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A Primer on Competitive Bargaining

*Gary Goodpaster**

One cannot understand negotiation without understanding competitive behavior in negotiation. It is not that competing is a good way to negotiate; it may or may not be, depending on the circumstances. Understanding competition in negotiation is important simply because many people do compete when they negotiate, either by choice or happenstance.

The aim of this Article is to explore the competitive bargaining strategy in depth. Because competitive negotiation behavior is common, and sometimes advisable, one must understand it well to master negotiation practice. Knowing how competitors operate enables a negotiator to recognize competitive bargaining when it occurs and to deal with it affirmatively by transforming a competitive negotiation into a cooperative one or defensively by countering competitive moves. Furthermore, even parties who negotiate cooperatively sometimes compete. For example, negotiators may create a win-win situation by cooperating to “increase the size of the pie” to be divided between them. Nonetheless, they still must divide it, and it is when parties must allocate shares or divide gains that they may make competitive moves to secure as much for themselves as they can.

Finally, it is not only important for negotiators to understand competitive bargaining, but third-party neutrals, such as mediators, whose function is to assist parties to reach a negotiated agreement should understand it as well. More often than not, negotiating parties who are unable to reach an agreement on their own fail because their negotiation is adversarial and competitive. The neutral who recognizes the dynamics and knows how to intervene to change them can assist the parties to move toward settlement.

Although the major focus of this article is competitive negotiation, it is essential to review a few matters in order to place competitive bargaining in its proper context. Competitive bargaining is but one of three strategies people adopt to manage negotiation interactions and dynamics and to obtain something from others.

I. BASIC NEGOTIATION STRATEGIES

Negotiation strategies are basic ways of managing power relations, information exchanges, and interactions between the negotiating parties. Although often complex and varied, negotiation and bargaining behaviors generally fit into

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certain recognizable and often predictable patterns and subpatterns — essentially three basic negotiating strategies: competing, compromising, and collaborating or joint problem solving.¹ Not only are there variations on these strategies, but the negotiators' personal styles or ways of playing their strategies can also complicate matters. Nonetheless, understanding the three basic negotiation strategies, their characteristic tactics and techniques, and the ways to package and combine them, will prepare anyone for most negotiations.²

Most negotiators adopt one or more of the three strategies in an effort to reach an agreement. As a negotiation strategy, each of these ways of dealing with others has a different substantive aim, rests on different and usually unarticulated premises or assumptions about human behavior, and uses certain characteristic tactics and techniques to move toward agreement or to resolve disputes or conflicts.

A. Competing

Competitive bargaining, sometimes called hard, distributive, positional, zero-sum or win-lose bargaining, has the purpose of maximizing the competitive bargainer's gain over the gain of those with whom he negotiates. He is, in effect, trying to "come out ahead of", or "do better than", all other parties in the negotiation. For this reason, we sometimes refer to this competitive bargaining strategy as a *domination* strategy, meaning that the competitive bargainer tends to treat negotiations as a kind of contest to win.

The competitive negotiator tends to define success in negotiation rather narrowly. It is simply getting as much as possible for himself: the cheapest price, the most profit, the least cost, the best terms and so on. In its simplest form, this strategy focuses on immediate gain and is not much concerned with the relationship between the negotiating parties. A more complex version of this strategy focuses on long-term gain. This focus usually requires some effort to maintain or further a relationship and usually moderates the competitive, often aggressive, behavior that jeopardizes relationships and possibilities of long-term gain.

1. DEAN G. PRUITT & JEFFREY Z. RUBIN, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 29 (1986).

2. It is helpful to look upon different kinds of negotiations as related, but different, kinds of games. As most games, these are playable at different levels. If you understand which negotiation game you are playing and know how to make the moves appropriate to that game and its level, you basically know how to negotiate. If you know how to transform the particular negotiation game the other side seems to be playing into one you prefer to play, then you know how to negotiate well.

B. *Compromising*

A second negotiation strategy is cooperative-compromise bargaining, sometimes called soft-bargaining, or win-some-lose-some, or give-and-take bargaining. Compromise bargainers believe they must trade off some of what they want in order to get at least something. This means that, in some sense, they concern themselves not only with their own gain, but with that of the parties with whom they are dealing. They may do this out of genuine concern for others' well-being or because they conclude they must give up something to reach any agreement at all. In this sort of bargaining, the negotiator only receives, for whatever reason, some of what is desired.

For cooperators, success in a negotiation is often a combination of how the negotiation feels and what they receive. They want to be reasonable, which means accommodating the other party to a certain degree. If the negotiation involves roughly equivalent compromises on both sides and the final deal is satisfactory or "fair," then the cooperator thinks the negotiation has been successful. This view of success implies some concern for the relationship between the parties. When the parties compromise equally — or at least appear to each other to have done so — they feel treated equally. As long as the result is in the range of what they deem acceptable, they are satisfied. Such equal and fair treatment can reflect a concern for maintaining good relationships and, in any case, does not damage these relationships.

A person can cooperate or compromise as a matter of principle or as a matter of necessity. In the simplified, type-cast images of basic bargaining strategies presented here as introductory sketches, the cooperative bargainer compromises as a matter of principle. By contrast, a competitive bargainer compromises because she has to — there will be no deal if she does not. Consequently, although both cooperative and competitive bargainers may compromise, there are differences in why they do so, how they go about it, and how much they are willing to compromise.

C. *Collaborating or Problem-Solving*

Another important negotiation strategy is collaborating or working together with others to further all parties' interests and aims.³ This kind of bargaining is generally referred to as integrative or problem-solving bargaining, but is also called interest bargaining, positive-sum, or win-win bargaining. In integrative or

3. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problems Solving*, 31 UCLA L. Rev. 754 (1984); Gary Goodpaster, *Rational Decision-making in Problem-Solving Negotiation: Compromise, Interest-Valuation, and Cognitive Error*, 8 OHIO ST. J. ON DISP. RESOL. 299 (1993).

problem-solving bargaining, the parties aim to satisfy their own interests, as well as those of the other negotiating parties. Put another way, they seek to maximize their own gain *and* the gain of the other parties. The parties achieve this aim through a process in which the parties collaborate to discover what mutual action they can take to satisfy their respective interests.

Integrative bargaining is the fullest form of cooperative bargaining: How could one cooperate more than by engaging in joint problem solving with another? The integrative bargainer defines ideal negotiating success as satisfaction of both parties' interests, *without compromise*, if at all possible. The interests the parties seek to satisfy in the negotiation are as many and as broad as they wish to define them. This model, therefore, conceives of negotiation success more broadly than competitive bargaining, which focuses primarily on acquiring the most of anything in contention between the parties. The integrator is not trying to get "the most" or outdo the other side, but is simply trying to further or realize her aims. Unlike compromise bargaining, integrative bargaining treats negotiations as creative opportunities for problem solving that the parties can exploit to serve each of their interests fully so that each benefits as much as possible from the negotiation.

D. Choice Among Bargaining Strategies

Nothing, except perhaps local culture, standard, custom or practice in a particular industry or negotiating arena, requires negotiating parties to negotiate in any particular way. None of these ways of bargaining is *necessarily* "better" than any other way. Most sophisticated practitioners, however, would probably acknowledge that integrative bargaining is the most productive and efficient way to bargain.⁴

The way a party chooses to bargain, assuming a choice is made rather than just jumping in and doing what seems natural or what prior experience suggests, depends very much on the particular aims of a given negotiation. A negotiator's aims will, to a certain degree, depend on the aims of the other party negotiating. Context, circumstances, parties' expectations and personalities, the nature of the parties' interests and the issues between them, and the parties' relative knowledge of bargaining methods deeply shape the choice of bargaining strategy. Nonetheless, negotiators either consciously or unconsciously adopt negotiation aims and methods that conform to one of the foregoing basic forms or some combination of them. Anyone who does much negotiating should be familiar with each strategy, know how to recognize it, how to use it, and how to deal with it.

Some issues and the way the parties define them, as well as some circumstances, appear to dictate particular kinds of bargaining. For example, when each party wants the same indivisible thing, but both cannot have it, or when what one wants apparently conflicts with what the other wants, parties are quite likely

4. LAX & SEBENIUS, *supra* note 3, at 115; HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 148-65 (1982).

to bargain competitively. When, however, the matter in dispute is divisible, the parties anticipate a future relationship, and neither party needs nor desires to dominate, both parties may simply compromise. When the parties have common or complementary interests, such that mutual action will satisfy or enhance their respective interests, they are likely to bargain integratively. These examples, however, do not exhaust the possibilities, and negotiators can transform one kind of bargaining into another.

E. Negotiating Style

Negotiators' personalities and their own characteristic methods of dealing with others also inevitably affect negotiations. Some people are naturally disposed to be competitive, cooperative, or pragmatic and inclined to take a problem-solving approach in dealing with issues. Others acquire one disposition or another through training or experience. Further, individuals often react differently in different contexts or respond differently to different persons. Finally, some persons are self-aware, have some control over their basic dispositions, and can adapt themselves effectively in interactions with different people. Others are pretty much what they are and act much the same way with everyone.

These simple observations imply that a negotiator's basic bargaining strategy can be, but is not necessarily a simple reflection of his or her own personality. A negotiator who is at heart a competitor and is trying to "win" a negotiation by doing better than the other side through extracting more gain than the other side may also have a competitive or aggressive demeanor and, therefore, bargain competitively. Alternatively, the same negotiator could bargain competitively on substance yet affect a cooperative, "reasonable," or non-aggressive bargaining manner if he is aware of and in conscious control of his own behavior. Similarly, one who has a competitive nature can decide that it is in his best interests to be cooperative or collaborative, either in a particular situation or in general. Conversely, there will also be occasions when people who view themselves as compromisers or problem solvers will take a hard line and bargain competitively.

Consequently, while there are three basic ways of negotiating substance, a negotiator's behavioral style can mask or otherwise affect the strategy in actual use. Thus, a competitive negotiator who is reasonable in disposition and demeanor, acts agreeably, and gives the appearance of cooperation may be mistaken as one who is negotiating cooperatively even though he is a hard bargainer on matters of substance. Obviously, one should not mistake style for substance. Although style could reflect strategy, a person's attitude and demeanor in a negotiation is not a sure guide to her basic bargaining strategy.

During the course of a negotiation, any given negotiator may both change demeanor, mix or combine different methods of negotiating, or also use tactics and techniques that appropriately respond to the opposing party's method of negotiating. Negotiations also become more complex as the number of issues and parties involved increase. Adding issues and parties increases the interaction and

tradeoff possibilities and affects the psychological dynamics of the negotiating process.

While there are three basic models of negotiating strategies that can be used to organize our analysis—think, plan and negotiate—there are many permutations and combinations of these three models. The issues, the parties' personal interactions and the dynamics between them, their sophistication, as well as contextual and cultural factors form and shade every negotiation.

II. BASIC NEGOTIATION DYNAMICS

Negotiation is an interactive, dynamic process. The way we interact with others shapes the way they interact with us, and their reactions and responses to us affect our further interactions with them. It is like a game: I make a move; the other player responds with a move; and I respond in turn.

The game metaphor is useful because it captures the fluid, unscripted, contingent character of negotiating. Not only is negotiation like an interactive game, it is also like a game of chess or football involving strategy and tactics. Such games operate on several levels simultaneously. There is what you are actually doing and what the other players think you are doing; what you think the other players are doing and what they are actually doing. There is also your effort to think through what the other players will think you are doing: "If Sam thinks I am doing Y, Sam will do A. If Sam does A, then I will do Z, because Z will help me reach my goal. So I will attempt to get Sam to think I am doing Y." Of course, Sam may be engaging in a similar kind of thinking process. Therefore, you may have to figure out whether Sam is trying to get you to think he is doing one thing while actually doing otherwise. If you conclude he is, you may want him to think that you think he thinks that you think and so on.

Negotiations can be game-like but they are not necessarily games. Negotiators can treat negotiations as games, but need not. They may or may not choose to engage in strategic and tactical calculations. The point to emphasize, however, is that negotiation can be a multi-level process and that the parties' *perceptions* or *appraisals* of what is occurring are deeply important. This is because the parties base their decisions regarding what moves to make and where to settle on their idea of what the other participants want or are willing to do.

A. Simple Bargaining

In simple negotiations, the parties establish the field of negotiation play by staking out initial positions. For example, in the Oriental Rug Bazaar, Mustafa offers to sell me the intricately patterned and colorful Kurdish woven silk rug I've admired for \$2400. I really like the rug, but that is far more money than I want to spend. I respond that I wouldn't pay more than \$1000. If each of us is

agreeable to further dealing on this particular rug, our initial figures establish the range within which we will bargain.

Now, Mustafa and I each are likely to have some figure in mind that we are not willing to go beyond in our bargaining over the rug, our "bottom lines" or "reservation points." Suppose I am not willing to pay more than \$1800 for the rug, and Mustafa is not willing to sell it for less than \$1600. At the beginning of our bargaining, neither of us knows how far the other is willing to go. It is likely that we are both trying to do as well as we can. I am trying to buy the rug as cheaply as possible, while he is attempting to maximize his profit.

Because our initial offers are so far apart, if we are still interested in making a deal for the rug, we must make moves to close the gap. If we are each trying to do as well as we can, we will make attempts to see how far the other is willing to go or concede. In doing so, we will provide each other with information about our willingness to move. Although we may initially remain far apart, the fact that we continue to talk shows that we each remain interested and that there may be some possibility of closing the gap and reaching an agreement on a figure. Once I offer \$1600 or the dealer offers \$1800, we have narrowed our differences to our actual or realistic bargaining range. As our bottom lines overlap, we can make a deal and it will be somewhere between \$1600 and \$1800.

In simple negotiations, each party has some figure or settlement point they would like to attain. While these figures will likely differ between the parties, the difference between them sets the actual range of possible settlement. The parties can find some mutually agreeable settlement point if the parties' actual reservation points overlap within this range and if they continue to bargain by trading offers.

Now, let us take a somewhat more complicated example to see how negotiating parties can manipulate the other's perceptions of their respective willingness to settle at given points. Assume someone is selling a house and has decided she will not accept less than \$425,000 for it. Of course, she would like to get more, and, therefore, offers the house at a higher selling price, say \$450,000. A potential buyer is interested in the house and would pay as much as \$440,000 for it. The buyer, however, would like to pay less. On these assumptions, the parties could settle on a price anywhere in their actual bargaining range of between \$425,000 and \$440,000.

Typically, in negotiations neither party has full information about what the other party is willing to do. Consequently, neither can accurately determine the real bargaining range, at least not without getting information from the other side. As the previous example illustrates, however, neither party is likely to tell the other party its bottom line. If a party knows or could somehow determine the other party's bottom line, that party would be at an advantage in any effort to maximize its gain at the expense of the other party. If the buyer knows the seller would accept \$425,000, then the buyer would offer only \$425,000 and stick firmly to that offer, realizing that at some point, and assuming there is no better offer coming from somewhere else, it would be accepted. Similarly, if the seller knows

that the buyer will pay up to \$440,000 and really wants this house, the seller could refuse to lower the asking price below \$440,000.⁵

Let us assume that the negotiators in this transaction each want to maximize their own gains. In this simple negotiation, they could do this by treating the negotiation as an information game in which the parties trade, or appear to trade, information which each party can use to infer the other party's reservation price. In an information game of this sort, the person who gets the most accurate information about the other party's reservation price while providing the least about its own will win. With such knowledge or good guessing, a party can make his offers at or near the other party's reservation price and persist in them until the other party agrees. Consequently, the seller would seek to get as much information as possible about the buyer's actual reservation price while revealing as little as possible about her own. The seller would also likely attempt to get the buyer to think that her own reservation point is other than it actually is. In this example, the buyer would engage in similar conduct.

