

USING PERFORMATIVE, DISTRIBUTIVE, INTEGRATIVE, AND TRANSFORMATIVE PRINCIPLES IN NEGOTIATION

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DIFFERENTIATING BETWEEN FOUR APPROACHES

Disputes between parties can involve four different kinds of possible interactions or combinations of interactions: disputed high-conflict communication; distribution of something of value; a mutually acceptable solution to a shared problem; or repair of a damaged relationship. The first interaction is identified with performative negotiation, the second with distributive negotiation, the third with integrative negotiation, and the fourth with transformative negotiation. Different styles of communication are associated with each type of negotiation. In a performative negotiation, the parties narrate incompatible conflict stories and engage in little or no listening or problem solving. In a distributive negotiation, communications are often about who should pay how much, to whom, and why. In an integrative negotiation, communications tend to focus on the parties' needs and the ways in which they can work together. In a transformative negotiation, communications center on the parties' relationship and how the parties can interact more effectively with each other.

The outcome expected by parties to a negotiation undoubtedly will require the use of one or more of these kinds of negotiation. Because many unanticipated issues can arise in a negotiation, an effective negotiator must be able to recognize which principles are appropriate and easily transition between the different styles of communication.¹ To do this effectively a negotiator must understand which negotiation principles are appropriate for specific contexts and objectives.

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1. See, e.g., KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 177 (2001).

PERFORMATIVE NEGOTIATION PRINCIPLES²

High-conflict negotiations often begin with the narration (i.e., performance) by the parties (or their lawyers) of more or less emotionally charged stories about their conflict. Author Kenneth Cloke calls these presentations “conflict stories,” which have the following general characteristics: a focus on the past; stereotypical victimization with no recognition of contribution to the conflict; negative-reactive reciprocal blaming and defending; no acceptance of responsibility for changing the situation; projection of one’s own anxiety or guilt into the negatively-defined identity of the other; and unwillingness to listen or engage in problem solving.³

The objective of performative negotiation is to transform the narration of conflict stories into genuine conversation that can open up each party to the possibility of another point of view through mutual willingness to listen and speak. Dialogue (i.e., conversation rather than narration) allows the parties to listen and talk to one another, which can make it possible for their competing positions and interests to emerge. However, when parties are involved in highly charged conflict, how can they keep talking long enough for even fragments of conversation to begin to take place? The answer to this is multi-faceted.

Important motivations fuel engagement in high-conflict conversation. Disputants want to validate their opinions, improve their decisions, and manage their perceptions of risk. They have a need to be right and a corresponding fear of being wrong. Sometimes there is a need to “speak truth to power,” to say what they believe to someone who may have power over them. They have a need to understand themselves. They also have a need to understand differences. Each disputant has the capacity to see some things that others cannot see; conversely, each is blind to some things that others can see. Part of the process of understanding is seeing the world, including oneself, through the eyes of another.

Acknowledgement and affirmation are primary interpersonal needs; a disputant wants to know that she has been heard and understood, even if the listener does not agree with her. Effective performative negotiation skills therefore include: being mindful (of self, other, our interactions, and related

2. The author has developed these performative negotiation principles with Dr. Leonard C. Hawes, Professor of Communication, at the University of Utah. The author thanks Professor Hawes for his invaluable insights into the dynamics of performative negotiation, which are discussed in this Article.

3. See generally KENNETH CLOKE & JOAN GOLDSMITH, *RESOLVING PERSONAL AND ORGANIZATIONAL CONFLICT: STORIES OF TRANSFORMATION AND FORGIVENESS* (2000).

self-awareness, self-discipline, and self-control); conversational turn-taking and commitment to conversational ground rules, conventions, and protocols; listening; acknowledging; speaking; creating a learning conversation; exchanging information; and becoming vulnerable (i.e., being willing to be open and accessible to, and possibly affected by, the other's conflict story).

