

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

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This Article addresses two longstanding negotiation questions. 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. Second, what distinguishes 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 aspire to be.

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I. INTRODUCTION

This Article considers the most basic question in any negotiation: what strategic choices make us effective? There are many choices to make, for example: 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. 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: good practices, tactics, or tricks (“GTT”). Each category highlights the benefits and risks of the choice.

This tripartite framework (“GTT Framework” or “Framework”) for assessing our choices applies to any negotiation approach we may prefer, whether positional or adversarial, principled or problem-solving, or some other approach. By overlaying this Framework on our preferred negotiation approach, it illuminates the implications of our choices.

As the GTT Framework is introduced in this Article, you should keep in mind that 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 within

negotiations, the boundaries can be further influenced by the context. Instead, the value of the Framework is how it promotes a thoughtful and informed assessment of each choice to fashion an effective negotiation style.

A. *Negotiation Style vs. Conflict Style*

Negotiation style, the subject of this Article, describes how we want to negotiate (who we want to be). It reflects the conscious, deliberate choices we make among possible moves and techniques during a negotiation.¹

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 Section III). It describes how we naturally negotiate (who we are). For instance, we might be more comfortable avoiding conflicts or compromising than being competitive. *Conflict style* is a product of our personal and family experiences, cultural upbringing, local practices, genetics, and personality.² 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 Section III).

A key benefit of the distinction between *negotiation style* and *conflict style* is how it induces us to make informed choices. Rather than reflexively adopting our *conflict style* as our *negotiation style* 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. Of course, when a negotiator is representing a client, “who we want to be” can be affected 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.

2. 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.

II. NEGOTIATION STYLE

Countless books offer instruction on how to negotiate effectively. They include classics by academic luminaries such as Roger Fisher and William Ury, Howard Raiffa, David Lax and James Sebenius, Richard Shell, and Robert Mnookin.³ The books also include popular press versions with such tantalizing titles as “You Can Negotiate Anything,” “Guerrilla Negotiating,” and “Secrets of Power Negotiating.”⁴ 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 GTT Framework. 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

Good practices are ones that are unconditionally used, with ample rewards and negligible risk. They will likely produce the best negotiated results. They include a range of practices familiar to anyone who views themselves as principled, interest-based, or problem-solving negotiators:

Asserting Interests—Advocating in the negotiation to meet the interests of both sides, instead of asserting that particular positions or solutions be adopted by the other side;

Presenting Rational Explanations—Supporting conclusions with explanations instead of simply asserting, for example, that you have a strong legal case;

Acting Ethically and Trustworthily—Engaging in practices that are consistent with ethical practices and norms, like acting with integrity and being reliable;

Using Active Listening Skills to Build Rapport and Cultivate Information Exchange—Engaging in good listening like summarizing, being empathic and posing open questions;

3. See generally 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 2.

4. See generally 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).

Using Objective Standards—Employing objective standards to reconcile apparent differences. Rather than simply offering a three-percent pay increase, for example, citing objective data like low inflation index to justify the low percentage increase; and

Generating Options—Focusing on brainstorming and assessing options based on meeting interests.

These negotiation techniques and other good practices 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 negotiation books and articles such as *Getting to Yes*,⁵ *Beyond Winning*,⁶ *Bargaining for Advantage*,⁷ and *Toward Another View of Legal Negotiations*,⁸ promote the use of good practices as defined in this article.⁹

However, the opposite of a good practice is not automatically a bad one. For example, if we do not advocate for our interests or build rapport, although we may be depriving ourselves of the benefits of a good practice, we are still not necessarily engaging in a bad practice that will likely hurt the negotiations. We are merely depriving ourselves of the benefits of a good practice, unless the good practice is being used against us, as discussed below. Moreover, not using a good practice, such as justifications, and instead making an inflated first offer may in fact be an effective tactic and not necessarily a bad one, as will be discussed in the next Section.

i. *Good Practices at Work*

Two of the good practices mentioned above, supporting a claim based on rational explanations and using objective standards, can be an effective way to steer a positional negotiation toward a reasoned discussion. For example, in an intellectual property dispute, we might 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 in the form of a determination by an independent judge. Then we might ask what legal risks

5. See FISHER ET AL., *supra* note 3.

6. See MNOOKIN ET AL., *supra* note 3.

7. See SHELL, *supra* note 2.

8. See Carie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984).

9. See HAROLD ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM SOLVER* 25–26, 44–45 (2013).

the other side thinks they are facing. These good practices are designed to highlight the alternative to settlement while steering the discussion toward a substantive consideration of the legal merits.

