

Key Questions Revisited By Successful Negotiators

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How do you assess your risks and potential rewards?

How do you think your counter-party assesses its risks and potential rewards?

How do you think your counter-party thinks that you assess both your and its respective risks and potential rewards?

These questions should be asked and answered by each party at the outset of negotiations and then at critical junctures. Admittedly, the questions may not have clear or ready answers—especially at the outset. Indeed, the process of posing and answering these questions is inherently probabilistic and dynamic since communications between parties as well as other factors should change assessments, and, thus, answers to the questions over time.

Culture, history of prior negotiations or prior conduct, and other subjective influences provide background and context for parties' perceptions. Moreover, a party may attempt to affect the perceptions of its counter-party through the offers it makes and the negotiating devices it employs such as imposing deadlines, making take it or leave it offers, making high-low offers, or threatening to walk away – all of which may either be genuine or ploys to affect perceptions or to test positions of the counter-party.

The process of answering the key questions helps each party pierce the fog of negotiations, bearing in mind that the answers are usually subject to significant uncertainty. An effective mediator should also ask him or herself the key questions in order to increase insight into the actions and expectations of each participating party. Indeed, if there is a mediator, a party should try to answer questions concerning the perceptions of its counter-party through communication with the mediator especially when, due to the mediation process, direct communication with counter-parties may be unavailable. The mediator may not necessarily provide as much information as might be desired due to the need to maintain confidentiality to encourage the parties to be candid with the mediator. However, posing probing questions is important for focusing discussions.

Perhaps to over-simplify, the parties are more likely to reach agreement when their respective subjective perceptions of each party's risks and rewards converge. Assuming that an objective assessment of each party's risks and rewards is possible, the convergence of perceptions is more likely to occur when perceptions are congruent with reality. However, an objective assessment may itself be in the eye of the beholder which is an important reason for the parties to use a mediator or other means of seeking neutral evaluation. But mediators are human and may be susceptible to subjectivity for any number of reasons, including such basic ones as acquiescing to one party's better advocacy or a subjective investment in the mediation process itself. A focus on answering the key questions helps to mitigate this subjectivity.

The operational application of the key questions becomes more complex when multiple parties are involved and when participants may not be principals. Complexity also increases when externalities beyond the control of the parties can affect their assessments. Examples

of externalities might include an interim judicial ruling in litigation or a change in a party's government in international negotiations. The potentiality for these externalities may affect assessments of risk and reward, but their actual occurrence often results in real consequences.

Clearly, many negotiations are not confrontational and may increase value for both parties. Moreover, even confrontational negotiations may not be purely zero sum. Assessments of parties' interests – both specific and general – are important for exploring areas of cooperation and devising innovative solutions. General interests might, for example, include a party having a portfolio of confrontational interests which, on the one hand, might enable hedging across the portfolio but, on the other hand, may create a need to establish or maintain precedent. Identification of relevant general or strategic interests can lead to the supersession of more specific confrontational interests. The process of answering the key questions helps to reveal the potentiality for mutuality.

The focus resulting from continually revisiting the key questions in a dynamic context does not detract from helpful negotiation constructs such as each party considering its best alternative to a negotiated agreement. Rather the focus seeks to achieve the best or optimum negotiation result upon which a comparison may be made to the best alternative. This is especially important when the best alternative may not be static and may itself be subject to risk in effecting it.

Estimates of both the optimum negotiation result and the best alternative result may be subject to variability, both objectively and subjectively. Indeed, the assessments of risk involved with answering the key questions over the course of a negotiation involve not only assessing risk relative to reward in failing to achieve a negotiated outcome but also risk

relative to reward in failing to negotiate an outcome at a particular point in time. Depending upon the costs attendant to failure, resumed negotiations may be materially impacted.

The key questions are common sense based, and good negotiators have no doubt employed them implicitly if not explicitly. For the academically inclined, the questions are grounded in economic game theory and Bayesian statistics, especially the notion of changes in conditional probabilities changing subjective risk assessments.

An interesting example of the key question process occurred in a three party litigation context where Plaintiff A brought a class action against defendant corporations B and C—who each had indemnification claims against the other. B perceived that A probably thought that A had stronger claims against C than against B and that A would likewise think that B had stronger indemnification claims against C than C had against B. So B argued to A that C should be principally responsible to A, and B offered to A only a nominal sum in settlement reflecting B's anticipated defense costs. A did not want to concede B's arguments, and, indeed, asserted that B was jointly and severally liable with C to A demanding that both pay approximately \$6 billion jointly. B rejected A's demand, as did C, and a negotiating stalemate resulted which lasted for some time. Finally, in order to break the stalemate, B told A that B would settle for itself alone by guaranteeing A's future recovery from C in an amount no less than \$1 billion (in effect offering to A a floor for recovery against C). B also told A that under no circumstances would B raise its offer or, alternatively, offer anything else other than a nominal sum. A tested B's resolve, including enlisting a mediator, and after B stood fast, A accepted B's offer of a \$1 billion guarantee.

To reach this result, B assessed its own position in relation to A and C, assessed how A probably assessed A's own position in relation to B and C, and then convinced A of how

strongly B viewed its own strength in relation to A and C. Further, B, in order to “sell” a \$1 billion guarantee not only had to assess *a priori* how A assessed A’s risks and potential rewards in recovering from C but also how A would perceive how the guarantee itself would affect and change assessments of risks and potential rewards—the guarantee would provide not only a recovery floor for A but also leverage for A against C since C would perceive that the floor hedged A’s downside risk in trying the case to judgment against C. Lastly, B perceived that A’s assessments of risk and reward would be influenced by B’s very willingness to guarantee \$1 billion. Indeed, and vitally important, A’s assessments—especially with respect to the guarantee—coalesced with B’s, enabling A and B to reach a settlement which each recognized to be favorable to them, breaking the log jam.

The process of asking and answering the key questions—albeit with considerable uncertainty—facilitated this negotiated outcome for A and B. Admittedly, the process was partially implicit, and generally it is, since good negotiators have usually employed intuition far more than explicit inferential analysis. However, when negotiators employ and revisit the key questions explicitly, they mitigate differences in intuitive negotiating ability and leave less to chance.

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