

A Context-Based Theory of Strategy Selection in Legal Negotiation

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I. INTRODUCTION

Negotiation and other lawyering processes emerged during the past decade as legitimate subjects for study and teaching both within legal academe¹ and among the practicing bar.² This recognition rests on the premise that a body of knowledge exists

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1. The study of lawyering skills as a separate discipline emerged predominantly from law school clinical education in which students receive academic credit for working with actual clients and their cases. In the early years of clinical education, its proponents stressed the social service benefits of having law students represent indigent clients. William Pincus, a pioneer of the clinical movement, articulated these goals in 1969:

So far as society is concerned it sorely needs the services which only law students and their professors can provide in the great mass of individual cases involving the "little man" It behooves legal educators and law students to learn that they will be great movers of social forces if they act forcefully and directly where their talents and position give them strategic influence on what nowadays appears to be the small matter of obtaining justice for an individual.

W. PINCUS, *A Statement on CLEPR's Program*, in CLINICAL EDUCATION FOR LAW STUDENTS 71-72 (1980).

A change of emphasis in the goals of clinical education occurred in the mid-1970s; this shift is symbolized by the publication of Professors Bellow and Moulton's seminal work, *The Lawyering Process: Materials For Clinical Instruction in Advocacy*. Professors Bellow and Moulton intended it to be used primarily as a text by students working in clinical programs. According to the authors, "It asks the student practitioner to describe and generalize from his or her law practice" G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS. MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* xix (1978). They state that the materials in the text "are not intended to communicate a particular body of information to the student. The readings, models and commentary are not to be 'learned.'" *Id.* at xxiv. Nevertheless, Professors Bellow and Moulton acknowledge that "lawyer work can be analyzed and discussed in much the same way as a piece of literature or an appellate case, and that reasoning from analogy offers a useful way to connect theory with practice." *Id.* at xxiii. By 1982, a survey conducted by the Committee on Teaching Materials of the American Association of Law Schools revealed that 46 of the 103 law schools with clinical programs which responded to a survey questionnaire identified "negotiations" or other lawyering skills as subjects taught in clinical courses. See Survey Results: Memorandum from Committee on Teaching Materials to American Association of Law Schools Clinical Education Section Members 44-48 (Jan. 4, 1983) (copy on file with author).

Since the publication of *The Lawyering Process*, the study of lawyering skills has emerged as an independent discipline; lawyering skills are taught in courses using educational methods other than actual cases, such as simulated negotiation and interviewing exercises, demonstrations and lecture and discussion. See, e.g., Coleman, *Teaching the Theory and Practice of Bargaining to Lawyers and Students*, 30 J. LEGAL EDUC. 470 (1980); Ortwein, *Teaching Negotiation: A Valuable Experience*, 31 J. LEGAL EDUC. 108 (1981). The teaching of negotiation theory and technique has even penetrated the first-year law school curriculum. See Margolick, *The Trouble With American Law Schools*, N.Y. Times, May 22, 1983, § 6 (Magazine), at 20, 32 (description of first-year course called "Lawyering Process" at Stanford Law School).

During this same period of time, "there has been a virtual explosion of books about negotiation." Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM B. FOUND RESEARCH J. 905, 905. Professor Menkel-Meadow provides an excellent description and synthesis of contributions to the study of legal negotiations between 1977 and 1983. See *id.* at 905 n.1 for a listing of these recent works.

2. See generally ILLINOIS INST. FOR CONTINUING LEGAL EDUC., ATTORNEY'S GUIDE TO NEGOTIATIONS (1979); M. NELKEN & M. SCHOENFIELD, PROBLEMS AND CASES IN INTERVIEWING, COUNSELING AND NEGOTIATION (1983); Schoenfield, *Strategies and Techniques for Successful Negotiations*, 69 A.B.A. J. 1226 (1983).

which can assist lawyers in becoming more effective at skills such as negotiating and interviewing.³ For example, Professors Gary Bellow and Bea Moulton, pioneers in lawyering skills education, begin their discussion of negotiations by presenting “a model—a set of simplifying assumptions to help you better understand an area of lawyer work.”⁴ Similarly, Professor Gerald Williams acknowledges that throughout his text on legal negotiation the question, “What does it mean to be an effective negotiator?” is a “major concern.”⁵

Disagreement among legal negotiation theorists about which negotiation strategy is most likely to be effective and the absence of a comprehensive theory of negotiation strategies currently jeopardize the legitimacy of negotiation as an academic discipline. There is little or no consensus on whether a negotiator should pursue a competitive⁶ or an accommodative⁷ approach when dealing with the other party; instead, legal negotiation theorists espouse directly conflicting advice. Most of the early texts used in law schools to teach negotiations focused on the “competitive strategy” and, at least implicitly, endorsed such a strategy.⁸ In 1981, Professors Roger Fisher and William Ury published their seminal book, *Getting to Yes: Negotiating Agreement Without Giving In*, in which they severely criticized the competitive theory⁹ and advanced “the method of *principled negotiation* developed at the Harvard Negotiation Project”¹⁰ Their strategy is largely based on a problem-solving or integrative approach,¹¹ and Professors Fisher and Ury claim that it is “an all purpose

3. Texts written by law professors and used to teach negotiations include the following: H. EDWARDS & J. WHITE, *PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS A NEGOTIATOR* (1977); R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981); G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983). These texts borrow heavily from the research and recommendations of social scientists, particularly social psychologists who have studied bargaining. See, e.g., H. EDWARDS & J. WHITE, *supra*, at 67–68; G. WILLIAMS, *supra*, at 44–45, 48–58; see also G. BELLOW & B. MOULTON, *supra* note 1, at 445–555. This cognitive approach to understanding negotiation contrasts sharply with the way that most lawyers learn to negotiate. Gerard Nierenberg, a lawyer, describes the process by which most lawyers are educated: “Many people, due to their lack of awareness of any structured approach to the negotiating process, are forced to reuse self-taught methods that have merely appeared to work in the past—methods that were acquired, like diseases, from social contact.” G. NIENBERG, *FUNDAMENTALS OF NEGOTIATING* xi (1973).