We may cultivate a hospitable environment for settlement by establishing rapport with the other side and promoting an exchange of information by listening actively, including reacting empathetically and asking open questions. Then, we may go to the next steps to brainstorm and assess options with the other side. We might conclude in a contract dispute, for example, that our highest priority is to restructure the business relationship with the other side so long as it would be profitable to do so. After engaging in active listening to build rapport, learning the other side's perspective on what went wrong under the contract, and gaining some trust by demonstrating an understanding of their perspective, we may then ask open questions designed to promote brainstorming of options. We might ask to list possible options if we were to terminate the business relationship and then ask to generate a list of options around restructuring the relationship. After reviewing and refining the two lists, we could invite both sides to jointly assess the options and, through this process, we can learn whether there are any mutually profitable opportunities to restructure the relationship.

ii. *Good Practices Exploited by the Other Side*

We should not employ good practices blindly. There are limited occasions when they may need to be suspended or further calibrated.

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 in fact trying to exploit our good practices. For example, in an employment dispute, an employee might explain specifically how he thought he met the performance standards in order to cultivate a rational, reciprocal discussion. But if that effort is failing because the employee thinks the employer is using the pretense of a rational discussion to merely delay the negotiations, the employee needs to test whether the rational-sounding exchanges are based on good faith. The employee might propose a deadline by which the information gathering should be completed and observe what happens. While figuring out whether a good practice is being exploited can be challenging, the next two Sections will discuss how to fashion a methodology to test whether the other side's response is a good practice or in fact a tactic or trick.

Although most negotiation strategies entail quid pro quo, nevertheless, this Article suggests that some good practices, such as ethical behavior or rapport 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 discuss tactics or tricks in the next two Sections, we will be selecting moves that involve 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,"¹⁰ "Hard Bargaining Tactics,"¹¹ and "A Rogue's Gallery of Tactics."¹² These lists comingle both low and high-risk techniques that should be considered individually by classifying each technique as either a tactic or a trick. This classification will be done in the next two Sections.

B. *Tactics*

Tactics are moves that negotiators conventionally use, not because they are good practices with no risk of harm to the negotiation, but because they reflect customary practices with risks that can still be effective. Tactics are so widely used that parties frequently 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, they do not severely undermine relationships or the negotiation process even if discovered.

Acceptable tactics have been recognized by the ABA Professional Model Code ("Code") when it labeled particular practices as negotiation conventions and exempted them from the bar against false statements of material fact. For example, the Code views the misrepresentation of a walkaway point by a negotiator as puffery and not a code violation.¹³

Although not everyone may agree on which moves are tactics, some common ones can be confidently identified:

10. FISHER ET AL., *supra* note 3, at 129–43.

11. MNOOKIN ET AL., *supra* note 3, at 24–25.

12. SHELL, *supra* note 2, at 22–27.

13. MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 2016); ABRAMSON, *supra* note 9, at 322–25.

Exaggerate Proposals—Making inflated or deflated proposals to anchor the other side toward an upper or lower range. This is probably the most common tactic that is employed when negotiating over a price such as making offers and counteroffers for buying a car, house, or business equipment;

Distort Bottom Line—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;

Manipulate Information—Disclosing or withholding selective information to strengthen the appearance of a legal case, the BATNA (Best Alternative to a Negotiated Agreement), in order to improve the bargaining position in the negotiation;¹⁴

Threats—Threatening to leave the negotiation when not planning to leave;

False Demands—Asserting a false demand for something unimportant, and then giving it up in return for something important; and

Exploiting the Reciprocity Norm—Exploiting the reciprocity norm by making an unimportant concession to manipulate the other side into making a concession. This is a variation of a false demand in which a negotiator might make several demands, including a false one, and then concede the false demand. The false concession may then spur the other side to make a reciprocal concession.

