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A Culture of Conflict: Lessons from Renegotiating Health Care

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A CULTURE OF CONFLICT: LESSONS FROM RENEGOTIATING HEALTH CARE*

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I. INTRODUCTION

Dean Rothenberg, Judge Bell, Dean Hoffman, Professor Wolf, colleagues, and long standing friends. It is an honor and great pleasure to be with you today to address this important gathering for the field of health care conflict resolution. We have the extraordinary opportunity today to achieve a bird's eye view of the many front lines of conflict and conflict resolution in the health care world. I commend the School of Law here at the University of Maryland for its vision and leadership in organizing and hosting this important conference, and in bringing us all together. Before I begin what I had planned as my opening remarks, a few words.

The events of the past two weeks demand a brief preface. It has been said now over and over again that what happened on September 11 changed us, if not forever, certainly in this period in which we are now living. To be sure, the big picture of international relations and our vigilance for terror and terrorism has changed. Likewise, it has changed in many ways the manner by which we live our day to day lives: the way couples interact with one another, the way parents relate to their children, and the way friends stay in touch and communicate. We have gently come to appreciate one another better, to no longer take for granted what has become routine, and to conduct our lives with a different sense of insecurity and a different sense of purpose.

With all of this, I should report that among the surprises of these days, it has also been shown that New Yorkers actually can be nice to one another. In Boston, where we have among the worst, most aggressive, and least considerate drivers in the world, we have actually seen that drivers can be civil and even polite to one another. Some of the old differences and antagonisms have been smoothed down. This is all good, very good.

Amidst this global sense of insecurity, one might ask: In the overall scheme of things, really, how important is the dispute between a

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nurse and a doctor over a medication? How important is the continuing pressure of litigation and rising malpractice premiums on medical practices? What is the real significance of the business disputes that spin out of hospital mergers, changing medical practices, and the pressures of diminishing Medicaid, Medicare and private reimbursement rates?

The answer is that these differences, disputes, and conflicts are in fact very important. They are important because just as the terrorism that spins about our consciousness puts lives at stake, there is also much at stake in these yet unresolved disputes that demand our ongoing attention. For example, in the case of medications, the ability for people at the front lines – or as it is called in the patient safety verbiage, the "sharp end" – to be able to work with and address their conflicts can make the difference between a deadly error and an opportunity to prevent a calamity and learn something in the process. These matters are important because we in health care live in a culture of blame, finger pointing, and dodge ball from the issues, all to the detriment of effective and efficient health care service.

They are important because the health of our nation in large measure depends upon the health of our national health care infrastructure – the organizations and professions that comprise it, the system that provides its financing, and the training, education, and research capabilities that inform it. Furthermore, the way we resolve these disputes will not only have direct implications for what we accomplish or do not accomplish in health care, they are also part of a much larger picture that we cannot ignore, a vital perspective that, while we cannot explore it extensively, at least should be given brief mention.

How we humans deal with our differences, or do not deal with our differences, will undoubtedly be the most important and ultimately decisive question that faces us as a species. It will determine everything we are talking about in this conference: our well-being, our quality of life, our social and economic vitality. This perspective on the close link between health and dispute resolution - the importance of learning to better deal with our differences – is an important lesson to be learned from this difficult time. Assisting in this effort could very well turn out to be a greater contribution to the ultimate longevity of humans than any genetic breakthrough or artificial heart that comes from our laboratories.

As a roomful of people dedicated to finding both improved ways for people to resolve their differences and to improving the capacity for our health care system to resolve its differences, disputes and con-

flicts, we cannot ignore this bigger picture and the potential roles we can play in helping humankind come to terms with this important lesson. With that preface, now please allow me to begin my prepared remarks.

II. RENEGOTIATING HEALTH CARE

My talk is entitled, "A Culture of Conflict: Lessons from Renegotiating Health Care." This title borrows from the name of the 1995 book I authored in collaboration with colleagues – *Renegotiating Health Care: Resolving Conflict to Build Collaboration.*[1] Now, truth be known, there was a good deal of "conflict" back then about what we should call this book. Our intent was to write a text that reflected what was happening at the time in this new field of health care negotiation and conflict resolution. However, we also wanted to prepare a text that would have longevity, that would not only address current issues, but would also address anticipated issues, problems, and solutions facing health care. Many of our discussions about content and presentation responded to the question, "Where do you think the system is going in the next decade?" For that reason, this "renegotiating" theme came to the fore, since we reasoned that the system would be going through a series of changes and then rechanging as new information, problems, and issues were to arise.

The primary proponent of a name different from the one chosen was my wife, Barbara who was concerned that while "Renegotiating Health Care" may have been descriptive, it did not ring of a best seller. So she inspired us to ponder a set of alternative names. One of the earliest suggestions was a name that would combine the intrigue and allure of a James Bond thriller, "Dr. NO," with the pragmatic appeal of Roger Fisher and Bill Ury's popular guide to interest based negotiation, "Getting to Yes." What better title for a book intending to encourage collaboration and cooperation in the medical community than "Dr. YES!" Then there was the idea that would accent the severe problems facing health care: "Health Care: Code Blue," to convey the sense of emergency. The idea I lamented did not really convey the dynamic of conflict that we hoped to raise, and it was amended to better reflect the medical outcomes of battle: "Health Care: Code Black and Blue." Then, there was the title that reflected some of the pressing issues in health care and that had a catchy ring, "HMO: No Go!" And the one that tried to put a sense of direction and divine

1. LEONARD J. MARCUS ET AL., RENEGOTIATING HEALTH CARE: RESOLVING CONFLICT TO BUILD COLLABORATION (1995).

purpose into the process, "Gurney to Heaven." Finally, the most compelling of the eventually rejected name options was the one suggested by my son Jeremy, who was 13 years old when we were finalizing the title. His suggestion, after hearing all these other nominations, was "Health Care Sucks: So Go Do Something About It." Certainly, for many people working in health care or seeking services from it, this is an apt description of what they have been experiencing in these past few years. In the end, we opted to stick with "Renegotiating Health Care," and in fact as it turns out, this has been an accurate description for what transpired in the system for the past decade, and to be sure, this process of renegotiating the system is still very much in play.

In keeping with that theme, I share with you today my own observations about the evolution of this field of practice, stories gathered along the way, and "lessons learned" from the process. I focus on three themes: obstacles, many unexpected in our effort to incorporate alternative dispute resolution methods into the health care system; opportunities and glimmers of success along the way; and a brief overview of a new method for problem solving – the "Walk in the Woods" that emerged out of our experiences in working in the policy, professional, organizational, and patient care venues in which health care disputes occur and seek to be resolved.

III. OBSTACLES

When many of us entered this field – back in the late 1980s and early 1990s - we thought that engaging the health care system in Alternative Dispute Resolution (ADR) methods would be a piece of cake. The disputes were clear and evident. The financial and quality of care benefits of more efficient, humane, and engaging methods for resolving conflict through the use of mediation, interest-based negotiation, and arbitration were obvious. Certainly, as we began our forays, initial discussions and focus groups about plans and strategies, we were given nothing but encouragement, praise, and commentary about our being in one of the major "growth industries" within health care. Since the general field already had built some experience in the use of mediation in other areas, we initially predicted that our work would be a piece of cake. This perception only grew with intense national attention to health care that emerged out of the first years of the Clinton administration. This was a high priority policy area, demanding

change and fraught with conflict.[2] The turmoil afflicting the health system provided new fuel to our anticipation and enthusiasm for moving forward. Then, reality struck.