4. G. BELLOW & B. MOULTON, *supra* note 1, at 445.

5. G. WILLIAMS, *supra* note 3, at 7. In an article specifically dealing with negotiation strategy, Professor Gary Lowenthal convincingly argues that “certain strategic decisions,” which must be made by each party in all negotiations, “can and should be planned systematically, according to general principles applicable to all negotiations.” Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69, 69 (1982). In the analogous context of interviewing and counseling, Professors Binder and Price express similar goals: “Our intention is to provide general models which can be used as a foundation for learning to become an effective interviewer and counselor. The models are intended to serve as basic guidelines, as a way to begin.” D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* vi (1977).

6. See *infra* notes 56–88 and accompanying text.

7. See *infra* notes 89–102 and accompanying text.

8. See, e.g., G. BELLOW & B. MOULTON, *supra* note 1, at 445–555; H. EDWARDS & J. WHITE, *supra* note 3, at 7–163; C. KARRASS, *THE NEGOTIATING GAME* 12–26 (1970).

9. R. FISHER & W. URY, *supra* note 3, at xii.

10. *Id.*

11. See *infra* notes 103–31 and accompanying text for a complete description of the integrative strategy. During the last several years, much of the attention directed toward legal negotiation theory has been focused specifically on the problem-solving or integrative strategy. See generally R. FISHER & W. URY, *supra* note 3; Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984). This interest is linked to the contemporaneous emergence of mediation and other alternative dispute resolution methods as appropriate topics for legal scholarship and education. See, e.g., Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982).

Integrative strategy theorists sometimes appear driven by a desire to proselytize. Professor Menkel-Meadow states that “[t]his effort is motivated by a desire to see the legal system work in a way which promotes and maximizes human

strategy"¹² that can be used in any negotiation. Two years later, Professor Gerald Williams published another text on legal negotiation and concluded that a third negotiation strategy, the cooperative strategy, is most likely to be effective in any given negotiation.¹³

The lawyer or law student who wishes to study negotiation strategies is faced, therefore, with three possible negotiation strategies, each of which is claimed by some negotiation experts to be superior to the other two. The confusion is exacerbated because no one has codified a generally accepted typology or terminology of negotiation strategies. Although leading negotiation theorists share a common understanding of what constitutes the competitive strategy,¹⁴ there is little consistency in the descriptions and names of noncompetitive theories. Noncompetitive strategies are variously referred to as collaborative,¹⁵ cooperative,¹⁶ and problem-solving.¹⁷

This article recommends a typology for negotiation strategies¹⁸ and outlines three distinct negotiating strategies: competitive, cooperative, and integrative. This system of nomenclature is adapted from social scientists who have studied bargaining

interactions that are creative, enfranchising, enriching, and empowering, rather than alienating and conflict-provoking." Menkel-Meadow, *supra* note 11, at 763. Through problem-solving negotiation, according to Professor Menkel-Meadow, "negotiators have an opportunity to transform an intimidating, mystifying process into one which will better serve the needs of those who require it. Whether or not this will work, we don't yet know. But what can we lose by trying?" *Id.* at 842. She acknowledges that "[t]eaching alternative models of negotiation, such as problem-solving or integrative models, may be easier and more subversive with law students than with practitioners—the former don't realize they are being taught anything different." Menkel-Meadow, *supra* note 1, at 934.

Professor Menkel-Meadow and other problem-solving theorists are correct when they argue that attorneys trained in the adversary system frequently miss opportunities for problem-solving. This article, however, advocates that an effective negotiator should be able to use any of three separate strategies in an appropriate context and that a strong inclination to apply any single strategy in all contexts may be disadvantageous. Somewhat ironically, Professor Menkel-Meadow also finds the "assumption of universal applicability" when suggested by competitive negotiation theorists to be "astounding." Menkel-Meadow, *supra* note 11, at 776.

12. R. FISHER & W. URY, *supra* note 3, at xiii. Recently, Professor Fisher acknowledged that his thinking has changed and that there are at least some instances in which a strategy other than principled negotiation is likely to be most advantageous. See Fisher, *The Pros and Cons of Getting to Yes*, 34 J. LEGAL EDUC. 120, 123 (1984) (printed as epilogue to White, Book Review, 34 J. LEGAL EDUC. 115 (1984) (reviewing R. FISHER & W. URY, *GETTING TO YES: NEGOTIATION AGREEMENT WITHOUT GIVING IN* (1981))). Professor Fisher reports that "[o]n the first day of my most recent negotiation course I tore a paperback copy [of *Getting to Yes: Negotiating Agreement Without Giving In*] in half to convince students how much work we had yet to do." *Id.* at 120.

13. G. WILLIAMS, *supra* note 3, at 19, 41.

14. Compare G. WILLIAMS, *supra* note 3, at 48–52 with Lowenthal, *supra* note 5, at 73–92.

15. See Lowenthal, *supra* note 5, at 73. Professor Lowenthal's collaborative strategy appears to encompass both of the noncompetitive strategies described below: cooperative, see *infra* notes 89–102 and accompanying text, and integrative, see *infra* notes 103–31 and accompanying text. See also *infra* note 40 and accompanying text.

16. See G. WILLIAMS, *supra* note 3, at 53. Professor Williams' cooperative strategy corresponds closely with the cooperative strategy described below. See *infra* notes 48–51 and accompanying text. Professor Williams fails to separately identify the integrative strategy. See *infra* notes 40–47, 105–11 and accompanying text.

17. See G. BELLOW & B. MOULTON, *supra* note 1, at 575. Professor Menkel-Meadow, unlike other legal negotiation theorists who generally identify only two negotiation strategies, describes four approaches: "(1) conventional adversarial; (2) problem solving (meeting needs); (3) fair or objective negotiation (solutions mediated by outside standards where needs are not the only criteria); (4) conventional cooperative (compromise)." Menkel-Meadow, *supra* note 11, at 816 n.243.