i. *Degree of Risks Posed by Tactics*

The degree of risk posed by using a tactic depends on the nature of the particular tactic involved. For example, presenting modestly-inflated initial offers and trying to anchor the other side are standard moves with defined benefits and only limited risks of harm if discovered.¹⁵ The discovery of an opposing party's inflated offer may be viewed simply as irritating because it falls at the less adversarial end of a continuum of tactical practices. Other tactics, however, can pose a higher risk of harm if discovered. Aggressively belittling the opposing offeror, acting insulted by the offer, and walking out of a negotiation and later returning, while perhaps not unusual tactics, promote an adversarial tone and pose a higher risk of corroding trust, impairing the relationship, and ultimately hindering progress. When considering using any tactic, and especially a higher-risk, more adversarial one, a negotiator should weigh its benefits against the risk of harm if discovered.

14. FISHER ET AL., *supra* note 3, at 97–106.

15. *Id.* at 4.

ii. *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. On the one hand, the other side's declaration that its counter-offer is its bottom line might be a sincere statement, or conversely, it could be designed to mislead the other party to extract a concession. The opposing party's threat to leave can be a sincere act of frustration or a pretense to pressure the other party into making a concession. Indeed, if it were an easy feat to recognize tactics, they would be ineffective. Once a party is aware of a tactic, he or she 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 through legal research that demonstrates the value is overstated, a practice that negotiators should routinely engage in regardless of negotiation strategy.¹⁶

C. *Tricks*

Tricks, by definition, are not good practices or conventionally accepted ones.¹⁷ They are viewed by the other side as innately adversarial and repugnant; they can be viewed as unethical.¹⁸ Negotiation tricks can include lying about material facts,¹⁹ partnering as a team to perform good-guy/bad-guy roles, and arriving purposely without sufficient settlement authority. Tricks in negotiations are not always objective; they can be viewed as tricks by the target based on the target's subjective perspective. Unlike tactics, tricks, if discovered, can severely damage if not destroy the negotiation process. Yet, when done convincingly and skillfully, they can produce positive and sometimes spectacular results, which can make this behavior tempting.

16. —One side can try to manipulate the other by employing an elaborate tactic. The other side might try to anchor the other party with a high demand in the initial pleadings in order to later make other offers appear favorable. For example, if the pleadings set forth a claim for a million dollars and their subsequent first offer is \$750,000, the other party may still perceive that move as a substantial concession even though it 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. These declining offers in reference to the high initial anchor may induce the opposing party to reciprocate with a concession even when the offers have been purposefully unreasonable.

17. FISHER ET AL., *supra* note 3, at 131–45; MNOOKIN ET AL., *supra* note 3, at 24–25; SHELL, *supra* note 2, at 223–27.

18. See MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 2016).

19. *Id.*

This category for tricks should not be viewed as one that legitimizes their use. It does not. Nevertheless, a discussion of 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 that tricks are used and condemning them, warn negotiators to be on alert and offer advice on how to respond to such deceptive practices.²⁰ This Article takes a different approach. It confronts the temptation to use tricks and gives negotiators a principled and pragmatic method for assessing whether to employ them. This analytical approach that highlights the high risks should discourage their use. If a negotiator still chooses to use a trick, it will be done after making an informed choice based on the risks.

Keeping in mind that whether a move will be considered by the other side as a trick can depend on context, culture, and experience of the party, the following are examples of several possible tricks:²¹

Lying about a Material Fact—Misrepresenting a material fact to the other side. For example, when seeking damages for lost profits in a breach of contract dispute involving non-delivery of goods, a plaintiff misrepresents the loss opportunity to re-sell the goods. She claims she lost profits because she did not receive the goods to re-sell to buyers who were ready to buy them. There were no buyers. Such a misrepresentation would violate the ABA Professional Code of Conduct on truth telling;²²

Insufficient Settlement Authority—Arriving to the negotiation with purposely insufficient settlement authority for the likely settlement range of the dispute. A lawyer claims he cannot accept the offer because it is more than his client has authority to accept and pay. The lawyer purposely arrived with insufficient settlement authority so that he can make the claim in order to pressure the other side to concede within an unreasonable settlement range. This trick might breach a local rule²³ 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—Making a unilateral commitment that effectively removes an issue from the negotiation. A franchisor

20. See FISHER ET AL., *supra* note 3, at 129–43; MNOOKIN ET AL., *supra* note 3, at 24–25, 90, 147–48, 211–23; SHELL, *supra* note 2, at 217–27.