Conversation is taking and giving turns.⁴ Conversation as a turn-taking system has become conventionalized, and speakers assume and anticipate that they have certain rights and are subject to certain obligations for giving, getting, taking, and surrendering turns. Because conversations are conventionalized, rules of politeness are also often assumed. Because conversation is a practical affair, parties can talk about and agree to change how they are talking. In high-conflict conversations, when utterances violate conventionalized rules of politeness, parties may talk about and agree to comply with certain ground rules (e.g., no shouting, no name calling, no personal attacks, etc.).

To lose one's place in conversation can have adverse personal, interpersonal, and material consequences.⁵ Therefore, when one is not speaking, it is important to listen or otherwise attend well enough to follow along what is being said. To be a good listener in a high-conflict conversation, therefore, is a matter of self-interest, intentional choice, and self-discipline.

A skillful performative negotiator therefore demonstrates behaviors that motivate and increase the other negotiator's willingness to participate in a conversation with reciprocal economy. By attending to the other speaker's desires and desired outcomes, negotiation experience, willingness to participate, and reasons for resistance, the experienced negotiator has to ask fewer questions and intervene less often with questions. To do this, experienced performative negotiators are respectful, mindful and self-managing of their own anxiety, self-controlled, patient, and tolerant of ambiguity. They use a high-quality form of active listening that may be called "witnessing," which is paradoxically both very self-interested and selflessly focused on the other. They ask sincere, curious, non-coercive questions about what they do not know, and they disclose what they are willing to do and say to create the conditions of possibility for getting what they want.⁶ All these behaviors enable the other negotiator to positively

4. See generally Harvey Sacks et al., *A Simplest Systematics for the Organization of Turn-Taking for Conversation*, in *STUDIES IN ORGANIZATION OF CONVERSATIONAL INTERACTION* 7 (Jim Schenkein ed., 1978).

5. See *id.* at 43-45.

6. See LEONARD C. HAWES, *DESIRING UTTERANCES: CONFLICT, DISCOURSE, PROCESS*

reciprocate more willingness to participate in conversation.

Genuine conversation often takes on “a life of its own.” Parties may have considerable anxiety about participating in a conversation they have been consciously avoiding, because they fear they will step into an unknown and uncontrollable present from an unacceptable past. Once the conversation has started, however, within a matter of minutes, parties can be carried along by its flow, becoming less and less anxious during their respective turns.

Effective performative negotiators forego blame. Seeking answers to questions about the truth of what actually happened in the past is often not relevant to the resolution of conflicts. Determining “who started it” or “where or when it all began” or who is “right” and who is “wrong” are questions for which the answers have little or no problem-solving value. Asking such questions may even protract or exacerbate the conflict by provoking defensiveness and reciprocal blaming.

Here are six practical steps to take in performative negotiation to transform narration of conflict stories into genuine conversation:

First, ask questions that encourage others to speak in first-person, present tense, active voice, so as to change the time frame from past to present (because problems cannot be solved in the past) and motivate the other to disclose personal facts and feelings.

Second, listen carefully to the answers to understand what is being said; demonstrate to the other that you do (or at least want to) understand; and acknowledge that you “get” the other person’s point of view, even though you disagree with it.

Third, characterize the other’s demands as possibilities, rather than threats. Explore these possibilities for previously hidden requests, opportunities for concession, and concealed interests and desires.

Fourth, assume the other is motivated by desire and is willing to speak the truth of her lived experience, just as you are so motivated and willing to speak your truth.

Fifth, talk about present and future desires (e.g., “What do you want?”) and willingness (e.g., “If I did X, would you be willing to do Y?”).

Sixth, accept the likelihood of and related need to talk about overcoming obstacles, misunderstandings, and mistaken assumptions.