Perhaps the most important lesson derived from this process is this: Before we came along as a "new" field of practice, there was already in place a very well established, well financed, professionally entrenched system that was structured for the purpose of resolving conflicts.[3] This system was premised on the adversarial model, it depended on the perseverance of the adversarial model, and little that we could do or say would change that. Furthermore, powerful and lucrative economic interests rely upon the perpetuation of this model,[4] so that ironically, even our argument that mediation would "save money" turned out to be a strong disincentive to use of mediation. Each of these potent interest groups structured the system to advance their own objectives, and there was but marginal real interest in adopting an alternative that would work for the good of the system, the patients served by it, or those who work within it.

This came roaring home when in early 1996, I organized, with several colleagues and the support of the Robert Wood Johnson Foundation, a meeting in Washington, D.C. to discuss development of mediation options to resolve medical malpractice disputes. At the meeting were leaders of malpractice insurers, policy makers, academics, the head of the National Practitioner Data Bank, the Massachusetts Board of Registration in Medicine, and others prominent nationally in medical and legal leadership circles.

At that meeting, the CEO of a nationally well-known malpractice carrier glared at me across the table and publicly said, "I am going to shut you down!" He then went on to say that he had spent his entire career building a deep moat and high wall to keep "you and your kind" out, and that he wasn't going to let me destroy it. He said that if two cases came into his insurance company, and one was of an 80 year old Alzheimers patient who was dangled out a hospital window by the ankles by a doctor who let go, killing the patient, and the second was of a problematic newborn baby whose doctor during the delivery glanced away from the patient for a second, that "you damned well better be sure that I would care a lot more about that second case

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2. *See* Leonard J. Marcus & Edward A. Dauer, *A New Era: Transformation of Health Care Brings New Strains of Conflict, Needs for Negotiation,* DISPUTE RESOLUTION MAGAZINE, Spring 1999, at 3.

3. *See* MARCUS ET AL., *supra* note 1, at 3.

4. *See* Leonard J. Marcus & Barry C. Dorn, *A Three-Basket Model for Health Care,* THE BOSTON GLOBE, Sept. 1, 2000, at A19.

than I did the first." He wanted to make sure that everyone in the room understood that in his mind, this was simply a matter of money and holding onto it, and because he perceived those of us working to advocate health care alternative dispute resolution to be threatening that system, he was out to stop us.

Some of you who know that we dispute resolution people can be incorrigibly stubborn, but despite this vow and curse against us, we struggled on. Three years later, the CEO of a different malpractice carrier decided he would work together with a group of us to put together a mediation product. This of course was not without enormous prodding. The president of that state's medical society made the development of a mediation system for resolving malpractice disputes a key theme of his presidency. The bar association of the state joined in the process, and at least publicly, was behind the effort.

The willingness to explore the issue by this new CEO, it turned out, was not out of idealistic commitment or academic interest: it was pure business. The collaborative efforts with this fellow actually spurred some intriguing dialogues about social change: the opportunities and potential for academics and business people to work together to encourage development and deployment of new ideas and methods. This cooperation seemed a marvelous example of the opportunities that could derive from such a mutual effort.

That is of course, until our next dose of reality struck. Responsibly, this CEO reasoned that leading physicians are telling him that doctors want to mediate malpractice. However, before he went to market with a new product, he wanted to get a better sense of his real potential customers. So he did what many business leaders would do in such a situation; he sponsored four focus groups of doctors to assess their interest and willingness to use mediation should they be facing a situation that could lead to a lawsuit.

Sitting behind a one-way glass mirror, the few of us observers anxiously awaited the discussion among a cross-section of physicians who were given a description of mediation, examples of real cases in which a patient and physician were able to develop a mutually acceptable resolution of their dispute, and the opportunity then to engage with one another on the topic with the guidance of an impartial, professional focus group leader.

The experience of the first group was repeated four times. One or two physicians became enthusiastically supportive of the use of mediation to resolve medical malpractice disputes. They cited experiences of friends who had gone through divorce mediation, and reported it as a positive experience. They also noted experiences of

colleagues going through a malpractice trial, and reported it as a very negative experience. We were behind the screen silently cheering. Then the tone in each group dramatically changed. A physician objected, suggesting that these physicians were "nuts" if they presumed that talking with their patients would accomplish anything but the ruin of their professional practice. Noting that the best defense is a good offense, plaintiff attorneys, malpractice carriers, and patients themselves were characterized as out to get doctors. To surrender would be a disaster. They refused to believe the validity of the mediation cases that were provided to them. They castigated managed care, hospital administrators, the government, and just about anyone else "out there." These were uniformly beleaguered people who were suspicious and guarded against anyone outside the medical profession. Those who started the conversation in favor of mediation felt foolish and retreated sheepishly from their stance. The company abandoned any plans of putting together a mediation product.

Following that experience, Barry Dorn and I published several articles on the "malaise of American medicine."[5] These doctors were so defeated that when presented scenarios in which they could derive financial, professional, and personal benefit, they simply refused to believe that it not become just another trap to lure them into risking their professional reputation and credentials. These results were sad and disappointing on many levels.

A project designed in cooperation with a large managed care organization also fizzled, though for very different reasons. A pilot project to demonstrate the benefits of mediation accomplished extraordinary success. The patients were ecstatic about the experience and what it reaped for them. Representatives of the managed care plan reported that it not only helped them make improved decisions about these cases themselves, it also helped them spot and understand weaknesses in the case review processes. While there were some costs, there was a clear expectation that over time this mediation program could save them significant monies and time if it were deployed over the long haul. The project received only praise and enthusiastic support. Then the managed care plan went into a financial tailspin. It was not only that they jettisoned all but the most mandatory of administrative functions. All of the people associated with the project were laid off. This promising program became a casualty of the realities of the crunch facing health care organizations.

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5. Leonard J. Marcus, Ph.D. & Barry C. Dorn, M.D., *Beyond the Malaise of American Medicine,* 16 J. OF MED. PRAC. MGMT. 227 (Mar./Apr. 2001).

So on the patient care level, there was also a great deal of disappointment.

IV. SUCCESSES

Despite these disappointments – and we tried to keep perspective and our sense of humor intact as we experienced them - there were also a number of important successes that we can point to as a field of practice. Among those successes was the design and implementation of the Voluntary Mediation Program at the Massachusetts Board of Registration in Medicine.[6] This program identifies cases that are reviewed by the Board's complaint committee to find patient-physician disputes that are appropriate for mediation. These cases are eligible for mediation if they do not involve egregious violations of standards of care or misconduct in which the Board would normally consider disciplinary action against the physician. If both physician and patient, or family member, agree, a mediator is assigned by the Center for Health Care Negotiation, a Boston-based not-for-profit mediation service established by graduates of Harvard School of Public Health's Program for Health Care Negotiation training seminar.[7] The program has mediated approximately 40 cases to date. About 90 percent of those cases have settled to the satisfaction of both patient and physician.[8]

We have learned some important lessons in those cases. Most important, we have found that after an error, problem or miscommunication in the course of care, patients or family member are seeking primarily three objectives. First, they want to know what happened. However, the civil justice system and the adversarial template it imposes on cases, discourages such disclosure. Second, they want some form of acknowledgement or apology from the caregiver. Given the intimate and interdependent nature of the patient-physician relationship, it is only natural that a patient would want that sort of human interaction following a problem in the course of care. Third, that the system learned something from the error so that whatever happened to them or their loved ones will never happen to someone else. This third element is obviously of critical importance to the growing patient safety movement in this country and has been seized by them as

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6. *See* Leonard J. Marcus, Ph.D. & Barry C. Dorn, M.D., *Project Aims to Foster Mediations in Liability Cases*, AMNEWS, May 4, 1998, at 31, 31.