Consider how the contest of information trades might now proceed. Seller makes the first move in the information game by presenting an asking price of \$450,000. Because this figure is beyond buyer's reservation price, the buyer does not agree to it. Buyer could offer \$440,000, his reservation price. If the seller's reservation price is below that, however, which buyer presently has no way of knowing, the seller may accept and the buyer will have to pay the excess — in this case, an additional \$15,000. In order to test the firmness of seller's asking price, buyer makes a counteroffer of \$410,000, which is below his own reservation price. The seller could interpret the counteroffer as providing information about how high buyer will go. If she is not firm in her own reservation price of \$425,000 and really believes she could get no more from the buyer, she might accept. Because she really does not believe, however, that the buyer is at his limit, she counteroffers for \$440,000, thereby, indicating that the original asking price of \$450,000 was not her bottom line. This gives the buyer an opportunity to counteroffer and provide more information about his own bottom line.

Assume the counteroffers continue. As long as they do, each party knows the other party has not yet reached its reservation price. Further assume that seller realizes that buyer is trying to determine seller's reservation price, but knows that the buyer only has the information provided by seller's counteroffers. If in response to each of buyer's counteroffers, seller reduces the asking price in

5. Theoretically, if the parties were completely open and forthcoming about providing information, each of them could determine the other side's bottom line. If these figures were disparate, as in the example, say \$425,000 and \$440,000, neither party might be willing to give, but they would prefer to attempt to reach the other side's bottom line, which is better than its own. This might then be a case where full information *hindered* the reaching of an agreement because, hypothetically, each party is equally firm in seeking to realize all the gain possible. This suggests that in some situations in competitive bargaining, a negotiator's uncertainty about the other side's bottom line is what leads to agreement. The negotiator's conclusion or guess that he has gotten about as much as he can get is what prompts him to settle.

increasingly smaller increments, seller will give the appearance of coming close to her reservation price, even if, seller has, in fact, not come close.

Suppose that once buyer offers \$425,000, seller counteroffers with \$439,000 and thereafter lowers the asking price in subsequent, reduced increments. The buyer may, as the seller hopes, read seller's counteroffers as progressively declining concessions, cumulatively pointing to a figure that must be seller's bottom line. In other words, seller's concession behavior creates an appearance that the seller is becoming more firm or rigid and signals that seller cannot be pushed much farther. This, of course, could be true, but in the example seller's real bottom line is \$425,000. Seller is, however, attempting to signal a bottom line of \$435,000 which is actually seller's target price or "aspiration point", as opposed to a reservation price, which is the least amount seller would accept. Treating the negotiation as an information game, seller supplies the buyer with information which will shape the perception or appraisal of seller's actual position. This information, however, is "misleading"; not because it is false, but because the buyer has read it incorrectly, albeit the result of the seller's action to make it likely he would do so. In other words, from the point of view of maximizing the seller's gain, the seller successfully caused the buyer to infer that the bottom line was \$435,000.

In a typical arms-length negotiation, each party tries to determine what the other is willing to do. Because each party is uncertain about the other, perhaps even initially somewhat mistrustful, the parties disclose information about what they are willing to do selectively and incrementally. The parties trade information through offers, counteroffers, concessions, and the arguments and reasons they give supporting them. The supporting arguments and reasons are meant to show that a particular position is firm and to persuade the other side that the party is at his bottom line. As the parties gain this information, they incrementally evaluate it and reassess their own positions in light of it. In other words, the overall process is one of progressive disclosure and closure.

In the interactive and communicative processes of negotiation, negotiators constantly make ongoing evaluations and assessments of one another and make responsive moves or choices based on these. These evaluations and assessments are interpretations of the "evidence" at any given moment. Because this "evidence" is often ambiguous or unclear, interpreting it to draw a conclusion sometimes involves filling in the gaps.

III. NEGOTIATION VARIABLES

The major factors or variables that shape and fix the parties' perceptions during negotiations are power, information, and strategy. These variables are interrelated. For example, the information a party has about the other party's needs may provide some relative bargaining power because the information enables a party to structure proposals based on the other's needs. Similarly, party A can adopt a particular bargaining strategy in order to shape party B's perception of

party A's position. Another way of considering this is to say that by adopting a particular strategy, party A gives party B certain kinds of information from which B may draw certain conclusions about A. The conclusions B draws will affect B's perceptions of A's power.

A. Bargaining Needs and Bargaining Power

Parties enter bargaining relationships because they think they need one another to get something they want. That neediness, of course, varies from situation to situation and ranges from the simplest of wants or desires, that many parties could satisfy, to serious needs or necessities, that only one party or a few parties could satisfy. If I want to buy a new shirt, but do not really need one and do not have anything particular in mind, I can browse many stores and still not buy one. If, however, my business employees are going to strike and I cannot replace them, then I have to deal with them.

These simple examples clarify that a party's need to deal with another confers a kind of power or leverage on the other party. Much of negotiating comprises the parties' efforts to determine just how much and in what respects they each need each other to get what they want. This is much of what negotiation information trades are all about. What the parties are trying to figure is the relative balance of "power" between them. This balance of power is their relative dependence on one another to get something they want and what they will have to pay for it.

The term "power" has unfortunate connotations of force or domination, a party's unilateral ability to have its way. As used in negotiation analysis, however, it is a shorthand term referring to the dependency relationships between the negotiating parties. In negotiation, a party's power is a relational matter and arises from the negotiating parties' dependence on one another to obtain something they want in order to satisfy their respective needs from that particular relationship.⁶ A's power depends on B's need of A to get something B wants and on A's need of B to get something A wants.

For example, if Sally does not need what Harry controls or can provide her or if Sally needs or wants it but has other ways of getting it, she does not need to negotiate with Harry. She is independent rather than dependent. Her independence, assuming that Harry does not have a similar capability of satisfying his wants outside of negotiating with Sally, confers bargaining power on her. Harry's neediness to obtain particular results from Sally increases his dependence on her and decreases his power with respect to her, at least with regard to those particular

6. SAMUEL B. BACHARACH & EDWARD J. LAWLER, *BARGAINING: POWER, TACTICS, AND OUTCOMES* 56 (1981).

outcomes he desires to reach by dealing with her.⁷ Sally has power in her negotiation with Harry if she has at least one reasonably good alternative way to get what she wants outside of settling with him. She also has power over Harry if he does not have a good alternative way of getting what he wants without settling with her.

On the other hand, if Sally is unable to obtain what she wants other than by bargaining with Harry, she is dependent on Harry and has relatively less bargaining power. Similarly, the more specific the items Sally needs to get from Harry, the less her relative bargaining power with him.⁸ She not only lacks alternatives to doing *without* Harry, but also alternatives for dealing *with* Harry.

If Sally needs to sell her house because she has purchased a new one and Harry is the only prospective buyer she has, she has no alternative to dealing with him. If Harry has no particular need for Sally's house, as compared to other houses on the market, he does have alternatives to dealing with her. If Sally has to sell her house immediately, her freedom not to deal with Harry is even more restricted. Under these circumstances, if Sally wants to increase her bargaining power, she needs to find alternative ways to get what she wants without Harry; to be more flexible in what she needs to get from negotiating with him; or to increase Harry's dependence on her. To do this, Sally could find other prospective buyers, come up with a way to relieve the pressure for immediate sale, or induce Harry to want her house above all others available to him.

Thus, bargaining power in negotiation is a relational, relative and changeable matter. It is not possible to say how much bargaining power a negotiator has without considering how much the other negotiator possesses because it is a question of their relative dependency on one another to realize particular outcomes. Furthermore, the parties' dependency on one another is not necessarily fixed or static since the parties can often act to change their dependency.

B. Using Agreement Alternatives

Working with agreement alternatives is an important way to enhance bargaining power and negotiation outcomes. Sally could seek to lessen her dependency on Harry by developing alternative ways of getting what she wants outside of her particular bargaining relationship with him. If she finds another buyer, she may not have to deal with Harry at all. Similarly, she could reduce her commitment to a particular outcome from the bargaining, thereby increasing her power. If she decides she does not have to sell her house immediately, she would

7. Somewhat paradoxically, however, Harry's neediness could turn out to be a source of power for him. Because he needs to obtain particular results, he may expend great effort to achieve them. In other words, neediness motivates and may generate impression management moves that persuade Sally to do what Harry wants, even though in some absolute, objective sense, Sally has greater "real" power. *Id.* at 64.

8. *Id.* at 60.

give herself more time. Finally, although there is no apparent way for her to do so in the house-sale example, she could theoretically seek to worsen Harry's alternatives to dealing without her.

C. Impression Management: Shaping Perceptions to Enhance Bargaining Power

In many negotiations, the parties have only partial or incomplete information, if any, about the alternatives the other party has to satisfy its particular wants. Similarly, parties do not know exactly what the other party's commitment to these other alternatives may be, or what costs the other party may experience in resorting to them. Finally, the parties may not know what standards, criteria or values the other party uses to assess its alternatives.

Consequently, negotiating parties usually do not actually know just how dependent they are on one another. The exact character of their dependence is unclear or ambiguous. In other words, the bargaining parties may not know how much respective or relative bargaining power they have. For this reason, a significant part of the discussion that occurs in negotiation involves the parties' efforts to obtain information that, when added to information they already have in their possession and their own perception of their position, will enable them to assess their relative dependence on each other or their relative bargaining power.

Generally, in the world of human relationships, a person has power if others perceive that the person has power. The perception of power is as important, perhaps more important, than actual, measurable advantage. Having real advantage, in the sense that the other party truly needs you to get what it wants, confers power. Lacking that, however, getting the other party to think that he needs you or that you do not need him may also confer bargaining power. Consequently, negotiators often attempt to shape the other party's perceptions of the relative power between the parties.

Indeed, much of the communication process in negotiation involves perception or "impression management" with each party working to shape the other party's perceptions of its relative dependence. Such impression management can be honest, sincere, or forthright and can occur when a party simply tries to inform the other party of his actual power position. It can also be merely interpretive, such as when the parties are unclear or uncertain about their dependencies. In these cases, the parties' situation is subject to interpretation and persuasion based on interpretation. Finally, it can also be consciously manipulative, as when a party actively tries to mislead the other side about their respective dependencies.

D. Bargaining Power and Bargaining Arguments

While the specific arguments that a negotiator uses to advance his positions and persuade the other side depend on bargaining issues and contexts, there are some characteristic patterns of argument that revolve around, or implicate, the power relationships between the parties. Since the perception of relative power may be as important as actual power, the parties are likely to attempt to persuade one another about their relative power.

For example, suppose I am negotiating with you over some matter. In order to maximize my gains, I will try to shape your perceptions about what I want and what you need of me. I am likely to argue that I have other alternatives to dealing with you or that my interest in what you have to offer is not as great as you had supposed and that my priorities are different than what you think they are. Similarly, I might try to persuade you to think that you do not have good alternatives to dealing with me, or if you think that you do, then they are not as good as you think they are.

My arguments may be “true” in the sense that I really believe them or that they are in fact so. Alternatively, my arguments may be advocacy, in the sense that I interpret everything in my favor, and I attempt to persuade you to view matters the same way. After all, the “reality” of a situation is often what we agree that it is or mutually decide it to be. So-called “facts” are often disputable and we may need to settle them by agreeing on what they are. Even where the facts are clear, it might not be clear how they bear on decisions about what to do. Rather, they are matters of human valuation, judgment and decision that are open to persuasive efforts. Finally, I could know that the situation is other than I claim it to be, but realize or believe that you do not know that and try to persuade you that it is as I say it is.

The intended effect of this argumentation is to persuade the other party by shaping its perception of your relative bargaining power. Hopefully, if I am trying to “win” the negotiation, I would convince you that I was in the stronger position. Thus, if we are to settle, you must give more to me than I give to you. If, instead, I am simply trying to insure that my interests are served by an agreement with you, I will hopefully persuade you that my interest is also your interest. Of course, depending on what you are trying to achieve, you can and will make similar arguments to me. We will influence each other and draw our own conclusions about where to settle depending on the understanding we bring to the situation and the “learning” we experience through discussion.

E. Information and Negotiation Transaction Costs⁹

While negotiation bargaining power is a question of relative dependency, it is useful to specify in greater detail the elements or variables on which it depends. The apparent variables, already discussed, are a party's needs or wants and its alternative ways of satisfying them. In relation to these, we must also consider the information a party has, a party's negotiating transaction costs, and its belief in the other party's ability to meet its needs.

A party has some relative bargaining strength if it has an alternative way of satisfying its needs other than through the negotiation. Nonetheless, if the party does not know these alternative ways, then it is effectively without bargaining power. So, we need to factor into the bargaining power equation the party's relative knowledge regarding information about its alternatives. If a party is clear and certain about its alternatives, then it can readily test the value of possible settlements by comparing them with its alternatives. If, however, a party is uncertain or insecure about its alternatives, then it will have to discount the alternatives accordingly. Furthermore, discovering what effective alternatives exist may impose time, expense, and other costs on a party. To the degree that a party fails to gather the information it needs to specify its alternatives realistically, it weakens its relative bargaining position.

Other costs associated with negotiating may also factor into the bargaining power equation. The first of these is investment costs. Investment costs include all of the costs associated with initiating the negotiation and carrying it to its final stage. These costs include research and time, meeting set-up, and any opportunity costs incurred as a result of the actual negotiation. All other things being equal, the more a party has invested in a given negotiation, the more likely that party is to settle. A party will still need to compare any proffered settlement with any alternatives, but the costs experienced in negotiating may change the party's view of the alternatives. If the party refuses to settle, negotiating costs will be lost costs. In that sense, the negotiation has made it more costly for the party to resort to alternatives. In brief, the costs of negotiating may discount the value of alternatives available to the party; thus, increasing a party's negotiation investment costs tends to decrease that party's bargaining power.

Another important negotiation transaction cost to consider is the anticipated cost of continuing negotiations. The greater this is, the more attractive alternatives to negotiation may become. Accordingly, it follows that a party enhances bargaining power by reducing the *other party's* anticipated negotiation costs. If the cost of continuing negotiation is low, then there is less incentive to resort to alternatives to negotiation.

A final variable is a party's belief in the other party's ability to meet its needs or wants. Suppose you wish to remodel your house and you contact

9. For a more detailed and sophisticated discussion of the points made in this section and for a comprehensively stated bargaining power model, see ALVIN GOLDMAN, *SETTLING FOR MORE*, 27-52 (1991) (shows a different point of view).

contractors for bids. Before you settle on a contractor, you will want assurances that the contractor is capable and dependable and provides quality work at a price you desire. If you are not persuaded that a particular contractor meets these conditions, you will not hire him. Similarly, where a party's performance is important in a negotiation, the other party's belief in its capability, trustworthiness, and reliability is a critical variable. Therefore, when performance is important, the performing party can increase its bargaining power by enhancing the other party's belief in the existence of these qualities. On the other hand, a party can possibly weaken the performing party's bargaining position by questioning the other party's ability to perform.