DISTRIBUTIVE NEGOTIATION PRINCIPLES

In a distributive negotiation each party assumes that resources are fixed and limited and attempts to claim resources for himself at the expense of the other. Money is the resource over which parties typically contend. The dynamic of their distributive bargaining often focuses on how much money one party will agree to pay to the other and how little money the other party will agree to accept. In disputes over money, there is often a disparity in bargaining power. If one party has a more attractive alternative than the other, that party often cares less than the other about reaching a negotiated agreement. This means that the party with less bargaining power usually is more motivated to settle, even though the terms are not entirely to his liking, to avoid an even less desirable alternative.

Distributive negotiations occur in many marketplace transactions between buyers and sellers and in negotiated monetary settlements of legal disputes.⁷

Communications in a distributive negotiation often look like positional bargaining that reflects strategic positioning by the parties. The parties typically share little accurate information about their interests or objectives. The parties tend to present conflicting stories in which they take seemingly contradictory positions and either hold back or exaggerate some of the truth about their respective issues and interests. Each may attempt to confuse the other with misleading, incomplete, or inaccurate information or even intimidate the other party with bluffs or threats.

A distributive negotiation generally works as follows: each party has a negotiating range with a starting point, a target point, and a stopping point. A party may choose to make the first offer, hoping that it will limit the other party's expectation about the extent of the negotiation range. Neither party discloses its target or stopping point to the other. The parties usually expect that there will be some back-and-forth bargaining after they disclose their respective starting points. Typically, one party makes an offer, and the other makes a counteroffer and so on, until they reach an agreement or deadlock. This sequence is very important. It is supposed to move the bargaining exchange along by influencing the parties to adjust their positions. Each movement by a party narrows the negotiation range between the parties. The parties' bargaining behavior therefore "funnels"

7. They also occur in negotiated plea bargains, except that the result is not a distribution of money but the length of a jail term. For example, a prosecutor who believes a jury will convict the defendant would rather accept a plea to a lesser charge to avoid preparing for trial, while the defendant would rather plead guilty to the lesser charge to avoid the risk of being convicted at trial of a greater charge and risk a longer sentence.

the negotiation toward an eventual agreement point.⁸

Each offer and counteroffer sends signals back and forth about the parties' target points and stopping points. For example, if a starting offer is too far away from the offeror's target point, the offer may appear outlandish or made in bad faith to the offeree, who may then decide to discontinue the negotiation. During a distributive negotiation, each party will likely be able to infer the other's target point because parties typically give up the difference between their starting points and their target points, i.e., they get closer and closer to their respective target points during the bargaining process.

A negotiator who can instigate a change in the other party's stopping point will have a strategic advantage in distributive negotiations. Therefore, the task is first to try to ascertain the other party's stopping point and then influence that party to modify it. To exert such influence, a party may disclose inaccurate information about his own stopping point, manipulate the parties' relationship with fawning or threatening behavior, or try to persuade or pressure the other party to make a commitment or concession that he had not intended to make. To illustrate, a seller may decide to reduce his lowest price because he believes he would lose the sale to another seller allegedly offering a lower price down the street.

This dynamic in distributive negotiation creates tension between trying to obtain as much information as possible about the other party's stopping point and at the same time trying to disclose as little accurate information as possible about one's own stopping point. A party may find out indirectly about the other's likely stopping point by obtaining current market data or interviewing someone who recently negotiated with the other party. She also can ask the other party for information about his negotiating range, although it is difficult to know how much to trust any information disclosed. Typically a party's BATNA⁹ will determine his stopping point, because that is the point at which the party is likely to walk away from the negotiation.

INTEGRATIVE NEGOTIATION PRINCIPLES

Unlike a distributive negotiation, which tends to be more adversarial and often focuses on money, an integrative negotiation takes a "more

8. ROY J. LEWICKI ET AL., *NEGOTIATION* 187 (McGraw Hill Higher Education 2d ed. 1994) (1985).

9. BATNA is an acronym for each party's best alternative to a negotiated agreement or the solution a party plans to pursue in the event the negotiation fails.

expansive view of both resource use and self-interest.”¹⁰ Generally, an integrative negotiation seeks types of solutions that satisfy the important needs of both parties. Integrative negotiations require the parties to identify and understand their mutual problem, bring their interests to the surface, generate possible solutions, and choose one solution from the available options.¹¹

Both parties try to frame their joint problem in a mutually acceptable way. This requires them to focus on their primary interests and set aside their less important concerns and desires that do not have to be satisfied to reach an agreement.