21. See sources cited *supra* note 3.

22. MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 2016).

23. See ABRAMSON, *supra* note 9, at 329–35.

who is terminating an agreement with a franchisee, for example, might enter into an agreement with a new franchisee to replace the original one while the original franchisee is trying to restore the franchise agreement. He may have replaced the franchisee while the litigation is pending in order to convince the original franchisee that the franchisor will not agree to retaining an exclusive arrangement with the original franchisee;

Misleading through Intentional Ambiguities—Making purposefully vague statements that give the negotiator wiggle room to get out of an apparent commitment; and

Good-Guy/Bad-Guy Scheme—Teaming up on one side whereby one member of the team 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 may feel inclined to concede.

i. *Tricks Pose High Risks*

If a negotiator is considering using a technique that might be viewed as a trick, they 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.²⁴ Tricks can severely undermine the other side's trust in the negotiator and poison the relationship.²⁵ 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.

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.²⁶ 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.

ii. *Avoid Using Tricks by Mistake*

A negotiator should guard against a move that they 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

24. See *id.*, at 27–28, 44–46.

25. See *id.*

26. See *id.*

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, while 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 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 percent 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: (1) How would we react if we were the target of the move? (2) 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 our move is likely to be viewed more negatively by the target than by us as the actor, due to a combination of the actor-observer bias and the target's attribution bias.²⁷ When assessing our move, we may be influenced by an actor-observer bias²⁸ 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 our move differently due to a fundamental attribution error. An attribution error occurs when the other side sees our move as one motivated by our "disposition," (inclination to do something bad) and not one justified by the circumstances.²⁹ Our choice to make an inflated first offer may be motivated by the conventional practice to start a negotiation, for example, but the other side may think our choice is further evidence that we cannot be trusted because the offer was not justified due to fundamental attribution error. In this clash of biases, there is a risk that our belief that our

27. See Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 298–301 (2006).

28. See *id.*

29. See *id.*

move is a good practice or common tactic might be viewed by the other side as a trick.

As another example, if we show up with limited settlement authority, which we think is reasonable based on the circumstances of the case, the other side might see the choice as dispositional and a trick due to the attribution error. Or, when we are convinced that our financial circumstance is so dire that if we do not settle this liability issue today, we will need to file for bankruptcy and the other side will get nothing, the other side may see our situation differently. Due to the influence of the attribution bias, the other side may think that our assertion is based on a disposition to trick them into settling now under the threat of bankruptcy and getting nothing and therefore 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, leave the negotiation, and might try to retaliate.

One way to guard against the other side mistakenly perceiving a tactic as a trick would be to ask a friend or even better, a person with different sensibilities than your own whether that person would view the tactic we are contemplating to be a trick. Or, better yet, try to find someone with sensibilities similar to the other side if their sensibilities are known or find someone who knows the sensibilities of the other side and test the tactic with that person. If the other person perceives a 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. Then it should be avoided, unless we intend to use a trick with its accompanying risks.

iii. *Temptation to Use Tricks when Little Bargaining Power*

When we have little bargaining power, we can be tempted to use tricks; we have little to lose. We also can be tempted to use tricks when the other side has little power and a great need to bargain with us. This section considers why we can be tempted and why not to succumb.

When we have limited bargaining power, a successful trick, like a bluff, may advance our interests. If discovered by the other side, even though the trick might severely damage the negotiations, the result may be no worse than one that reflects our weak bargaining position. For example, if we threaten to go to court to embarrass the other side in an effort to press for a favorable settlement, we may

succeed. However, if we buckle the last minute, we may be no worse off than if we did not bluff subject to the risks highlighted in the last paragraph of this section.

When we have the greater bargaining power and use a trick, its successful use also may advance our interests. If discovered, it may not even hurt the negotiations although its use can make us less trustworthy. If we employ the good-guy/bad-guy ploy or lie about a material fact in violation of professional conduct rules, the target still may want the employment opportunity or to purchase the land parcel. Or she may still proceed with the negotiation because she cannot afford to wait to get a better outcome at trial, or has a weak legal case if she goes to trial.