Negotiating parties base negotiating decisions on their perceptions of the negotiating situation. Consequently, it is the parties' perceptions of their alternatives, the certainty and quality of their information, their costs, and their respective abilities to perform that determine their relative bargaining power. This means a negotiating party can increase its bargaining power by bettering its alternatives, improving its information, reducing its negotiating transaction costs, and improving the impression it gives of its ability to perform. Alternatively, a party can also increase its relative bargaining power by acting to decrease the other party's bargaining power. It can do this by eliminating the other party's alternatives or that party's *perceptions* of its alternatives. It can also undermine the other party's confidence in the information on which it bases its bargaining position, work to increase the other party's negotiation investment cost and seek to convince the other party that further negotiation transaction costs will be low. Finally, it can increase its bargaining power by attempting to persuade the other party that can meet the other party's needs better than any alternatives available to it.¹⁰

F. Bargaining Power and Arguments of Principle

In addition to the inevitable, perception-shaping moves involved in any negotiation, the perceived power relationships between bargaining parties also elicit characteristic negotiating arguments. Three common types of normative arguments are particularly revealing: appeals to equity, equality, and responsibility.¹¹ Equity arguments claim parties should receive benefits in proportion to their contribution. Equality arguments claim parties should receive equal payoffs regardless of their contributions or inputs. Responsibility arguments claim that need should be the basis of distributing benefits.

Assuming that bargaining parties choose those arguments that best advance their interests as they see them, the normative arguments they choose to make

10. Obviously, there are many variables that affect bargaining power. Further, negotiating parties can manipulate or shape one another's perceptions of these variables. Clearly, negotiation can be a complex, fluid, dynamic, and interactive process.

11. BACHARACH AND LAWLER, *supra* note 6, at 175.

reveal their perceptions of their bargaining power. A bargaining party that believes it is in the stronger position is likely to compete and seek gains through domination. To distribute bargaining gains, it will most likely advance equity arguments such as "take it or leave it." By utilizing equity arguments, the stronger party will receive more of the gains because it believes it can command the results it desires. Where a party views itself of roughly equal power to the other party, it is more likely to bargain cooperatively and engage in compromise. It will likely make the equality claim that gains should be distributed equally, or it will propose trades of roughly equivalent value. Finally, where a party perceives a large power discrepancy in which it is in the inferior power position, it will likely make general fairness or moral obligation appeals. Of course, in the same situation, the party with the greater power likely will make a demand or equity argument.

Because normative arguments reveal a party's power perception of itself, an examination of a party's choice of arguments is a useful tool in determining how it perceives the power relationship and what kind of concessions it could be expected to claim or give. Further, note that a shrewd party might choose its normative arguments as a part of an impression management scheme to shape the other side's perceptions of the power relationship between the parties.¹² This also suggests that if the character of a party's normative arguments shifts over time, for instance, from an equity argument to an equality argument, a party has either changed its view of its power position or has given up a pose that it deems unsuccessful.

G. Bargaining Informational Moves

Our mutual efforts to shape each other's perceptions of our relative bargaining strength determine not only the character and direction of some of our bargaining arguments, but also determines what information we seek and what we are willing to disclose. For example, not only may I try to persuade you that I am not very dependent on you or that you are more dependent on me than you think, but I may also not disclose any information that reveals that I am more needy than I claim to be. Similarly, I will likely seek information from you that tells me exactly how much you think you need me to get what you want. If you are an inexperienced or naive negotiator or for some other reason do not realize this is the strategy that I am using, you may fully reveal the information I need. If you are more sophisticated or are playing the same negotiation game I am playing,

12. "Responsibility norms are the only hope for bargainers in a highly disadvantaged position because equality norms require more concessions from the opponent than a very weak party can reasonably expect. The only way for a lower-power party to receive more concessions than implied by equity . . . is to appeal to the opponent's responsibility for its plight In a bargaining relationship, responsibility appeals cast the opponent in the role of helper and portray the needy as unfortunate and desperately needing more concessions from the opponent." *Id.* at 177.

then you will likely selectively disclose and withhold information in the same manner.

“Bluffing” in a poker game is a good example. The rules of poker confer no special advantages on any player, notwithstanding chance in the shuffle and deal. Poker players have some information, usually inconclusive, about the other players’ hands. As a result, a player cannot draw strong conclusions about how good another player’s hand or relative “power” is. The bluffer uses appearances and subtle signals or messages of confidence to convince other players he has a winning hand. Essentially, the bluffer in poker negotiates a win by manipulating the information he knows the other players have and by providing additional, misleading information to those players. The bluffer may cannily play off the other players’ personalities and the revelations their prior play has provided by feeding the other players messages he calculates will cause them to draw the conclusion he wants them to draw.¹³

Not only do negotiators shape each other’s perceptions of the situation, but a negotiator may also shape his or her own self-perceptions disadvantageously. Unskilled or innocent negotiators, for example, often make the common mistake of internalizing and focusing on weaknesses in their own bargaining position rather than focusing on objective information. Entering negotiations aware that they does not have good alternatives to a settlement causes them to bargain needily. Their self-perception of weakness often entails a conclusion that the other side is stronger and more able to dictate terms. In fact, the other side may be in as bad a position or worse. A more skilled negotiator would not assume that his own weakness meant corresponding strength on the other side. Rather, a skilled negotiator might even suspect that the other party’s appearance of strength masks real weakness. Such a negotiator would then seek information that would permit an objective assessment of the other party’s real strength. A skilled negotiator would also seek to project the appearance of relative strength by adopting a confident and unyielding demeanor, tactics aimed at masking her own weakness, misleading the other party, and negatively shaping the other side’s assessment of its own strength.

IV. COMPETITIVE NEGOTIATION

A. Why People Bargain Competitively?

People bargain competitively essentially for three reasons, which often overlap. First, by inclination or calculation, they view the negotiation as a kind

13. Bluffing is an interesting tactic which involves a certain degree of risk. Though a bluff may be just a “feeler” thrown out to obtain information, but it could backfire if called. Bluffing is least risky when the bluffing side has substantial information about the other side’s strengths and weaknesses, and the other side has little information about the bluffer’s situation. The bluffer can then tailor the bluff in such a way that it is unlikely to be called. *Id.* at 173.

of competition, in which they wish to win or gain as much as possible. Secondly, they do not trust the other party. Where parties are non-trusting, they are non-disclosing and withhold information, which leads to further distrust and defensive or self-protective moves. Parties may be non-trusting because they are unfamiliar with the other party or because they are generally or situationally non-trusting. Finally, a party may bargain competitively as a defense to, or retaliation for, competitive moves directed at it.¹⁴

B. Competitive Negotiation Strategy

In competitive negotiation or distributive bargaining, the parties actual or perceived respective aims or goals conflict. In this context, the negotiator's aim is to maximize the realization of its goals. Since the goals conflict, either in fact or supposition, one party's gains are the other party's losses. Therefore, a negotiator's goal is to win by gaining as much value as possible from the other party. The basic idea is that the negotiation is about a fixed good or sum that must be divided between the parties. Not only is the competitive negotiator out to gain as much as he or she can, but he or she will take risks, even the risk of non-agreement, to secure a significant gain.

The competitive negotiator adopts a risky strategy which involves the taking of firm, almost extreme positions, making few and small concessions, and withholding information that may be useful to the other party. The intention, and hoped-for effect, behind this basic strategy is to persuade the other party that it must make concessions if it is to get an agreement. In addition to this basic strategy, competitive negotiators may also use various ploys or tactics aimed at pressuring, unsettling, unbalancing or even misleading the other party to secure an agreement with its demands.

In an important sense, the competitive negotiator plays negotiation as an information game. In this game, the object is to get as much information from the other party as possible while disclosing as little information as possible. Alternatively, a competitive negotiator sometimes provides the other party with misleading clues, bluffs, and ambiguous assertions with multiple meanings, which are not actually false, but nevertheless mislead the other party into drawing incorrect conclusions that are beneficial to the competitor.

The information the competitive negotiator seeks is the other party's bottom line. How much he will maximally give or minimally accept to make a deal. On the other hand, the competitive negotiator wants to persuade the other side about the firmness of the negotiator's own *asserted* bottom line. The competitive negotiator works to convince the other party that it will settle only at some point

14. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984). Indeed, one effective way of dealing with a competitive bargainer is to compete back, creating a case where mutual competition between parties may ultimately lead to cooperation. *Id.*

that is higher (or lower, as the case may be) than its *actual* and unrevealed bottom line.

In skillful hands the bargaining position performs a double function. It conceals, and it reveals. The bargaining position is used to indicate — to unfold gradually, step by step — the maximum expectation of the negotiator, while at the same time concealing, for as long as necessary, his minimum expectation.

By indirect means, such as the manner and timing of the changes in your bargaining position, you, as a negotiator, try to convince the other side that your maximum expectation is really your minimum breaking-off point Since you have taken an appropriate bargaining position at the start of negotiations, each change in your position should give ever-clearer indications of your maximum expectation. Also, each change should be designed to encourage or pressure the other side to reciprocate with at least as much information as you give them, if not more.¹⁵

Taking a firm position and conceding little will incline the other party to think the competitor has little to give. Thus, if there is to be a deal, then the other party must give or concede more.

1. Pure bargaining, haggling, and just trading figures

When the parties are apart and have *no reason*, other than their mutual choice, to settle at any particular point between them, they are in a “pure bargaining” situation. It is easy to see how the simple negotiation game, like the rug purchase described earlier, can degenerate into a contest of haggling or just trading figures. The parties’ positions — the particular dollar figures they are offering — are not connected to any reason or rationale. Basically, both buyer and seller are seeking to maximize gains. Each attempts to accomplish this by seeing how far the other party can be pushed.

Often this happens in competitive bargaining, particularly with unsophisticated competitive bargainers and usually in the late and ending stages of a negotiation. When it occurs, the “take as much as you can” grab is transparent and signals that the parties, or at least one party, is bargaining just to win as much as possible. Automobile dealers’ sales practices exemplify this phenomenon. A new car dealer usually pegs an asking price to a manufacturer’s suggested retail sticker price and to items the dealer adds to the car. Once those starting prices are left behind, the dealer and buyer usually just trade dollar figures until they reach one they are both comfortable with. Similarly, travelers who visit native markets or bazaars, or those who visit flea markets or garage sales in this country,

15. EDWARD PETERS, *STRATEGY AND TACTICS IN LABOR NEGOTIATIONS* 112 (1955), quoted in RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* 86-87 (1965).

sometimes experience much the same kind of trading. Offers and counteroffers are thrown back and forth, each party testing the other party's resolve to stick with a figure by refusing to budge further or threatening to walk away. In essence, bargaining in this fashion is really nothing but a contest of firmness or a game of chicken.

2. Focal points or mutually prominent alternatives¹⁶

It is revealing to analyze a pure bargaining situation where two equally competitive negotiators bargain with each other. Once the bargaining parties have assured their bottom lines or reservation values and have staked out their respective positions on the bargaining range, nothing inherently seems to impel settlement at any particular point between the positions, except each party's expectations regarding what the other side in fact will accept. This is problematic, however, for

with each guided by expectations and knowing that the other is too, expectations become compounded. A bargain is struck when somebody makes a final, sufficient concession. Why does he concede? Because he thinks the other will not. "I must concede because he won't. He won't because he thinks I will. He thinks I will because he thinks I think he thinks so...." There is some range of alternative outcomes in which any point is better for both sides than no agreement at all. To insist on any such point is pure bargaining, since one always *would* take less rather than reach no agreement at all, and since one always *can* recede if retreat proves necessary to agreement. Yet if both parties are aware of the limits to this range, *any* outcome is a point from which at least one party would have been willing to retreat and the other knows it! There is no resting place.¹⁷

Notwithstanding this apparent problem of infinite recursion, an operating "logic of indeterminate situations"¹⁸ enables competitive bargainers to find and agree on a resting place. Generally, the logic is not that one will dominate the other in the struggle over gain. Instead, it is one of belief and congruent behavior: each side believes it has gained as much as possible because each party is naturally drawn to a mutually acceptable point in the range between them.

In bargaining, the points of settlement can either be: 1) at a position between the parties that one party has convincingly persuaded the other party to accept; or 2) at what is called a *focal point* or *mutually prominent alternative*, a salient point on the otherwise featureless negotiation landscape that seemingly and naturally draws the parties to it. Focal points are those outcomes having an "intrinsic

16. THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 21 (1963); DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 57 (1981).

17. SCHELLING, *supra* note 16, at 21-22.

18. *Id.* at 21.

magnetism,"¹⁹"especially those that enjoy prominence, uniqueness, simplicity, precedent, or some rationale that makes them qualitatively differentiable from the continuum of possible alternatives."²⁰ For example, the midpoint between final offers which are still some distance apart is a focal point and an attractive and obvious place to compromise. Similarly, a precedent, a bargaining point that makes the parties' positions symmetrical, round numbers, and the like can all operate to set focal points. In effect, focal points are simply situational clues giving the bargaining parties ideas for coordinating their behavior so that they can arrive at a common position.

In preparing for a negotiation, a shrewd negotiator would pay attention to potential focal points and attempt to script the negotiation so that it will converge on the focal point that provides him the most gain. Generally, no one can list all possible focal points because what may constitute a focal point in any given negotiation depends on the situation and circumstances at the time. However, an example, however, can show how this could work.

Suppose an automobile dealer and a customer are bargaining over the price of a new car. The MRSP, plus dealer add-ons and charges for the car, totals \$31,500. The dealer's price is actually \$27,500, but the customer does not know this. The price of the car without dealer charges totals \$31,000 and without dealer add-ons totals \$30,500. Those figures are easily determined because they are specified on a sticker in the car window. In this example, there are two possible focal points in the range defined by the figures \$27,500 to \$31,500. They are \$30,500 and \$31,000. It becomes apparent to the dealer, however, that the customer will not buy at either of those focal points. The dealer knows he can make a profit if he sells the car for at least \$28,000, but how, other than through just trading figures or haggling, can the dealer and customer find a suitable figure between \$28,000 and somewhere under \$30,500 to agree on? Now suppose that the MRSP for last year's model of the car was \$29,000, and the dealer tells the customer he will sell him the car for last year's price of \$29,000. The \$29,000 figure becomes a new focal point or anchor. It is quite possible that the parties will in fact settle at this anchor, *even though* last year's price has no real relevance to this deal. The \$29,000 figure stands out on an otherwise featureless negotiation landscape. As a result, both parties will focus on it even though there is no particular reason to do so other than its having been mentioned. When nothing better exists, a focal point virtually declares itself a potential place of agreement.

3. Reasons, rationales, and justifications

More sophisticated competitive bargainers know that simple haggling exposes the game for what it is, a contest for gain and a test of one's ability to read the other party. To avoid revealing his or her hand, a sophisticated competitor devises reasons for his or her positions and concessions. Providing a rationale for a

19. *Id.* at 70.

