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Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics and Tricks

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[Summary: This article addresses two long standing issues in negotiations. First, what choices should we make to be effective? This article offers a schema for classifying the choices into one of three categories and in so doing, classifies choices based on likely benefits and degree of risk when fashioning an effective negotiation style. The second question is how to distinguish between *negotiation* style, the subject of this article, and our natural *conflict style.* By highlighting the distinction between how we want to negotiate (negotiation style) and how we naturally negotiate (conflict style), this article offers a way to become the negotiator we want to be.**]**

This article considers the most basic question in any negotiation: what strategic choices should we make to be effective? And there are many choices to make like: Should we tell the other side what we really want or stay mum regarding our true interests? Should we be nice or nasty; tell the truth or lie; hide unfavorable information or be forthright? These questions and others hover over us as we decide how to be effective.[2] As negotiators, we must make choices, and the choices we make determine our style of negotiation along a continuum from problem-solving at one end to adversarial at the other end.

This article offers a framework for classifying possible choices according to their effect on the other side and success of the negotiation. Each choice falls into one of three categories of good practices, tactics and tricks (GTT), and each category highlights the benefits and risks of the choice.

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[2] *See infra* Part 4 for answers to these questions. For one long list of possible choices for negotiators, *see* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 170-203 (7th ed. 2012).

This tripartite framework (GTT Framework) for assessing our choices applies to any negotiation approach we may prefer, whether a positional or adversarial approach, a principled or problem-solving approach, or some other approach. By overlaying this framework on our preferred negotiation approach, it illuminates the implications of our choices, as will be illustrated in Part 1 on Negotiation Style.[3]

As this GTT framework is introduced in this article, you should keep in mind that the value of the Framework does not depend on classifying each choice correctly. As with many classification systems, the boundaries of each category can be murky and debatable, and for negotiations, the boundaries can be further influenced by the negotiation context as will be examined. Instead, the value of the framework is how it promotes a thoughtful and informed assessment of each choice when fashioning an effective negotiation style.

Negotiation vs Conflict Style

Negotiation style, the subject of this article, describes how we want to negotiate (who we want to be). It reflects conscious, deliberate choices among alternatives.[4]

Negotiation style needs to be distinguished from a facially similar label called *conflict* style, which sometimes can be used interchangeably with *negotiation* style. *Conflict* style refers to our default behavior that negotiators are frequently asked to ascertain in negotiation training programs by taking short, self-administered surveys (see Part 3). It describes how we naturally negotiate (who we are). We might be more comfortable avoiding conflicts or compromising, for instance, than being competitive. *Conflict* style is a product of our personal and family experiences, cultural upbringing, local practices, genetics, and personality.[5] It describes our instinctive reactions to conflict. Our *conflict* style can influence the choices we make when fashioning our *negotiation* style, which will be considered toward the end including how to productively manage this interconnection (see Part 3).

A key benefit of the distinction between negotiation and conflict style is how it induces us to make informed choices. Rather than reflexly adopting our conflict style as our negotiation style

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[3] Let me emphasize that this framework does not offer a separate or new model of negotiations. It applies to any negotiation model.

[4] Of course, when a negotiator is representing a client, "who we want to be" can be effected by a client's preferences. This framework offers a basis for discussing with a client the choices that might be more effective for the client.

[5] G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE, 12 (2d ed. 2006). As more fully explained by Professor Shell, "These inclinations [labels "conflicts styles" as "personal bargaining styles"] can come from many sources—childhood, family, early professional experiences, mentors, ethical systems or beliefs, and so on. And your inclinations can change over time as your knowledge of negotiation grows and you gain more confidence in a wide range of skills. But I genuinely believe that most of us have a set of core personality traits that make radical changes in our basic negotiation preferences difficult."). *Id.*

or automatically following local negotiation practices, the GTT Framework, clarified by the negotiation and conflict style distinction, promotes making choices that that will be effective for the personal, business, professional, or other context in which we are negotiating.

1. Negotiation Style

Countless books offer instruction on how to negotiate effectively. They include classic books by academic luminaries such as Roger Fisher and William Ury, Howard Raiffa, David Lax and James Sebenius, Richard Shell, and Robert Mnookin.[6] They also include popular press versions with such tantalizing titles as "You Can Negotiate Anything," "Guerrilla Negotiating," "Never Make the First Offer," and "Secrets of Power Negotiating".[7] In this article, I lump together the choices in these books under one heading, *negotiation style*, and further divide style into good practices, tactics, and tricks. The utility of this tripartite framework for analysis depends on understanding the contours of each category and the opportunities and risks afforded by the choices within each category.

a. Good Practices, including Justifications

Good practices, as you might expect by the label, can be unconditionally used, with ample rewards and negligible risk. They will likely produce the best negotiated results. They include asserting your interests in way that will not be exploited rather than your positions, advancing rational and principled justifications to persuade the other side, and engaging in reasonable information exchanges. They include acting ethically and fairly. They also include building rapport and trust, and using effective communication techniques such as summarizing, paraphrasing, framing, and questioning. Good practices can include using objective standards and generating options. These negotiation techniques can be safely and routinely used because they pose no inherent risk of harm other than in the limited circumstances suggested at the end of this section. Widely used books and articles like *Getting to Yes*,[8] *Beyond Winning*[9], a *Bargaining for Advantage*[10] and *Toward Another View of Legal Negotiations*[11] promote good practices as

[6] Howard Raiffa, THE ART AND SCIENCE OF NEGOTIATION (1982); David A. Lax & James K. Sebenius, THE MANAGER AS NEGOTIATOR-BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986); Roger Fisher et al., GETTING TO YES – NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991); Robert H. Mnookin et al., BEYOND WINNING-NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000); Shell, *supra* note 5.