To engage in this type of problem solving, the parties must minimize interpersonal conflict so that they can work together. Fisher, Ury, and Patton recommend structuring the integrative negotiation as “a side-by-side process,” even placing the negotiators on the same side of the table.¹² Writing mutual interests and possible options on a white board or flip chart can heighten this sense of working together.

Communications in an integrative negotiation differ from the positional bargaining typical of a distributive negotiation. Integrative communications are more inviting and cooperative. Integrative negotiators tend to present overlapping stories and focus on satisfaction of their individual interests, which may require them to compromise.

A party’s opening statement can strongly suggest the type of solution he is seeking. Opening remarks communicating interest in both the outcome of the negotiation and the relationship with the other party signal a desire for a more integrative solution, as opposed to opening remarks that demonstrate interest only in the outcome or only in the relationship.¹³

In an integrative negotiation there must be a free flow of information so that the parties’ respective interests can be revealed. Each party must be able to hear and understand the interests of the other as well as disclose his own interests. Interests include positive and negative objectives, needs, desires, concerns, fears, aversions, and the like. They may be substantive or procedural in nature. Substantive interests include objective interests (which are tangible, quantitative, and rational) and subjective interests (which are intangible, qualitative, and emotional). Procedural interests are

10. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 58 (1994).

11. LEWICKI ET AL., *supra* note 8, at 83.

12. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 38 (Bruce Patton ed., 2d ed. 1991).

13. *See* LEWICKI ET AL., *supra* note 8, at 190.

those related to the quality of the process of achieving an acceptable outcome or selecting objective standards of legitimacy and fairness (i.e., negotiators not only want to achieve a fair outcome, they also want to feel they were treated fairly in getting there). Interests also may relate to third persons, such as family members, friends, or co-workers, and, sometimes, important third-party interests must be disclosed and satisfied if there is to be a settlement.

Interests must be prioritized into needs and wants. Needs are more important and usually must be satisfied before an agreement can be reached, whereas wants may be traded or given away.

A party who perceives and understands the other party's perspective and important interests is better able to frame the integrative negotiation productively and more effectively identify potential options and measures of legitimacy that might satisfy both parties.

TRANSFORMATIVE NEGOTIATION PRINCIPLES

In some conflicts, the relationship between the parties is more important than any particular solution to the problem that faces them. Because neither party wants to admit to being the one at fault, the parties in a conflict relationship often do not notice their own contribution to the problem. Therefore, they rarely look in a productive place (i.e., at their own contribution) to help themselves change.¹⁴

When bad things happen in a relationship, the parties may feel anger, blame, injustice, guilt, regret, shame, helplessness, resignation, etc. Each response takes the parties on a "detour" from their own responsibility.¹⁵ As in performative negotiation, the parties tend to have conflicting stories about who is responsible for their dispute. They tend to get stuck in the past and in blaming each other. In a transformative negotiation, the parties must attempt to meld their competing individual stories into a "third story" in which they each recognize their own contribution to their relationship problem and their polarizing patterns of communication.¹⁶ They need to focus on the present and disclose how they feel. They also need to begin to talk about the future and about the possibilities of relating to each other in a different way.

In a transformative negotiation, the parties must understand the nature

14. Gerald R. Williams, *Negotiation as a Healing Process*, 1 J. DISP. RESOL. 1, 43-44 (1996).

15. ROSAMUND STONE ZANDER & BENJAMIN ZANDER, *THE ART OF POSSIBILITY: TRANSFORMING PROFESSIONAL AND PERSONAL LIFE* 155 (2000).