Because our limited or superior bargaining power can position us to use tricks with impunity, we can be tempted to operate toward the tricks end of the continuum, if we do not care about our reputation and relationships.³⁰ We, however, ought to take a long view and resist claiming short-term advantages. We should weigh the costs and possible time-limited gains if the tricks or adversarial tactics destroy any trust for the rest of the current negotiations or for any future dealings or trigger retaliatory actions by the other side. Real life examples have been reported when Presidents Clinton and Trump threatened to take away federal economic benefits from the states of targeted U.S. Senators if the Senators voted against the Administration's proposals.³¹ The threats were viewed as crossing the line from

30. For any fans of the House of Cards, this exception when the negotiator has greater bargaining power might be called the Frank Underwood exception to the use of tricks. When watching House of Cards, 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? He lied, destroyed careers, and even murdered political enemies. People still negotiated with him because he could give them something they needed. Few people trusted him but they had to deal with him, and he knew that and exploited that power advantage. Most of the show illustrates the risks as many of his victims tried aggressively to retaliate. (House of Cards, a Netflix television broadcast that began Feb. 1, 2013, is an American political television series created for and shown on the streaming service Netflix.)

31. 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/597a7cf630fb045fdaf0fd5/?utm_term=.eb24d481cf5a.

acceptable tactics to offensive tricks to secure votes, and each target rejected the threats and ultimately engaged in retaliatory actions.³² When tempted to use tricks, we also should consider the empirical evidence on the overall effectiveness of good practices over tricks.³³

iv. *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 it lacks settlement authority because the negotiation unexpectedly reached the limit of the authority given by its supervisor who is out of the office. In fact, 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 using the information to embarrass or ridicule our client, as a trick. Even a hard bargaining move like a “take it 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 their 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.³⁴ For example, rather than risk being tricked by a misrepresentation, set a norm for independent verification of key facts.³⁵ In order to avoid the psychological pressure of a good-guy/

32. *See id.*

33. *See infra* Section III.

34. FISHER, ET AL., *supra* note 3, at 129–43.

35. *Id.* at 132–33.

bad-guy ruse, the target can change the dynamic by requesting a rational justification for their offer.³⁶

As this discussion on spotting and responding to tricks illustrates, these three categories of Good Practices, Tactics and Tricks offer a Framework for classifying and responding to the other side's negotiation moves. The label we attach to the negotiation move 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 threatening to leave or a trick like withholding information, we should react with a suitable response to negate it. We might ignore the threat tactic as just noise and see what happens and respond to the withholding trick by seeking judicial involvement to compel disclosure and to send the message that tricks will not be tolerated.

D. *GTT Framework: A Supplement To Any Negotiation Approach*

Is the GTT Framework a replacement or supplement to the way we currently negotiate? This is a question relevant to any experienced practitioner or negotiation teacher. I realized that I had to address this question when I recommended teaching the GTT Framework in a Fall 2017 negotiation course at the US Air Force Academy.³⁷ The negotiation course director, Major Carman Leone, responded with probing questions on how the Framework related to what he already knew and how he teaches interest-based negotiations.³⁸ His questions helped me formulate both the question and the answer. For experienced negotiators, the GTT Framework serves as a supplement, not a replacement, that dovetails with any negotiation approach.

36. *Id.* at 136.

37. 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 developing the next iteration of the basic negotiation course, including a website for use by other negotiation teachers in the military.

38. Major Leone had studied the *Getting to Yes* interest-based negotiation model, participated in a training program at the Harvard Negotiation Institute, and taught negotiations under the tutelage of other like-minded negotiation teachers.

The choices within our preferred approach can be classified as a good practice, tactic, or trick. In accordance with the principled negotiation approach, for instance, identifying interests and creating options are good practices. Within a positional model,³⁹ the choice to make an inflated 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 produces our negotiation style.

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.