7. *See id.*

8. *See* Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, 60 LAW & CONTEMP. PROB. 185, 207 (Winter 1997).

an important potential venue for encouraging constructive communication following an error or poor medical outcome. My colleagues and I have been asked to speak on mediation at a number of meetings on patient safety and even to conduct a mock mediation for the most recent conference of the National Foundation for Patient Safety.

As some of you may know, recent data suggests that some 100,000 people die each year in this country as a function of avoidable health care errors.[9] Lucian Leape, my colleague at the Harvard School of Public Health, has advocated a move away from the culture of blame that pervades the system. That culture of blame discourages the system's capacity to learn from errors in order to prevent their recurrence. The patient safety movement is advocating a culture of correction that certainly would be assisted by actively bringing the patient into the process. Mediation is certainly one effective venue through which to do that.

We are also now learning of a very exciting project that has been developed at COPIC, the Colorado Physician Insurance Company based in the Denver area. Dawn Watson, a claims manager at COPIC and a graduate of our dispute resolution program at Harvard, returned from the training seminar eager to develop the Early Intervention Conflict Resolution Program. After a physician self-reports a problem in the course of care that could result in a claim, or after a complaint or claim has been received at the company, the physician is coached and urged to meet with the patient to discuss the issues. If there are direct economic losses associated with the problem, the company will reimburse those expenses up to several thousand dollars.

Dawn reports that 322 cases have gone through the program in its first two years. Of those cases, only 10 were converted into a claim, and only one turned into a lawsuit, a case that was eventually dismissed by the court. This is an important finding, since the conventional wisdom practiced among medical malpractice carriers is that physicians should be encouraged not to speak to their patient after a problem, as it could encourage the patient to pursue legal action. In these cases, legal action was discouraged. Of these cases, only 43, or 13 percent, resulted in some financial compensation to the patient. The total amount paid was a mere $58,651, or an average of $1,363 per case in which there was any payment. When that figure is spread over the total number of cases processed by the Early Intervention Conflict Resolution Program, the average cost per case is $182.

9. *See id.* at 187-89.

There are several important points to garner from the early results of this program. First, it highlights the benefits that can accrue from a carefully coached discussion between patient and physician. This relationship is one of huge consequence in which the patient has often revealed intimate details of his or her life, has shared fears regarding health status, and has reached some times difficult life decisions. To suspend conversation after an error or unsatisfactory outcome makes little sense from a human relations perspective. Though given the emotions and stakes involved in the subject, it does make sense to provide coaching and support to enhance the likelihood of success from such a discussion. Second, it demonstrates the huge savings that can accrue to the medical community through the use of systematic conflict resolution mechanisms. Ultimately, it is the physician community, who through their premiums, pay the costs of medical malpractice settlements. Reducing those cash outlays produces significant savings. Dawn estimates that the insurer would otherwise have spent $1 million to $1.5 million to settle these same disputes. Finally, in an anecdotal review of the cases that were resolved through the initiative, there were numerous examples of patients and physicians repairing their relationships. Some patients returned to the care of the same doctor. Physicians reported that the conversations provided the opportunity both for them to settle the case, as well as learn from it. And once settled, these cases required far less ongoing time and attention from the insurer. Dawn reports that COPIC has decided to continue and build upon this initial success of the program.

There certainly have been other important uses of mediation to enhance the experience of the patient and to improve decision-making and actions directly related to patient care. It has been encouraging to witness the interest of the bioethics community, as well as the patient representative and risk management professions in adopting mediation methods in their processes.

Nationally, the adoption of alternative dispute resolution to resolve a range of health related conflict has varied from locale to locale and from venue to venue. There has been growing interest and use of arbitration to resolve medical malpractice cases. Mediation is being increasingly used to resolve organizational issues, such as hospital mergers, professional disputes, such as medical practice business disputes, as well as policy disputes, such as organ transplant controversies.

V. THE PEDAGOGY OF NEGOTIATION AND CONFLICT RESOLUTION

I would like to focus the remainder of my talk on the pedagogy of negotiation and conflict resolution. Faculty associated with the Program on Negotiation (PON) at Harvard have focused a recent year of meetings and seminars on this complex topic, and the Hewlett Foundation generously supported a national meeting organized by the PON to look at this issue. Naturally, the question for us is the pedagogy of negotiation and conflict resolution as it pertains to the health care arena.

As I wrote in *Renegotiating Health Care*, there are a number of factors that make conflict in health care - as compared with other areas of dispute resolution practice - a particularly daunting matter. First, health care has a highly complex and intricately structured decision-making system. By way of example, the purchaser of the service, often an employer, is not the person receiving the service, the insured patient. This split between payment and receipt of service complicates the clinical relationship. Likewise, the physician who orders the test or treatment does not necessarily pay the financial consequence of that decision, though that arrangement is changing with capitated, managed care systems in which the physician is paid a lump sum figure to cover all the costs of caring for that patient. Critics of that system argue that it encourages the doctor to scrimp on the care provided,[10] again a unique dynamic of health care negotiation and conflict resolution. Second, the emotions and passions run high in health care because of the nature of the work. As a result, it is a value driven enterprise, though those values often collide, especially as we are forced to consider the financial value of a life or an improvement in its quality. Finally, the stakes are often very high: in life and death terms; in the cost of care; or in the legal consequences of making a mistake.

Given these complexities, the process of teaching people to better negotiate and resolve their conflicts in such an environment requires an understanding both of the unique dynamics of health care, as well as the applicable lessons and models from the dispute resolution field. Out of this experience, our faculty developed a unique set of models and approaches to negotiation, problem solving, and conflict resolution applicable to the problems and disputes typical of the health care environment. To this end, I acknowledge the important contributions of Dr. Barry C. Dorn, an orthopedic surgeon as well as an accomplished mediator and negotiation teacher, to the efforts to

10. MARCUS ET AL., *supra* note 1, at 255.

integrate the conflict resolution world with the real world problems facing health care today. I would like to briefly introduce to you today our work in developing and deploying the "Walk in the Woods" model.[11]

VI. THE WALK IN THE WOODS

Mediators, negotiators, and problem solvers build a process to create and exchange information, generate decisions, and then implement what was decided. This process could be based on their interests, allowing the parties to smoothly reach a conclusion that satisfies mutual goals, objectives, and concerns.[12] Just the same, the process could be positional and divisive, with each of the parties looking to defeat the other side.[13]

Often, when parties identify differences in goals and objectives, they instinctively go on the offensive, consumed with claiming turf before it is taken away from them. They argue about solutions and whose will predominate.[14] This kind of claiming behavior is seen by some as the only way to negotiate, and they seek to do it better in order to get more for themselves or their constituents.[15] Nonetheless, in many of these situations, there could be advantages in reframing the negotiation into an interest-based opportunity for mutual gain, especially when interdependent work is being negotiated.

What could be done to encourage the parties toward the interest-based side of the spectrum? Make the process clear and easy to understand. Attend to and engage in a progression of exchanges that generates solutions responsive to the range of their interests.