18. See *infra* notes 37–39 and accompanying text.

strategies,¹⁹ although even these theorists use varying terminologies.²⁰ Section II describes the basic ingredients of each strategy and the characteristics which distinguish each one from the other strategies. Section II also argues that a negotiator often can change a negotiation strategy during a single negotiation. Professor Dean Pruitt, a social psychologist, first suggested this idea and labelled it the "strategic choice model."²¹

Section III discusses how a negotiator should decide which strategy to employ in a specific negotiation.²² Social scientists, and more recently law professors,²³ have identified a number of factors to consider in choosing between the three strategies. This section attempts to provide a more comprehensive list of relevant factors than has previously been available to those interested in legal negotiation. These factors are organized into two groups: (1) factors to consider in deciding between a competitive and noncompetitive strategy;²⁴ and (2) factors to consider in deciding between the two noncompetitive strategies, cooperative and integrative.²⁵

A list of factors to be considered in choosing a negotiation strategy, by itself, however, is limited in its usefulness. When all of the factors considered suggest the same strategy, no problem arises.²⁶ In the more likely event that the factors point to different strategies, however, a mere list provides no guidance to the negotiator seeking to choose the most effective strategy.²⁷ Legal negotiation theorists have failed to indicate how factors suggesting different strategies should be ranked in importance or how they should be balanced against each other. Ultimately the negotiator is left to rely on his own instincts, albeit instincts that are somewhat better educated. Providing only a list of factors also ignores the reality that the process of analyzing such factors in a particular negotiation is a terribly complex operation to be undertaken by a negotiator on an ad hoc basis, even in the unlikely event that the negotiator is schooled in negotiation theory.

19. The competitive strategy is described in D. PRUITT, *NEGOTIATION BEHAVIOR* 15, 71-89 (1981). Social scientists sometimes refer to this strategy as the "rivalist" strategy, L. FOURAKER & S. SIEGEL, *BARGAINING BEHAVIOR* 67 (1963), or the "tough" strategy, Harnett, Cummings & Hamner, *Personality, Bargaining Style and Payoff in Bilateral Monopoly Bargaining Among European Managers*, 36 *SOCIOMETRY* 325, 328 (1973). The "cooperative strategy" is a generic term used by Professor Williams to describe negotiation strategies recommending unilateral concessions and seeking agreements fair and just to both parties. See G. WILLIAMS, *supra* note 3, at 53-54; see also D. PRUITT, *supra*, at 15, 91; Bartos, *Simple Model of Negotiation: A Sociological Point of View*, in *THE NEGOTIATION PROCESS: THEORIES AND APPLICATIONS* 13 (I. Zartman ed. 1978). Variations of the cooperative strategy have been referred to as the "soft," "intermediate," and "fair" strategies. See Harnett, Cummings & Hamner, *supra*, at 328. The integrative strategy is described in D. PRUITT, *supra*, at 137-200.

20. For example, Professors Harnett, Cummings, and Hamner identify four separate strategies. See Harnett, Cummings & Hamner, *supra* note 19, at 328. Similarly, Professors Horowitz and Willging identify five distinct strategies, see I. HOROWITZ & T. WILLGING, *THE PSYCHOLOGY OF LAW: INTEGRATIONS AND APPLICATIONS* 284 (1984), and Professor Pruitt finds five totally different strategies, see Pruitt, *Strategic Choice in Negotiation*, 27 *AM. BEHAVIORAL SCIENTIST* 167, 167 (1983).

21. See D. PRUITT, *supra* note 19, at 15. See generally Menkel-Meadow, *supra* note 11, at 759 n.10.

22. See *infra* notes 140-238, 244 and accompanying text.

23. See generally D. PRUITT, *supra* note 19, at 21-46, 84-89, 107-27 (social scientists). See Lowenthal, *supra* note 5, at 92-112; Menkel-Meadow, *supra* note 1, at 928-29 n.288; Menkel-Meadow, *supra* note 11, at 828-29 (law professors).

24. See *infra* notes 148-214 and accompanying text.

25. See *infra* notes 215-38 and accompanying text.

26. See Lowenthal, *supra* note 5, at 112.

27. See *id.*; see also *infra* notes 239-40 and accompanying text.

This article argues that it is possible to identify a negotiation strategy which is likely to succeed throughout an entire field of legal negotiations, such as plea bargaining or personal injury negotiations.²⁸ Within each substantive area of negotiation, certain systemic characteristics recur; in choosing a negotiation strategy, the importance of these characteristics outweighs the effects of idiosyncratic facts in most negotiations. Accordingly, by applying the factors to be used in choosing a negotiation strategy to the characteristics of a particular type of negotiation, a negotiator can determine systemically a recommended strategy. Although a somewhat different strategy may sometimes be dictated by the peculiar facts of a specific transaction, the recommended strategy for the context in which the negotiation occurs can serve as a guideline or starting point for the negotiator. The ability to prescribe a strategy for a specific type of negotiation enables negotiation theory to provide meaningful advice for the real world negotiator: by doing so, the study of negotiation in professional education is legitimated.

This article proceeds to apply this general theory to three specific situations involving strategy selection: (1) the defense attorney's strategy in plea bargaining;²⁹ (2) the plaintiff's attorney's negotiation strategy in personal injury negotiations;³⁰ and (3) the management attorney's strategy in labor negotiations.³¹ In each context, the recurring characteristics of the bargaining milieu are applied to the factors previously identified as relevant to the choice of a negotiation strategy and a strategy likely to be effective is recommended.

II. A BASIC TYPOLOGY OF NEGOTIATION STRATEGIES

The type of negotiation strategy likely to yield the most favorable outcome for a client is an important question, because the attorney is professionally obligated to seek an advantageous result for her client in all negotiations.³² During the last twenty years, negotiation theorists from various disciplines including law,³³ social psychology,³⁴ economics,³⁵ and international relations³⁶ have debated vigorously the attributes of various approaches to negotiation. This section defines the characteristics of three primary negotiation strategies and suggests that the negotiator's view of his relationship with the other party is the primary determinant that identifies each theory

28. See *infra* notes 241-44 and accompanying text.

29. See *infra* notes 245-307 and accompanying text.

30. See *infra* notes 308-52 and accompanying text.

31. See *infra* notes 353-400 and accompanying text.

32. See MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (1983) which provides: "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others." See also *id.* at Rule 1.3 comment; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, DR 7-101 (1976).

33. See, e.g., G. WILLIAMS, *supra* note 3, at 41, 47-54; Lowenthal, *supra* note 5, at 69.

34. See generally L. FOURAKER & S. SEGEL, *supra* note 19; D. PRUITT, *supra* note 19; R. WALTON & R. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATION (1965); Deutsch, *Cooperation and Trust: Some Theoretical Notes*, in CONTEMPORARY SOCIAL PSYCHOLOGY 121 (D. Johnson ed. 1973); Spector, *Negotiation as a Psychological Process*, 21 J. CONFLICT RESOLUTION 607 (1977).