III. AN EFFECTIVE NEGOTIATION STYLE

Negotiation style matters because our style affects our effectiveness in negotiations. In Andrea Schneider's highly-regarded study on negotiation styles, she "found that problem-solving behavior is perceived as highly effective."⁴⁰ The statistics were stark: "90% of lawyers [who were] perceived as ineffective were also adversarial. In contrast, 91% of lawyers seen as effective took a problem-solving approach to negotiation . . ."⁴¹ Schneider's study compares the style of problem-solving with the adversarial style by using descriptors of each style that fit the good practices, tactics, and tricks distinctions.

A. *Problem-solving Style*

In Schneider's description of problem-solvers, she identified negotiation practices that fall within the definition of good practices in this Article. She noted that problem-solvers are ethical, trustworthy, and fair-minded.⁴² They are prepared, flexible, realistic, and understand their client's interests.⁴³ They are interested in the other side's needs.⁴⁴ They also are assertive while remaining ethical and staying within the bounds of the law.⁴⁵ The ones that are perceived to be more effective do not employ the sort of practices that are labelled in

39. Positional model entails parties exchanging offers and counteroffers along with employing possible good practices, tactics, or tricks to support the offers and counteroffers. Through these exchanges parties move toward a resolution. See ABRAMSON, *supra* note 9, at 30–52.

40. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).

41. *Id.* at 167.

42. *Id.* at 164.

43. *Id.*

44. *Id.* at 163–64.

45. *Id.* at 164.

this Article as tactics and tricks. They “do not make unfair representations, use haranguing or offensive tactics, make threats, or advance unwanted claims”⁴⁶ The highest goals of the problem-solvers are to conduct themselves ethically, maximize settlement, achieve a fair settlement, and meet both sides’ interests.⁴⁷

B. *Adversarial Style*

In contrast, Schneider’s description of negotiation practices that she labeled as adversarial align with tricks and adversarial tactics,⁴⁸ 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.⁴⁹

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 were classically adversarial in that they were “rigid, aggressive, and starting off high (made extreme opening demand and unrealistic initial position).”⁵⁰

Within the group of adversarial negotiators, the particular practices selected can make a negotiator more or less effective than other adversarial negotiators.⁵¹ The study found that the relatively ineffective adversarial bargainer used techniques that the more effective adversarial negotiator did not.⁵² 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.⁵³

The study also found that unethical adversarial negotiators are less effective than ethical adversarial ones.⁵⁴ Unethical negotiators were described as insincere, devious, dishonest, and distrustful.⁵⁵ They also used manipulative strategies like advancing unwarranted claims.⁵⁶ In contrast, ethical negotiations were not pinned with such

46. *Id.* at 165.

47. *Id.* at 164–66.

48. *See id.*

49. *See infra* Section IV.

50. Schneider, *supra* note 40, at 165.

51. *See id.* at 176–84.

52. *See id.* at 178–79.

53. *See id.* at 179–84.

54. *Id.* at 181.

55. *Id.*

56. *Id.* at 181–83.

suspect labels as manipulative, conniving, deceptive, or evasive.⁵⁷ 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.”⁵⁸

The lessons from these findings for the adversarial lawyer is clear. When the adversarial lawyer is selecting among good practices, tactics, and tricks, the lawyer should avoid the more extreme adversarial behavior, adopt some less adversarial practices, and incorporate some key good practices like rational discussions and ethical behavior. By doing this, the negotiator will be perceived as a more effective adversarial negotiator than other adversarial negotiators.

Schneider compared her results with the well-known similar study done earlier by Gerald Williams and his colleagues⁵⁹ 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.”⁶⁰

C. *Effective Negotiation Style*

At the end of her study, Schneider summarized her conclusion that problem-solving skills are the more effective ones. As highlighted under the Problem-solving Style in this Section, these skills are similar to the good practices favored in the GTT framework. She concluded that:

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

57. *Id.* at 181

58. *Id.* at 184. Unethical adversarial negotiators are perceived as rigid, arrogant, unreasonable, and insincere. They make extreme first offers and inflict needless harm.

59. *See id.* at 148–57, 184–90. Schneider’s study was designed to update the Williams and colleagues study to reflect changes in the negotiation field while learning what negotiation styles and techniques are perceived to be effective at time of the study, as was done for the time of the earlier study.

60. *See id.* 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.

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.⁶¹

This Article will conclude by briefly illustrating 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 \$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 based on good practices has been shown to be usually more effective than an adversarial one based on tactics and tricks.

