NO NEUTRAL



- Neither sees whole conflict
- Danger of personalization
- Danger of positional bargaining
- Danger of exacerbating conflict

MULTI-PARTY CONFLICT

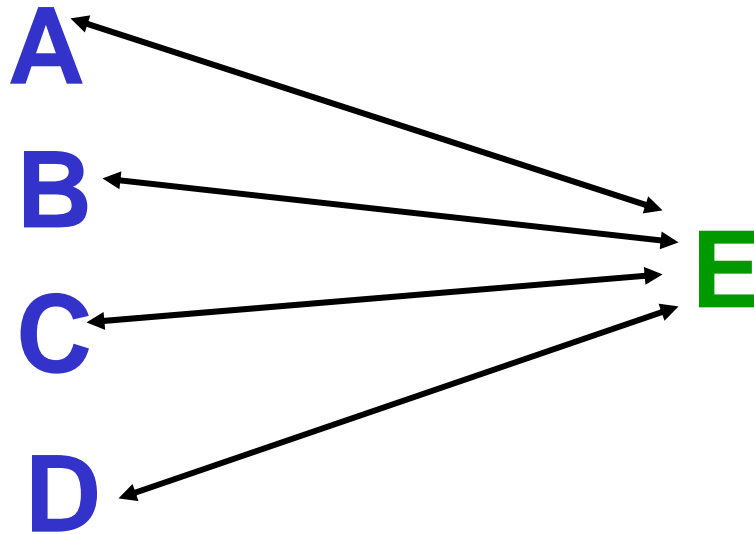
STAGE 1: NO NEUTRAL



- danger of confusion of issues
- danger of focusing on positions, not interests
- danger of missing options for settlement

MULTI-PARTY CONFLICT

STAGE 2: NO NEUTRAL

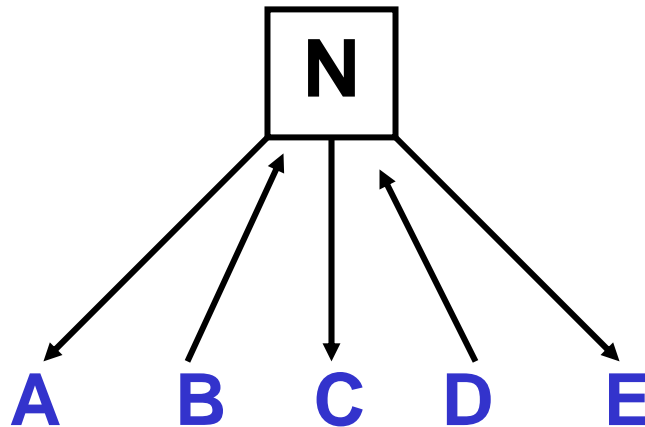


- danger of coalitions / alliances

MARGINALIZATION

- danger of increased positioning

MULTI-PARTY CONFLICT WITH A NEUTRAL



TRIANGULATE

- decrease personalization
- focuses on interests
- helps identify, create, and assess options for settlement

BREAKTHROUGH NEGOTIATION

- **GO TO THE BALCONY**

Do not react to other's tactics, become an observer of the process

- **STEP TO THEIR SIDE**

Acknowledge points of agreement whenever possible

- **REFRAME**

Go around attacks, expose tricks and reinforce commonality of interests

- **BUILD A GOLDEN BRIDGE**

Bridge the gap between your interests and theirs, make it their victory

- **BRING THEM TO THEIR SENSES
NOT THEIR KNEES**

Warn rather than threaten; use reality-testing questions

Problems are resolved in the future, not the past.

PRESENT

PAST	FUTURE
<ul style="list-style-type: none">•Blame•Evidence•Litigation <p>e.g. “Your deliveries are always late.”</p>	<ul style="list-style-type: none">• Collaboration•Options•Problem-Solving <p>e.g. “Is there anything we can do to make sure your deliveries are on time?”</p>

FOUR PRINCIPLES OF COMMUNICATION

- Everyone communicates verbally and nonverbally, consciously and unconsciously.
- Every individual is a product of his or her own culture.
- All communication is culture-bounded.
- There are numerous communication styles within racial, gender, and ethnic groups.

