

Substantive Outcome Differences Between Styles of Negotiation

By J. Mark Weiss

A tear welled up in the corner of her eye. My client Becky, age 43 with a newly-earned MBA, sat across from me. She had just described the hardships she and her daughters endured during her marriage to Donald—his long hours away at work, her responsibility to get the girls to activities, his unwillingness to encourage their enrollment in private school. Even though Donald had just lost his job, Becky wanted to demand that he pay lifetime spousal support plus all future educational expenses for the girls. When I asked Becky what she thought might be important to Donald, she wondered why that mattered. As I explored her thinking, it became apparent that that Becky believed that taking an extreme position from which she might compromise would get her the best deal.¹

Becky was convinced that a positional negotiation style would give her the best possible result. She wanted her lawyer (me) to argue why she should receive all she asked for, to bluff, and to deliver an implied threat by participating in positional negotiations. She feared that providing Donald with accurate information about her intentions and needs, and learning what was important to him, could only lead to the worst possible outcome.

These same fears are often raised by lawyers who are detractors of Collaborative Practice. These lawyers sometimes assert that they cannot possibly get the best deal for their client if they also consider the priorities of their client's spouse. They argue that their client will give up a negotiation advantage, and get a worse outcome, if they do not take a strong position that favors their own client and no one else. Some Collaborative professionals share those fears, steering clients away unless the clients are in near-agreement.

Interest-based negotiation is a style of negotiation popularized in the early 1980s by the book *Getting to Yes*,² and is often emphasized in Collaborative Practice trainings. For many, interest-based negotiation is an essential part of Collaborative Practice. One benefit of interest-based negotiation is that it is much less likely to adversely impact the relationships in the way a more adversarial style of negotiation will tend to do. A consequence is to increase the probability that the parties will be able to work together in the future. These benefits are particularly valuable for families, especially if they will have an ongoing co-parenting arrangement. This is perhaps the reason why the interest-based negotiation style has gained such a foothold in Collaborative Practice.

Apart from the probability of better relationships, does interest-based negotiation hurt the substantive outcome, as asserted by doubters? Without a good answer, many Collaborative professionals sidestep that question. This article focuses on research that studied how the

¹ Identifying information of my client and her husband has been changed to protect their privacy.

² Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement without Giving In* (1981). Although *Getting to Yes* was revolutionary in the popular culture, its success stemmed largely from making decades of scholarship approachable.

negotiation style affects the tangible, substantive, deal. The question can be framed thusly: While collaboration can be expected to tend to lead to a better personal relationship between parties, does collaboration come at the expense of having to settle for a worse substantive result?

Classifications of Negotiation Styles

The literature contains hundreds, if not thousands, of research studies and experiments on negotiation. When comparing negotiation styles, academics often classify them as either “distributive negotiation” or “integrative negotiation.”

In *distributive negotiation*, the negotiators each focus on getting what they want, without much concern for the other. Each aims to *claim value* for him- or herself. They take positions, argue for them, and, if they must, compromise from there. Becky wanted to engage in distributive negotiation.

In *integrative negotiation*, the negotiators work together and share information so they can each accurately learn what is important to the other. By finding common interests and trading concessions on issues where they have different priorities and preferences, they aim to *create value* for both.

Most Collaborative professionals will think of “distributive” as positional negotiation, and “integrative” as interest-based negotiation.³ As noted above, interest-based negotiation is the dominant style of negotiation used in Collaborative Practice and by many mediators. The terms “positional negotiation” and “distributive negotiation” are essentially synonymous.

Does an Integrative Negotiation Style Come at the Expense of a Good Outcome?

Researchers Carsten de Dreu, of the University of Amsterdam, and Laurie Weingart and Seungwoo Kwon, of Carnegie-Mellon University, wondered whether distributive or integrative negotiation was more effective at reaching better substantive outcomes. They wanted to learn whether cooperation and concern for others during negotiations helped or hurt getting a good outcome. The researchers identified those two attributes, cooperation and concern for the other, as central to the integrative negotiation style.

³ Integrative negotiation includes interest-based negotiation, but interest-based negotiation is only one type of integrative negotiation.

To study this, they performed a meta-analysis⁴ of 28 different research studies, performed by different researchers, that measured one or both of those attributes.⁵ Each of the 28 studies drew conclusions based on observations of multiple negotiations.