16. See generally DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (2000).

of their conflict. To do this they must have the “capacity for self-awareness and critical observation, subsequent reflection and correction, honesty and [especially] empathy.”¹⁷ Fisher, Ury, and Patton stress the importance of empathy:

The ability to see the situation as the other side sees it, as difficult as it may be, is one of the most important skills a negotiator can possess. It is not enough to know that they see things differently. If you want to influence them, you also need to understand empathetically the power of their point of view and to feel the emotional force with which they believe in it.¹⁸

So-called “attending behaviors”¹⁹ of effective listening can enhance the relationship of the parties during a transformative negotiation. These behaviors include eye contact, positive body posture (such as sitting up straight and leaning forward to express interest), smiling, and nodding. Other conduct that may affect the relationship in a positive way includes showing courtesy and respect, doing the other party a favor, immediately returning a favor, making a quick concession, giving the other party needed time or information to consider, and helping that party “save face” (e.g., avoid being caught off guard by surprise).

NEGOTIATION DYNAMICS: THE INTERRELATION AMONG OUTCOME, PROCESS, AND COMMUNICATION

Negotiation can be broken down into three interrelated dynamics: the outcome, the process, and the communication between the parties. A skillful negotiator can facilitate the course of the negotiation by appropriately changing these dynamics. For example, a change in the desired outcome from distributing value to improving the parties’ relationship would call for a change in the process from a distributive negotiation to a transformative one. This, in turn, would require the parties to communicate differently to have a positive effect on both the process and the outcome.

To assure that the appropriate principles are used in a negotiation, the negotiator must know what type of outcome each party desires and how important the parties’ relationship is to them. If the parties want a financial settlement and are not particularly interested in their relationship, they are seeking a distributive solution. If they want to find a joint solution to their problem that preserves their relationship (indicating that both the outcome

17. CLOKE, *supra* note 1, at 67.

18. FISHER ET AL., *supra* note 11, at 23.

19. See LEWICKI, *supra* note 8, at 222-24.

and the relationship are equally important), they are seeking an integrative solution. And, if they value their relationship more than the outcome, they are seeking a transformative solution. Performative negotiation (especially in high-conflict situations) often is the conversational doorway through which parties become willing to enter into one or more of the three other kinds of negotiation.

If both parties do not want the same kind of outcome in negotiation (e.g., one party values the relationship and wants to continue doing business, while the other party wants to get paid what is owed and thereafter cease doing business altogether), it may be necessary for the skillful negotiator to move from one set of negotiation principles to another during the negotiation. To know whether this is appropriate, the negotiator must understand what will motivate the other party to adjust his position during the negotiation. Because communication is integral to the negotiation process, the negotiator must recognize communication patterns associated with each type of negotiation and be able to facilitate a change from one pattern to another that is better suited to a different process and a different outcome.

The widely believed golden rule of negotiation, called the “law of reciprocity,” plays a crucial role in negotiation.²⁰ This rule states that, when one party acts in a specific way, the other party likely will react similarly.²¹ It is “the almost universal belief that people should be paid back for what they do, that one good (or bad) deed deserves another. . . . Because people expect that their actions will be paid back in one form or another, influence is possible.”²²

The “pay back” dynamic of the norm of reciprocity influences virtually every aspect of negotiation, including building relationships and trust, initiating and improving communications, exchanging information, brainstorming, problem solving, and overcoming impasses. The skillful negotiator can use this reciprocity dynamic to influence both the positive and negative aspects of the negotiation. For example, in a performative negotiation, the negotiator can use turn-taking, asking sincere and curious questions, effective listening, and complying with ground rules to motivate the other party to transform the negative-reactive reciprocal narration of conflict stories into genuine conversation. In a distributive negotiation, the skillful negotiator can avoid making only small incremental moves because

20. See Allan R. Cohen & David L. Bradford, *Influence Without Authority: The Use of Alliances, Reciprocity, and Exchange to Accomplish Work*, in NEGOTIATION: READINGS, EXERCISES AND CASES 355 (Roy J. Lewicki et al., eds., 2d ed. 1993).