[7] Herb Cohen, YOU CAN NEGOTIATE ANYTHING (1982); Jay Conrad Levinson et al., GUERRILLA NEGOTIATING-UNCONVENTIONAL WEAPONS AND TACTICS TO GET WHAT YOU WANT (1983); Roger Dawson, SECRETS OF POWER NEGOTIATING (2d. ed. 1987); Donald Dell & John Boswell, NEVER MAKE THE FIRST OFFER (EXCEPT WHEN YOU SHOULD) -WISDOM FROM A MASTER DEALMAKER (2009).

[8] FISHER ET AL., *supra* note 6.

[9] MNOOKIN ET AL., *supra* note 6.

[10] SHELL, *supra* note 5.

[11] Carie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-solving*, 31 UCLA L. REV.754, 754-842 (1984).

defined in this article.[12]

The opposite of a good practice is not automatically a bad one, however. If we do not advocate for our interests or build rapport, for example, we are not necessarily engaging in a bad practice. We are depriving ourselves of the benefits of a good practice, unless the good practice is being used against us, as discussed below. Also, not using a good practice, like justifications, and instead making inflated claims, may be an effective tactic as will be discussed in the next section—and not necessarily a bad one.

Here are several illustrations of good practices at work:
We may support a claim based on rational explanations and objective standards—what I might suggest as the best of the good practices. The use of justifications and standards can be an effective way to steer a positional negotiation toward a reasoned discussion. We may cultivate a hospitable environment for settlement by establishing rapport with the other side through connections unrelated to the dispute. We might promote the exchange of information by listening actively, including reacting empathetically and asking open and closed questions. And, we might act ethically in order to create trust that can lubricate the negotiations.

For example, we might say our highest priority is to restructure the business relationship so long as it will be profitable to do so. After sharing our primary interest, we might ask an open question inquiring about their primary interests. Another illustration might be to acknowledge that the other side may not agree with our interpretation of the law, and that our different views may need to be resolved by the court. We are implicitly recognizing legal risks and suggesting relying on an objective standard-an independent judicial determination. Then we might ask what legal risks the other side thinks they are facing. These good practices are designed to steer the discussion toward parties' priorities and merits of the legal case.

Good Practices Exploited by Other Side
We should not employ good practices blindly, however. During the heat of a negotiation, we need to spot when our good practices are being used against us. We want to avoid being lured by a negotiator who may appear to be engaging in good practices when they are trying to exploit our good practices. For example, we might present explanations to cultivate a rational, reciprocal discussion, but if our effort is failing because we think the other side is using the pretense of a rational discussion to delay the negotiations, we need to test the other side. We might propose a deadline by which the information gathering should be completed for example and see what happens. Figuring out whether a good practice is being exploited can be challenging. We need to find a way to test whether the other side's response is a good practice or possibly a tactic or trick as considered in the next two sections.

Nevertheless, I dare suggest that some good practices, such as ethical behavior or rapport

[12] *See also*, HAROLD ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM SOLVER, 25-26, 44-45 (2013).

building, should be *unconditional*. Regardless of the other side's behavior, we are likely to come out ahead for clients by establishing a reputation as an ethical and approachable negotiator.

In short, good practices are primarily safe and efficacious ones. However, when crossing over to tactics or tricks in the next two sections, we are selecting moves with risks that a negotiator should ponder and appraise. In three widely used books that promote negotiations based on good practices, the authors include lists of "Dirty Tricks," "hard bargaining tactics," and "A Rogue's Gallery of Tactics."[13] These lists comingle low and high-risk techniques that should be considered separately by classifying each technique as either a tactic or a trick.

b. Tactics

Tactics are moves that negotiators conventionally use, not because they are good practices with no risks but because they reflect customary ones with risks that can be effective. Tactics are so widely used that parties expect to encounter them. Making extreme first offers and denigrating the other side's arguments are common examples. These practices are generally accepted ones that can offer advantages if they are done convincingly. Because they are generally acceptable or at least tolerable, if discovered they do not severely undermine relationships or the negotiation process.

Acceptable tactics have been recognized by the ABA Professional Model Code when it labeled as negotiation conventions particular practices and exempted them from the bar against false statements of material fact. For example, the Code views as puffery and not a code violation the misrepresentation of a walkaway point by a negotiator.[14]

Although not everyone may agree which moves are tactics, some common ones can be confidently identified. Here are a few more examples:

•Making inflated or deflated proposals to anchor the other side toward an upper or lower range.
•Exaggerating a bottom line by using various techniques such as conveying misleading clues and shading information to influence the other side's perception of your bottom line.
•Disclosing or withholding selective information to strengthen the appearance of a legal case, the BATNA (Best Alternative to a Negotiated Agreement).[15]
•Threatening to leave the negotiation when the person does not plan to leave.
•Asserting a false demand for something unimportant, and then giving it up in return for something important.
•Exploiting the reciprocity norm (variation of a false demand) by making an unimportant concession to manipulate the other side into making a concession. A negotiator might make several demands, including a false one, and then concede the false demand. The false concession may spur the other side to make a concession.