35. See generally BARGAINING: FORMAL THEORIES OF NEGOTIATION, 131-242 (O. Young ed. 1975); A. CODDINGTON, THEORIES OF THE BARGAINING PROCESS (1968); J. CROSS, THE ECONOMICS OF BARGAINING 42-68 (1969).

36. See generally R. FISHER & W. URY, *supra* note 3; THE NEGOTIATION PROCESS: THEORIES AND APPLICATIONS 111-224 (I. Zartman ed. 1978); C. OSGOOD, AN ALTERNATIVE TO WAR OR SURRENDER (1962).

and distinguishes it from the others. The competitive negotiator seeks to force the opposing party to a settlement favorable to the negotiator by convincing the opponent that his case is not as strong as previously thought and that he should settle the case.³⁷ The cooperative strategy mandates that the negotiator make concessions to build trust in the other party and encourage further concessions on his part.³⁸ The third strategy, integrative bargaining, seeks to find solutions to the conflict which satisfy the interests of both parties.³⁹

The cooperative and integrative strategies are separate and distinct, even though some legal negotiation theorists fail to distinguish them.⁴⁰ The two noncompetitive strategies⁴¹ are similar; the goal of both is to create a nonadversarial atmosphere in which the parties can work toward an agreement.⁴² Aside from sharing this objective, however, the strategies involve quite different tactics. Under the cooperative strategy, the negotiator makes concessions in anticipation that his opponent will reciprocate and that the parties will move closer to a compromise resolution.⁴³ The cooperative strategy is the noncompetitive strategy most likely to be used in a "share bargaining"⁴⁴ or "distributive bargaining"⁴⁵ situation, that is, where the parties must divide a fixed quantity of resources. The integrative strategy, on the other hand, is not a concession based strategy that seeks to divide a fixed pie; rather, it maximizes the parties' potential for problem-solving in order to increase the joint benefit and expand the pie. It is incorrect, however, to view the cooperative and integrative strategies solely as aspects of a single accommodative or collaborative strategy functioning in two different contexts. Even in an apparently distributive or share bargaining situation, the

37. See G. WILLIAMS, *supra* note 3, at 48-49; Lowenthal, *supra* note 5, at 74, 90. Professors Fouraker and Siegel's *Bargaining Behavior* was the seminal exposition of competitive strategy principles.

38. See *infra* notes 89-102 and accompanying text.

39. See *infra* notes 103-31 and accompanying text.

40. Professor Lowenthal's concept of collaborative bargaining, for example, includes both "problem solving," see Lowenthal, *supra* note 5, at 72, and "a trading process in which each party will compromise her opening position in return for a matching compromise by the other side." *Id.* at 75. The trading process described by Professor Lowenthal is the core of the cooperative strategy. See *infra* notes 43-45, 89-102 and accompanying text. Other negotiation theorists previously distinguished the cooperative strategy from the integrative strategy. For example, Professor Menkel-Meadow highlights the distinctions between problem-solving and adversarial negotiation, see Menkel-Meadow, *supra* note 11, at 757-60, but recognizes that there may be two additional approaches which she calls fair or objective negotiation and conventional cooperative negotiation. See *id.* at 816 n.243. This article suggests that these last alternatives identified by Professor Menkel-Meadow are different aspects of a single strategy—the cooperative strategy. Similarly, Professors Fisher and Ury acknowledge the existence of the cooperative strategy in a pejorative manner when they contrast their principled negotiation not only with hard negotiation (the competitive strategy), but with soft negotiation (the cooperative strategy). R. FISHER & W. URY, *supra* note 3, at 13.

41. The term noncompetitive strategies is used in a technical sense to mean strategies that are premised on a positive working relationship with the negotiating party, as opposed to those based on attempts to undermine the opposing party. It is certainly not used in the colloquial sense to suggest that these strategies are not effective and cannot compete with the competitive strategy. See D. PRUITT, *supra* note 19, at 91.

42. The requisite atmosphere for cooperative bargaining is one characterized by trust. See *infra* notes 89-91 and accompanying text; see also D. PRUITT, *supra* note 19, at 124-25. A problem-solving orientation is required for the integrative approach. See *infra* notes 103-04 and accompanying text; see also D. PRUITT, *supra* note 19, at 182.

43. See D. PRUITT, *supra* note 19, at 91; Hamner, *Effects of Bargaining Strategy and Pressure to Reach Agreement in a Stalemated Negotiation*, 30 J. PERSONALITY & SOC. PSYCHOLOGY 458, 466 (1974); see also *infra* notes 89-96 and accompanying text.

44. See C. KARRASS, *supra* note 8, at 66.

45. See R. WALTON & R. MCKERSIE, *supra* note 34, at 13; see also White, Book Review, 34 J. LEGAL EDUC. 115, 116 (1984) (reviewing R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981)). Share or distributive bargaining is also referred to as "a zero-sum game." See *infra* notes 219-21 and accompanying text.

integrative negotiator strives to identify problem-solving solutions which are not readily perceived.⁴⁶ In contrast, the cooperative negotiator initiates the concession swapping process.⁴⁷

Negotiation strategies must be distinguished from the personal styles of negotiators. Professor Gerald Williams' recent text on legal negotiations tends to blur this distinction by using the same descriptive labels, cooperative and competitive, to describe both negotiators' styles⁴⁸ and negotiation strategies.⁴⁹ Professor Williams' work focuses on an empirical study of effective attorneys' characteristics as evaluated by other attorneys.⁵⁰ He labels negotiators who are described by other attorneys as being forthright, trustful, logical (not emotional), courteous, personable, friendly, and tactful as *cooperative*.⁵¹ On the other hand, Professor Williams describes the competitive negotiator as dominant, forceful, aggressive, attacking, ambitious, egotistical, arrogant, and clever.⁵² Professor Williams' focus on the personal characteristics of the attorney leads him to the cynical and confining conclusion that "[i]ndividual negotiators may not have much choice about the basic approach they use, which may be determined largely by one's own personality and experience."⁵³

A negotiation strategy is a separate and distinct concept from the negotiator's personal characteristics; a strategy is the negotiator's planned and systematic attempt to move the negotiation process toward a resolution favorable to his client's interests. Negotiation strategy consists of the decisions made regarding the opening bid and the subsequent modifications of proposals. Admittedly, strategy and personal style are frequently intertwined. A negotiator who has a "forceful, aggressive, and attacking" personal style frequently will succeed in causing an opponent to lose confidence in himself or his case thereby inducing substantial unilateral concessions, a goal of the competitive strategy. In another instance, however, a negotiator who is "courteous,