20. *Id.*

position makes it more credible and, therefore, harder for the other party to assail or counter without providing equal or more persuasive reasons for his or her position. The new car dealer may, for example, say that his car price is just the MSRP, claiming that the price reflects a dealer profit that the manufacturer thought was fair. That might persuade some buyers, and might appear to treat all buyers the same way. A more savvy buyer might respond that the MSRP is not dealer invoice price, but is considerably above it, and offer to buy for a figure lower than the former. In that case, the dealer could either shift to haggling or, more shrewdly, make a price concession based on a rationale difficult to challenge, e.g., a sales price based on dealer invoice, plus overhead assignable to the car, plus a standard profit of 10% or some such figure. Although the offer sounds reasonable, it actually might not be. Such a price rationale is based in part on an intangible and generally unverifiable "overhead" figure that hides much and is quite difficult for a buyer to assess and challenge. Buyers unarmed with comparative price information to counter such a position may not be able to break through the dealer's strong facade.

C. A Competitive Negotiator's Operating Assumptions

Generally, the competitive negotiator seeks to persuade the other party that she will not agree to or settle above or below a certain point. In devising a negotiating strategy, the competitor uses some general approaches and rules of thumb. These are:

Negotiation is an information game. The competitor treats negotiation as a game in which the party with the most accurate information wins. Thus, the competitor either seeks to gather as much information as possible while giving away as little as possible or gives and manipulates information in such a way that the other party is led indirectly to draw conclusions the competitor wishes it to draw. Realizing that the other party will decide what to do on the basis of what he or she thinks and believes, the competitor seeks to shape, manage, and manipulate the other party's perceptions of the situation and that party's available choices.

Take an opening position at the margin (high or low openers). The negotiator who opens with a high or low offer and makes few and small concessions generally has the most success in negotiation.²¹ As used here, "opens high" or "opens low" means at the extreme or far end of the potential bargaining range but sufficiently within the range to retain credibility. The competitive negotiator prepares an opening position by first estimating her best possible deal and then staking out an initial position considerably beyond that estimate while developing justifications for the latter position.

Treat concessions as a way to gain and disclose information. Concessions convey information about what a party wants and values, about the party's

21. ROY J. LEWICKI & JOSEPH A. LITTERER, NEGOTIATION 90 (1985).

preferences and intentions, and about the party's perception of the other party. The skillful, competitive negotiator "reads" concessions to infer this information and plans her own concessions to give the other party only those impressions she wants it to have. Concessions are not only, and perhaps are not even principally, a way to give something to the other party to narrow differences, but are also a way to gain advantage. A skillful competitor crafts concessions to shape the perceptions and expectations of the other party.

Hang tough on concessions; do not make concessions one-for-one nor trade concessions equally. Concessions seem to beget concessions. In general, an expectation exists in bargaining that when one party makes a concession, then the other party will also make a concession in return. Indeed, a party usually makes concessions *in order to* gain a concession. Notwithstanding this expectation, it is not *always* necessary to give a concession in exchange for receiving one. Indeed, failing to note a concession or to make a return concession may cause the other party to make one or more additional concessions.

Furthermore, when making a concession in exchange for a concession, it is not necessary to give something of equivalent value to that received. For example, take the typical case of someone negotiating a purchase of a relatively expensive new car. The dealer says he wants \$30,000, and the buyer says he wants to pay only \$24,000. After negotiating for a while, the buyer relents and offers \$26,000. The dealer, rather than making an equivalent \$2000 concession, counters with \$29,000, in effect exchanging \$1000 for \$2000.

Although this kind of exchange is common, what many do not realize is that the need or desire to get something back in exchange for a concession is often satisfied by *any* concession from the other party. In addition, when weighing a concession, the receiving party may accord the concession a lower value than the conceder *apparently* gives it. For example, in a negotiation if A concedes something having a value of \$100 and B makes a return concession having a value of \$50 to A, then A may conclude that B values \$50 as much as A values \$100. While this could be true if B has fewer resources, is more needy, etc., B may simply wish for A to believe that this is so. In short, a negotiator need not respond to a concession by making a concession of equal value. In fact, competitive negotiators often respond in this fashion. In using an apparent value scale different from that of the other party, the competitive negotiator may mislead the other party into misvaluing the concession.

Make small, infrequent, and declining concessions. As a corollary to the foregoing, the competitive negotiator makes it a practice to make small concessions and force the other party to work hard to gain any concessions. The aim is to send the message that there is not much to give: if there is to be a bargain, the other party will have to move much further than the competitor. The competitive negotiator also makes concessions in declining increments in order to suggest a convergence on his apparent bottom line; that is, his maximal expectation point.

One effect of "hanging tough" and making small concessions is to shape or alter the other party's expectations or aspirations about what it can get out of the

negotiation. Treating a negotiator's concessions as information about what can be achieved, the other party may alter its expectations in a way favorable to the negotiator.

Select an opening position by reference to the mid-point rule. Once two settlement offers are on the table, the natural settling point is the mid-point. This rule of thumb, while not always true, is true often enough that competitive negotiators can use it to good effect. Typically, the competitive negotiator will allow, or more likely, *get* the other party to make the first offer. This allows the competitor to set his or her offer at the most advantageous point, given the likelihood that once both offers are out, the negotiators will settle in the middle. Alternatively, a competitive negotiator simply starts with an extreme offer, hoping that the other party is either innocent or will overvalue the item being negotiated and will open with an offer more favorable to the competitor. In effect, the competitor's high opener draws the other party's opener in its direction. If the parties continue bargaining and eventually settle in the middle, then the competitive negotiator will have extracted additional gain.

Link positions and concessions to convincing justifications or rationales. Experienced competitive negotiators know that they may not be able to persuade the other party to agree to settle at any particular point in the perceived bargaining range simply by hanging tough. Though simple firmness is sometimes enough, it will not work with everyone. In bargaining situations, people want justifications for positions taken. Understanding this, in preparing for a negotiation, the competitor picks positions on the bargaining continuum that he can defend with some plausible justification. For example, the woman selling her house might say her house is priced at \$450,000 because that is the price she paid for it adjusted for inflation over the years she has owned it. Alternatively, she might say she has compared prices for comparable houses and that, although their prices were somewhat lower, her house has special features that justify the price differential. A negotiator should note that though these justifications have some persuasive value, they certainly have flaws or counters and may not, in fact, be the reason she chose the figure. She may have chosen the figure because that is what she needs to buy a new condominium and still qualify for the \$125,000 one-time, over age-55, tax exclusion on profit from a home sale. The latter reason, however, will not carry as much weight with the buyer as the former, and she would find it easier to maintain the former in the face of argued counterproposals. In short, giving reasons or justifications for positions taken is persuasive, even when they are not the real reasons.

The same reasoning applies to concessions. A concession made by moving from one position to another needs a good justification in order to convince the other party that the new position is a real bottom line. For example, after bargaining for a while, the house seller might say, "Well, o.k., you've convinced me the price is too high for you. The house may need a new roof in a few years, and I think that \$10,000 would be a reasonable amount to reduce the asking price to reflect that." Again, a negotiator should note that whether or not the reason

given is the seller's true reason is not important, but only that it sounds reasonable.

Tying positions taken to reasons and justifications not only hides the potential grab involved in competitive bargaining, but also permits planning a strategy for moving from position to position, if necessary, in response to moves and demands of the other party. Actually moving from one position to another or to several different, but understandable, positions may cause the other party to believe it has gained from bargaining and, therefore, to feel satisfied with the deal struck.²² Of course, had the party known more by investigating further, it might have discovered there was, in fact, more to gain.

Good, competitive negotiators prepare for negotiations by developing plausible rationales for the positions they are going to take and the concessions they may make. They also attempt to anticipate what positions the other party may take and what rationales it may provide and then develop counterpositions and arguments. While developing a position and concession strategy and developing rationales are important, a competitive negotiator, nonetheless, does not limit himself to only these kinds of negotiation moves. Instead, he may orchestrate negotiation strategy with a variety of informational and psychological tactics to manage, manipulate, pressure, cajole or persuade the other party in ways aimed at extracting as much gain as possible.

V. COMPETITIVE NEGOTIATION TACTICS

A. *Commonly Used Ploys and Tactics*

In addition to using basic hard bargaining strategy, a competitive negotiator may also use a variety of ploys and tactics to persuade or induce the other party to settle at a point as favorable as possible to the competitor. Not all competitors use these devices. Some manage quite well with just the basic *high demand, small concession, firmness* strategy. Even those who use such devices do not use them all, nor any standard set of them all the time. Nonetheless, some are commonly used, and some are a part of standard practice in some negotiating arenas.

Knowing these ploys and tactics gives a negotiator a clearer and deeper understanding of how hard bargainers can operate throughout a negotiation on some issues or, in a positive sum negotiation, when it comes time to allocate shares in whatever value the negotiators may have created. More importantly, a large part of negotiating well involves understanding how the other party is negotiating, then responding appropriately. That can entail negotiating defensively, so as not to be taken, or it may involve taking the initiative and trying to change the very character of the negotiation as a process, for example, transforming a competitive negotiation into a problem-solving negotiation. To use the game

22. See, JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 278 (1975).

metaphor again, notwithstanding lucky breaks, you usually can play a game well only if you understand the game you are playing. There are several different basic negotiation games, and more complicated negotiation games may involve elements of each. To negotiate well, you must understand the negotiation game the other party is attempting to play. Recognizing the moves the other party is using helps you figure out its game and game plan. You can then play that game, if you choose, or at least protect yourself and defend your interests. If you think you can better achieve your aims by negotiating in a different way, you can seek to change the negotiation game.

Furthermore, although you might not wish to use some of the competitive ploys and tactics, you should nonetheless have other ploys and tactics at your command. Although typically used by competitive bargainers, some of these devices are useful to cooperative bargainers as well. For example, one effective way of dealing with a hard bargainer may be to hard bargain back. This shows the other party that you can play its game and respond in-kind to its tactics, which may be all that is necessary to induce some cooperation.

Most of the ploys and tactics a competitor may use involve informational or psychological manipulations. The informational tactics are designed to manage expectations, create doubt, misdirect, play off mistaken assumptions the other party may make, and sometimes even to mislead. The psychological tactics create pressures or inclinations to settle.²³

Some of these tactics are ethically dubious, and some are downright immoral or illegal, depending on the duplicity involved. I will discuss the ethics, as well as the practical advisability, of using such ploys and tactics later.

"Precondition" demands. Sometimes a party will refuse to negotiate unless some condition or demand is satisfied prior to beginning the negotiation. Actually, setting a precondition is a way of obtaining a concession without giving any in return and, in effect, is the price paid to get the other party to bargain. Demanding satisfaction of a precondition may not only gain a concession without cost, it may also reveal how eager the other party is to secure a deal. If the other party meets the demand, it signals, intentionally or not, that it is willing to compromise, that its positions may be soft, and that it may possibly be successfully pushed hard during the negotiation.

23. Many of these tactics operate on psychological principles of behavior reinforcement. Positive reinforcement is action which either elicits or rewards a particular behavior. Negative reinforcement is action which either inhibits or halts a behavior. Viewing a negotiation, in part, as a reinforcement session, the competitive negotiator focuses on behaviors of the other side that it wants to encourage or inhibit, and rewards or punishes them accordingly. For example, if the other side somehow discloses some doubt about the strength of its position, the competitor would encourage the doubt. If the other side makes a concession, the competitor will in some way reward the concession. This reward will often be very minimal, e.g., a softening of demeanor or a small concession in return. Similarly, fractionating concessions—that is, dividing a concession into smaller concessions—and doling them out as rewards to the other side for its negotiation behaviors - gives the competitive bargainer opportunities to reinforce on a variable schedule. This is a classic way to anchor certain desired behaviors and to keep the other side at the bargaining table a long time.

Simply understanding that precondition demands actually are, and should be, a part of the principal negotiation dictates the appropriate response. Essentially that response is simply to make clear that you consider the precondition issues to be a part of the negotiation. Then, you should either demand reciprocal concessions in return for any concessions you make or delay consideration of the demands until the full negotiation begins.

Your move, or you first. If competitive negotiation is an information game, the party that has the most and best information regarding the underlying issues and the real desires of the other party positions itself to maximize its gains. A competitor thus seeks to gain as much information as possible while disclosing as little as possible. One way to do this, often disguised as simple politeness, is to convince the other party to make the first offer. Whatever information is received allows the negotiator to set her own first offer advantageously by adjusting the offer for maximum, ultimate gain.

First offer - large demand. For a first offer, which was ideally made only after the other party made its offer, the competitive negotiator states an extreme demand, which is beyond or at the far margin of the range of credible or reasonable offers. This has the effect of setting the perceived or apparent bargaining range. When combined with the tactic of splitting the difference,²⁴ it allows the user to manipulate the other party for maximum gain.

A variation on the first offer-large demand tactic is the *extreme demand-small demand* ploy. The negotiator first makes an extreme demand which she knows the other party certainly will refuse. On refusal, the negotiator then makes a "smaller" demand. The smaller demand looks reasonable by contrast, and the other party, "indebted" from withdrawal of the extreme demand, may more readily accept the smaller demand.

If the other party's initial demand is extreme or high in this fashion, it is a good indicator it is hard-bargaining. In dealing with such an opening, you can either ignore it by tactfully stating that it is extreme, and you will not use it as a basis of bargaining; or counter with an equally extreme demand in the other direction. Both of these moves have the effect of nullifying the initial claim.

Anchoring. Anchoring is fixing or establishing the focus of discussion around a certain point, whether it be a figure, a range, an issue, and the like, simply by asserting it. As a technique, anchoring plays on human suggestibility, that is, on the human tendency to fix attention on, and be influenced by, what someone says.

Psychologists sometimes demonstrate the phenomenon of anchoring in the following way.²⁵ A psychologist will divide a group into two smaller groups, say groups A and B. She will then ask the members of group B to close their eyes while she writes a number on a blackboard, for example, 4,000,000, on the blackboard so group A can see it. She then erases the figure and has the groups switch roles, group A members now closing their eyes and group B members

24. See text *infra* pp 30-31.

25. ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 121 (1988).

watching. She writes another number on the board, for example, 30,000,000, and then erases it. After this, she tells the entire group that she will now ask them a question whose answer is unrelated to the number they saw on the board. She asks everyone to estimate the correct number for the population of Nepal. When the results are tallied, estimates from group A members are consistently lower than those from group B members. Evidently, the figure the psychologist wrote on the board influenced the subsequent estimates of those who saw it, notwithstanding its asserted irrelevance to the actual figure for the population of Nepal. In other words, the simple assertion of an item sets it as an anchor, holding the recipient's mind in its vicinity.

False demand, false concession. In using the false issue or false demand-false concession tactic, a negotiator attempts to convince the other party that an issue, which she actually cares little about, is very important. The negotiator makes it appear that she will concede the issue only if the other party makes either a great concession or a particular concession which, perhaps unknown to the other party, has great value to the negotiator. When the concession is finally made, the negotiator reluctantly gives up or concedes the false demand. In effect, the negotiator obtains an important concession with an *asserted*, but not *real*, exchange of value.