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[13] FISHER ET AL., *supra* note 6, at 129-43; MNOOKIN ET AL., *supra* note 6, at 24-25; SHELL, *supra* note 5, at 223-27.

[14] Model Rules of Profl' Conduct r. 4.1 cmt. 2. (Am. Bar Ass'n 2016); ABRAMSON, *supra* note 12, at 319-26.

[15] FISHER ET AL., *supra* note 6.

Tactics pose risks

The degree of risk posed by using a tactic depends on the particular tactic, of course. Presenting modestly inflated initial offers and trying to anchor the other side are standard moves with benefits and only limited risks of harm when discovered. If uncovered, an inflated offer may be viewed as simply irritating. Other tactics can pose a higher risk of harm if discovered. For example, even though aggressively belittling the other side or walking out of a negotiation and later returning may not be unusual tactics, the moves promote an adversarial tone and pose a higher risk of corroding trust, impairing the relationship, and hindering progress. When considering a higher risk tactic, we should be sure to weigh its benefits against the risk of harm if discovered.

Spotting tactics by others

Tactics can be difficult to decipher when used by the other side because the move can appear to be a good practice. The other side's declaration that its counter-offer is her bottom line might be a sincere statement, or designed to mislead us to extract a concession. The other side's threat to leave can be a sincere act of frustration or a pretense to pressure us into making a concession. If it were easy to recognize tactics, tactics would be ineffective. Once aware of a tactic, the object of the tactic usually can avoid being manipulated by it. When the target believes that the other side's demand is grossly inflated to anchor the target's view of the settlement value, for example, the target can reduce the effect by independently assessing the claim, as negotiators ought to routinely do anyhow.[16]

c. Tricks

Tricks, by definition, are not good practices or conventionally accepted ones. They are viewed by the other side as innately adversarial and repugnant; they can be viewed as unethical. For these reasons, they are highly risky. When done convincingly and undiscovered, however, they can produce positive and sometimes spectacular results-which make tricks tempting. Unlike tactics, tricks, if discovered, can severely damage if not destroy the negotiation process. Negotiation tricks can include lying about material facts, partnering as a team to perform good guy-bad guy roles, and arriving purposely without sufficient settlement authority.

This category for tricks should not be viewed as one that legitimizes their use. It does not. But their use in practice and especially the temptation to use them to gain advantage and possibly a "jackpot" ought to be addressed in any framework on negotiation choices. In several leading negotiation books, the authors when acknowledging and condemning their use warn negotiators to be on alert and offer advice on how to respond—all valuable information.[17] This article takes a

[16] The other side can try to manipulate you by employing an elaborate tactic. The other side might try to anchor you with a high demand in the pleadings in order to make other offers appear favorable. If the pleadings set forth a claim for a million dollars and their first offer is $750,000, for example, you may experience their move as a substantial concession even though you may have thought the amount in the pleadings was a preposterous number. After some discussion, the other side may bid against themselves by dropping the demand by $50,000 and asking for $700,000, a still unreasonable offer. However, these declining offers in reference to the high initial anchor may induce you to reciprocate with a concession even when the offers have been purposeful unreasonable.

different approach. It confronts the temptation to use tricks and gives negotiators a principled and pragmatic method for assessing whether to do so. This analytical approach that highlights the high risks should discourage their use. If a negotiator still chooses to use a trick, it will done after making an informed choice based on the risks.

Here are several possible tricks[18] although whether each one will be viewed as a trick by the other side can depend on context, culture and experience of the other side, as considered in the section on "Avoid Mistaken Tricks":
•Lie about a Material Fact—when seeking damages for lost profits in a breach of contract dispute involving non-delivery of goods, a plaintiff misrepresents that she had offers for the re-sale of the goods that the defendant did not timely deliver. Such a misrepresentation would violate Rule 4.1 of the ABA Professional Code of Conduct on truth telling.
•Insufficient Settlement Authority—a lawyer claims he cannot accept the offer because it is more than his client has authority to accept and pay. The client arrived purposely with insufficient settlement authority in order to pressure the other side to concede within an unreasonable settlement range. This trick might breach a local rule that requires the negotiator to appear with settlement authority, unless he can demonstrate that the level of authority was sufficient for the amount in dispute.
•Irrevocable Commitments—a party makes a unilateral commitment that effectively removes an issue from the negotiation. A franchisor in a termination dispute, for example, might replace a franchisee while the dispute is unresolved so that the franchisee knows that the franchisor will not agree to retaining an exclusive arrangement with the original franchisee because of the commitment to the new franchisee.
•Misleading through Intentional Ambiguities—a negotiator makes purposefully vague statements that give him wiggle room to get out of an apparent commitment.
•Good Guy/Bad Guy Scheme—one side works as a negotiation team whereby one member performs the role of the good guy to psychologically assert pressure to settle by apologizing and protecting the victim (other side) from the hostile treatment of the other team member, who performs the role of the bad guy. In appreciation for the protection, the victim can feel inclined to concede.

Tricks pose high risks
If a negotiator is considering using a technique that might be viewed as a trick, the negotiator should pause and carefully weigh the risks. Although tricks, like tactics, offer the possibility of advantages, tricks can impose greater harm on the negotiation process than tactics when discovered. Tricks can severely undermine the other side's trust in the negotiator and poison the relationship. The other side learns to suspect whatever the negotiator does and guard against future manipulations. Tricks can motivate the victim to try undoing the deal and finding ways to retaliate.