21. See *id.* at 228-30.

22. See *id.* at 355.

it is likely the other will reciprocate with equally small moves. Similarly, in an integrative negotiation, if one party is willing to share information about underlying interests, the other party is likely to reciprocate positively. And in a transformative negotiation, if one party refuses to discuss his contribution to the parties' relationship conflict, the other party will likely reciprocate negatively and refuse to discuss that issue also.

PERFORMATIVE NEGOTIATIONS

Many negotiations of legal disputes begin with the narration by the parties (or their lawyers) of conflict stories. I have learned that the parties' performance of their conflict stories is a necessary part of high-conflict negotiation that has to be managed properly. Parties often need to "vent" their (so-called irrational) emotions before they become willing to begin (rational) problem solving or risk analysis, which is considered to be the real work of the negotiation of legal disputes using distributive negotiation principles.

Venting, however, creates a dilemma for the negotiator. Too much venting creates the very real risk of further polarizing the parties at the outset of negotiation. This makes more difficult the parties' task of soothing bruised feelings and recreating the parties' initial commitment to work together in negotiation. Too little venting, on the other hand, often means that the parties do not feel they had a full and fair opportunity to tell their sides of the conflict the way they wanted. This makes more difficult the negotiator's task of drawing out the other party's issues and interests that often are hidden behind the positions that are presented. As a negotiator, I have learned to manage this dilemma of too much versus too little venting by discussing, or even negotiating, ground rules that are intended to keep the expressions of unproductive emotions in check.

One technique for handling this venting dilemma is for the negotiator to ask skillful, non-coercive, interest-based questions such as, "What do you want?" The objective of these interest-based questions is to quickly "drill down" through the adversarial position and negative emotions of the other party's conflict story into the underlying (rational) self-interests and desired outcome. The assumption behind this technique is that a party would willingly stop venting as soon as the party was enabled to disclose his real interests. The problem with this technique, at least for some parties, is that the need to tell conflict stories in the manner they want to tell them remains, which re-injects the risk of too much unproductive venting.

A different technique for handling the venting dilemma and transforming the narration of conflict stories into genuine conversation is by asking questions that encourage the other party to speak in first-person,

present tense, active voice, so as to change the time frame from past to present and to disclose personal facts and feelings. The negotiator can listen carefully to the other party's responses to understand what is being said and demonstrate to the other party that the negotiator does understand and acknowledge the party's point of view. The negotiator can characterize the other party's demands as possibilities, rather than threats, and thus explore these new possibilities for hidden interests or requests, willingness to make concessions, et cetera. The negotiator can emphasize that both parties are motivated by a desire and willingness to work together as demonstrated by their initial agreement to participate in negotiation. The negotiator can focus on the present and avoid seeking answers to questions about the truth of what actually happened in the past. The negotiator also can accept the likelihood of and the related need to talk through obstacles, misunderstandings, and mistaken assumptions, among other things.

Typically negotiation involves more than one issue, and parties often believe they must agree on each issue to reach an overall agreement. This is not so. The skillful negotiator can help the other party understand that, even though they may not agree on even one issue, they can resolve their dispute in a way that is acceptable to each of them, but for different reasons. The negotiator also can look for opportunities where the parties' relatively unimportant interests can be traded or conceded during the course of the negotiation to avoid impasse.

DISTRIBUTIVE NEGOTIATIONS

Distributive negotiation principles are appropriate for a negotiation in which the important interests that the parties wish to satisfy involve the distribution of something tangible, like money or property. In this type of negotiation, skillful negotiators can frame their starting positions so that the negotiation can proceed in a productive manner. The negotiators also can use respectful communication with each other so as to advance the back-and-forth exchanges typical of distributive negotiation, and thereby conform to the bargaining protocol of the distributive negotiation process.