A statistical analysis to these research studies showed the commonalities and differences, and gave important insights. The analysis supported these conclusions about the substantive outcomes of the different negotiation styles:

Conclusion 1: Working Cooperatively Yields the Best Outcome: Compared to other negotiation styles, the best measurable substantive outcomes occur when negotiators cooperate and have high concern about the other party, but only *if* they can avoid compromising what's important to themselves (what the researchers refer to as a “high resistance to yielding”). In other words, problem-solving is most effective when negotiations are interpersonal, the perspectives and interests of all are considered, and negotiators do not capitulate on what's important to them. These negotiators consistently had the best substantive outcomes.

Conclusion 2: Compromising Important Interests Creates a Worse Outcome: Negotiators who have high concern about the other party (similar to those in Conclusion 1) but who have a “low resistance to yielding” (*i.e., who easily compromise*) end up with worse substantive outcomes. On reflection, it should be no surprise that premature compromise frequently yields a measurably worse outcome as compared to those who remain engaged in problem-solving. A low resistance to yielding (easy compromisers) could be the result of being accommodating or avoidant.

Conclusion 3: Compromising Important Interests Increases Acrimony: The research came to a second conclusion about the same negotiators identified in Conclusion 2—those who have a high concern about others and a low resistance to yielding. Perhaps counter-intuitively, and almost certainly contrary to the desire of the accommodator or avoider, the research shows that accommodating and avoiding also increases the level of contentious behavior in negotiations. In other words, not only did these negotiators get a worse substantive outcome, the desired positive impact on relationships often eluded them.

Conclusion 4: Distributive Negotiation Creates a Higher Risk of Impasse and Worse Outcome: Distributive negotiation, such as what my client Becky sought to do, tends to drive out problem-solving. As a result, the research shows distributive negotiators end up

⁴ A meta-analysis can be defined as:

[a] quantitative statistical analysis that is applied to separate but similar experiments of different and usually independent researchers and that involves pooling the data and using the pooled data to test the effectiveness of the results

Merriam-Webster online Medical Dictionary (<https://www.merriam-webster.com/medical/meta-analysis>), last accessed 4/1/2017.

⁵ De Dreu, Weingart, and Kwon: *Influence of Social Motives on Integrative Negotiation: A Meta-Analytic Review and Test of Two Theories*, J. of Personality and Social Psych., Vol. 78, No. 5, p. 889 (2000).

at impasse more often than integrative negotiators. The likelihood of any success is diminished. Additionally, when they do reach agreement, distributive negotiators do about the same as negotiators who have compromised important values and interests.⁶ They do worse than integrative negotiators who keep all interests, needs, and concerns front and center.

In short, the research shows that Becky was mistaken about the negotiation style that would likely get her the best deal. She held a false belief that she would do better if she took a positional stance. The research shows that Becky would likely achieve a better outcome if she worked cooperatively with Donald, was concerned about his goals and needs, helped Donald understand hers, and then worked together with Donald to problem-solve.

However, it also showed that Becky was correct about the importance of asserting what was important to her, and not compromising easily. Being nice and seeking compromise, which so many incorrectly believe to be the only alternative to positional negotiation, yields poor outcomes. Had Becky done that, she and Donald would likely both reach a suboptimal substantive agreement by bypassing the problem-solving that occurs when the interests of all are included. Becky's mistake was in taking positions and by not paying close attention to and engaging with what was important to Donald and to her, and not realizing there was a third, more effective, way.

How Negotiators Are Perceived by Lawyers

The meta-analysis discussed above describes how distributive negotiation generally results in worse substantive outcomes when compared to integrative negotiation. How negotiators are perceived may be a factor in this, according to a study was conducted by Andrea Schneider, of Marquette University, who surveyed 727 lawyers to ask about their peers.⁷ Schneider asked questions that teased out characteristics of lawyers whom their peers perceived to be effective negotiators, and characteristics of lawyers whom their peers perceived to be ineffective negotiators. The lawyers whom Schneider surveyed were not Collaborative professionals, but instead were lawyers randomly selected in several communities.

The survey revealed that lawyers who were perceived to be adversarial were seen as ineffective negotiators. Only 9% of lawyers who were perceived as adversarial were described as effective negotiators, and only 9% of effective lawyers were described as adversarial. Lawyers who took a problem-solving approach were perceived as effective negotiators. 91% of lawyers seen as effective took a problem-solving approach to negotiation. Increasingly adversarial behavior was correlated with being perceived as increasingly ineffective. The more positional a lawyer became, the more ineffective that lawyer was perceived to be—which might be presumed to be the exact opposite of the positional lawyer's intent.

⁶ The meta-analysis also tested for these other variables which had no measurable effect: task complexity, negotiation scenario, gender composition, and operationalization of social motive.

⁷ Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 Harv. Negot. L. Rev. 143 (2002).