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[17] *See* FISHER ET AL., *supra* note 6, at 129-43; MNOOKIN ET AL., *supra* note 6, at 24-25, 90, 147-48, 211-23; SHELL, *supra* note 5, at 217-27.

[18] *See* sources cited *supra* note 13.

The more adversarial the negotiation becomes due to the use of perceived tricks, the greater the risk of impasse because adversarial moves can cut off communications, obstruct a reasoned discussion, and alienate the other side. Tricks along with adversarial tactics can induce parties to focus on protective measures and revenge rather than on problem-solving and probing for inventive solutions.

Avoid mistaken tricks

We should guard against a move we intend as a tactic from being interpreted by the other side as a trick. What we intend is secondary; what the other side believes is primary. Whether a move will be viewed as a tactic or trick can be difficult to predict even though the core difference between the two is clear: tricks are not acceptable when discovered; tactics can be. I have found that predicting whether a move will be viewed as a trick is more difficult than predicting whether a move will be viewed as a tactic. Whether the move will be regarded as a trick may depend on the life experiences and sensibilities of the other side as well as the context and culture of the negotiation. Some people may consider a good guy-bad guy ploy as a tactic based on their experiences and sensibilities while others may see the ploy as a trick. The same person may view insufficient settlement authority as a tactic in a dispute involving an insured claim, but as a trick when it happens in a business-to-business contract dispute. An inflated first offer of 90% above a reasonable settlement amount might be viewed as a tactic in some cultures and a trick in other cultures.

We can try to gauge whether our move will be experienced as a tactic or trick by asking ourselves two questions: How would we react if we were the target of the move? How do we think the other side would react if they discovered our true intentions?

When gauging how a move might be viewed, we should keep in mind that a move is likely to be viewed more negatively by the target than by the actor, due to a combination of the actor-observer bias and the target's attribution bias.[19] When assessing our move, we may be influenced by an actor-observer bias that favors seeing what we do as justified by the "situation" due to external factors that are beyond our control. We are less likely than the other side to see our move as one based on our own "disposition" to trick the other side (unless of course that is our premeditated plan.) In contrast, the other side may interpret the move differently due to a fundamental attribution error. The other side may see our move as one motivated by our "disposition," not justified by the situation. In this clash of biases, there is a risk that our belief that our move is a good practice or common tactic might be viewed by the other side as a trick.

For example, if we show up with limited settlement authority, which we think is reasonable based on the circumstances of the case (legal risks), the other side might see the choice as dispositional and a trick. Or, when we are convinced that if the case does not settle today, we will file for bankruptcy and the other side will get nothing, the other side may see it differently. Due to the influence of the attribution bias, the other side may view our assertion as one based on

[19] Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 298-301 (2006).

our disposition to trick them into settling now and not trust the statement or us. When the target views the move as one based on the actor's personal disposition rather than reasonable justifications or for reasons out of the actor's control, the target is likely to view the move as a trick, get angry, and try to retaliate.

One way to guard against the other side mistakenly perceiving a tactic as a trick would be to pose the two questions to a friend or even better, a person with different sensibilities than your own. Or, better yet, try to find someone with sensibilities similar to the other side if the sensibilities are known or find someone who knows the sensibilities of the other side. We can test how the other side might perceive the move by asking this third party: How would you (third party) react if you were the target of the move? How do you think the other side would react if they discovered my true intentions? If the third party perceives the move like appearing with limited but not patently insufficient settlement authority as one that would likely anger the other side and severely hurt or derail the negotiations if discovered, it will probably be perceived as a trick by the other side and should be avoided, unless you intend to use a trick with its accompanying risks.

Tricks with power

Not all discovered tricks impede significantly or destroy a negotiation, even though the use of tricks can render the duplicitous negotiator untrustworthy. If the other negotiator plays the good guy/bad guy ploy or lies about a material fact in violation of professional conduct rules, the target still may want the employment opportunity or to purchase the land parcel, for example. Or she cannot afford to wait to get a better outcome at trial, or has a weak legal case if she goes to trial. In short, the target as a weak BATNA.

I might call this the Frank Underwood exception. When watching the *House of Cards*,[20] I kept asking myself how could the main character, Frank Underwood, when Congressional Whip, Vice President, and then President, employ tricks and get away with them (spoiler alert). He lied, destroyed careers, and even murdered political enemies. People still negotiated with him because he could give them something they wanted. Few people trusted him but they had to deal with him, and he knew that and exploited that power advantage.

The relatively greater bargaining power of a negotiator can position him to use tricks with impunity. Because of this superior power, a negotiator can be tempted to operate at the tactics and tricks end of the continuum, especially if he does not care about his reputation and healthy relationships. Negotiators, however, ought to take a long view and resist claiming short-term advantages. Negotiators should weigh the costs and possible time-limited gains if the adversarial strategies trigger angry rejection of proposals or retaliatory actions by the other side. Even Frank Underwood faced retaliation and revenge as others plotted Underwood's political demise. Real

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[20] *House of Cards* (Netflix television broadcast Feb. 1, 2013). (*House of Cards* is an American political television series created for and shown on the streaming service Netflix. After the season premier, the television series finished its fourth season in 2016).

life examples have been reported when Presidents Clinton and Trump threatened to take away federal economic benefits from the states of targeted US Senators if the Senators voted against their proposals. The threats were viewed as crossing the line from acceptable tactics to offensive tricks to secure votes, and each target rejected the threats and ultimately engaged in retaliatory actions.[21] Negotiators also should consider the empirical evidence on the overall effectiveness of good practices over tricks described in the next section on optimum negotiator styles.