46. See, e.g., Menkel-Meadow, *supra* note 11, at 772-75, 785-89.

47. The failure of legal negotiation theorists to separately identify and describe the cooperative strategy may result from the inherent limitations on researching and teaching negotiation theory using simulations. In a simulated distributive bargaining situation, the competitive strategy usually yields a better quantitative result than the cooperative strategy. See *infra* notes 85-86 and accompanying text. Simulations are not designed to force students or research subjects to deal with the consequences of a competitive strategy, such as damage to continuing relationships, see *infra* notes 180-84 and accompanying text, stalemates in negotiations, see *infra* notes 163-79 and accompanying text, and violations of professional norms, see *infra* notes 209-14 and accompanying text. In much the same way, students engaged in problem-solving bargaining simulations generally experience both personal satisfaction and positive reinforcement from the instructor when they devise an integrative solution that satisfies both parties' interests. Conversely, there is little positive feedback in simulated negotiations for initiating concessions. Paradoxically, the only published empirical study of attorneys' negotiating behavior suggests that the cooperative strategy is the strategy most widely used by lawyers. See G. WILLIAMS, *supra* note 3, at 19. This contradiction suggests both that the cooperative strategy may be a more viable alternative in the actual practice of legal negotiations than it is in simulated student exercises, and, more broadly, that there are some limitations on the applicability of research simulations to the practice of law.

48. See G. WILLIAMS, *supra* note 3, at 18-40.

49. See *id.* at 47-54. Professor Williams acknowledges the distinction between style and strategy:

The descriptions of cooperative and competitive negotiators provide a basis for evaluating our personal negotiating patterns and those of negotiators we may see in action. But the descriptions do not directly address the question of *how the cooperative and competitive strategies work: what are the dynamics of each strategy, and what determines the effectiveness or ineffectiveness of a negotiator's application of the strategy?*

Id. at 47 (emphasis in original).

50. See *id.* at 17-20.

51. *Id.* at 21.

52. *Id.* at 23.

53. *Id.* at 41.

personable, and friendly” may, through competitive strategic moves such as high opening demands and infrequent concessions, be even more successful in destroying the opponent’s confidence in his case and inducing unilateral concessions from the opponent. Usually, a negotiator’s personal characteristics positively correlate with his preferred negotiating strategy. Separating personal style and negotiation strategies, however, yields new flexibility for the negotiator.⁵⁴ It is possible for negotiators with cooperative personal characteristics to adopt a competitive strategy when it would be advantageous, and naturally competitive individuals can adopt a cooperative strategy.⁵⁵ Further, a negotiator should often make competitive, cooperative, and integrative moves within a single negotiation. If negotiation strategies are recognized as something distinct from the personal style of negotiators, then the essential elements of each strategy can be disseminated in writing and taught to prospective negotiators. Short of psychoanalysis, however, it might be difficult or impossible to transform a naturally “courteous, personable, and friendly” individual, even temporarily, into someone who is “attacking, forceful, and aggressive.”

A. *The Competitive Strategy*

The competitive negotiator tries to maximize the benefits for his client by convincing his opponent to settle for less than she otherwise would have at the outset of the negotiation process.⁵⁶ The basic premise underlying the competitive strategy is that all gains for one’s own client are obtained at the expense of the opposing party.⁵⁷ The strategy aims to convince the opposing party that her settlement alternative is not as advantageous as she previously thought. Competitive tactics are designed to lessen the opponent’s confidence in her case, thereby inducing her to settle for less than she originally asked. The competitive negotiator moves “psychologically against the other person,”⁵⁸ with behavior designed to unnerve the opponent.⁵⁹ Competitive negotiators expect similar behavior from their opponents and therefore mistrust them.⁶⁰ In undermining their opponents’ confidence, competitive negotiators employ a strategy which often includes the following tactics:

1. a high initial demand;
2. limited disclosure of information regarding facts and one’s own preferences;

54. *Id.* at 49. Professor Williams admits that “we can all shift from one style to another or anywhere in between under sufficient encouragement or provocation” and that “many effective attorneys have developed the capability to adopt either style convincingly.” *Id.* at 41.

55. See *infra* notes 148–238 and accompanying text for a general discussion of choosing between the competitive, cooperative, and integrative strategies.

56. See R. WALTON & R. MCKERSIE, *supra* note 34, at 59–82; G. WILLIAMS, *supra* note 3, at 49; Lowenthal, *supra* note 5, at 83–84.

57. See G. WILLIAMS, *supra* note 3, at 48–49; see also D. PRUITT, *supra* note 19, at 15; R. WALTON & R. MCKERSIE, *supra* note 34, at 13; Lowenthal, *supra* note 5, at 74.

58. G. WILLIAMS, *supra* note 3, at 48–49; see also R. WALTON & R. MCKERSIE, *supra* note 34, at 59–82; Lowenthal, *supra* note 5, at 83–88.

59. See S. SIEGEL & L. FOURAKER, BARGAINING AND GROUP DECISION MAKING: EXPERIMENTS IN BILATERAL MONOPOLY 100 (1960); Lowenthal, *supra* note 5, at 90; see also C. OSGOOD, *supra* note 36, at 53 (competitive military psychology utilizes a “seesawing” arms race to achieve this effect).

60. See generally Schlenker & Goldman, *Cooperators and Competitors in Conflict: A Test of the “Triangle Model,”* 22 J. CONFLICT RESOLUTION 393 (1978).

3. few and small concessions;
4. threats and arguments; and
5. apparent commitment to positions during the negotiating process.