HOW IMPORTANT IS COMMUNICATION TO THE CREATION OF A DISPUTE?

MYTH

Disputes are created by poor communication

REALITY

While good communication is important, most disputes are created by a difference in values

Miscommunication or Conflict?

“...many...advocates of the ‘broken telephone’ theory of dispute resolution... suggest that disputes are simply ‘failures to communicate’ and will therefore yield to ‘repair service by the expert facilitator’...This result is praiseworthy – mutual understanding and good feeling among disputants obviously facilitates intelligent dispute resolution – but there are some disputes that cannot be resolved simply by mutual agreement and good faith. ...many disputes reflect sharply contrasting views about fundamental...values that can never be eliminated by techniques that encourage disputants to ‘understand’ each other. Indeed, many disputants understand their opponents all too well.

Edwards, “Alternative Dispute Resolution: Anathema or Panacea,” 99 Harv. L. Rev. 668-682, 678 (1986)

CONFLICT STYLES

Avoidance- where people withdraw to avoid conflict. They believe it is hopeless to try to resolve conflict, and easier to step back from conflict situation. The avoidance style leads to a “lose-lose” approach.

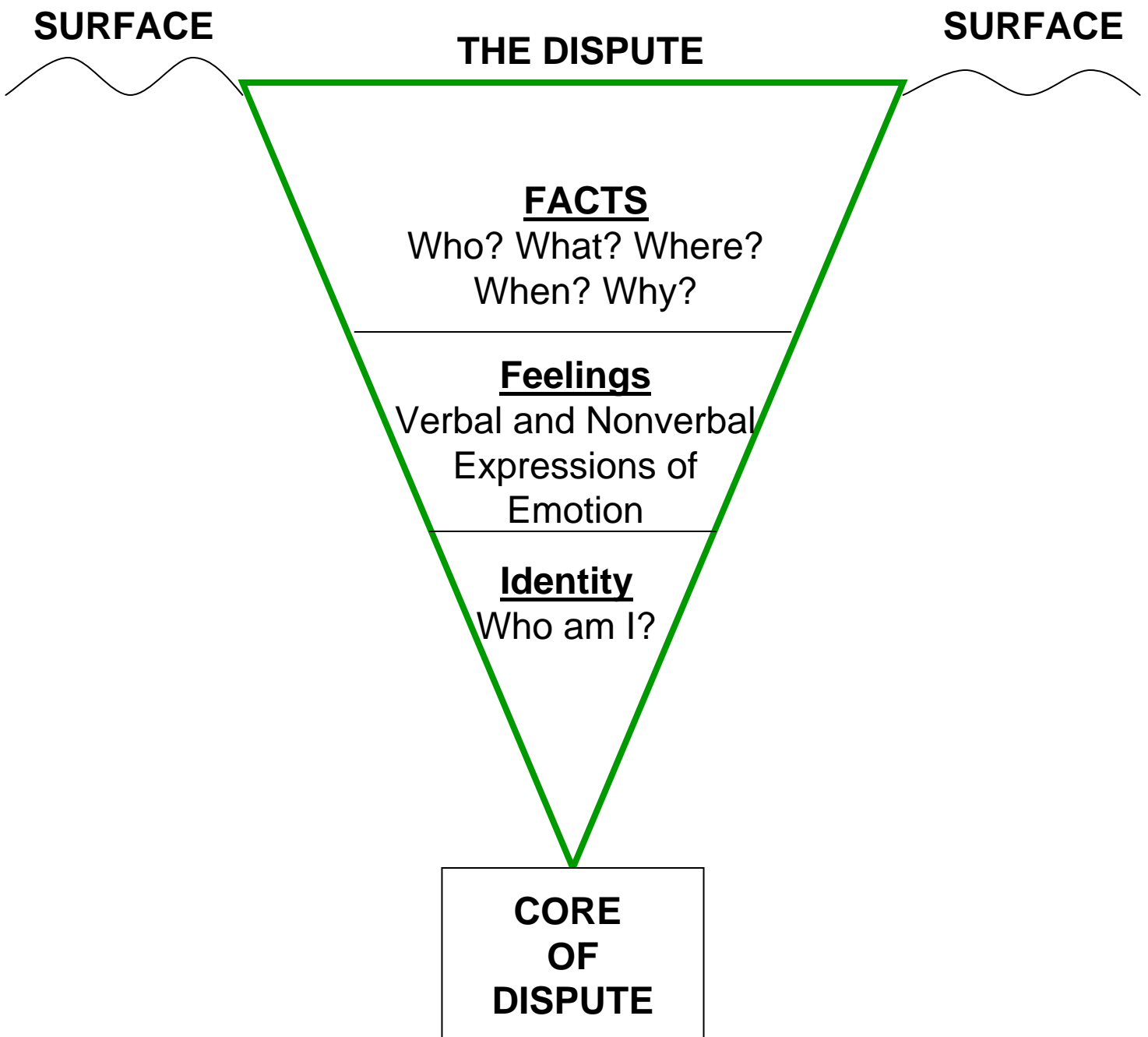
Competition- where one disputant tries to overpower another disputant by forcing his or her own solution on the other person. This style is considered a “win-lose” approach.