Spotting and responding to tricks by others

Tricks by others can be difficult to recognize because like tactics, they can be masked by good practices. The other side might claim a lack of settlement authority due to unexpectedly reaching a settlement limit when the other side might have purposely arrived with limited authority as a tactic or severely limited authority as a trick. The other side may appear to employ the good practice of replying to questions during the information sharing stage when she might be using this façade to prolong the negotiation, as a tactic, or to hide a misrepresentation, as a trick. The other side may appear to be engaging in the good practice of listening in order for our client to feel heard, when he is actually going through the pretense and not hearing anything, as a tactic, or distorting what is heard by trying to embarrass or ridicule our client, as a trick. Even a hard-bargaining move like a "take or leave it" proposal or an exploding offer (that expires in a short-time period) can be presented as a good practice if it can be justified when in fact the move could be a tactic if supported by puffery or a trick if the ploy is being used to distract us from uncovering information about the value of the claim.

The other side's conviction that it's behavior is a good practice can make it easier to conceal tricks, just as a convincing move can conceal tactics. If it were easy to recognize tricks, they would be ineffective and would lose their power to manipulate. Negotiators need to be vigilant and adeptly test whether an apparent good practice is a tactic or trick in order to guard against becoming a victim. *Getting to Yes* includes a chapter with the pithy title "What if they use Dirty Tricks? (Taming the Hard Bargainer)" with a sampling of ways to test the other side.[22] For example, rather than risk being tricked by a misrepresentation, set a norm for independent verification of key facts. In order to avoid the psychological pressure of a good-guy/bad-guy ruse, the target can change the dynamic by requesting a rational justification for their offer.

As this discussion on spotting and responding to tricks illustrates, these three categories offer a framework for classifying and responding to the other side's negotiation moves. The label we

[21] President Clinton apparently threatened to take away federal benefits from the state of a US Senator from his party when the Senator did not support the President's economic plan, and President Trump apparently made a similar threat to a US Senator from his party when she did not support the health care reforms. *See* Carl Hulse, *Lessons for Trump: Hardball Against Senators is a Game He can Lose*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/us/politics/presidents-trump-senators.html?mcubz=3; James Hohmann, *The Daily 202: Trump's hardball tactics backfire as 'skinny repeal' goes down*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/07/28/daily-202-trump-s-hardball-tactics-backfire-as-skinny-repeal-goes-down/597a7cf630fb045fdaef0fd5/?utm_term=.eb24d481cf5a.

[22] FISHER, ET AL., *supra* note 6, at 129-43.

attach can guide our response. If the other side engages in good practices like focusing on interests, presenting justifications, or realistically assessing legal risks, we should respond similarly, for example. But if the other side engages in a tactic like threating to leave or trick like withholding information, we should react with a suitable response to negate it. We might ignore the threat tactic as just noise and respond to the withholding trick by seeking judicial involvement to compel disclosure (and to send the message that tricks will not be tolerated.)

Conclusion on GTT Framework: Applies to any negotiation approach
During the final edits of this article, I realized that I needed to address a question relevant to experienced teachers and practitioners: Is the GTT Framework a replacement or supplement to the way we currently negotiate? I had to address this question when recommending teaching the GTT Framework in a negotiation course at the US Air Force Academy.[23] The negotiation course director, Major Carman Leone, kept probing how the framework related to what he already knew and teaches. He had studied the *Getting to Yes* principled negotiation model, and based on this approach, participated in a Harvard training program and taught negotiations under the tutelage of other like-minded negotiation teachers. I realized that his inquiries were relevant to anyone with experience teaching or negotiating. The answer is that the GTT Framework serves as a supplement, not a replacement, that dovetails with any negotiation approach.

The choices within a person's preferred approach can be classified as a good practices, tactic, or trick. In accordance with the principled negotiation approach, for instance, identifying interests and creating options are good practices. Within a positional model, the choice to make an extreme first offer is a tactic or to lie about a material fact is a trick. And the resulting mix of good practices, tactics and tricks produce the style of negotiation.

Even though this article explains how to apply this framework to any negotiation approach, this article ultimately rejects the use of tricks and endorses the problem-solving approach as the one that is most likely to be effective, as explained in the next section.

2. Optimum Negotiation Style

Negotiation style matters because our style affects our effectiveness in negotiations. In Andrea Schneider's landmark study on negotiation styles, she "… found that problem-solving behavior is perceived as highly effective."[24] The statistics were stark: "…. 90% of lawyers perceived as

[23] During the 2017-2018 academic year, I was asked to help the US Air Force Academy build a negotiation program suitable for officers in the military. I am spending the year at the Academy as a distinguished visiting professor. Major Leone, as the negotiation course director, and I are collaborating on developing the next iteration of the basic negotiation course.