A negotiator who utilizes the competitive strategy begins with a high initial demand.⁶¹ Empirical research repeatedly demonstrates a significant positive relationship between a negotiator's original demand and his payoff.⁶² A high initial demand conceals the negotiator's minimum settlement point and allows the negotiator to grant concessions during the negotiating process⁶³ and still achieve a favorable result. The negotiator's opening position may also include a false issue—a demand that the negotiator does not really care about, but one that can be traded for concessions from the opponent during the negotiation.⁶⁴ Generally, the more that the negotiator insists upon a particular demand early in the negotiation, the larger the concession that ultimately will be obtained from the opponent in exchange for dropping that demand.⁶⁵ In addition, the opponent may have evaluated the negotiator's case more favorably than the negotiator has; a high demand protects the negotiator from quickly agreeing to a less favorable settlement than one which he might later obtain. If the demand is high but credible,⁶⁶ the opponent's response to the demand may also educate the negotiator about how the opponent evaluates her own case.⁶⁷

The competitive negotiator selectively and strategically shares information with his opponent.⁶⁸ He does not disclose the least favorable terms to which his client would agree, that is, his minimum reservation point.⁶⁹ He prefers to obtain an even more favorable settlement in excess of his reservation point. If the negotiator reveals his reservation point too quickly, the opponent has no incentive to offer anything more than the reservation price. Therefore, the competitive negotiator carefully hides not

61. Competitive negotiators characteristically have high aspiration levels; they expect a higher outcome for their clients than would other negotiators. See C. KARRASS, *supra* note 8, at 17–18; see also L. FOURAKER & S. SIEGEL, *supra* note 19, at 90–95.

62. See, e.g., C. KARRASS, *supra* note 8, at 18; Harnett, Cummings & Hamner, *supra* note 19, at 342.

63. See G. BELLOW & B. MOULTON, *supra* note 1, at 529; D. PRUITT, *supra* note 19, at 26; S. SIEGEL & L. FOURAKER, *supra* note 59, at 67.

64. For example, a labor negotiator might include in her opening position a demand for a better pension plan. In reality, the union may not be concerned about a better pension plan, but instead may intend to drop this demand in exchange for wage concessions from the employer.

65. The false demand strategy can fail if the opponent agrees to concede to the false demand and psychologically expects reciprocation.

66. If an initial demand is too high to be regarded as credible or reasonable, then at best it will have no effect and at worst it may prevent successful negotiations. See G. BELLOW & B. MOULTON, *supra* note 1, at 529. An outrageously high demand may be dismissed by opposing counsel and have no effect on her evaluation of the case. It may cause opposing counsel to resort to threats or to begin to prepare for trial in anticipation of deadlock. Excessive demands also suggest to opposing counsel that the negotiating attorney does not understand the value of the case. This inferred attribution of inexperience or incompetence might raise opposing counsel's expectations and result in her becoming a "tough" opponent. See S. SIEGEL & L. FOURAKER, *supra* note 59, at 93.

67. Experiments conducted by Professor Raiffa of the Harvard Business School demonstrate that once two offers are on the table, the best prediction of the final agreement is the midpoint between the opening bids. H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 48 (1982).

68. See generally G. BELLOW & B. MOULTON, *supra* note 1, at 512, 528; D. PRUITT, *supra* note 19, at 172, 196; Deutsch, *supra* note 34, at 137; Lowenthal, *supra* note 5, at 79–83; Pruitt & Lewis, *The Psychology of Integrative Bargaining*, in *NEGOTIATION: SOCIAL-PSYCHOLOGICAL PERSPECTIVES* 175–76 (D. Druckman ed. 1977).

69. See, e.g., H. RAIFFA, *supra* note 67, at 84–85. This limit has also been referred to as a "minimum disposition," G. BELLOW & B. MOULTON, *supra* note 1, at 487, and as a "minimum necessary share," D. PRUITT, *supra* note 19, at 47.

only his reservation point, but also any information which would allow the opponent to determine his true reservation point. For example, in a criminal case, the prosecutor might conceal from the defense attorney information regarding her caseload, her familiarity with the case, her own vacation plans, and the attitude of the victim toward the case.⁷⁰ Conversely, the competitive negotiator selectively discloses information which strengthens his case and which undermines the opponent's case. The competitive negotiator should also pursue tactics that glean information about his opponent's reservation price, his opponent's attitude toward the case, and specific facts about the case.⁷¹

The competitive strategy of negotiations mandates that the party make as few concessions⁷² as possible. If a concession must be made, it should be as small as possible.⁷³ The competitive negotiator makes concessions reluctantly, because concessions may weaken one's position through both "position loss" and "image loss." Position loss occurs because in most negotiations a norm exists against withdrawing a concession. Further, an early concession results in an opportunity loss for something that might have been extracted in exchange for the concession later in the negotiation process. Image loss occurs because after a concession, the opponent perceives that the negotiator is flexible; in the opponent's mind this may suggest that further concessions can be obtained.⁷⁴ Obviously, however, concessions are generally an inevitable part of the negotiating process.⁷⁵ Concessions made by a negotiator build an expectation of reciprocity and lead to further concessions by the opponent which bring the parties closer to agreement.⁷⁶ Granting concessions prevents premature deadlock and impasse and maintains goodwill with the adversary. This may be necessary to complete the negotiations or to foster a continued cooperative venture in the future. When possible, the competitive negotiator seeks to create the illusion in his opponent's eye that he is making a concession without diminishing his own satisfaction.

70. G. BELLOW & B. MOULTON, *supra* note 1, at 513; see D. PRUITT, *supra* note 19, at 25-26.

71. Professors Bellow and Moulton suggest a number of techniques that may be utilized by a negotiator to obtain information from his opponent. The techniques described range from the deceptively simple yet effective method of direct questioning, to the more subtle technique of suggesting third-party mediation in order to ascertain the opposing party's commitment to her position. The opponent's firmness may also be evidenced by her reaction to the possibility of deadlock. Professors Bellow and Moulton warn, however, that inevitable risks accompany these types of information bargaining. The tactics delineated may create pressures on the instigator to disclose some of his own information or may increase the level of suspicion and distrust between the negotiators. G. BELLOW & B. MOULTON, *supra* note 1, at 512-28.

72. "A concession is a change of offer in the supposed direction of the other party's interests that reduces the level of benefit sought." D. PRUITT, *supra* note 19, at 19.

73. See G. BELLOW & B. MOULTON, *supra* note 1, at 543-45; C. KARRASS, *supra* note 8, at 18-19; Chertkoff & Conley, *Opening Offer and Frequency of Concession as Bargaining Strategies*, 7 J. PERSONALITY & SOC. PSYCHOLOGY 181, 184 (1967); Harnett, Cummings & Hamner, *supra* note 19, at 342-43.

74. See Pruitt, *Indirect Communication and the Search for Agreement in Negotiation*, 1 J. APPLIED SOC. PSYCHOLOGY 205, 236-38 (1971).