Adaptation- where people feel that the relationships are more important than their own goals. They want to be liked and accepted, and harmony is the most important thing. These people are choosing a “lose-win” approach.

Cooperation- where disputants highly value their own goals and relationships. They consider conflicts as problems to be solved, and want both parties to achieve their goals. These disputants are not satisfied until an acceptable solution is found for both parties. They have chosen a “win-win” approach.

“The Difficult Conversations*” Model in a Schematic

*from Stone, Patten, & Heen, Difficult Conversations
(1999)



“The Difficult Conversations” Model As Applied to Special Education

PARENTS

SCHOOL
STAFF

“MY STORY”

FACTS

“MY STORY”

- FRUSTRATION
 - ANGER
 - CONFUSION
 - IMPATIENCE
 - GUILT
-

- FRUSTRATION
 - ANGER
 - CONFUSION
 - IMPATIENCE
 - GUILT
-

- Am I a “good parent?”
- Am I an advocate for my child?
- Am I viewed as loving and nurturing my child?

IDENTITY

- Am I a competent educator?
- Am I respected by my colleagues?
- Am I viewed as compassionate?

**CORE
OF
DISPUTE**

Special Education “Demonization”

- Participants think in stereotypes (black/white thinking) that leads to adversarial and positional bargaining

PARENT

(Usually Mother)


SCHOOL

ADMINISTRATION



**The over-protective,
overemotional,
unknowledgeable,
unreasonable
mother**

**The cold-hearted,
rule-bound,
money conscious
bureaucrat**



**THE ROLE OF EMOTION
IN MULTI-PARTY, MULTI-
ISSUE DISPUTE
RESOLUTION**

- **Group problem-solving is not therapy**
- **Focus on emotional behaviors only as they relate to group effectiveness**
- **Do not not focus on:**
 - **individual personalities**
 - **emotions for their own sake**


WHAT IS EMOTION?

- **A process, a kind of automatic appraisal influenced by our evolutionary and personal past, in which we sense something important to our welfare is occurring, and a set of physiological changes and emotional behaviors begins to deal with the situation (Ekman)**
- **Words are representations of the emotion, but not the emotions themselves**

HOW INAPPROPRIATE EMOTIONAL REACTIONS OCCUR:

- (1) Right emotion / wrong intensity**
- (2) Right emotion / wrong behavior**
- (3) Wrong emotion -- we've somehow misinterpreted the situation**

WHAT TRIGGERS EMOTION?