A variation on false concession is *reverse false concession*. In this ploy, the negotiator inflates the significance of an issue which she actually considers minor, but she knows is important to the other party. After intense bargaining, the negotiator then concedes the issue. Later, however, the negotiator demands a large concession on an issue she truly deems important in return for the earlier concession on the minor issue.

The false demand-false concession tactic is difficult to deal with because our ideas of what is important to the other party usually come from information the other party provides. This makes it difficult to discount the party's claims that some issue has great importance to it. Obtaining outside information, assessing probabilities, and probing questions aimed at establishing convincing justifications for the other party's claims are the major defenses.

Escalation. Escalation involves raising demands, in some way, either before or during a negotiation. Escalation before a negotiation can take the form of adding conditions to be met before the negotiation occurs. During a negotiation, escalating demands is another way of finding the limits of what the other party is willing to give to effect an agreement. It is particularly effective when used against conciliatory or naively cooperative negotiators.

A negotiator can also escalate demands as the first move in a negotiation. Suppose, for example, two parties are meeting to discuss a proposed contract for sale of real property for an offered price of \$650,000. When the negotiation begins, the seller could state that he was sorry, but he must raise the asking price to \$750,000 for a variety of reasons. The buyer, who was originally prepared to try and whittle down the \$650,000 figure, now must struggle to even reach that figure. This tactic makes \$650,000 look awfully good.

Escalation taking the form of precondition demands should be dealt with as such. First move escalations change the parameters of the negotiation you prepared to enter and provide a sufficient reason to call off the negotiation so that you can coolly consider whether you want to negotiate on the new terms. Such an escalation also invites the counter that you are not willing to negotiate on the basis of the change since all your preparation was based on other assumptions. This may induce the other party to return to the original proposal.

A party counters escalations during a negotiation by calling attention to them, by indicating that counterescalations are possible and by refusing to agree to any escalated terms.

Nibble or late hit. The nibble or late hit is a form of escalation which comes at the end of a negotiation after the parties have invested time and energy and the major matters have been resolved. The nibbler then raises a relatively small, but yet undiscussed, item and indicates that it "must have" the item or the negotiation may otherwise fail; in other words, it may be a "deal-breaker."²⁶ Usually, the other party will concede because of the large psychological investment in the potential agreement and the apparent risk of loss. Importantly, this type of escalation can also involve significant matters.

The nibble is really a test of firmness or resolve that plays on possible impatience and frustration, on "sunk costs"²⁷ and on deal momentum concerns. In dealing with a nibble, it helps to recognize that both parties can play the game of threatening a final agreement. Expressing a willingness to accept the fact that the deal may fail and refusing to succumb to these demands may cause the nibbler to retreat from these demands.

*Low-balling.*²⁸ A difficult point in many transactions and negotiations is getting a party to make a decision. Once a party makes a decision and has committed to it in some way, however, he is unlikely to back out of it. Low-balling plays on this psychological phenomenon. In low-balling, one party induces another to make a decision or to commit to a particular choice. The inducer then confirms that commitment and then changes the original terms which induced it. Automobile salesmen, for example, often use low-balling. They offer an automobile on very favorable terms and induce the buyer to purchase on that basis. They have the buyer sign papers and perhaps even permit the buyer to use the car prior to any money changing hands. They then claim that some mistake has been made or that the manager will not approve the original deal and ask for more money. Since the buyer has committed to buying the car, he is likely to accept the new demands and pay the additional money, assuming he is unaware of the ploy. Generalizing, it is easy to see that low-balling is a method of baiting a party and it is a different form of "nibble." The way to deal with low-balling is to protest

26. HERB COHEN, YOU CAN NEGOTIATE ANYTHING 37-39 (1980).

27. DAWES, *supra* note 25, at 22.

28. See ROBERT B. CIALDINI, INFLUENCE: HOW AND WHY PEOPLE AGREE TO THINGS 102-05 (1984) (provides a good discussion of low-balling).

the changed terms and express a willingness to walk away from the deal proposed on terms other than the original terms.

Linkage. Negotiators sometimes attempt to expand the scope of a negotiation by bringing in issues which, while not clearly related, a party can make a plausible case for. Successful linkage may change bargaining power and leverage, the focus and character of the dispute, or the set of gains and opportunities the parties are attempting to divide.

A famous recent attempt to transform a dispute and gain bargaining power through linkage was Saddam Hussein's attempt to tie the issue of Iraq's withdrawal from Kuwait to the Palestinian issue.²⁹ Note that Hussein's effort was not only to introduce another issue, but to shift the alignments of the parties by introducing new parties and concerned "audiences." Had Hussein been successful, he would have expanded the focus of the dispute from an allegedly justified invasion of a sovereign state and possession and control of world oil supplies to include the Arab-Israeli conflict. The added issue would have been a "wedge" issue because it offered Arab states a reason to break their alliance with the West.

Linkage of issues or parties can have a positive or negative effect in a negotiation.³⁰ Adding issues creates possibilities of tradeoffs that may not have existed previously. Adding parties may create tradeoffs and also change the dynamic of the negotiation. On the other hand, adding issues or parties can sometimes complicate matters, particularly where the added issues or parties increase the potential for conflict. A party should either agree or resist linkage, depending on whether the linkage enhances or inhibits the possibility of agreement. Of course, if a party is not prepared to deal with added issues and the consequences that handling them may entail, as was true of the United States regarding the Palestinian issue, then it should certainly resist efforts to add issues.

Salami. Eventually, as one slices thin rounds from a salami, it disappears. The salami tactic involves making a series of small demands, which, if all are conceded, add up to something considerable. Psychologically and practically speaking, small demands may be easier to tolerate and concede than large demands. Salami plays on this tolerance in order to make significant gains from small, consecutive, and perhaps seemingly inconsequential requests. Note, too, that a negotiator could use salami as a concession tactic as well as a demand tactic. Using it as a concession tactic might result in the negotiator giving up less overall.

Boulewarism. Boulewarism is, in effect, a single offer approach to reaching an agreement. It is the antithesis of genuine bargaining aimed at resolving issues. It is named after Lemuel Bouleware, a General Electric Vice-President and negotiator, who used this technique. It involves making a single, firm offer, usually based on a unilateral idea of what is fair or right under the circumstances,

29. Dan Balz, *Bush Bars 'Linkage' in Crisis*, Wash. Post, December 5, 1990, at A1; William Claiborne, *Saddam Links New Crisis to Old Mideast Disputes*, Wash. Post, August 13, 1990, at A1.

30. LAX & SEBENTUS, *supra* note 3, at 138-39, 221-26.

and, in effect, tells the other party to “take it or leave it.”³¹ The offeror may act quite sincerely and believe that he is making the most reasonable offer possible. There is a certain arrogance in this as the posture does not permit the other party’s input and, therefore, does not treat the other party as a bargaining equal. Aside from any question of the substantive position taken, this tactic will likely create resistance and anger.

If genuine, the Boulewarism posture tells the other party that there is nothing to bargain. This posture is a way to assert an upper hand or make clear where a party firmly stands. Of course, this approach could be used as a tactic to mislead the other party into thinking there is no give when in fact there can be. While Boulewarism may be inimical to developing good relationships, it wears a cloak of righteousness and could be effective with weak or dependent parties. In this sense, it is a kind of authoritarian paternalism as much concerned with maintaining authority and future freedom of action for the offeror as it is with maintaining the substantive merits of a proposal.

Split the difference. Splitting the difference is a common phenomenon in negotiations. The parties reach a point where they are close to an agreement but remain some distance apart. Each party lacks compelling reasons to convince the other party to accept its position, and each is unwilling to give up its position. In these circumstances, the parties often agree to settle by splitting the difference. This approach seems fair, appears to involve equal concessions, and saves face for the parties. Aware that parties close to agreement are likely to split the difference, a party who may already have everything it wants in a negotiation can consciously use it as a tactic to exact a further gain. The tactic is often effectively used in conjunction with the first offer-large demand tactic.

Splitting the difference is not a bad method to employ, unless, of course, the other party has so manipulated the game that it gets an unwarranted gain when the difference is split. It is important to remember, however, that although splitting the difference seems fair, it is not necessarily so. Fairness depends on where the parties start. Splitting the difference is not the only “fair” formula to use to close the gap when the parties are some distance apart. You should seek other formulas which might divide the difference more advantageously.

Other offer. To test the other party’s willingness to reach an agreement or to extract concessions, a negotiator can state he has another offer or possibility and either specify what it is or deliberately leave it vague. If true, the other offer gives a baseline to judge the superiority of any pending agreement. If untrue, this is simply a tactic used to gain information or secure an advantage from the other party. Direct lies in negotiations carry considerable risks, however, particularly when the parties will have future dealings. When there is this kind of risk, those using this tactic may merely hint or imply they have another offer. This vagueness allows them to claim a misunderstanding if the other party discovers that another offer did not exist. Therefore, never accept vague assertions of the existence of other offers. You can deal most effectively with claims of other

31. HARRY T. EDWARDS & JAMES J. WHITE, *THE LAWYER AS NEGOTIATOR* 119 (1977).

offers by demanding detailed information about them. This allows you to assess the reality and firmness of the "other offers" and compare their terms concretely with your own offer.

False scarcity. Psychologically, people generally tend to respond to the scarcity of some item or commodity by valuing it higher. In addition, psychological reactance theory holds that when opportunities which were once open are now limited, e.g., items become scarcer or some authority imposes restrictions on conduct, people react by wanting the opportunity *more* than when it was more openly available.³² Negotiators sometimes use this psychology. They try to induce the other party into agreeing to certain positions or terms by suggesting that the opportunities to get those terms are somehow quite limited.

Induced competitiveness. Induced competitiveness is a distinctive form of *false scarcity* which combines aspects of the *other offer* ploy. It involves converting what would ordinarily be a two party negotiation into a multi-party negotiation where all the parties interested in a particular good are forced to compete with each other for it. The competition makes the item more desirable, therefore driving up its price. For example, suppose that someone wishes to sell some item, and instead of dealing with prospective buyers one at a time, he invites them all to meet with him simultaneously. The appearance of a number of persons apparently interested in the item will likely make it appear more desirable and incline some party to want it more. (A particularly duplicitous form of this ploy involves using confederates or "shills" to act as competitors.) An alternative way of inducing a similar effect is to create an auction for the item. In one reported case, when a Hollywood movie was auctioned to broadcasting companies rather than sold through ordinary two party bargaining, the movie went for more than \$1 million higher than the highest price ever previously paid for a similar broadcast showing.³³

Final offer. "Final offer" is just a statement that the negotiator has reached her final position and will concede no further. This could be true or false. If the statement is false, then the final offer is just a tactic used to mislead the other party into thinking the stated position is firm. In some ways, this is a risky tactic to use because a party must be prepared to terminate negotiations if the other party

32. The psychological dynamic involved here has been postulated as a theory, Brehm's theory of psychological reactance, well-described as follows:

"when [persons] are tightly constrained in their behaviors or choices, they will react against such constraints by becoming dissatisfied and attempting to remove the constraints . . . [L]abeling a resource as scarce . . . may cause reactance . . . and produce more vigorous action to obtain the resource and more dissatisfaction with its . . . unavailability."

JEFFREY PFEFFER, *POWER IN ORGANIZATIONS* 83-84 (1981).

33. CIALDINI, *supra* note 28, at 254-55. As reported by one of the participants in the auction:

"[After the bidding started,] ABC opened with two million. I came back with two point four. ABC went to two point eight. And the fever of the thing caught us. Like a guy who had lost his mind, I kept bidding. Finally, I went to three point two; and there came a moment when I said to myself, 'Good grief, if I get it, what the heck am I going to do with it?' When ABC finally topped me, my main feeling was relief."

Id. at 255.

rejects the final offer. To claim “final offer” and then concede when the offer is rejected discloses that the offer was not actually final and creates a “cry wolf” reaction to subsequent final offer claims. A party could evade this consequence by linking a retreat from the asserted final offer to the receipt of some significant concession. If consciously used this way, the final offer tactic is similar to a false demand.

Misleading concession pattern. In win-lose or distributive negotiations, each side uses all available information and attempts to figure out the other party’s bottom line in order to extract all possible gains. Reading the concession pattern is one way to do that. In theory at least, a party will make smaller and smaller concessions as the bargaining converges on his bottom line or reservation point. Knowing that this is a common view, a negotiator can mislead the other party by planning a concession pattern which converges at a point above or below his actual bottom line. While “reading” the concession pattern, the other party may then extrapolate it to that point and mistakenly conclude the conceiver has reached his bottom line.

Red herring. A red herring is essentially a false, yet highly distracting, issue which a party can use to bring pressure to bear on the other party in a negotiation. Red herring is often used in politics, where politicians play off easily manipulated public fears to attack opponents regarding their stands, or lack of them, on red herring issues. The American communist or “red scare” in the late 1950s and the early 1960s is a good example. While red herrings may be most useful in negotiations where the parties represent outside constituencies which can be manipulated to bring pressure to bear on a recalcitrant party, negotiators sometimes use them tactically in ordinary negotiations. The *false issue-false demand* tactic, for example, is one version of red herring brought into ordinary negotiations.

Threats, anger, and aggression. The use of threats, angry displays, and aggressive tactics in a negotiation may evidence personality, frustration, or calculation. If the threat is real and the party making it can carry it out, the threat is an exercise of power and poses to the recipient the adverse consequences of a wrong choice. Negotiators, however, sometimes deliberately use such tactics simply to intimidate, disturb, and confuse the other party. As the psychological assault can unnerve and incline the victim to seek to mollify or conciliate the tantrum-thrower, negotiators using such tactics are attempting to create and to play on vulnerability in order to induce appeasement and exact concessions.

Blaming or fault-finding. Perhaps most common in negotiations involving interpersonal issues, blaming, or assigning of fault is an aggressive tactic possibly having several aims. This tactic may invoke conciliatory behavior as a result of induced guilt feelings or a sensed need to mollify. It may distract by focusing the negotiation on a substantively irrelevant, but psychologically volatile or conflictual relationship issue. “Winning” the relationship issue may result in concessions on the substantive issue. Note, however, that a person can use the tactic even in arms-length transactions where the parties do not have a psychologically invested relationship. For example, the department store claims-adjuster could parry a

customer claim by asking, "Do you have a receipt?" If a receipt is not actually necessary, the question implies that a receipt is necessary. Thus, the customer is *at fault* for failing to have one, and the store cannot process the claim *for that reason*.

Sudden change of mood. Sometimes, either during a single negotiation session or over the course of several sessions, a negotiator will shift radically from a reasonable, friendly tone to an angry, abusive, hostile tone, or vice-versa. Such a shift may reflect the conscious use of psychological tactics designed to confuse the other party, place it off-balance, and create vulnerability. One who is the target of another's anger often assumes, many times mistakenly, that he has somehow caused it. A natural human reaction then occurs to attempt to placate the angry person in order to smooth the situation and save the relationship. Response in kind or *tit-for-tat*³⁴ is an effective way of dealing with such tactics.

Intransigence and entrenchment. Negotiators sometimes just dig in their heels and refuse to budge from a position. They may offer all sorts of reasons for not moving and skillfully counter arguments offered to persuade them to move. The refusal to move can be a ploy aimed at testing the other party's firmness and discovering just how much concession room exists.