People often think of negotiation in terms of outcomes, not process.[16] The question, "How much did you get the car for?" refers to the outcome. There is much less attention on how the outcome was achieved. To encourage an option that is different from the usual positional approaches, there must be an inherent understanding of process: what it is, how it works, and what it can achieve.[17] By clearly delineating the steps that can take parties from problem toward solution, the participants discover a new-found faith in the process that

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11. Leonard J. Marcus & Barry C. Dorn, *Negotiating Organizational Alliances: The Walk in the Woods,* AMNEWS, Sept. 21, 1998.
12. *Id.*
13. *Id.*
14. *See* MARCUS ET AL., *supra* note 1, at 68.
15. *Id.*
16. *Id.* at 102.
17. *Id.*

gives them faith in the fairness of the potential outcome.[18] It is a reframing and a fresh confidence that encourages a willingness to engage in interest-based negotiation. The *Walk in the Woods* is just such a delineation of process. It guides parties in a step-by-step fashion through interest-based negotiation in order to achieve mutual gain outcomes.

The Walk in the Woods is named after the classic problem-solving saga of two nuclear arms reduction negotiators. Facing a desperate impediment in their talks, the head of the U.S. delegation and head of the Soviet delegation left the retreat center where they were meeting for, literally, a walk in the woods on their own. During the walk, they discussed mutual concerns, interests, and objectives and achieved a genuine human-to-human understanding. The two returned to the retreat center with the very agreement that beforehand had been so elusive.

The Walk in the Woods is a structured exercise – a momentary diversion - from the normal course of events intended to focus attention on interests and objectives shared by people working together.[19] Its purpose is to improve the effectiveness, efficiency and ultimately the satisfaction that participants derive from their efforts.[20] When adversarial interactions have found parties in conflict with one another, this structured, four-part process of renegotiating working relationships can help to constructively incorporate the ideas, ambitions, and concerns of the many parties who have a stake in both the process and outcome of change.

The Walk in the Woods is a process for multi-dimensional problem solving. It is a method for thinking about and conducting negotiation that can be applied to many of the perplexing organizational problems facing health care today.[21]

What does "multi-dimensional problem solving" refer to? "Dimension" refers to what you are negotiating about: the tangibles and intangibles, the issues, concerns, intentions, and the pieces of the negotiation.[22] Each person who participates in a negotiation adds a different set of dimensions. There are three approaches to dimensional

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18. *Id.*

19. Marcus & Dorn, *supra* note 11, at 18.

20. *Id.*

21. Leonard J. Marcus, Ph.D. & Barry C. Dorn, M.D., *Enlarged Interests – Seeing Things from a New Angle*, AM NEWS, Oct. 19, 1998, at 20.

22. *See* Leonard Marcus & Barry Dorn, *Negotiating an Effective Physician-Patient Relationship*, 20 FORUM, (2002) *at* http://www.rmf.harvard.edu/publications/forum/v20n6/article2/body.html.

problem solving: uni-dimensional, two-dimensional, and multi-dimensional.[23]

The uni-dimensional perspective considers a problem simply as a matter of satisfying "my own" wants and desires.[24] A uni-dimensional negotiator expects self-satisfaction, irrespective of the needs of others.[25] The uni-dimensional negotiator, on the topic of diminishing reimbursement, likely would say: "This is what I expect to get, and I don't really care what others get. It is the job of the reimbursement agent to get me my money. You do your job. I'll do mine. End of case." In the days of cost-plus reimbursement, physicians had the expectation that the insurer would pay the bill, no matter what. They were not compelled to actively deal with the insurer or the marketplace under this system. The uni-dimensional, "selfish," perspective on negotiation often sparks resistance from others who are loath to accommodate to uni-dimensional expectations. The resistance manifests itself into a "fight" response.[26] Uni-dimensional negotiation invariably leads to two-dimensional negotiation, as in: "Who do they think they are, pushing us around. Why, we're going to show them."[27]

The two-dimensional perspective sees the problem as "us versus them."[28] The contending parties line up as adversaries, and they each know what they want to get.[29] Other parties are obstacles to be circumvented.[30] Two-dimensional problem solvers are singularly concerned with the defeat of their opponents as a means to achieve their objectives. They use positional and confrontational approaches in order to get their way.[31] On the problem of diminishing reimbursement, the two-dimensional negotiator would say: "The managed care organization is the enemy. They are to be defeated. What can we do to minimize support for that organization and maximize support for us?"[32] On the other side of the table, doctors are perceived as cost centers that need to be controlled. Each side sees the other as the adversary.[33]

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23. *See* MARCUS ET AL., *supra* note 1, at 102-03.
24. Marcus & Dorn, *supra* note 21, at 20.
25. *Id.*
26. See MARCUS ET AL., *supra* note 1, at 25.
27. *Id.*
28. *See* Marcus & Dorn, *supra* note 21, at 20.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

By contrast, multi-dimensional problem solving accounts for the differences in perspective, ambition, and desires of the many parties whose combined efforts ultimately will determine whether they are a success or failure.[34] Multi-dimensional problem solving is an integrative process in which people work to satisfy their own interests as well as the interests of the combined enterprise, or "the good of the group."[35] In this way, if success is a function of the ability of people to work together, then working on the process of working together is time and attention well spent.[36]

As with much of life, developing a balance of perspective is the best formula for achieving your objectives.[37] There are times to be uni-dimensional. After all, you have to take care of yourself.[38] There are also times to be two-dimensional. Principles that must be upheld and supported sometimes demand that people have the courage and capability to rise into battle.[39] However, especially during times of change, and given the particular contingencies pertinent to health care negotiation and conflict resolution, the advantages of multi-dimensional approaches should not be missed.[40] These approaches help negotiating parties to build solutions that reflect the legitimate needs of key constituencies and develop buy-in and support to make them work.[41] How does one put the multi-dimensional approach into action? That is the purpose of *The Walk in the Woods.*

VII. THE STEPS OF THE WALK IN THE WOODS

As structured, *The Walk* offers parties a step-by-step process to help them discover and implement solutions to multi-dimensional problems. A multi-dimensional problem typically involves a number of constituents who each bring to the table their own unique hopes, concerns, demands, and desires.[42] Getting them to somehow fit together is the problem, especially if these people are to work together in some form of partnership.[43]

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34. Leonard J. Marcus, Ph.D. & Barry C. Dorn, M.D., *Enlarged Interests – Seeing Things from a New Angle,* AM NEWS, Oct. 19, 1998, at 16.

35. *See id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

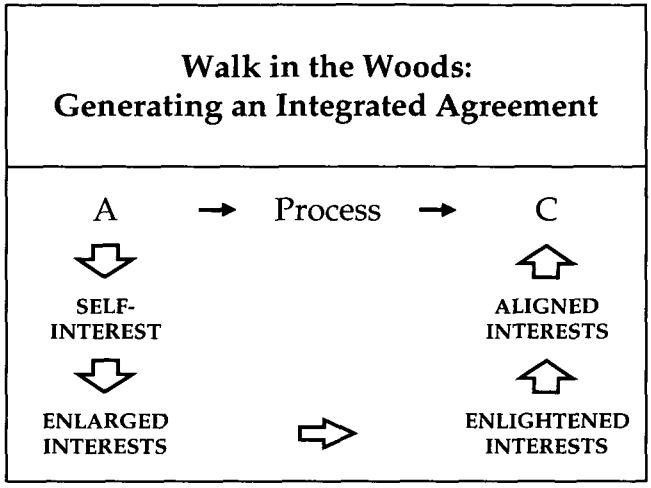
40. Leonard J. Marcus, Ph.D. & Barry C. Dorn, M.D., *Enlarged Interests – Seeing Things from a new angle,* AM NEWS, Oct. 19, 1998, at 16.

41. *Id.*

42. Marcus & Dorn, *supra* note 11, at 18.

43. *Id.*

In practice, *The Walk in the Woods* serves as a detour from the normal course of discussion. The focused attention on a problem of shared concern and its creative approach to problem solving generates a fertile ground for shaping breakthrough opportunities. It prompts a whole new level and method of communication.