IV. 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 should be aware of our *conflict style*. Then, we can assess whether we need to modify (or possibly overcome) our default style when forming our *negotiation style*. Understanding how our *conflict style* might influence our *negotiation style* begins with figuring out our *conflict style*.

A. Defining Conflict Styles

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.⁶² Each instrument poses questions that require the respondent to choose between two behavioral responses or rate on a scale

61. *Id.* at 197.

62. See generally Ralph H. Killman & Kenneth W. Thomas, *Developing a Forced-Choice Measure of Conflict-Handling Behavior: The "Mode" Instrument*, 37 *Educ. and Psychological Measurement* 2 (1977); SHELL, *supra* note 2; Ralph H. Killmann, *Celebrating 40 Years with the TKI Assessment-A Summary of My Favorite Insights*, Psychometrics (2009), https://www.cpp.com/PDFs/Author_Insights_April_2011.pdf;

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.⁶³

The widely used TKI labels classify *conflicts styles* into five categories:⁶⁴

*Collaborating*⁶⁵

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 approaches,⁶⁶ problem solving. This approach receives much praise in the negotiation literature and instruction.⁶⁷ The drawbacks of this conflict style include collaborators taking a lot of time and becoming overly focused

Andrea Kupfer Schneider & Jennifer Gerarda Brown, *Negotiation Barometry: A Dynamic Measure of Conflict Management Style*, 28 OHIO ST. J. ON DISP. RESOL. 557, 557–80 (2013).

63. SHELL, *supra* note 2, at 8-15; Kilmann, *supra* note 62; RONALD S. KRAYBILL, STYLE MATTERS: THE KRAYBILL CONFLICT STYLE INVENTORY, 11 (2011); Schneider & Brown, *supra* note 62, at 557 (labelled as the “Dynamic Negotiating Approach Diagnostic,” the assessment tool is designed to try to more accurately capture how styles can change as the conflict becomes more difficult).

64. These definitions are a blend from various sources. See sources cited *supra* note 63.

65. KRAYBILL, *supra* note 63, at 12 (Kraybill uses the label of “cooperating”).

66. See ABRAMSON, *supra* note 9, at 19–96 (compares and contrasts the two primary negotiation approaches, positional and problem-solving).

67. See sources cited *supra* note 3.

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*⁶⁸

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.⁶⁹ This style can be hard on relationships, undermine trust across the table, and impact negatively on future dealings.

*Compromising*⁷⁰

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*⁷¹

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

68. KRAYBILL, *supra* note 63, at 12. (Kraybill uses the label of "directing").

69. See ABRAMSON, *supra* note 9, at 19–96 (compares and contrasts the two primary negotiation approaches, positional and problem-solving).

70. KRAYBILL, *supra* note 63, at 13.

71. *Id.* at 14. (Kraybill uses the label of "harmonizing").

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*⁷²

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 might miss out on opportunities that otherwise might be available if he would just ask.

B. *How Conflict Style Influences Negotiation Style*

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.

72. *Id.* at 13.

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 like summarizing and asking suitable questions⁷³ 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.

V. APPLYING THE GTT FRAMEWORK TO QUESTIONS IN INTRODUCTION

Let us return to the questions in the introduction and consider how each one might be answered based on the GTT Framework. Because any analysis depends on the context of the question, these suggestions rely on a few additional facts.

73. ABRAMSON, *supra* note 9, App. F-Cultivating Information: Attentive and Proactive Listening.

Should we tell the other side what we really want or stay mum regarding our true interests?

It 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 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).⁷⁴ 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.

74. MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 2016); ABRAMSON, *supra* note 9, at 319-26.

Hide unfavorable information or be forthright and 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.

VI. CONCLUSION

Many, if not most, negotiation instructors and trainers teach a negotiation approach based on good practices with some measured tactics while also identifying and critiquing a range of more adversarial tactics and tricks. The benefits and risks of each negotiation choice can be assessed by applying the GTT Framework as illustrated throughout this Article. However, the ultimate value of this tripartite schema is not correctly classifying each choice. The value of this Framework is the analysis of choices it promotes for forging an effective *negotiation style*.