Sowing doubts; dismissals out-of-hand; or put-downs. Sowing doubts about proposals; curt dismissals of offers, positions, and concessions; and various other kinds of put-downs and denigrations are ways of shaping the other party's perceptions of its own bargaining position and its expectations of what it can get out of the negotiation. Unless the other party enters the negotiation reasonably well-informed, prepared, and fairly hard-skinned; this kind of devaluation can undermine its confidence and cause it to make faulty judgments about the relative merits of its bargaining position.

Playing to fears or assumptions. Sometimes negotiators can advantageously manipulate the other party's fears or assumptions. Suppose, for example, a buyer who wants an item badly and fears others may be interested volunteers to the seller, "I suppose there are a lot of people interested in that." This reveals a concern for competition. The seller might respond truthfully by stating, "Well, you might say that." This suggests, without affirming, that the buyer's statement is true. The buyer might take the remark as confirming that others were interested in buying the same item, and the buyer may decide to buy the item while the opportunity still exists.

In general, whenever a party discloses in some way that it has made an assumption favorable to the other party's bargaining position, the other party can use that knowledge to its advantage. It can take advantage, even where the assumption is not true, simply by not disconfirming the assumption or disabusing the party of its mistake. In order to do this, however, a negotiator has to draw the other party out, getting a sense of its thought processes as it approaches the negotiation.

34. AXELROD, *supra* note 14, at 13-14.

Deadlock and walkout. A deadlock occurs when the parties assert they are, or seem to be, hopelessly unable to agree. A walkout is a unilateral termination of negotiation, usually expressed by actually walking out of the negotiating room, often in a righteous huff. Negotiations sometimes become stymied, and the proceedings and lack of progress upset the parties so much that they feel they must leave the negotiations.

Deadlocking is risky behavior because it may mean there will be no negotiated settlement. Deadlocking likely results when a party is concerned with what it may lose through a negotiation. Psychological “prospect” theory³⁵ is helpful in understanding this concern. This theory holds that persons will act to conserve current wealth, and that they have a risk-averse orientation toward seeking gains and a risk-accepting orientation toward preventing losses. In other words, persons will take risks rather than face a loss but will not take equal risks in order to secure gains.³⁶ Consequently, parties who enter negotiations concerned with what they may lose are likely to engage in behaviors which risk deadlock, such as escalation tactics.

Whether or not people can articulate the prospect theory, they instinctively understand it. They interpret a party declaring a deadlock to mean that the negotiation proposals under discussion, if accepted, will impose an unbearable loss on it. Knowing that this is the likely conclusion to be drawn, negotiators sometimes consciously use deadlock and walkout as tactics. When used as tactics, they are simply threatening pretenses designed to mislead the other party into thinking the deadlocking party’s bottom line has been reached, to test the other party’s resolve, and to impel the other party to make major concessions. Such risky and high stakes tactics, however, make credible retreat difficult unless the other side does make a large concession. Consequently, to permit a return to the table without concession and to save face, negotiators often hedge deadlock and walkout threats with language providing an escape if they need it.

*Deadlock and concede.*³⁷ In deadlock and concede, the negotiator sets the agenda and organizes her issues so that she raises her least important issue first and her most important issue second. The remaining issues are handled similarly, alternating less important with more important issues. As the negotiator bargains, she deadlocks on the first issue but then concedes. Continuing to bargain, she also deadlocks on the most important issue, but then demands that the other party concede the issue because she conceded on the first issue and there has not yet been a reciprocal concession, and so on.

Friendliness. People are generally well-disposed to those who are friendly and more easily persuaded to give or concede them at least some of what they desire. Friendliness can be genuine, reflect good-will, or be a tactic used to mask

35. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *Econometrica* 263 (1979).

36. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *Science* 453, 456 (1981).

37. JAMES A. WALL, *NEGOTIATION: THEORY AND PRACTICE* 91-92 (1985).

an underlying aim to gain advantage. Friendliness elicits friendliness; but, unless a negotiator's aim is to build a relationship, he should not concede simply out of friendliness. This is not to suggest that one should be hostile, but rather, to note that it is important to distinguish between a friendly demeanor and what is a good deal. In hard-bargaining, a negotiator should make concessions only for return concessions of equivalent value.

Mutt and Jeff, good guy-bad guy, black hat-white hat. Mutt and Jeff, also called good guy-bad guy or black hat-white hat, is a well-known negotiation tactic combining anger, threats, hostility, and friendliness. In this tactic, two negotiators work together to off-balance the other party psychologically. One negotiator is hard, aggressive, angry, while the other negotiator is soft, friendly, well-disposed, and reasonable. Disconcerted and perhaps threatened by the attacking Mutt, the party being worked on turns to the friendly and reasonable Jeff, whom he or she feels may be an ally of a kind. Softened in this way, the target is more likely to make important information or position concessions to the friendly negotiator.

Negotiator without authority. Persons negotiating for others may or may not have authority to agree to the resolution of any or all issues concerned in the negotiation. A negotiator who does not have authority will have to clear proposed settlements with his or her principal. The negotiator-without-authority device, however, can also be used for tactical advantage in a negotiation, particularly where the other side is misled into thinking there is apparent authority to settle or is unaware authority is lacking. The negotiator who lacks authority or who pretends he lacks authority can explore the other party's positions and even gain concessions without making any real commitments or corresponding concessions of his own. Essentially, it is a way to obtain full information while reserving time to make careful, calculated decisions.

Claims of limited authority or the necessity to seek approval are also forms of the negotiator without authority tactic. A negotiator may invoke limited authority as a tactic to induce settlement within the limits assertedly imposed. The other party may simply not want to take the time or trouble to seek to go beyond the limits.

A negotiator could also assert authority to settle — meaning authority to discuss and make tentative agreements without any imposed limits — but subsequently claim the need to seek approval of any settlement. Although subtly different from the negotiator without authority tactic, this tactic can have the same effect. Note, also, that the pattern of behavior and inducement is similar to that of low-balling.

Representative cloak³⁸ or phantom player. Sometimes negotiators will assert that they are acting in a representative capacity and must take the stance of their principal despite being personally sympathetic to the other party's position. Such statements can be genuine or ploys. As a ploy, the assertion of representative status is a subtle combination of negotiator without authority and the Mutt and Jeff approach and effectively allows a negotiator using it to adopt two postures at the

38. WALTER MAGGIOLO, *TECHNIQUES OF MEDIATION* 173-74 (1985).

same time, one of sympathy and friendliness, the other of toughness and arms-length dealing, and to play on both. We can also think of this as a phantom player phenomenon. Depending on how the competitor plays it, he may proceed as though there was a third party at the table; a party who can make demands but cannot be questioned.

Status, authority, association and credentialing. Although not commonly acknowledged, there are significant wealth, class, and status differences and distinctions in the United States. Most people are aware of them on at least an unconscious level. Wealth, class, and status distinctions and their trappings can sometimes influence negotiations. This occurs when one party is consciously or unconsciously impressed by the status, stature, or authority of the other side and either defers for that reason or makes unwarranted assumptions about the other side's power, strength, or resolve. One inoculates oneself from such influence by being aware of the phenomenon. If bitten, there are the antidotes of carefully considering the relevance of the displayed array, adopting a "show me" attitude and resisting persuasions based on a relative social position alone.

Association is a similar negotiation tactic using borrowed authority. There is a certain cachet that attaches to one connected with "important" or "famous" people. These real or asserted connections impress many people, but they are usually the non-thinking. Consequently, negotiators sometimes seek to legitimize themselves and their stances by making some claim of important association. (Name-dropping is a form of claiming legitimation or status by association.) The association may be real or feigned. Negotiators sometimes seek to enhance their bargaining position by involving well-known persons or authorities by actually bringing them to the table or by in some way obtaining their blessing. Asserted but false association is a trickier form of the same tactic. In either case, one should guard against undue persuasions based on authority.

Principle. Appeals to principle are often highly persuasive. On the other hand, negotiators and others, including politicians, sometimes use principles in unprincipled ways as tools to manipulate. Unless simply horse-trading or haggling, most bargainers invoke principles as a justification for positions they take. Indeed, one good way to prepare for negotiations is to develop arguments of principle for the positions one takes. There is a difference, however, between deriving positions from principles and finding principled arguments to support a position taken for other reasons. The latter may be simply rationalizing or seeking to find a high moral gloss for what is actually a calculation for private advantage. One should not be easily taken in by arguments of principle but should seek close, reasoned justifications supported by evidence.

Time, timing and end-game. Time is important in negotiations and can be used in many ways. Usually, the party that is more patient or less pressed for time has an advantage. The need to come to agreement within a specified time may force one to make concessions one would not otherwise make. A negotiator can also pretend that time is important when it is not, forcing the other party to a speedy agreement or to hasty concessions.

Cunning negotiators who know that the other party is under some time deadline or pressure to conclude negotiations can use time to their advantage. As the time deadline approaches, they may begin to stall, to raise new issues or resurrect old ones, to inject new complications, to produce documents containing already rejected agreement language, or generally to appear to unravel what once appeared already settled. The hope is that the need to reach an agreement by a certain time will force the needy party to make significant concessions. It may even force the needy party to concede points already won. Not having a deadline, not announcing a deadline, patience, and a willingness to walk away are ways to deal with such tactics.

Deadline. When both sides bargain competitively but also want a deal, most concessions will likely occur toward the end of the negotiation when the deadline approaches. In the initial stages of a competitive negotiation, the parties mutually explore each other's position and test each other's firmness and resolve. If both parties are competitive, they will both follow the firmness strategy. When they do, the negotiation becomes a contest of respective resolve. As a result, neither party is likely to move much until it appears absolutely necessary. Deadlines under urgency, especially externally imposed deadlines that preclude or seriously inhibit further negotiations bring the parties to the very brink of the consequences of non-agreement. Examples of such deadlines include the beginning of a trial, a company's need for a certain product to meet its own manufacturing deadline, or other contractual obligation. Indeed, it is as the deadline approaches that competitors are most likely to attempt to outwait the other party so that the need to settle and related time pressures cause them to concede.³⁹

Setting a deadline to accept or refuse an offer or position can also be a tactic, although it may be dangerous and risky. A deadline may succeed where the side imposing the deadline is committed to accepting the consequences of no agreement and the other side has less resolve. Where the consequences of no agreement are severe for the side refusing to agree, the approach of the deadline enhances psychological pressure and concentrates the mind on the downsides of refusing to agree. Certainly, if the side refusing to agree is simply bluffing, then the deadline calls the bluff and changes the contest to a test of resolve.⁴⁰

39. When both parties in a negotiation bargain competitively, there is a possibility that in the end they will bargain cooperatively. If both parties are equally competitive and equally firm, and neither has a good alternative to settlement, then both may conclude that they must cooperate by making concessions in order to agree. The parties are not likely to arrive at this point without significant exploration and testing of each other's positions and firmness. Sometimes parties in this position even deadlock before they begin to cooperate.

40. A recent example of the deadline approach was the United Nations imposed deadline of January 15, 1991, for Iraq's withdrawal of Kuwait. Anyone who followed the events during the last few weeks prior to the deadline understands how the deadline forced desperate searches for ways out as well as generating immense public pressures and anxieties. Nevertheless, this imposition of the deadline failed to achieve its intended result, and the nations arrayed had to accept the consequences of failure (war) to meet the deadline. David Hoffman, *US-Iraqi Talks Fail to Break Gulf Stalemate*, Wash. Post, January 10, 1991, at A1; Ann Devroy, *Bush Offers Scant Hope of Averting War*, Wash. Post, January 15, 1991, at A12.

Draftsman or single negotiating text. Sometimes a party to a negotiation will bring to the table a document it has already drafted and offer it as a basic text to set the agenda or to work from in moving toward a final agreement. While this is often a useful technique to advance negotiations, it is also a powerful tactic because a document tends almost irresistibly to set the agenda and focus the parties, not only on particular issues, but also on a prescribed resolution of those issues. It is really a way to take the initiative in negotiations. The other party's choices include either working with the document, ignoring it, offering a counter-document, or using enormous self-discipline in dealing with the document for selective advantage.

Backtracking or unraveling. Backtracking or unraveling can occur when the parties negotiate a number of issues separately and sequentially during a single negotiation. After a few issues appear to have been settled, a negotiator may threaten to undo the earlier agreements in order to succeed on a new issue under discussion. Note that a negotiator can use this ploy as a means to gain leverage over the issue currently under discussion or use intransigence over the current issue to force reopening apparently settled issues in order to obtain more gain on them.

*Irrevocable commitment.*⁴¹ One problem a negotiator may have is persuading the other party that the negotiator has reached his bottom line, particularly when he has not. One way to accomplish this is to apparently commit oneself to a course of action which shows the other party that the negotiator cannot budge. For example, union negotiators could propose a negotiating position to the union and ask the union to vote on it. If the membership adopts it, then the negotiators can claim to management that they cannot agree to a less advantageous settlement position because the union would dismiss the negotiators and strike.

*Reinforcement and reward.*⁴² In reinforcement and reward, the negotiator, in effect, applies principles of operant conditioning theory and treats concessions as rewards for desired concession behavior of the other party. The concession follows the other party's concession and is a greater than equivalent concession with the excess or "unearned" portion of the reciprocal concession being the reward. This tactic apparently produces more concessions and even stimulates concessions to continue even when the negotiator stops making reciprocal concessions.⁴³

B. Misleading Communication and Deception in Negotiation

Many competitive negotiation tactics involve some kind of manipulative perception management or more active deception. Whether or not one would ever use such tactics, one must be able to recognize and deal with them. Moreover,

41. SCHELLING, *supra* note 16, at 24-28.

42. WALL, *supra* note 37, at 98-99.

43. *Id.* at 99.

some of the described tactics and ploys certainly seem unethical, immoral, or perhaps counterproductive, and it is necessary to assess the morality and advisability of using them.

Some negotiators manage communications to mislead or deceive in a number of ways, but not always intentionally. Most of these ways do not involve any deliberate lying. Their effectiveness depends considerably on the gullibility of the other party, his lack of acuteness in listening, and his unwillingness to confront or draw attention to what is happening. Although the effect is to mislead, a negotiator who uses the method may subsequently deny intentionally misleading and, instead, lay the blame on the other party's faulty interpretation of what was said. For example, suppose negotiator A during the course of a negotiation says, "Our company never does that," and strikes an agreement with the other party, B, that does not require his company to do what he said it never does. In another business deal following this agreement, A's company does for B's competitor what A said it would not do for B. When B comes raging back to A complaining of unfair treatment, A responds that he was just asserting what his company had refused to do in the past, and he was not taking a position regarding what his company might do in the future. B is, in effect, forced to confront the possibility that it was his own misinterpretation of the statement which led him astray.

C. *Competitive Communication Tactics for Managing Information and Party Perceptions*

Masking intentions. A negotiator may conceal his actual goals in a negotiation and minimize the giving of any clues regarding his real intentions. The aim is either to manipulate the other party or to protect the negotiator from the risk of disclosing information the other party will use to his disadvantage. For example, a negotiator may not disclose that he has no other alternatives to getting what he wants other than dealing with the other party. He may pretend he has other alternatives in order to persuade the other party that he has bargaining power or to prevent the other party from taking advantage of him because he has nowhere else to turn.