[24] Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style,* HARV. NEGOT. L. REV. 143, 143-233 (2002).

ineffective were also adversarial. In contrast, 91% of lawyers seen as effective took a problem-solving approach to negotiation..."[25]

The study described the styles of problem-solving and adversarial negotiators by using descriptors that fit the good practices, tactics, and tricks distinctions.

Problem-solving Style

In Schneider's description, problem-solvers conform to good practices. Problem-solvers are ethical, trustworthy, and fair-minded. They are prepared, flexible, realistic, and understand their client's interests. They are interested in the other side's needs. They also are assertive while remaining ethical and staying within the bounds of the law. They do not use familiar tactics and tricks. They "do not make unfair representations, use haranguing or offensive tactics, make threats, or advance unwanted claims"[26] Their highest goals are to conduct themselves ethically, maximize settlement, achieve a fair settlement, and meet both sides' interests.[27]

Adversarial Style

In contrast, her descriptions of adversarial negotiators align with tricks and adversarial tactics, although some behavior appeared non-strategic. Adversarial behavior, like being arrogant and egotistical, for instance, may be the product of the negotiator's personality rather than a strategy.

In the study, adversarial negotiators as a group were assertive, inflexible, and self-centered. They were not concerned with the other side's needs and can be classically adversarial in that they were "rigid, aggressive, and starting off high (made extreme opening demand and unrealistic initial position.)."[28]

Within the group of adversarial negotiators, the particular practices selected can make a negotiator more or less effective than other adversarial negotiators.

The study found that the "ineffective adversarial bargainer is perceived as engaging in all sorts of tactics that his effective [adversarial] peers do not."[29] Less effective adversarial negotiators can be hostile and start with unrealistic initial positions, be rigid, and refuse to move. They can inaccurately estimate the value of their case. They can view the case narrowly, fix on a single solution, and make take it-or-leave-it offers. They can be unreasonable, uncooperative, and view negotiations as a win/lose proposition.[30]

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[25] *Id*. at 167.

[26] *Id*. at 165.

[27] *Id*. at 163-66.

[28] *Id*.

[29] *Id*. at 168.

[30] Schneider, *Shattering Negotiation Myths*, at 177-79.

The study also found that unethical adversarial negotiators are less effective than ethical adversarial ones.[31] Unethical negotiators were described as insincere, devious, dishonest, and distrustful. They also used manipulative strategies like advancing unwarranted claims. In contrast, ethical negotiations were not pinned with such suspect labels as manipulative, conniving, deceptive, or evasive. The statistical results were revealing: "Seventy-five percent of the unethical adversarial group is considered ineffective. Only… 2.5% were considered effective. In comparison,…. [f]orty percent of ethical adversarials were ineffective, 44% were average, and 16% were effective." Although these ethical effectiveness percentages are much lower than for problem-solving negotiators, they were still "notably better than the unethical adversarial bargainers."[32]

The lessons for the adversarial lawyer is clear when selecting among good practices, tactics, and tricks. If the adversarial lawyer avoids the more extreme adversarial behavior, adopts some less adversarial practices, and incorporates some key good practices like rational discussions and ethical behavior, he will be perceived as a more effective adversarial negotiator than other adversarial negotiators.

Schneider compared her results with the landmark study done earlier by Gerald Williams and his colleagues[33] and came to a sobering observation relevant to negotiators inclined toward the tactics and tricks end of the continuum: "[A]dversarial attorneys have become more extreme and less effective in the last twenty-five years."[34]

Schneider concluded her study with: "When lawyers are able to maximize their problem-solving skills balancing assertiveness and empathy, they are more effective on behalf of their clients. They are able to enlarge the pie through creativity and flexibility. They are able to understand the other side with listening and perceptiveness. They argue well for their clients with confidence, poise, and zealous representation. In short, these lawyers set the standard to which other lawyers and law students should aspire."[35]

Let me briefly illustrate how negotiation choices can vary along a problem-solving to adversarial continuum. With a problem-solving negotiation style, we might present an offer based on a rational justification, with only limited use of tactics like inflating the offer. We might ask for

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[31] *Id*. at 179-84.

[32] *Id*. at 182 (For a description of behaviors associated with unethical adversarial negotiators, see Table. They are perceived as rigid, arrogant, unreasonable, and insincere. They make extreme first offers and inflict needless harm).

[33] GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 15-46 (3rd ed. 1983).

[34] Schneider, *Shattering Negotiation Myths*, at 189. (Changes in effectiveness of adversarial bargainer between the two studies are striking. Adversarial negotiators were 25% effective in the Williams study and 9 % effective in the Schneider study. They were 33% ineffective in the Williams study and 53% ineffective in the Schneider study.).

[35] *Id*. at 197.

$80,000 in damages based on the projected lost sales due to the delivery of defective products even though we might be willing to settle for $70,000. By citing projected lost sales, we have provided a rationale for our offer. If we move toward the adversarial end of tactics and tricks, we might belligerently demand $100,000 today without justifying the level of damages, along with a threat to file a suit in court with the aim of bankrupting the other side and embarrassing them publicly.

In any negotiation, we ought to select a mix of techniques that we think will yield the most effective style, realizing that a problem-solving one has been shown to be usually more effective than an adversarial one.

3. Negotiation Style Influenced by Conflict Styles

Because our *negotiation* style can be influenced by our personal *conflict* style, as mentioned at the outset of this article, we need to be aware of our *conflict* style. Then, we can assess whether we should modify (or possibly overcome) our conflict style when fashioning our negotiation style. Understanding how our conflict style might influence our negotiation style begins with figuring out our conflict style.