The first of the four steps is *self-interests.* Each party describes what he or she needs to gain or achieve in the negotiation, and in the process, all parties are encouraged to actively listen to one another in a non-adversarial manner.[44] They understand that, "just because you disagree with me, it does not mean that your ideas are bad or counterproductive to mine."

In the second phase, *enlarged interests,* the parties discover their shared interests, and develops a much broader view for their common problems, options, and objectives.[45] They appreciate that in many ways, they are on the same boat headed toward the same objective, seeing that "we might get there faster and more efficiently if we are all rowing in the same direction."[46]

In the third phase, *enlightened interests,* the parties craft new ideas and options together that they would otherwise have been unlikely to even contemplate.[47] They discover that "working together to bake a

44. *Id.*

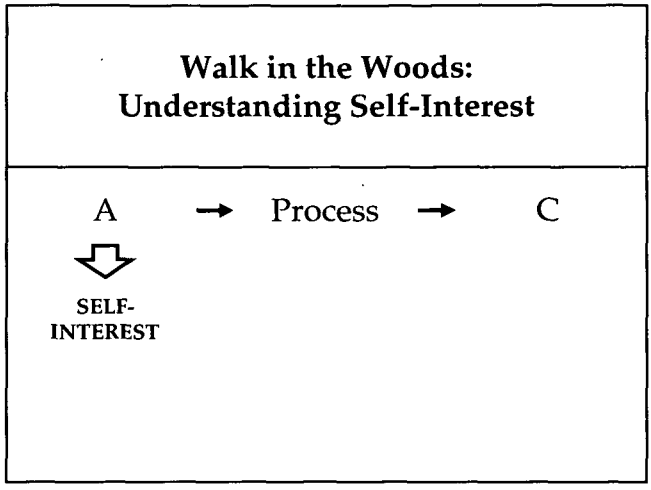
45. *See* Marcus & Dorn, *supra* note 21, at 21-22

46. *See id.*

47. Leonard J. Marcus, Ph.D. & Barry Dorn, M.D., *Negotiating Enlightened Interests: The Walk in the Woods,* AMNEWS, Nov. 16, 1998, at 17-18.

larger pie allows each of us to have a bigger slice of the action."[48] This is the step during which parties are encouraged to imagine.[49]

The final phase, *aligned interests*, is the bargaining phase when the parties finalize arrangements of the deal they have been negotiating.[50] The bottom line here is, "If I succeed, you succeed, and if you succeed, then I succeed."[51] Each side is working toward their own advancement by enhancing the accomplishments of their collaborators.[52] This is the formula for a satisfying partnership.[53]



A. *Self Interests*

Negotiations reach an impasse when each party pursues his or her own agenda with little attention to the objectives or concerns of others.[54] That agenda, when it becomes selfish, focuses attention on a narrow set of objectives: "mine." This uni-dimensional perspective is where the conflict and the obstacles emerge.[55] By contrast, the multi-dimensional purview applauds both the differences and the legitimacy of the many viewpoints that need to be balanced if the outcome is to succeed.[56] How can you craft the expression of self-interests in order

48. *See id.*
49. *See id.*
50. Leonard J. Marcus, Ph.D. & Barry Dorn, M.D., *A Walk in the Woods: Moving Toward Aligned Interests*, AMNEWS, Jan. 11, 1999, at 19-20, 22.
51. *Id.* at 19.
52. *See id.*
53. *See id.*
54. Marcus & Dorn, *supra* note 11, at 18.
55. *Id.*
56. *Id.*

to gain an appreciation for the multi-dimensional aspects of your alliance, change, or common problems? Interest-based negotiation intends to address and realize the interests – mutual or different – that the parties bring to the table.[57] Interests include the goals, objectives, ideas, concerns and hopes that we hope will be satisfied through the negotiation.[58] Positional negotiation, by contrast, intends to establish winners and losers.[59] The premise of positional bargaining is that one's objectives are best met by attaining victory, control, or dominance.[60] Though difficult, it is possible to reframe a negotiation, inducing a shift from contentious to collaborative problem solving.[61] For people intending to work together, interest-based negotiation implicitly reduces the effort invested in battling one another and increases the efforts directed toward achieving mutual gain.[62] The question is how to bring and keep the negotiations in an interest-based framework?

It is natural to negotiate based on self-interests. These interests define what it is that you want to accomplish – your financial and practice objectives - and what it is you want to avoid – the disruption of your clinical effectiveness.[63] Often, parties in a complex health care organization negotiation recognize that they can best achieve their self-interests by achieving them in concert with others, in the process creating "mutual benefit."[64] This interest-based negotiation approach offers the most likely trajectory for generating and discovering opportunities that would not have been available had the parties not been working together.[65]

Self-interest is distinct from "selfish interest." Selfish interest seeks advantage at the expense of others.[66] It creates an atmosphere in which parties feel that if they do not achieve a clear triumph, then all will be lost.[67] It is no surprise what results in such an atmosphere: one's workplace becomes a battle zone.[68]

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57. *Id.* at 19.
58. *Id.*
59. Leonard J. Marcus & Barry C. Dorn, *Negotiating Organizational Alliances: The Walk in the Woods,* AMNEWS, Sept. 21, 1998, at 19.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. Leonard J. Marcus & Barry C. Dorn, *Negotiating Organizational Alliances: The Walk in the Woods,* AMNEWS, Sept. 21, 1998, at 19.
66. *Id.*
67. *Id.*
68. *Id.*

The purpose of *The Walk in the Woods* is to help parties restore and build trust and confidence in one another.[69] The process helps them recognize that those on the other side of the table are not necessarily the "enemy" or incarnation of evil. It begins to identify the advantages and the results that could derive from truly working together: simultaneously uncovering both motive and incentive for those participating.[70]

B. Beginning the Walk in the Woods: Describing Self-Interest

Parties often come to the table in a positional frame of mind. They do not trust the other side. They are convinced that the other side has deceitful, if not selfish intentions. They come in a protective mode, seeking at least to hold their ground and at best to conquer their opponents.[71] What does it take for people who implicitly do not trust one another to begin talking and even listening to one another? Asking people to abruptly establish trust is asking for the nearly impossible.[72] The word "trust" is often too charged and too personal.

We have tried another approach. In place of trust, we focus attention on "confidence."[73] "What would it take for you to have the confidence that the other side will in fact do what they have agreed to do?" "What could you do to give the other side confidence that you will carry out what you have agreed to do?" These questions place emphasis on the present and the immediate future rather than on the past.[74] Whereas "trust" refers to deep-seated matters of relationships and beliefs, confidence building refers to specific actions and behaviors.[75] It could take years to repair the suspicions of the past, though nothing could do more to speed the process of interest-based negotiation than some successes and confidence building now and into the future.[76]

Having established what it would take to build confidence, we can then ask each of the parties to discuss their self-interests.[77] What do you hope to accomplish? What resources do you need in order to

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69. *Id.*

70. Leonard J. Marcus & Barry C. Dorn, *Negotiating Organizational Alliances: The Walk in the Woods*, AMNEWS, Sept. 21, 1998, at 19-20.

71. *Id.* at 20.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Leonard J. Marcus & Barry C. Dorn, *Negotiating Organizational Alliances: The Walk in the Woods*, AMNEWS, Sept. 21, 1998, at 20.