75. A notable exception is Boulwarism, the strategy of making a reasonable opening offer and refusing to make concessions. See H. RAIFFA, *supra* note 67, at 48. Lemuel Boulware, former vice-president of the General Electric Company, started negotiations with unions by making what he considered to be a fair opening offer and then holding firm. *Id.* Boulwarism has subsequently been held to be an unfair labor practice under the National Labor Relations Act. See *NLRB v. General Elec. Co.*, 418 F.2d 736, 762 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

76. See Pruitt, *supra* note 74, at 210-12.

This is done by either conceding on an issue the negotiator does not care about⁷⁷ or appearing to make a concession without really making one.⁷⁸

The competitive negotiator obviously strives to force his opponent into making as many and as large concessions as possible while he makes few concessions, small in degree. To force concessions from his opponent, he employs both arguments and threats. In negotiations, arguments are communications intended to persuade the opponent to draw logical inferences from known data.⁷⁹ For example, a plaintiff's attorney might describe a favorable eyewitness account of a collision and ask the defense counsel to infer the probability that her client will be found liable. Arguments should suggest to the opponent that her case is weaker than she previously thought and, therefore, that she should make new concessions. A threat, on the other hand, is a communication intended to inform the opponent that unless she agrees to a settlement acceptable to the negotiator, the negotiator or his client will act to the opponent's detriment.⁸⁰ For example, a union negotiator might threaten that the union will strike if management refuses to make wage concessions.

The competitive negotiator not only uses offensive tactics to force concessions from his opponent, but he also makes as few concessions as possible. The competitive negotiator ignores both arguments and threats, believing that this is the best response. When the negotiator must make a concession, the competitive strategist suggests that the negotiator give the opponent a "positional commitment," a reason why he is not conceding more.⁸¹ Without such a positional commitment, according to the competitive strategist, the opponent will perceive the grant of a concession as a weakness and will expect further concessions. The negotiator's resolve to concede nothing more can be substantiated by linking the concession to a principle,⁸² to the negotiator's personal reputation,⁸³ or to a threat of ending negotiations.⁸⁴

To the extent that the success of a negotiation strategy is measured by the payoff in a single negotiation involving the division of limited resources between two

77. See *supra* notes 64-65 and accompanying text.

78. For example, a prosecutor in plea bargaining might agree to dismiss one charge of a two-count indictment as part of a plea bargain, realizing that dismissing one charge would not affect the length of the defendant's sentence because the trial court judge would sentence concurrently on the two counts.

79. See D. PRUITT, *supra* note 19, at 77; Lowenthal, *supra* note 5, at 84. In the field of formal logic, an argument has been defined as "a group of statements in which one, the conclusion, is claimed to follow from the others." J. CORNMAN & K. LEHRER, *PHILOSOPHICAL PROBLEMS AND ARGUMENTS: AN INTRODUCTION* 5 (1968).

80. See E. MCGINNIES, *SOCIAL BEHAVIOR: A FUNCTIONAL ANALYSIS* 431 (1970). See generally G. BELLOW & B. MOULTON, *supra* note 1, at 559-61; D. PRUITT, *supra* note 19, at 77-78; T. SCHELLING, *THE STRATEGY OF CONFLICT* 35-43 (1960); Lowenthal, *supra* note 5, at 85-88. To be effective, a threat must be credible, clearly stated, and prospective in effect. See G. BELLOW & B. MOULTON, *supra* note 1, at 560-61; Lowenthal, *supra* note 5, at 86-88. Credibility depends on both the ability to carry out a threat and the inclination to do so. In assessing the credibility of a negotiator's threat, the opponent should consider the past activity of the negotiator, as well as the proportionality of the threatened consequences to the issue at stake in the negotiation. For example, it would not be credible for the prosecutor to threaten a lengthy prison sentence for a defendant who has committed a minor offense and has no prior criminal record. Lowenthal, *supra* note 5, at 86.

81. See D. PRUITT, *supra* note 19, at 75-76.

82. For example, a prosecutor may refuse to reduce a felony to a misdemeanor because the conduct involved personal violence.

83. A prosecutor might claim that if she further reduced a charge in plea bargaining, then she would not be able to function effectively with law enforcement officers.

84. A defense attorney may tell the prosecutor that his client will not plead to any higher offense and that if his offer is not acceptable to the prosecutor, then the case must proceed to trial.

parties,⁸⁵ studies of simulated negotiations suggest that the competitive strategy yields better results than other strategies for the negotiator.⁸⁶ However, the competitive strategy suffers severe disadvantages. The likelihood of impasse is much greater for negotiators who employ the competitive strategy than for those who use other approaches.⁸⁷ Competitive tactics engender tension and mistrust between the parties, which can give the appearance that the parties are farther apart than they really are. These negative attitudes may carry over into matters other than the current negotiation and may make continuing relationships difficult.⁸⁸

B. *The Cooperative Strategy*

A view of human nature different than that upon which the competitive strategy is premised, with its emphasis on undermining the confidence of opposing counsel, underlies most collaborative interaction. In everyday events, even when they are deciding how to divide a limited resource between them, two negotiators often seek to reach an agreement which is fair and equitable to both parties and seek to build an interpersonal relationship based on trust.⁸⁹ This approach to negotiation can be designated the cooperative strategy.⁹⁰ The cooperative negotiator initiates granting concessions in order to create both a moral obligation to reciprocate and a relationship built on trust that is conducive to achieving a fair agreement.⁹¹

The cooperative negotiator does not view making concessions as a necessity resulting from a weak bargaining position or a loss of confidence in the value of her case. Rather, she values concessions as an affirmative negotiating technique designed to capitalize on the opponent's desire to reach a fair and just agreement and to maintain an accommodative working relationship. Proponents of the cooperative strategy believe that negotiators are motivated not only by individualistic or competitive desires to maximize their own utilities, but also by collectivistic desires to reach a fair solution.⁹² Cooperative negotiators assert that the competitive strategy often leads to resentment between the parties and a breakdown of negotiations.⁹³

85. This negotiation context has been labelled distributive bargaining or share bargaining. See *supra* notes 44-45 and accompanying text; see also *infra* notes 218-21 and accompanying text.

86. See C. KARRASS, *supra* note 8, at 17-25; S. SIEGEL & L. FOURAKER, *supra* note 59, at 52; Harnett, Cummings & Hamner, *supra* note 19, at 342-43.