We can identify our conflict style by using one of several excellent self-assessment instruments. These instruments are widely used when teaching negotiation skills in order to help us understand how we naturally deal with conflict as well as how others might deal with conflict.[36] Each instrument poses questions that require the respondent to choose between two behavioral responses or rate on a scale how the respondent would react to a particular situation. The respondent is usually given a context for answering the questions like the context of a legal negotiation or a personal family conflict, because answers can vary based on context. Each choice is facially equally desirable and each question is facially neutral. Each choice and question tries to avoid signally socially desirable behavior. This careful phrasing is designed to reduce the "socially desirability response bias" so that it is difficult for the respondent to figure out how to manipulate the results to reflect how he sees himself or how he wants to be seen.

The inquiries and conflict style labels can vary among the assessment instruments, although the label definitions are similar among the instruments. The most popular instruments used in the dispute resolution field are the Thomas-Kilmann Instrument (TKI), Kraybill Conflict Style Inventory, and the more recent DYNAD conflict styles test.[37]

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[36] RALPH H. KILLMAN & KENNETH W. THOMAS, DEVELOPING A FORCED-CHOICE MEASURE OF CONFLICT-HANDLING BEHAVIOR: THE "MODE" INSTRUMENT 309-325 (1977); SHELL, *supra* note 5, at 242-43; Ralph H. Kilmann, *Celebrating 40 Years with the TKI Assessment-A Summary of My Favorite Insights*, (2009), https:// www.cpp.com/PDFs/Author_Insights_April_2011.pdf ; Andrea K. Schneider & Jennifer Gerarda Brown, *Negotiation Barometry: A Dynamic Measure of Conflict Management Style*, 28 OHIO ST. J. OF DISP. RESOL. 557, 557-80 (2013).

[37] SHELL, *supra* note 5, at 8-15; Kilmann, *supra* note 36; RONALD S. KRAYBILL, STYLE MATTERS: THE KRAYBILL CONFLICT STYLE INVENTORY, 11 (2011); Schneider & Brown, *supra* note 36.

The widely used TKI labels classify conflicts styles into five categories[38]:

Collaborating[39]
Collaborators are both highly assertive and highly cooperative (highly empathetic). They advocate for their interests while building relationships across the table, including inviting various views and learning about the needs of others. Collaborators can relish challenging problems and the process of negotiating. They can be creative and try to shape the so-called win-win solutions. Collaborating is the closest conflict style to one of the two primary negotiation styles, problem solving. This style receives much praise in the negotiation literature and instruction. The drawbacks of this conflict style include collaborators taking a lot of time and becoming overly focused on process and problem analysis that can exhaust others. They can transform simple problems into more interesting complex ones. To others, they can appear stubborn and unreasonable, and especially irritating to people who prefer closure.

Competing[40]
Competitors are highly assertive, with low cooperativeness (low empathy) and concern for relationships. They make strong, partisan arguments, are firm, like to take charge, and have little interest in input from others. The competitive negotiator also enjoys negotiating, and when doing so, wants to win. The competitive conflict style is closest to the other primary negotiation style, known as adversarial. This style can be hard on relationships, undermine trust across the table, and impact negatively on future dealings.

Compromising
Compromisers are moderately assertive and moderately cooperative (moderately empathetic). They primarily focus on making the deal, which can be done by meeting halfway. Splitting the difference is a desirable resolution, and they favor objective standards when possible. They can be cooperative and act quickly and fairly. When overused, the style can result in mediocre, unprincipled and suboptimal resolutions where no one is really happy. Compromisers can move too quickly, ask too few questions, and adopt the first fair standard rather than the best one. They also can patch over the problem while leaving unaddressed underlying symptoms and causes.

Accommodating[41]

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[38] These definitions are a blend from various sources. *See* sources cited *supra* note 37.

[39] KRAYBILL, *supra* note 37. *(*Kraybill uses the label of "cooperating.").

[40] KRAYBILL, *supra* note 37. (Kraybill uses the label of "directing.").

[41] KRAYBILL, *supra* note 37. (Kraybill uses the label of "harmonizing").

Accommodators are highly cooperative (highly empathetic) with a priority on developing and preserving relationships, while at the low end of assertiveness. They are agreeable, "reasonable," and want to placate the other side, at least in the short run. They are flexible, easy to work with, and have good relationship-building skills that can include being sensitive to the emotional needs and body and verbal signals of others. They can convince themselves that the conflict is no big deal. Their orientation can be "I lose/you win." When overused, the style can frustrate others who want to collaborate and jointly problem-solve. For the accommodator, the style risks causing personal resentment, depression, stunted growth, and dependency on others. The accommodator can be highly vulnerable to competitors.

Avoiding
Avoiders are both the least assertive and least cooperative (least empathetic). Avoiders, as you would expect, defer and dodge conflicts; they are conflict averse. They give little attention to relationships by withdrawing or delaying responses and suppressing personal emotions. They can employ a range of conflict-reducing methods like applying clear rules and resorting to formal decision-making authority over the give-and-take of negotiating. They also can avoid face-to-face negotiations by relying on emails, memos, and intermediaries. Avoiders can appear to others as tactful and diplomatic and can help dysfunctional groups operate better. When overused, however, an avoiding style can let conflicts fester and contribute to a bottleneck, because the avoider evades necessary interpersonal interactions. For the avoider, benefits can include freedom from entanglement in trivial issues or insignificant relationships while maintaining stability and status quo. But there are personal costs. Avoiders can sporadically explode due to pent-up anger, stagnate, and experience diminished energy. Avoiding can lead to no relationship or the slow death of one. And the avoider can miss out on opportunities that otherwise might be available if he would just ask.