77. *Id.*

meet those objectives? What obstacles do you face? What resources can you bring to the table? How do you view others at the table? Parties are encouraged to answer these questions in a straightforward, non-adversarial way.[78] We have a "no-zinger" rule. The purpose is to educate others at the table in a way that makes it as easy as possible to listen, hear, and understand.[79] Obviously, if these comments are made with interspersed jabs at others, the discussion will soon deteriorate into name-calling and accusations.[80]

The most important aspect of the process is listening. We encourage the participants to listen "actively." Hear and understand what is being said.[81] Make it clear to others that you are paying attention, that you care about what they are saying, and that you are trying to understand.[82] It is remarkable how often listening is lacking at a negotiation table. The most important information out of which the most resourceful solutions could emerge is simply lost because people are not paying attention. Listening does not cost a lot. And yet, it can generate a load of new value and confidence at the table.[83] Most importantly, there is nothing lost in giving it a try.

Allow all the people to gain a new appreciation for the hopes, objectives, problems, and constraints facing everyone at the table. This is what we have. This is what we want. This is what we could accomplish together. It is a process of discovery.

C. Building Solutions to Generate Buy-In

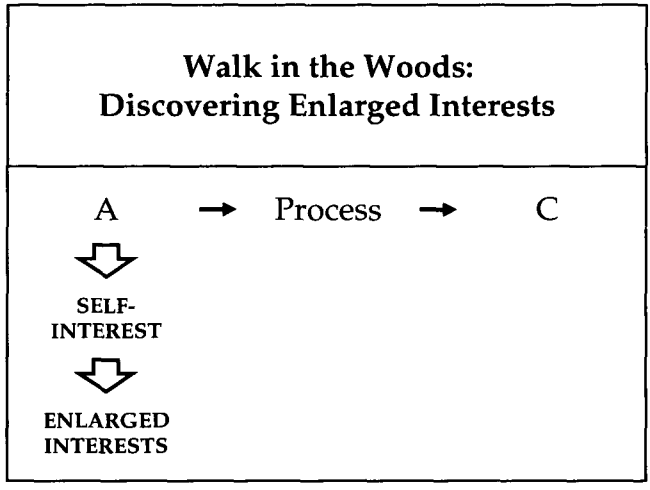
Contrast the autocratic model of management with participative styles. Managers characteristically are independent thinkers: we don't like being told what to do. Yet, many new management enterprises believe that they can maximize profits by merely directing the players. In the long run, those organizations most likely to succeed will be the ones that recognize that we are most likely to contribute productively to the outcome when we have actively been part of the process.[84] That is the point of *The Walk in the Woods.* Get the key players genuinely involved in charting the course of organizational direction. Get them listening to one another. Have them recognize and solve problems

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. Leonard J. Marcus & Barry C. Dorn, *Negotiating Organizational Alliances: The Walk in the Woods,* AMNEWS, Sept. 21, 1998, at 20.
83. *See id.*
84. *Id.*

together. Generate new ideas and actions based on positive incentives that are real motivators. What do you create in the process? Buy-in, a mutual investment in the success of the partnership you have created.[85]

D. The Next Step

Simply put, once the parties really begin to hear, understand, and exchange with one another, they discover all sorts of opportunities to "expand the pie," create a set of options that they had not yet even considered or discovered.[86] We call this next step "enlarged interests".



1. Enlarged Interests

Consider two groups endeavoring to work together, such as a clinical staff and a health system's management. Many interests, in particular those pertaining to their success and good fortune in a competitive marketplace, are shared. Yet they have become so combative that their primary focus is on what divides them.

Finding their "enlarged interests" is a step in identifying both the commonalties and the differences that they bring to the table.[87] It is not unusual to uncover in this process that there is more shared than is opposed.[88] It is a discovery process because, in most cases, the parties did not recognize their mutuality of concerns, obstacles, and

85. *Id.*
86. *Id.*
87. Marcus & Dorn, *supra* note 21, at 21.
88. *Id.*

objectives.[89] In the course of less confrontational dialogue, as they actively listen to one another, the parties often find that there are new and innovative solutions to their shared problems.[90] These solutions were obscured by their preoccupation with what divides them, rather than with what could in fact unite them.[91]

2. Putting Enlarged Interests into Action

The most potent tool of an effective negotiator is a good question.[92] What questions could parties use to advance this process of mutual discovery? How can they turn what they learn into pragmatic action and progress toward shared goals and objectives? The following is a selection of useful questions to ponder:[93]

- In very concrete terms, what is each of us individually trying to achieve?
- What obstacles are impeding progress toward our objectives?
- In what ways do our objectives overlap? What are the differences?
- In what ways have we been obstacles for one another, exasperating each of our problems?
- What could we do for one another to further shared interests and objectives?
- We have had confrontational and damaging interactions with one another. What could we each do that would build confidence from one side to the other?
- What is each of us trying to achieve in the marketplace? How could we generate a synergy of new income and better-managed expenses in order to help our linked bottom lines?
- To the extent that we have to share the "pain," how can we do it in such a way that is fair and constructive? What might we do in the process to reduce the impact of the pain on our day to day work, staff, and plans for the future? What could we do together to expand the pie – creating more resources through the synergy of collaborative effort – to reduce the amount of pain that must be managed?

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89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Leonard J. Marcus, Ph.D. & Barry C. Dorn, M.D., *Enlarged Interests – Seeing Things from a New Angle*, AM NEWS, Oct. 19, 1998, at 21.

3. What You Achieve by Articulating Enlarged Interests

The constructive dialogue that is at the center of this phase of *The Walk in the Woods* encourages the parties to see their own situation, and the circumstances that they share, from a new and different angle.[94] They better understand not only their own side of the problem, they also appreciate the problems from the perspective of others.[95] It is this broadened view that is the essence of multi-dimensional problem solving.[96] In this process, the parties recognize that their shared problems are not a simple matter of good guys and bad guys. Such a simplistic view of the problem is replaced by a real appreciation for the issues with which all sides of the problem are grappling, that is, what they each need in order to meet their legitimate objectives.[97] There is also the fresh recognition that together they might actually even be able to help solve each other's problems. They could build options that neither could have considered if they were only working alone.[98]

What is the outcome of this phase of the process? Each side has generated a bigger picture of the work they are doing. They have reframed the problem.[99] They see themselves as part of something larger: an interdependent system of people whose successes and failures directly affect the fate of others in their surroundings.[100] It puts everything they do - the problems they confront and the potential they face – into a whole new perspective.[101]

E. From Enlarged to Enlightened Interests

It is the change in the mood of negotiations and the new possibilities that are opened that propel the parties into the next phase of *The Walk in the Woods.* This next step, the enlightened interests, represents the "ah-ha" moment of the process, during which new ideas, creative options, and innovative solutions are generated.[102] Stage three builds upon the widened perspectives and new confidence that the sides are establishing with one another.

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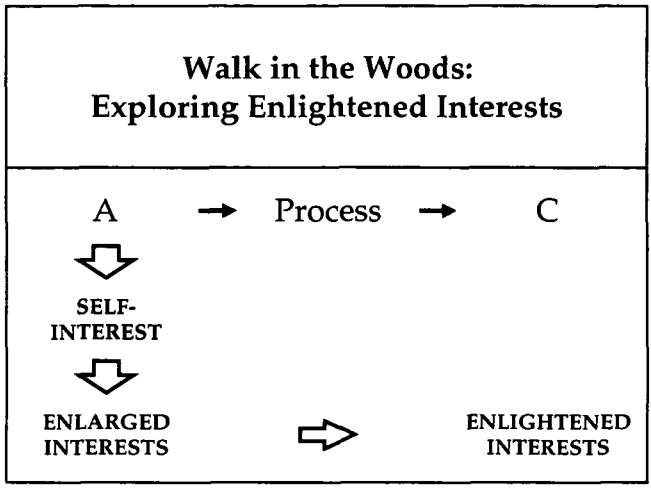
94. *Id.*
95. *Id.* at 21-22.
96. *Id.* at 21.
97. *Id.*
98. *Id.*
99. Leonard J. Marcus, Ph.D. & Barry C. Dorn, M.D., *Enlarged Interests – Seeing Things from a New Angle,* AM NEWS, Oct. 19, 1998, at 22.
100. *Id.*
101. *Id.*
102. Marcus & Dorn, *supra* note 47, at 17.