The skillful negotiator avoids breaching this protocol by not escalating an opening offer, not refusing to counteroffer, or not making a take-it-or-leave-it offer. Making a non-negotiable demand early in a distributive negotiation is likely to be perceived as bad-faith negotiation or a disrespectful assault on the other party's ego or identity. Rather than eliciting positive movement in the negotiation, a take-it-or-leave-it offer is more likely to provoke resentment and a breakdown in bargaining. The negotiator can avoid such an impasse by understanding that the norm of reciprocity requires each party to make a productive move to continue to narrow the gap between them.

The pattern of movement in a distributive negotiation conveys information back and forth between the parties. To be productive, the movement should not be haphazard. Consider, for example, if party *B* responds to party *A*'s offer with a counteroffer only marginally greater than *B*'s last offer, party *B* may be conveying that it has a relatively strong BATNA and relatively little interest in reaching settlement in the negotiation. This could motivate party *A* to reciprocate with an only marginally improved offer. Such an approach will drag out the negotiation or could even unnecessarily lead to its termination. The skillful negotiator understands the consequences of this kind of naïve signaling and thereby more accurately communicates the negotiator's underlying interest.

Every negotiation in which a distributive outcome is sought raises a legitimacy issue. The strengths and weaknesses of each party's position must be measured against some acceptable yardstick, often a legal or industry standard. The skillful negotiator understands that, if the parties can agree on a legitimacy principle to assess their respective positions and determine the objective fairness of possible options, it will be easier for them to find and commit to one option that will bring the deal to an agreement or the dispute to a settlement.

In every distributive negotiation, the time will come at which a party wants to convey the message that there is no room for further movement—that the last offer or counteroffer is final. The skillful negotiator can help the other party “save face” by conveying that the negotiation may no longer be about what is deemed to be “fair,” but instead is about what is feasible under the circumstances.

INTEGRATIVE NEGOTIATIONS

Integrative negotiation principles are appropriate for a negotiation in which the parties accept that:

- They are likely to benefit more by working together than by competing against each other;
- They have the interpersonal and communication skills to share information about themselves and to listen to and understand each other;
- They are willing to invest time and energy in creating or enhancing a productive problem solving relationship;
- They are willing to say what they want and why;
- They are willing to engage in joint problem solving, identifying possible ways to resolve their problem that are mutually acceptable;

and

- They are willing to commit to a mutually acceptable solution that incorporates their important interests.²³

However, the parties' important underlying interests frequently are obscured by the positions they assert early in the negotiation. The skillful negotiator can reveal his undisclosed interests and inquire about the underlying interests of the other party, which are necessary to determine whether an integrative outcome is desired and even whether an integrative process will be productive. Fisher, Ury, and Patton advise:

In searching for the basic interests behind a declared position, look particularly for those bedrock concerns which motivate all people [like security, economic well-being, a sense of belonging, recognition, and control over one's life]. If you can take care of such basic needs, you increase the chance both of reaching agreement and, if an agreement is reached, of the other side's keeping to it.²⁴

The skillful negotiator can identify potential options that might satisfy both parties' important interests. Options serve to answer future conditional questions beginning with "what if" (e.g., "What if you were to do X?"). To identify options, it is useful for the parties to have a brainstorming session in an environment free of early evaluation: "The key ground rule is to postpone all criticism and evaluation of ideas. The group simply invents ideas without pausing to consider whether they are good or bad, realistic or unrealistic."²⁵ The negotiator should remind the parties that the options they initially identify do not have to be acceptable or even feasible. This is important because an interesting aspect of an unworkable option could ultimately be included as part of a mutually acceptable agreement.

Once the options are identified, the parties evaluate them for feasibility and fairness. This may raise legitimacy issues because, to perform this evaluation, the parties will need criteria to weigh and rank the options for acceptability and satisfaction. The parties may need to agree on a legitimacy principle that they both can accept to use.