Bluffing. Bluffing is a form of pretense in which the bluffer either shows strength to mask weakness and to convince the other party that there is no weakness, or he shows and simulates weakness in order to hide strength and tempt the other party to make some move that the bluffer knows he can beat. In a negotiation, for example, the bluffing negotiator may attempt to show strength by confident assertions of claims or by using false threats and promises. Similarly, to avoid giving information and to entice the other party to make some disclosing move, the negotiator may feign ignorance or engage in "calculated incompetence."⁴⁴

44. WALTON & MCKERSIE, *supra* note 15, at 68.

Predictions. Negotiators sometimes make claims which in the quick and often animated exchanges of a negotiation seem to be factual assertions but are actually only predictions. Predictions are not true or false, but rather, they are claims about the future. A prediction about one's own behavior is really only a promise or a threat.

Repeated claims or assertions of "fact." Parties to short negotiations or to negotiations with an impending deadline rarely recess to investigate claims or assertions of fact. In these situations, negotiators, particularly inexperienced negotiators, oftentimes fail to challenge factual claims by asking for proof or support. When a negotiator repeatedly asserts something as a "fact," the negotiation dynamic tends to induce the other parties to treat it as fact and, thus, fail to explore the claim more deeply. For example, a negotiator representing a company in a negotiation says to the other side, "We can't do X," and repeats this position several times as the negotiation progresses. Unless alert and aware of the repetition phenomenon, the other party will likely accept the statement as fact, even though it may be no more than a refusal to concede. This is just another form of anchoring.

Opinions of value or worth. Persons negotiating often make exaggerated claims of value or worth. Of course, opinions can be informed or uninformed and can be correct or incorrect. When one makes a claim of value, however, there is generally some referent or standard of value implicit in the claim which supports it. For example, when the diamond dealer says, "This diamond is worth \$5,000," the prospective purchaser tends to assume that the dealer means the diamond would bring \$5,000 if offered on the open retail diamond market. But the dealer could really be saying that *he* places a \$5,000 value on the diamond or that he thinks that he might induce someone to buy it for \$5,000. Consequently, in making claims of value or worth, negotiators sometimes play off the assumptions the hearer makes about the objectivity of the claim. Note also that the repeated assertion of the unchallenged value claim tends to make it an operative negotiating fact.

Disinformation. Disinformation consists of either untrue statements made to deceive or mislead or of technically true statements which raise false impressions. In the latter case, the statements are not actually false respecting any material facts, but they are misleading because of a faulty assumption the hearer makes. Some of the tactics and claims described previously have this character. Suppose a negotiator says, "In the past, I've made it a practice never to come back to the negotiating table after I've made a final offer and it was refused." The implication is that the speaker will continue this practice during this negotiation even though, in fact, he may not. The hearer concludes that the negotiator will behave in the future as he said he has behaved in the past. The speaker, however, does not actually say that he will behave in the same manner and he could later credibly claim that he did not say he would. The other party might still feel misled but, nonetheless, be uncertain whether a lack of shrewdness or attention to detail resulted in the misunderstanding.

Misrepresentations of position. There is no law of negotiation which requires bargainers to state their actual position on issues. Indeed, during the negotiation, negotiating parties tend to assume that each party will move away from its initial, and possibly subsequent, positions. Consequently, for the most part, statements of position are simply bargaining points. Although not truthful in accurately reporting the party's reservation point or bottom line, negotiators view positions taken as moves and not as factual statements within the context of the negotiating game.

Withholding information—general failures to disclose. Even given the general norm that one should not lie, there is an important difference between lying and failing to provide information. Rather than lie or provide false information, negotiators often fail to provide requested information or they provide only partial information which results in a misleading effect. Although debatable, there appears to be a customary norm that unless the negotiating parties have some sort of trust or fiduciary relationship, negotiators may treat negotiations as arms-length transactions in which each party must take care of itself. Generally, this means that negotiators need not disclose information useful to the other party in the negotiation.⁴⁵

Withholding information provides advantages when the other party acts on factual assumptions favorable to the withholding party. Suppose, for example, that a manufacturer who is under a contract to produce a certain product by a certain date has had an equipment failure but has found a supplier of the same product. Unknown to the manufacturer, the supplier has an oversupply of the product and eagerly wants to dispose of its supply. The supplier could withhold information of its overstock and possibly even claim that to meet the manufacturer's order on short notice, the manufacturer would have to pay a premium or rush-order price. Here, the supplier has no obligation to disclose its actual position. Unless a good business reason, such as the development of a good, longer-term relationship suggests otherwise, the supplier could exact a greater gain by simply failing to disclose.

Failures to disclose specific requested information. Sometimes negotiators deliberately refuse to provide known information which the other party specifically requests. There is a difference between a refusal to disclose information on one's own initiative and a refusal to disclose information following a specific request for information. One may properly ignore general requests for information because they are open-ended requests to reveal one's hand. Practically, however, it is more difficult to avoid requests for specific information because there are few ways, short of lying, to avoid answering. Sometimes a refusal to respond will provide the very information the negotiator seeks to withhold. Unless very artfully stated, falsely denying that one has knowledge is a lie. If the other party relies to its detriment on the misrepresentation of no-knowledge, the negotiator has, in effect, provided materially false information. To avoid this, negotiators often prefer to

45. They may choose to do so for practical reasons, but that is another matter.

evade the question or to provide some plausible excuse for a refusal to provide the requested information.

Providing false factual information. Providing materially false factual information is simply lying. It is more than a sharp practice and can amount to fraud. People do lie in negotiations, but no one would assert that it is a proper tactic.

D. Avoidance Tactics

Negotiators avoid lying and answering information-seeking questions in a number of ways. They sometimes combine them to divert the other party and to take the initiative in maneuvering the discussion.

Shifting or diverting attention. Rather than answer a direct question, the negotiator ignores it and shifts the subject. One common way to do this is to “answer” the question with a question. Since many people react unconsciously by feeling a need to answer questions, this shift returns the initiative to the second questioner.

Answering unresponsively. Answering unresponsively occurs when the negotiator answers vaguely or answers a different question. He can answer a different question by simply being unresponsive or by restating the question as a different question and then answering the restated question. The psychology involved in this move is interesting. The response may simply dupe the questioner into not noticing that his original question went unanswered by distracting him with the reply. On the other hand, the questioner may notice but think the other party misunderstood. Out of politeness, the questioner may chose not to pursue the matter.

Answering partially. The negotiator answers incompletely, usually at some length, so that the questioner fails to notice that the question was not answered.

Promising. The negotiator promises to answer at a proper time but never does so. Instead, the negotiator takes the initiative and begins talking on a point he wants to make. This often results in diverting the questioner’s attention to the matter the negotiator is pressing.

Tactfully refusing. The negotiator refuses to answer and gives some explanation such as, “I’m not at liberty to tell you that” or “I’m not prepared to answer at this time.” Such statements are disingenuous and “artful.” Note that the lack of freedom to respond or lack of preparation may be matters completely within the speaker’s control. If so, the speaker is really saying that she does not give herself permission to answer now or that she is not ready to answer; however, the other party may conclude differently.

Subtle or ambiguous qualifying. In order to avoid giving the requested information, the negotiator may add a qualification to his statement. The qualification, usually unnoticed unless the other party listens carefully and is attuned to subtlety and nuance, makes the statement technically true. For example, if a negotiator says, “I can’t offer you more at this time,” the phrase “at this time”

qualifies the statement. The statement could mean that the negotiator truly cannot raise the offer; or it could mean that the negotiator has decided that he would be better off in the negotiation if he did not immediately offer more. The statement is true either way. Indeed, the negotiator in this example may mean the latter, but hope that the other party interprets the statement as the former.

Bargaining. The negotiator treats giving an answer as a concession and requires reciprocal equivalent disclosure. For example, "I will answer your question if you will tell me"

Listening. The negotiator generally avoids the information disclosure dilemma by asking open-ended questions and adopting the tactic of listening much and saying little.

E. Propriety of Using Misleading Communication Tactics

Many would argue that the maneuvers and deceptions just discussed, with the exception of deliberately lying, are permissible in ordinary competitive negotiations.

Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not be misled.

Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions. . . . To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.⁴⁶

The argument in favor of this position is essentially that when each party to a negotiation understands the basic rules of the bargaining game, no one playing the game is deceived about its nature. Each side understands that the other may engage in sharp practice, manage expectations, or mislead.⁴⁷ This is undoubtedly true in some fields of bargaining where adversarial bargaining practices and norms are relatively well-established and where the negotiators are generally experienced, for example, labor-management negotiations or law-suit negotiations.

Advocacy for a client tolerates, and even requires taking positions and making interpretations and arguments favoring or promoting the client's cause.

46. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 A.B. Found. Research J. 926, 927-28 (1980).

47. *Id.* at 927.

That is certainly a basic assumption of the adversary system for lawyers and, in large measure, seems to be an operative norm in competitive business and other contest arenas. In general, this kind of advocacy is acceptable even when the advocate objectively believes that his positions, interpretations, and agreements are wrong. There is a difference between arguing for a position in which you do not believe and actively lying regarding some material fact. This is true even though the appearance of belief in the argument adds credence to it.

Consequently, in advocacy arenas, one should not be surprised by advocacy. In such contexts, negotiators take it as axiomatic that they are advocates for their side and that the other side is equally capable of advocating its views. They assume that parties can distinguish between bluffing, opinions, and interpretations on the one hand; and factual statements on the other hand. They also assume that the parties understand that one cannot rely on the former. They would also expect that a careful, critical, and perhaps suspicious listener concerned about protecting her interests would note that many statements of the other side are not to be taken at face value but, instead, need discounting, interpretation, and subtle contextual reading.

Under similar reasoning, misrepresentations of position would not be improper. Competitive bargaining assumes that the parties will end at a place different from where they open. One can view such misrepresentations as a form of bluffing or as statements of claim and can expect that the other party will recognize them. Early statements of position, therefore, are viewed simply as positioning.

Outside structured adversarial negotiation contexts, some proponents of competitive bargaining might assert that the nature of profit-driven competition in business contemplates self-interested, arms-length behavior. This norm assumes that people in business understand, or will soon come to understand, competitive business practices. As long as such practices are not illegal, that is, they do not amount to fraud or other deceptive business practice, they are proper. Of course, this view must also contemplate that bargainers can use competitive strategies and tactics defensively to protect themselves and to deal effectively with a competitive bargainer.

The argument for the legitimacy of competitive or adversarial bargaining turns on the supposition that such bargaining is the norm in certain arenas or contexts or between certain kinds of parties who can be expected to take care of themselves adversarially.⁴⁸ Since the parties are, or should be, aware of the process and still choose to enter it, the process and whatever results it delivers are thought to be fair. While there are many cases where this may be an appropriate assumption, there are other cases where it is clearly false. Obviously, a sophisticated hard-bargainer can use competitive strategies and tactics to mislead unsuspecting innocents. This most sharply raises the issue of the morality of such practices.

48. *Id.*

In analyzing the morality of hard bargaining, it is essential to be precise regarding exactly what hard bargaining practices are in question. Positional bargaining is one thing, and the active use of misleading or deceptive practices is quite another. For example, unless there is some ethical rule of disclosure in arms-length transactions, it is difficult to conclude that basic positional bargaining is morally wrong or unethical. Taking an extreme opening position, making small concessions, and hanging tough on concessions is not being inherently deceptive, it is just being tough. Being tough or firm in this way may mislead by causing the other party to conclude that the negotiator will not settle at any point other than his asserted position. This may, of course, be untrue in some sense, but in a way it is also irrelevant. If the negotiation is framed as a contest of firmness, the only relevant truth is that the party that is or appears to be the most firm will prevail.⁴⁹

On the other hand, outside of *caveat emptor* arenas, where only those prepared to be wary or be fleeced should enter, competitive negotiation tactics involving active misleading, lying, or deception regarding material facts which the other party may rely appear simply to be wrong. The principal justification that context changes the actual meaning of the behavior in ways recognizable by the parties, does not apply here. It is at least arguable that the nature of adversarial bargaining in certain arenas permits the parties to act on the assumption that all parties are aware of the rules of the game. Being so, *otherwise* misleading practices are not truly misleading, and the parties are treating each other as autonomous moral equals. This is not so, however, where one of the parties goes beyond the rules of the game, or when one of the parties knows that the other party is plainly unaware of the rules of the game and is not on notice regarding them.

F. Defending Against Competitors: Defensive Cooperativeness

The Innocent or Naive Cooperator and the Cooperative Negotiator's Dilemma. Competitive and cooperative bargaining strategies conflict. A simple cooperative strategy leaves the cooperator vulnerable to exploitation by a competitor. There is also good evidence that competitive negotiators who use the high demand, firmness, small concession strategy get better negotiation results than cooperators, at least where "better" means getting the most immediate gain.⁵⁰

Cooperative bargainers vary greatly in their sophistication. Innocent cooperators who, consciously or unconsciously, uncritically adopt the premise that cooperation begets cooperation may unwittingly engage in behavior that exposes them to possible exploitation. Potentially detrimental information disclosures, unilateral concessions, or excessive concession making are all examples of this

49. That basic positional bargaining may not be morally wrong does not mean it is a wise way to bargain or that it will produce the best agreements.

50. RUBIN & BROWN, *supra* note 22, at 267.

kind of behavior. Some cooperators may even exhibit invariant, non-adaptive or “pathological” cooperation. That is, they either consistently and detrimentally misinterpret the other party’s exploitive moves, or otherwise always respond to persistent hard bargaining with increasing deference or reasonableness and with more, or greater, concessions.

If the hard bargainer overreaches too much, the cooperator may feel pushed beyond his own boundaries of reasonableness and cooperation and break off the negotiations out of frustration and anger at the other party’s unreasonableness. A canny, hard bargainer, however, who is skilled in reading the other party and sensitive to the possibility of pushing too far, can always take advantage of a naive and inexperienced cooperative negotiator. Innocent or naive cooperators tend to assume that the other party is bargaining non-exploitively. They want to be trusted and tend to trust others. In their desire to be reasonable and friendly, they assume that the other party will act the same way, even in the face of contrary evidence.

Cooperators may worry more about having a good relationship and keeping things calm, reasonable, and agreeable than they do about getting exactly what they want. Indeed, going into the negotiation, they may not specifically know what they would deem a good disposition. Instead, rather than enter the negotiation with certain figures or positions in mind as desirable results, they may enter with vaguer, more malleable and manipulable notions that they only want “what’s fair” or “what’s reasonable” under the circumstances. The lack of a clear reference point makes them less able to discern their own interest and, therefore, more vulnerable to competitive claiming.

The cooperator’s desire to be a certain kind of person — noncompetitive, nonaggressive, fair, decent, honorable — may also result in turning the other cheek to the other party’s hard-bargaining tactics. In fact, naive cooperators may undercut getting what they want by assuming that they must make unilateral concessions or compromises without a return just to get an agreement. They sometimes fail to distinguish between their behavior toward others and their behavior toward the problem they are trying to resolve. In other words, they are “soft on the people” and “soft on the problem.”