1. Enlightened Interests



Negotiation is, in part, a process for finding and taking advantage of opportunities.[103] You never really know what you are going to discover when you begin your bargaining.[104] The most creative of negotiators, opportunists, search for potential advantages and devise ways to make them happen.[105]

Opportunism need not have a bad connotation.[106] Taken at face value, we all are looking to forge and exploit opportunities in order to reach our goals.[107] In a system of interdependence, one can never meet one's objectives without doing it in concert with many others. Opportunism at the expense of your cohorts is reprehensible. Opportunism generated in concert with them is synergistic.[108]

Turning conflict into opportunity offers an exciting prospect. It is why we call enlightened interests the "ah-ha" moment of the negotiation process. It is the point when negotiating parties recognize the untapped and valuable benefits that could accrue from a working partnership.[109] This recognition itself engenders new-found confidence and motivation, a far cry from the fear and resistance with

103. *Id.* at 18.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Leonard J. Marcus, Ph.D. & Barry Dorn, M.D., *Negotiating Enlightened Interests: The Walk in the Woods*, AMNEWS, Nov. 16, 1998, at 18.

109. *Id.*

which the parties began the process.[110] In moving forward, how can they reap the mutual benefits of creative problem solving?

2. Generating New Opportunities

In our younger days, we were encouraged to imagine. With time, that gift fades into familiar patterns, safe solutions, and the securities of the known and tested. We accumulate a great deal of baggage as our career progresses: biases, sour experiences, resistance to change, and downright stubbornness. Time constraints and pressure may force us to take a path of least resistance and accept interim or less desirable solutions. These obstacles get in the way of creative problem solving.[111]

Imagine that you are working with other members of your team, participants in your organizational network, or partners in your alliance. What sort of new ideas could you generate to improve your operation? Think openly about operational procedures, modes of communication, or incentive mechanisms and remove all barriers. You and those with whom you are working become more productive, more effective, and ultimately more satisfied.

The imaginative dialogue that occurs during the enlightenment is reflective, responsive, and invigorating.[112] The creative exchange eschews hope and new confidence that workable solutions can be found.[113] Just as it opens doors to new opportunities, the discussion allows participants to discover doors they never knew existed.[114] Intuitive, inventive insight shares its place with the pragmatic sides of linear thinking.[115] The necessary risk taking, flexibility and openness to innovative ideas is buttressed by the new confidence found in the first steps of *The Walk in the Woods.* How do you get it going?

3. Instigating Enlightened Interests

I said earlier that the most important tool of a talented negotiator is a good question. What questions could you pose to further the creative process central to enlightened interests?[116]

- What if we tried . . .?

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110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. Leonard J. Marcus, Ph.D. & Barry Dorn, M.D., *Negotiating Enlightened Interests: The Walk in the Woods,* AMNEWS, Nov. 16, 1998, at 18.
115. *Id.*
116. *Id.*

- What is the potential value we could accomplish if we resolve the problem?
- What do you think would be the response to . . .?
- Among all the possible solutions to this problem are . . .?
- Among the great/lousy possibilities are . . .?
- Do you think it would be possible to remove obstacles to progress, including . . .?
- What will it cost us and what could we get in return?

During brainstorming, put as many ideas on the table as possible. Do not comment, edit, or disagree with what is being said. Let new and imaginative ideas flow so that they can stimulate even more advantageous possibilities.[117] Then categorize these ideas.[118] Place them into the probable, the possible, and the unlikely. Prioritize them to top, middle, and low. Place them into a time context: what will be done in month one, year one, and over a three year period. Identify ideas according to whom they are preferable, acceptable, or unsatisfactory.

By creating themes – ideas that forge common ground – you also create trade-offs.[119] "If we can get one item preferable to us, we will accept another provision preferable to you that is unsatisfactory for us." You also gain agreement on provisions that both sides find to their mutual worst interest.[120] For example, "If we cannot work out an agreement, what will happen to both our sides?" Most importantly, you reinforce the anticipation and hope that was developed in the first two phases of the process.[121]

4. Enlightened Interests in Practice

The Walk in the Woods has a number of problem-solving applications, among them the creation of new and innovative health care partnerships and alliances.[122] The new partnerships that will be most market responsive will be those born out of a process that accounts for the many perspectives necessary to make them work.[123] How can you take the best of the expertise, practices, and methods and put them together to create a synthesis that is truly better than each of the parts separately? Is that not the very motivation for creating this new work-

117. *Id.*
118. *Id.*
119. *Id.*
120. Leonard J. Marcus, Ph.D. & Barry Dorn, M.D., *Negotiating Enlightened Interests: The Walk in the Woods*, AMNEWS, Nov. 16, 1998, at 18.
121. *Id.*
122. *Id.*
123. *Id.*

ing relationship? Yet, how can you invent something new if you use the same old methods to create it?

The Walk in the Woods generates a fresh synthesis of ideas, contributions, and commitment.[124] Just as much as it opens new possibilities and enthusiasm, it can leaven the expectations of those who are involved, providing a reality test for that which is in the realm of the reasonable and that which is not.[125] This realization need not derive from an adversarial process. It can just as readily, and certainly more convincingly, derive from the lessons learned during this process.

5. Building Momentum

Each of the four steps of *The Walk in the Woods* generates its own momentum. Self interests forge the *confidence* that the parties find in one another and in the process.[126] During enlarged interests parties evoke *motivation* as they recognize the benefits that could accrue from joint problem solving.[127] It is during the enlightened phase that they formulate *incentives*, tangible though yet only potential consequences that could result from their working together.[128]

It is during the final phase of the process, the aligned interests, that they achieve the *rewards* of the process, coming to agreement, generating buy-in and developing a new working partnership.[129] The key to aligned interests is, "If you succeed, I succeed, and if I succeed, you succeed. Therefore, we are working together to create a shared success."

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124. *Id.*

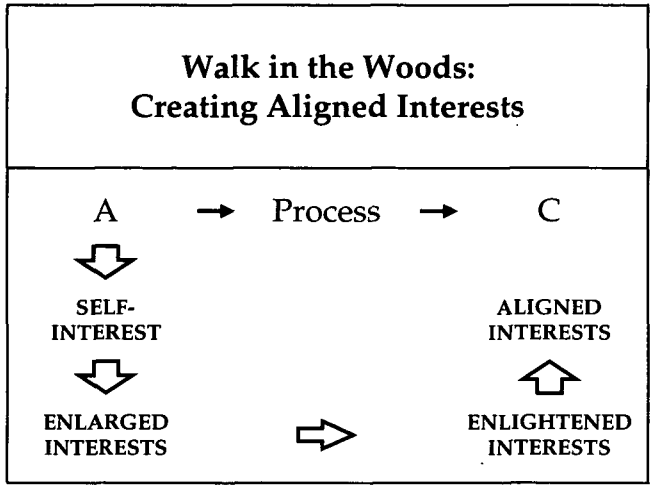
125. *Id.*

126. Leonard J. Marcus, Ph.D. & Barry Dorn, M.D., *Negotiating Enlightened Interests: The Walk in the Woods*, AMNEWS, Nov. 16, 1998, at 18.