TRANSFORMATIVE NEGOTIATIONS

Transformative negotiation principles are appropriate when the solution the parties desire or need is to repair or improve their relationship. A good example is a custody dispute between a couple in the middle of a

23. See generally FISHER ET AL., *supra* note 11.

24. FISHER ET AL., *supra* note 11, at 48.

25. *Id.* at 60.

divorce. The parties are often very angry at each other, but they care deeply about their children. Their relationship needs to be recast into one that involves mutually supportive and cooperative parenting, but they cannot communicate about that effectively because of their anger, bitterness, and sense of betrayal. As long as they have significant, unresolved negative feelings toward each other, they are unlikely to be willing or able to work together toward their otherwise shared goal of effective co-parenting.

Ironically, solutions to other co-parenting problems often emerge as by-products of the transformation of the parties' underlying relationship. For example, transformative negotiations can help divorcing parents get past their anger and resentment, allowing them to become motivated by their shared interest in their children's welfare to find an integrative solution to their dispute about joint custody.

The transformative approach also can lead to a solution of some distributive disputes. Take a boundary-line dispute between adjoining landowners. If the parties can get over their anger and repair their relationship as neighbors, one of them may become willing to convey title to the property in question to the other, in exchange for payment of fair market value. Transforming their relationship is the key to achieving their willingness to engage in a successful distributive solution to the property dispute.

To influence a change in the parties' relationship, the skillful negotiator must communicate in ways that encourage the parties to truly empathize with each other, to feel what it is like to walk in each other's shoes, and to see the world through each other's eyes.²⁶ The negotiator can help by encouraging the parties "in dropping their poses, communicating honestly and empathetically, and taking responsibility—not only for their intentions, but their words, actions, and effects they have on others regardless of intention."²⁷ Taking this kind of responsibility can help the parties apologize and perhaps even forgive each other, which in turn can help them create a new and productive relationship.

Restructuring the parties' relationship is often critical to resolving their dispute. This concept is the basis for the systematic approach to negotiation discussed below, which calls for the parties to work first on the underlying communication and relationship issues before trying to engage in problem solving.

26. CLOKE, *supra* note 1, at 26.

27. *Id.* at 35.

A SYSTEMATIC APPROACH

Having an array of negotiation principles to help resolve a dispute leaves the negotiator with the task of deciding the order in which they should be used. If the negotiation begins with narration of conflict stories, it makes sense to begin using performative principles first to deal with the parties' communication issues, then using transformative principles next to deal with relationship issues, then integrative principles to address the need to develop a mutually satisfactory solution to a joint problem that does not call for the distribution of value, and finally using distributive principles to resolve a dispute (or the remaining part of the dispute) that can only be resolved through a monetary settlement.

This systematic approach provides a road map for the negotiator. The first task will be to determine whether communication issues exist that would benefit from performative negotiation. Then the negotiator should determine whether relationship issues exist that would benefit from transformative negotiation. The next task will be to identify issues that can be solved through integrative principles, before identifying those requiring distributive negotiation principles. Working with the earlier example of divorcing parents who want to be effective co-parents, the skillful negotiator communicates effectively using performative negotiation techniques so they can create a co-parenting relationship using transformative negotiation principles, and they can then address custody and visitation issues using integrative negotiation principles. If there are distributive issues, like alimony or child support, those would be addressed last using distributive negotiation principles.

It is important to understand that, later in a negotiation, if and when the parties fear that the negotiation is going to end in impasse and their conflict will not be resolved, the parties' initial negative emotions may resurface, to be expressed through the renewed narration of conflict stories and blaming, which requires the skillful negotiator to intervene by using performative negotiation principles to improve the parties' communication and get back onto the problem-solving track.

CONCLUSION

Negotiators need to use all the effective techniques at their disposal and flexibly employ appropriate negotiation principles as needed to achieve the outcome they desire. This Article suggests that as negotiators increasingly understand when and how to use four different sets of negotiation principles systematically, they may come to wield more powerful tools to more effectively close deals and settle disputes.