The cooperator faces a dilemma:⁵¹ the reasonable, compromising conduct in which he wishes to engage in order to obtain a fair and just agreement also puts him at risk. If the other party is also cooperative, all is well and good. The other party, however, may not be cooperative. Instead, the other party may either be overtly competitive or cooperative in demeanor and competitive in substance. If, for example, to be reasonable and attempt to have the union understand its point of view, management volunteers important information, such as planning a plant expansion, the union may simply take the information and use it to its advantage without volunteering information in return or reciprocating in any other way. Similarly, if Susan, being cooperative, makes a concession hoping to trigger a concession from Jerry, Jerry may simply take the concession and either give nothing in return or give a non-commensurate concession. Indeed, the cooperator’s

51. LAX & SEBENIUS, *supra* note 3, at 33.

concession may encourage the other side to seek more or greater concessions. In this situation, the truly naive cooperator may respond by conceding more in the hope of inducing a concession and movement toward an agreeable settlement rather than by noting the lack of reciprocity and adjusting his own behavior to protect himself.

The cooperator faces the dilemma that the way he wants to negotiate may put him at risk of being taken or exploited. Obviously, cooperative negotiators should not naively *assume* that the other party will also act cooperatively. Indeed, they must recognize that they cannot successfully bargain cooperatively unless the other party cooperates. They also need to devise ways to protect themselves from the other party's possible competitive moves that are often masked or hidden by a genial, reasonable, or cooperative demeanor.

Aware of the potential risks involved in their cooperative behavior, a negotiator could adopt a hard bargaining strategy. This strategy would certainly not be necessary in all cases. In fact, many negotiators might object to hard bargaining in principle. How does a wise and careful cooperative negotiator protect herself from competitive bargainers?

Defensive cooperativeness. During the initial stages of a negotiation the parties feel each other out, not only to gain information respecting positions, wants, and desires, but also to get a sense of whether, and how far, they can trust one another. Since trust, or providing security that one can trust, is a key issue, cooperators should try to anticipate negotiations, develop information about the other party, and build a relationship with the other party prior to negotiation.

Because cooperative behavior promotes trust, it tends to induce reciprocal cooperative behavior.⁵² Once in a negotiation, the careful cooperator adopts a cooperative, yet wary, demeanor and indicates a general posture of flexibility on issues. This may signal or hint at a willingness to make concessions on certain issues. Nevertheless, the defensive or cautious cooperator does not make significant concessions before determining whether the other party is trustworthy.

Fractionating concessions. A careful negotiator can, in part, fashion a self-protective concession strategy by fractionating concessions.⁵³ One fractionates concessions by dividing an issue into smaller issues and, therefore, into smaller concessions where one gives on an issue. Using this method, the negotiator can make a small concession and wait to see how the other party responds. If the other party makes an equivalent concession, the negotiator can proceed.

Ambiguous or disownable signals. A negotiator makes a "disownable" concession move⁵⁴ by making an ambiguous statement that suggests a willingness to make a concession but which can also be plausibly interpreted as not expressing such willingness. If the other party interprets the statement as offering a

52. MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* 365 (1973); RUBIN & BROWN, *supra* note 22, at 263.

53. Roger Fisher, *Fractionating Conflict*, *INTERNATIONAL CONFLICT AND BEHAVIORAL SCIENCE* 91, 103 (ROGER FISHER, ED., 1964); WALTON & MCKERSIE, *supra* note 15, at 92.

54. PRUITT, *supra* note 16, at 94.

concession and reciprocates, then the negotiator confirms the other side's interpretation in some way. If the other party seeks to grab the assumed concession without offering a return, the negotiator denies making it. Suppose, for example, that one party has repeatedly argued that two conditions had to be met before he would consider changing his position. After a time, however, he begins to mention only one condition, thereby, signaling a willingness to drop the unmentioned condition.

This sort of signaling is, in effect, a testing of the other party. This test, however, does not run the actual risk of making a concession or exposing weakness. At most, it is an unclear expression of a contingent willingness to concede. As another example, consider two parties negotiating over contract terms. The buyer wants the seller to give her the same discount on equipment that the seller gives some of its other, much larger customers. The seller says, "We can write something like a "favored nations" clause into the contract." The buyer responds, "I'll take that, and I appreciate getting the same discount as your larger customers," but he makes no concession in return. The seller then responds, "Well, you can have the clause, but it doesn't apply to discounts." Alternatively, had the buyer shown a willingness to concede, the seller could let the buyer's first interpretation of the statement stand.

If there is little trust, this process of signaling can be quite subtle because the target of the signal may be uncertain whether to interpret a statement as expressing a willingness to concede. If the target is uncertain, he may fear responding in a way which clearly shows his willingness to reciprocate because that may put him at risk. Consequently, the parties sometimes engage in trading ambiguous statements until one party feels secure enough to make a clear proposal or until both parties simultaneously make a clear move.⁵⁵

*"Directional" information.*⁵⁶ Sometimes a negotiator may encourage cooperative bargaining simply by indicating on which issues the other party should improve its proposals. This tactic provides the other party with some information about the negotiator's priorities but without clearly committing to anything.

Demanding reasoned justifications. A negotiator should make a practice of asking the other party to justify its positions in terms of some objective criteria. If the other party simply behaves competitively and attempts to extract whatever gains it can, it may have difficulty in stating satisfactory justifications for its positions.

Contingent cooperativeness and the reformed sinner strategy. There is good evidence that even those who wish to bargain cooperatively can succeed with competitive negotiators by adopting a shifting "competitive to cooperative" or "reformed sinner" strategy.⁵⁷ This strategy involves making a high, initial demand, remaining firm initially, and then moving to a "contingently cooperative" strategy. Contingent cooperativeness involves behaving cooperatively if the other

55. *Id.* at 96.

56. *Id.* at 173-74.

57. RUBIN & BROWN, *supra* note 22, at 273.

party reciprocates cooperative behavior and increasing cooperative behavior as the other party does so. Interestingly, the cooperator's initial firmness may signal to the other party that competitive behavior will not work. By making high demands, a bargainer avoids the pitfall of adopting a stance that may prove to be too "generous"; he is thus less likely to accept a smaller division of the resources than the other is willing to offer. Second, by making extreme initial demands, the bargainer often gives himself more time to assemble information about the other's preferences and intentions. Third, he communicates his expectations of how he should be treated by the other—namely that he should not be exploited. Finally, his extreme initial offers provide the other with valuable information about his subjective utilities.⁵⁸

The contingently competitive strategy appears to work by giving the other party evidence that its own cooperative behavior, but not its competitive behavior, has a desirable effect.⁵⁹ In carrying out this general strategy, the cooperator may expressly negotiate over the negotiation ground rules and seek the other party's commitment to negotiate cooperatively as well, but, in any case, asserting a norm and expectation of cooperative behavior. The cooperator may then attempt to structure the negotiation to handle small issues first, where the risk of loss is not great. When ready to take some risks, the cooperator makes contingent proposals. The proposal expressly offers a concession or adopts a position closer to the other party's demands yet contingent on some specific concession or change of position from the other party.

Strategy imitation or tit-for-tat. Response-in-kind or tit-for-tat is a form of contingent cooperation a negotiator can use to handle a competitor. If the cooperator observes competitive tactics, she can call attention to them and state that she knows how to bargain that way too and will respond in kind unless the other party bargains cooperatively. Alternatively, the cooperator can just respond in kind by using tit-for-tat to discipline the other party.

Tit-for-tat is a negotiation strategy designed to shape the other party's bargaining behavior. One dilemma negotiators face is figuring out whether to bargain cooperatively or competitively. If one wishes to be reasonable and bargain cooperatively, there is a risk that the other party will bargain competitively and gain an advantage. Using tit-for-tat, a negotiator solves that problem by competing just as the other party does and, in effect, sends the message that "I will bargain the way you bargain and will use the same tactics you use." This teaches the other party that it cannot get away with anything, and may lead to cooperative behavior.

In general, using a tit-for-tat or matching strategy appears to be an effective way to induce cooperation.⁶⁰ The strategy makes it clear to the other party that it risks retaliation and increasing conflict if it continues to bargain competitively.

58. *Id.* at 268.

59. *Id.* at 277; PRUITT, *supra* note 16, at 115-16.

60. AXELROD, *supra* note 14, at 136-39; PRUITT, *supra* note 16, at 116-17.

Time-outs. Negotiating parties deadlock when no party is willing to make a further concession to bring the parties closer together. When the parties are nearing a deadline and are deadlocked, they may realize that the negotiation will fail completely unless they cooperate. Declaring a time-out when a deadlock is apparent gives the parties time to assess the situation without continued conflict, reconsider their reading of the negotiation thus far, and determine more rationally whether to risk trusting the other party. Often enough, when the parties return to formal negotiation, each side signals a willingness to move towards an agreement or make concessions leading to an agreement.⁶¹

VI. CONCLUSION: THE OCCASIONS AND RISKS OF COMPETITIVE BARGAINING

Because people bargain competitively for various reasons, negotiators and mediators need to understand competition in negotiation in order to respond appropriately. Some people bargain competitively without giving much conscious attention to the matter. Others compete in response to the other party's competitive behavior. In this response, they follow the common pattern that a particular kind of behavior elicits a similar behavior in response. In other words, one party frames the negotiation as a contest, and the other party picks up the competitive cues and behaves accordingly. Further, people naturally incline to competitive bargaining when they are non-trusting. In such situations, in order to avoid putting themselves at risk, non-trusting people act guardedly and adopt elements of the competitive strategy, for example, withholding information or misrepresenting a position. Finally, one can readily imagine ambiguous bargaining situations, in which at least one party is non-trusting, quickly devolving into a competitive negotiation between both parties. The non-trusting party acts defensively, and the other party senses this as competitive behavior and, therefore, acts in a similar fashion.

Negotiators, however, can also consciously adopt a competitive strategy. Negotiators are most likely to compete purposefully when

- the parties have an adversarial relationship;
- a negotiator has a bargaining power advantage and can dominate the situation;
- a negotiator perceives an opportunity for gain at the expense of the other party;

61. To this point, I have principally considered ways that a cooperative bargainer might negotiate to protect herself from a competitive bargainer, gain security, increase her confidence that the other side can be trusted, and discipline the other side to cooperate. The other side, however, may bargain competitively because it is so insecure or untrusting that it fears the other side will exploit it. While the tactics discussed above should also apply in this situation, it may sometimes be necessary for the cooperator to take greater risks, such as making a unilateral concession in order to gain the trust of the other side. There is no rule or guideline which will help the cooperator determine when to do this. It is simply a judgment call dependent on the negotiator's skill and sensitivity in reading the other side and assessing its real needs and interests.

- the other party appears susceptible to competitive tactics;
- the negotiator is defending against competitive moves; or
- there is no concern for the future relationship between the parties.

This list suggests that competitive bargaining most likely occurs in situations such as labor and lawsuit negotiations, insurance and similar claims type settlements, and in one-time transactions between a relatively experienced party and a relatively inexperienced party. One would, for example, expect to see it in sales transactions where the parties will probably not see each other again.

Representative bargaining or bargaining for a constituency may also prompt competitive bargaining even when there will be future negotiations between equally sophisticated parties. The negotiator's accountability may override relationship concerns and reasons for cooperation.⁶² The concerned audience, consisting of a client, constituency, coalition partner, or other phantom party at the table, is, in effect, looking over the negotiator's shoulder. The negotiator, therefore, takes positions and makes moves she believes her client either expects or would approve.⁶³ International negotiations between countries, union-management, lawsuit negotiations, and negotiations between different parties in interest-group coalition negotiations sometimes evidence this pattern.

Aside from circumstantial or situational pressures, there are some parties who bargain competitively because they believe that is the way to conduct business. There are also parties who are simply predisposed to bargain competitively and will incline to do so opportunistically in any bargaining situation if possible.⁶⁴

Finally, it is important to note that one can bargain competitively in a negotiation on some issues and cooperatively on others. In other words, a negotiator can selectively use competitive strategy or tactics on particular issues, while using a cooperative or problem-solving strategy on other issues. In such a case, extracting gain competitively may not greatly endanger future relationships. At least, there is a judgment call concerning this. The negotiator attempts to calculate the net effect of the overall results and skews the benefits, insofar as possible, to his side. In this kind of calculation, it is clear that there is some kind of assessment or balancing of short-term versus long-term gain. Again, there is no formula to calculate these gains, and the parties probably follow rules of thumb prevalent in the industry and developed from prior experience, or they calculate these gains based on hopes or individualized assessments.

Similarly, it is possible for negotiators to use an integrative or problem-solving bargaining strategy in order to increase the amount of gain

62. PRUITT, *supra* note 16, at 41-43.

63. RUBIN & BROWN, *supra* note 22, at 50-54.

64. The fabulously wealthy and sometime oil entrepreneur, Calouste Gulbenkian, appears to have been such a person. "He could not respect himself unless he 'drove as good a bargain as possible.' In other words, he wanted as much as he could get." DANIEL YERGIN, *THE PRIZE* 418 (1991). His son reported that his practice was "to make his demands step by step, so that having obtained satisfaction on one point he would raise another and yet another, thus achieving all he wanted or, at least, much more of what he wanted than he would have obtained if he had started by putting forward all his demands at once." *Id.* at 417.

possible to the parties. At some point, however, notwithstanding cooperation to produce greater gain, the parties will have to distribute or divide the gain. Therefore, they may also engage in competitive bargaining.⁶⁵

Obviously, competitive bargaining covers a continuum of behaviors from the simplest, unreflective adversarial actions to highly conscious and virtually scripted contests. As such, competitive bargaining moves are natural responses in some negotiation situations and advantageous or profitable actions in others. This being so, what are the downsides to competitive negotiation?

At least in its full-blown form, competitive negotiation is risky bargaining. The competitor takes risks in order to secure gains. Among these is the risk that there will be no gains at all. The competitive strategy of staking out a position and holding firm, particularly when joined with various devious tactics, runs the risk of alienating, frustrating, or angering the other party and, thus, precluding a possible agreement.

Even if there is an agreement, it may not be a sustainable one. On reflection, the other party may conclude that it does not really like the deal or feels that it was "taken" in some way. Furthermore, even if there is a deal and it survives, the bargaining that occurred may adversely affect future relations between the parties. This is certain to happen if one party discovers that the other party actively misled or manipulated it. It may also happen just because of residual hard feelings or mistrust arising from the tactics used.

Beyond these concerns, competitive bargaining is neither efficient nor productive bargaining. It is inefficient and nonproductive because parties who withhold and manipulate information miss possibilities of cooperating to find or create additional value to divide between them. As a result, they can be said "to leave gains on the table."

Along this line, genuine cooperation and positive relationships are two real gains that competitive negotiators are unlikely to ever realize and bring to bear in immediate or prospective negotiations between themselves and others. Put another way, although a competitive negotiator may realize a gain in a particular negotiation, he may forgo far greater possible gains in doing so. The greater foregone gains are those that may arise from enlisting the willing cooperation of others to assist him in maximizing the satisfaction of his interests, while at the same time advancing their own. That is an entirely different view of the negotiation situation, however, and one that competitors usually do not attempt. In any event, it remains the subject of other articles.⁶⁶

65. LAX & SEBENIUS, *supra* note 3, at 34.

66. *See* note 3, *supra*.