127. *Id.*

128. *Id.*

129. Marcus & Dorn, *supra* note 50, at 19.



F. Aligned interests

The enhanced understanding of self and enlarged interests and the optimism of enlightened interests must eventually translate into firm commitments and agreements if the process is to reap its intended rewards. The aligned interests embody the "so what" of the process.[130] If you cannot make a commitment to one another, if you don't accomplish anything in your negotiation, and if nothing has improved in the process, then what's the point?[131] These are the questions you ask in this concluding phase of the process.

Parties are encouraged in the enlightened interests phase to spawn as many new ideas as possible.[132] In this process of brainstorming, they spew out wild proposals without concern for their practicality.[133] These thoughts are then categorized for their acceptability and feasibility. The new confidence and hope engendered by the experience of going through the process translates creative thinking into plausible inspiration and even into workable plans.

Good questions are the most important tools of productive negotiation.[134] They can form the basis for exploring the bounds of the "so what" of aligned interests. The following questions can guide you through this process:[135]

130. *Id.* at 20.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. Leonard J. Marcus, Ph.D. & Barry Dorn, M.D., *A Walk in the Woods: Moving Toward Aligned Interests*, AMNEWS, Jan. 11, 1999, at 20.

- To what would you be willing to commit?
- What timeline is feasible from your perspective?
- What is unacceptable to you?
- What do you expect in exchange for your concession on key points?
- What can we hope to achieve together through this agreement?
- Step-by-step, how can we best move forward?

The answers reveal much about what is in the realm of the feasible and what is not.[136] They outline a plan for making progress.[137] Most importantly, the answers inform you whether this is a working relationship worth its investment: the cost of buying in and the rewards you likely will reap from the process.[138]

1. Assessing the Agreement

Ultimately, each party to the negotiation must "get" something. What they each get certainly need not be the same and it need not even be of equal monetary value. Its value – whether it is tangible such as money, or intangible such as recognition - is gauged by the importance it has for each recipient.[139]

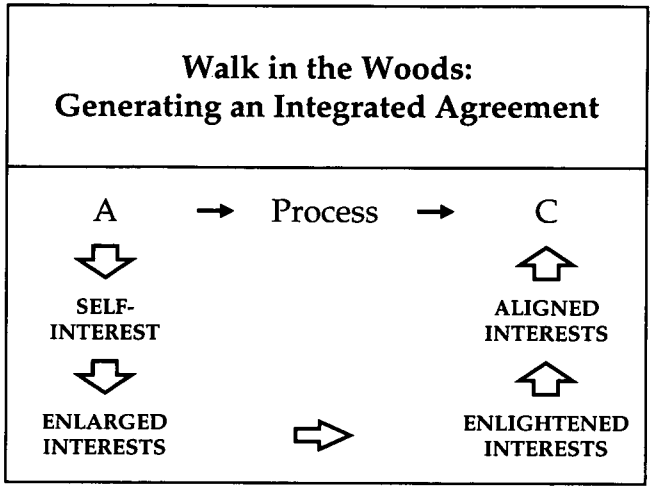
The arrangement must meet several tests if it is to succeed. It must be acceptable to each of the constituents.[140] It should be conspicuously clear what each person has to gain, just as it should be fully understood what the agreement costs each person.[141] As each side examines the deal, it must meet, in its balance, the test of fairness.[142] If it does, it likely will fulfill its long-term challenge: the test of time.

The intent here is to find common ground.[143] This is not the moment to inflate your desires or to exaggerate what you need. Rather, this is the time to seek a just balance, pledge to work together, and begin to anticipate the rewards of collaboration.[144] You get more because you conceived more. You are just as concerned about the others' satisfaction as you are about your own and that of your constituents. The deal you are accepting is based on a synergy of intent and

136. *Id.*
137. *Id.*
138. *Id.*
139. *See* Marcus & Dorn, *supra* note 22.
140. Marcus & Dorn, *supra* note 11, at 20.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

outcome. If it achieves its potential, it will spawn its own new successes.

The process is punctuated by a handshake, a contract, publicity, and renewed confidence. You have accomplished something worth the time and effort, not only for what it clarifies about the past, but more importantly, for what it promises for the future.



G. The Walk in the Woods in Practice

How can the walk facilitate problem solving among parts of a large health care organization, such as a medical staff and its management? Through this process, the parties recognize that like a yardstick, some decisions, clinical judgments for example, belong exclusively to one side, while others, nitty gritty administrative concerns, belong to solely to the other.[145] Many decisions belong in the middle as a shared responsibility.[146] When these important distinctions are not crystal clear, the breakdown in communication might lead parties to protest a move by the other side - not for its value but rather for its process.[147]

Strategic decisions over resources are facilitated when there is a clear understanding of what your system has by way of assets, what you are trying to accomplish together, and what it will take to get there.[148] Without that understanding, spending becomes less a process of in-

145. *Id.* at 21.

146. Leonard J. Marcus & Barry C. Dorn, *Negotiating Organizational Alliances: The Walk in the Woods*, AMNEWS, Sept. 21, 1998, at 21.

147. *Id.*

148. *Id.*

tended purpose and more a matter of influence and whim, a luxury that few large organizations can afford today.[149] Multi-dimensional problem solving, by contrast, has the parties methodically sharing information for the purpose of productively making decisions.[150]

Finally, by taking the hyperbole and posturing out of the negotiation process and replacing it with candor mixed with flexibility, the parties are more likely to acknowledge the pain that current constraints are placing on everyone at table.[151] They are more likely, at that point, to redirect their collective energies toward generating gains that would otherwise elude them.[152] Simple formula: more gain, less pain.

Given the interdependent nature of our work in health care, we ultimately do need one another if we aspire to achieve the enhanced marketabilities of clinical and administrative excellence. If we can fashion the right fit of work, values, and goals amongst ourselves, we recognize that just as our failures can be linked, so too can our successes. It is a change of attitude inextricably tied to a change in outcome.

H. The Time Dimension

There is an important time dimension fundamental to the negotiation process. What we do in today's transaction is based on our experiences and knowledge gained from the past. Yet, the negotiation takes us into the future when the outcomes of the accord itself will come to fruition.

"Multi-dimensional problem solving" and the *Walk in the Woods* serve as guides to decision making among people who share a common purpose and a shared fate. These methods systematically help them appreciate that today's negotiation itself is a step in an iterative evolution from past to future. As is the case with each step we take, it is a stride by which we shape our destiny.

VIII. CONCLUSION

What is it that we can hope to contribute to the combined health care and dispute resolution fields through our work? Ultimately, we hope to enhance the quality of decisions made and actions taken. We

149. *Id.*
150. *Id.*
151. *Id.*
152. Leonard J. Marcus & Barry C. Dorn, *Negotiating Organizational Alliances: The Walk in the Woods*, AMNEWS, Sept. 21, 1998, at 21.

do so by improving the quality of the process used to make those decisions or to resolve conflicts that arise from the actions.

Certainly, when both the quality of the decisions/actions and the quality of the process is low, then we have our work cut out for us. Success for us would be high quality decisions/actions derived out of the high quality processes that we contribute. Reaching that goal, despite all the obstacles, is our challenge.

These are very challenging times today. Our field has much to offer. I welcome your new initiatives and your new efforts here at the School of Law to contribute to further build this emerging field of health care negotiation and conflict resolution. It has certainly been an exciting journey to this point, and I am confident it will continue to be just as stimulating and rewarding.

Thank you for the invitation to be with you today, and happy travels.