Schneider's survey revealed that the lawyers who were identified to be most effective were not only highly rated in their problem-solving skills, but typically were identified as exhibiting a combination of assertiveness and empathy. Those who were ineffective were likely to be perceived as stubborn, arrogant, and egotistical.

In other words, those lawyers who were viewed as the most effective negotiators tended to use methods that can be described as fitting in an integrative style of negotiation. They were neither avoidant nor accommodating, but were both assertive and concerned about what was important to the other. The magic sauce seems to be that combination—assertiveness plus concern for the other.

Implications for Collaborative Practice

For Collaborative Practice, this research has profound implications.

First, the research shows that the integrative negotiation style will not only result in fewer damaged relationships, but will generally achieve superior substantive results. However, both advantages disappear if a party is not asserting their own needs. For integrative negotiation to deliver the benefits it promises, all must be rigorously engaged in working the problem. My client Becky was therefore well-served by later deciding to engage in an integrative-style negotiation with a team that was committed to keeping her and Donald focused on engaging with the problem, and kept their concerns at the forefront without fail.

Second, the necessary problem-solving for optimal outcomes can only occur after the perspectives, preferences, priorities, and goals of the parties are differentiated and truly well-understood by all. Only then can the necessary problem-solving occur to consider those differing perspectives and goals in the exploration of viable solutions. Negotiations are sabotaged by puffing, hidden agendas, secrets, or withholding concerns, interests, and needs. Not speaking up because of fear of disapproval or conflict will make things worse. If Becky and Donald can each honestly and fully disclose their objectives and their reasoning, everyone can engage with their concerns and do their best work.

Third, the benefits of integrative negotiation vanish unless the negotiators can simultaneously focus on the relationship and maintain a high resistance to compromise. When compromise occurs too readily, such as might occur if eagerly attempting to display cooperation, problem-solving is impeded and the substantive outcome degrades. Worse, compromise paradoxically results in increased contentious behavior—and consequent damage to relationships. This may occur when a party (or Collaborative lawyer) is either accommodating or conflict-avoidant. It is therefore important that Collaborative professionals keep all focused not only on the *common interests and needs* of the clients, but also on their sometimes-differing *individual interests and needs*, and to acknowledge and include them without any minimization. Only then can professionals reliably and repeatedly work in and maintain the conversation in the Goldilocks Zone so optimal problem-solving can occur.

Fourth, qualified professional assistance will be needed for most divorce clients if they are to work in the Goldilocks Zone. For most, unless kept on track, the combination of strong emotions

(such as fear, shame, and blame), an impaired ability to communicate effectively, and the sense of disempowerment will conspire to pull divorce clients to be too accommodating or to engage in distributive negotiation tactics, or even both. Many clients may lack awareness of the benefits of integrative negotiation, and most will not know what is expected from them. Even those who have an intellectual understanding of the expectations will often be challenged putting the lessons into effect without help from their Collaborative professionals. It is up to Collaborative professionals to educate and nudge clients into that Goldilocks Zone, and to maintain a strong and safe container so both professionals and clients can constructively engage the problems.

Fifth, Collaborative professionals must develop and maintain the personal awareness and skill to overcome their own subconscious tendencies towards being adversarial, avoidant, accommodating, or compromising during negotiations.⁸ These normal, self-protective, tendencies will impede professionals from being able to effectively assist clients, undermine the quality of the outcome of the negotiation, and increase the level of contention. They will also be perceived as being ineffective. Without conscious and deliberate effort to develop, master, and maintain these skills, professionals may not have the proficiency necessary to consistently guide conversations in the Goldilocks Zone.

Integrative negotiation skills are rarely taught and developed in professional schools or practice. They cannot be taught in an introductory Collaborative training and can only be touched on in a 40-hour mediation course. Hence, it is up to Collaborative professionals who wish to consistently work in the Goldilocks Zone to pursue their own ongoing learning and skill-building.

Collaborative Teams

The research shows that integrative negotiation yields superior substantive outcomes for clients. It also shows that the advantages can quickly disappear if a negotiator (client or professional) compromises too easily or does not assert what is important.

For Collaborative Practice, which is at essence a team process, each member of the team holds a responsibility to whether that superior outcome can be achieved. If a professional team member lacks the skill to work in or towards the Goldilocks Zone, the process will tend to deteriorate for the clients and the professionals, due to resulting increased levels of contention and decreased quality of substantive outcome.

Collaborative Practice has the benefit of a disqualification provision, which helps incentivize all to work in or towards the Goldilocks Zone, and to incentivize professionals to help each other achieve negotiations at the highest level.

⁸ These skills cannot be taught in an introductory Collaborative training and are often not taught or discussed in introductory negotiation and dispute resolution courses of the type required by IACP Standards.