By understanding our *conflict* style, we can be attentive to its influence on our *negotiation* style in order to avoid our *conflict* style leading us toward sub-optimal results. If we know that "compromising" is our *conflict* style, for example, this insight can guide us in selecting suitable moves. We might offset our inclination to prematurely split the difference by slowing down the negotiation pace and selecting the best objective standards instead of the first facially fair one. If we tend to "avoid" conflicts or "accommodate" to preserve relationships, we might compensate for our conflict style by conscientiously advocating our interests or client's interests, a good negotiation practice, instead of settling for what might be comfortable to do.

When we are aware of various *conflict* styles, we also are more likely to recognize conflict styles of others that can guide us in selecting our responses.

For example, if the other person has a take-charge, competitive conflict style, we might use good active listening skills including suitable questions to lead the person toward the issues we want to discuss, while reducing the risk of a contest over who is controlling the direction of the negotiation. If the other side insists that his issue gets addressed first, we might agree on the condition that our issue is considered next.

If we think the other person has a compromising style, we ought to act reasonably and fairly, and with a degree of efficiency—all values that compromisers subscribe to, when trying to influence and persuade the other person. We may want to highlight how our proposal gives up something based on the principle of reciprocity and why the proposal is fair to both parties.

If the other side has an avoiding conflict style, we may need to move slowly to give the other person time and space to deal with the issues in the negotiation. We also might educate the other side about the interests of our client in a way that gets the attention of an avoiding person. Of course, if the other person is avoiding an issue as a tactic and competitive move to wear us down, we should adopt a different response. We might file a motion to dismiss if tenable to create a deadline, for example.

Neither our conflict style nor their conflict style should monopolize the negotiations. Instead, we should consider which conflict styles are at play when selecting the moves that shape our style for negotiating.

4. Apply to Introductory Negotiation Questions

Based on the GTT Framework, let's return to the questions at the beginning of the article and consider how each one might be answered. Because any analysis depends on the context of the question, these suggestions rely on a few additional facts.

Should we tell the other side what we really want or stay mum regarding our true interests?
It usually is a good practice to share our interests. But to meet the test of a practice with minimal risks, we should share information in a way that reduces the risk of the other side using the information to our disadvantage. For example, if we would like to continue a business relationship, we might indicate that we are open to continuing the relationship on mutually beneficial terms. The conditional statement signals our interest while reducing our vulnerability. Although staying mum might be a conventional tactic that can protect us from the risk of the other side exploiting our interest in a continuing relationship, withholding the information risks the negotiation moving away from meeting our interests. Based on this assessment, I would want to find a way to safely share my interests.

Should we be nice or nasty?
It usually is a good practice to be nice (respectful, good listener, cooperative, etc.) with negligible risks when we also assert our interests. Acting nasty would be a tactic possibly designed to put pressure on the other side to settle and in so doing, poses the risk of undermining the negotiation if the other side reacts negatively. Based on this assessment, I think the benefits of being "nice" would outweigh the benefits and risks of being "nasty."

tell the truth or lie?
It usually is a good practice to be ethical and tell the truth. The ABA professional code generally bars making material misrepresentations (with exceptions). If we were to lie that our client lost several customers due to late deliveries in a claim for damages, we would be making a material misrepresentation that would be a trick, and if not discovered, would produce a substantial

monetary benefit. Like any trick, discovery by the other side poses a high risk of derailing the negotiation and future dealings. Based on this assessment, my professional obligation in conjunction with the overall benefits of an ethical reputation, I would not make a material misrepresentation.

hide unfavorable information or be forthright (to earn credibility points)?
It is usually a tactic to hide unfavorable information like a damaging document that would show that we knew about a non-life-threatening product defect in a product liability case, assuming we did not have a legal obligation to disclose the information. Even though the lack of disclosure can undermine trust if discovered, non-voluntary disclosure would likely be viewed as a negotiation tactic because it is a conventional choice with moderate risks. It offers an advantage to the party who can settle before the other side completes discovery (legal process for compelling giving information to other side). However, disclosing a legal weakness that will become known when discovery is completed also would be a tactic. Even though disclosure might enhance the credibility of other representations as a benefit, it also would hurt by increasing the settlement value of the case for the other side. Based on this assessment, I think many people would conclude that the benefits of the tactic to withhold the information outweigh the benefits of the tactic to disclose.

Conclusion

As a negotiator, we have choices to make. This tripartite schema of good practices, tactics and tricks provides a method for assessing and selecting among options. Although the illustrations in the prior section show one way to apply the tripartite schema, the schema's ultimate value is not correctly classifying each choice. The value of this method is the analysis it promotes.

Even though many if not most negotiation instructors and trainers teach a negotiation approach based on good practices with some measured tactics, they are likely to acknowledge that a range of tactics and tricks can be used in practice and even condemn their use. This article offers a framework for assessing the benefits and risks of any choice we are contemplating when forging a negotiation style that is likely to be effective.