- People react differently to same set of events (“hot buttons” are different for different people) What is your “emotional footprint”? Nature v. Nurture 
- Hot Buttons: lead a person to respond dysfunctionally and defensively.
 - lack of respect
 - lack of deference
 - lack of attention
 - questioning ability
 - questioning commitment
 - questioning integrity
 - feeling of being manipulated or controlled
 - fear of personal loss, such as social support, income, status symbols, well-being, surroundings
 - eg. office relocations
 - titles
 - restructuring / “rightsizing”

HOW IS EMOTION EXPRESSED?



Directly – describe the feeling

“I am very angry about this proposal.”

Indirectly – variety of behaviors which may or may not be interpreted correctly by the listener

Indirect Verbal Expressions

- raise / lower voice
- focus on one point repeatedly
- change opinions rapidly
- attack other participants or listener

Indirect Non-Verbal Expressions

- glaring
- slouching / perching on chair
- tightening facial muscles
- sighing
- waving of arms

- Different people express emotions differently
e.g. Outburst can be a sign of anger or anxiety.
e.g. Anger – attack or withdraw from process

- Expression of emotion is influenced by
 - (1) organizational culture
 - (2) group's own culture
 - (3) group member's skills

- “Display rules” – dictate whether we diminish / exaggerate, hide, or mask the expression of emotion

Private: innate expression

Public: managed expression

Interventions When the Discussion Becomes Emotional

Catch 22

You as leader or facilitator are appealing to the participants on an emotional plane in your attempt to build trust and support in you and your role

1.

1

Acknowledge → “It seems to me that you are...”

Identify → “...angry.”

→ “...frustrated with the process.”

→ “...afraid this will lead to even more development.”

Move On

2.

Never Ask Why?

3.

Check Your Own Emotional State

- **Discomfort w/conflict**

- **Are you prematurely cutting off exp of emotion because of your emotional footprint → conflict avoidance (NIDR Study, Wirthlin Group 1992)**

4. Remind participants of ground rules when appropriate

Eg. “We agreed at the start of this process to allow each person to have uninterrupted time to speak.”

5. Don’t intervene on every ad hominem attack

Eg. “You’re acting like a child.”

Or cheap shot

Eg. “You have your own little kingdom.”

6.

Use Humor



**selectively
and
appropriately**

7.

Reframe the emotion into a
content-based issue

IDENTIFYING EMOTIONS: Key Words

Thinking/Communication

- confused
- misunderstood
- puzzled
- uncertain
- considered
- concerned
- uncomfortable
- dissatisfied
- worried
- surprised
- discounted
- embarrassed

Anger

- angry
- frustrated
- resentful
- threatened
- infuriated
- betrayed
- ripped off
- irritated
- annoyed
- belittled
- put-down
- upset
- hateful
- getting the run around

© 2004. Eva M. Soeka. All rights reserved.

IDENTIFYING EMOTIONS: Key Words

Fear

- scared
- terrified
- defensive
- attacked
- in a bind
- cornered
- uptight
- anxious
- intimidated
- on the spot
- under the gun

Hopeful

- understood
- pleased
- enthusiastic
- delighted
- joyful
- great
- relieved
- cared for
- proud
- encouraged
- confident
- content

© 2004. Eva M. Soeka. All rights reserved.

IDENTIFYING EMOTIONS: Key Words

Hopeless

- worried
- stymied
- overwhelmed
- blamed
- discounted
- ignored
- rejected
- isolated
- left out
- desperate
- disappointed

© 2004. Eva M. Soeka. All rights reserved.

Selected Bibliography

1. Fisher and Brown, Getting Together, (Houghlin, Mifflin 1988)
2. Fisher and Ury, Getting to Yes, (Houghlin, Mifflin, 1981)
3. Leonard and Swap, When Sparks Fly: Harnessing the Power of Group Creativity, (Harvard Business School Press, 1999).
4. Schwartz, R. The Skilled Facilitator, (Jossey Bass, 2002)
5. Stone, Patton, and Heen, Difficult Conversations, (Viking, 1999)
6. Tannen, D. The Argument Culture, (Random House, 1998)