87. See E. MCGINNIES, *supra* note 80, at 210; C. OSGOOD, *supra* note 36, at 75-76; G. WILLIAMS, *supra* note 3, at 50-52.

88. See *infra* notes 180-84 and accompanying text.

89. In this context, trust is defined "as a belief that the other [person] is ready for coordination." D. PRUITT, *supra* note 19, at 124.

90. See generally O. BARTOS, PROCESS AND OUTCOME OF NEGOTIATIONS 44-47 (1974); D. PRUITT, *supra* note 19, at 91-135; G. WILLIAMS, *supra* note 3, at 53-54, 75-76; Bartos, *supra* note 19, at 13-27. According to the cooperative negotiation theorist, "[T]he key to inducing conciliatory behavior is not coercion and intimidation but a set of moves that encourage the other negotiator to feel competent and effective." Rubin, *Negotiation: An Introduction to Some Issues and Themes*, 27 AM. BEHAVIORAL SCIENTIST 135, 141 (1983).

91. See G. WILLIAMS, *supra* note 3, at 53; Bartos, *supra* note 19, at 13-15.

92. See Bartos, *supra* note 19, at 14-15. In 1961, Professor Homans, a sociologist, formulated the rule of "distributive justice" which essentially provides that individuals will regard as fair, rewards that are proportional to the recipient's contribution to society. O. BARTOS, *supra* note 90, at 30.

93. See G. WILLIAMS, *supra* note 3, at 50-52; Bartos, *supra* note 19, at 26-27.

According to Professor Otomar Bartos, an originator of the cooperative strategy, the negotiator should begin negotiations not with a maximalist position, but rather with a more moderate opening bid that is both favorable to him and barely acceptable to the opponent.⁹⁴ Once two such opening bids are on the table, the negotiators should determine the midpoint between the two opening bids and regard it as a fair and equitable outcome. External facts, such as how large a responsive concession the negotiator expects from the opponent, whether she is representing a tough constituency that would view large concessions unfavorably, and whether she is under a tight time deadline and wants to expedite the process by making a large concession, affect the size of the negotiator's first concession. According to Professor Bartos, the negotiator should then expect the opponent to reciprocate with a concession of similar size so that the midpoint between the parties' positions remains the same as it was after the realistic opening bids were made.⁹⁵ The concessions by the parties are fair, according to Bartos, as long as the parties do not need to revise their initial expectations about the substance of the agreement.⁹⁶

The term cooperative strategy embraces a larger variety of negotiation tactics than Bartos' detailed model. Cooperative strategies include any strategies that aim to develop trust between the parties and that focus on the expectation that the opponent will match concessions ungrudgingly.⁹⁷ Endemic to all cooperative strategies is the question of how the negotiator should respond if the opponent does not match her concessions and does not reciprocate her goodwill. The major weakness of the cooperative approach is its vulnerability to exploitation by the competitive negotiator.⁹⁸ The cooperative negotiator is severely disadvantaged if her opponent fails to reciprocate her concessions.⁹⁹ Cooperative negotiation theorists suggest a variety of responses when concessions are not matched. Professor Bartos recommends that the negotiator "stop making further concessions until the opponent catches up."¹⁰⁰

94. See Bartos, *supra* note 19, at 19–20, 24.

95. See *id.* at 21.

96. *Id.* at 22.

97. See D. PRUITT, *supra* note 19, at 91–135; G. WILLIAMS, *supra* note 3, at 53–54.

98. See D. PRUITT, *supra* note 19, at 92–93; G. WILLIAMS, *supra* note 3, at 53–54.

99. See *infra* notes 148–52 and accompanying text for a complete description of how the cooperative negotiator fares poorly when paired against a competitive negotiator; see also G. BELLOW & B. MOULTON, *supra* note 1, at 545–48; E. MCGINNIES, *supra* note 80, at 417–18, 423–24; D. PRUITT, *supra* note 19, at 102–10; H. RAIFFA, *supra* note 67, at 123–26.

100. Bartos, *supra* note 19, at 23. Professor Osgood recommends a more elaborate approach for encouraging trust and cooperation in an aggravated conflict situation known as *Graduated Reciprocation in Tension-Reduction*, or simply *GRIT*. See C. OSGOOD, *supra* note 36, at 85–134. Osgood's GRIT approach has been organized into ten separate steps by Professor Lindsfold:

1. The series of actions must be announced ahead of time as an effort to reduce tension.
2. Each action should be labelled as part of this series.
3. The initially announced timetable must be observed.
4. The target should be invited to reciprocate each action.
5. The series of actions must be continued for a period of time, even if there is no reciprocation.
6. The actions should be clear-cut and susceptible to verification.
7. The strategist must retain his or her capacity to retaliate should the other become more competitive during this campaign.
8. The strategist should retaliate if the other becomes competitive.
9. The actions should be of various kinds, so that all they have in common is their cooperative nature.

Because of its vulnerability to exploitation, the cooperative theory may not initially appear to be a viable alternative to the competitive strategy. As mentioned previously, in tightly controlled experiments with simulated negotiations, the competitive strategy generally produces better results. However, in actual practice, the competitive approach results in more impasses and greater distrust between the parties.¹⁰¹ Furthermore, most people tend to be cooperative in orientation and trusting of others. Professor Williams found that sixty-five percent of the attorneys he surveyed used a cooperative approach.¹⁰² This, of course, means that in a majority of cases the cooperative negotiator will not be exploited by her opponent, because the opponent also uses a cooperative approach. Most cooperative negotiators probably would not feel comfortable using the competitive negotiators' aggressive tactics, which are designed to undermine the opponent and his case. Nor would they relish living and working in the mistrustful milieu which may result from the use of the competitive strategy.

C. *The Integrative Strategy*

Both the competitive and cooperative strategies focus on the opposing positions of the negotiators—each negotiator attempts to achieve as many concessions from the other as possible. These concessions move the negotiations closer to an outcome favorable to the negotiator; however, each concession diminishes the opponent's satisfaction with the potential agreement. Integrative bargaining, on the other hand, attempts to reconcile the parties' interests and thus provides high benefits to both.¹⁰³ Integrative bargaining is usually associated with a situation in which the parties' interests are not directly opposed and the benefit of one widget for one party does not necessarily result in the loss of one widget for the opponent.¹⁰⁴ Instead, the parties use a problem-solving approach to invent a solution which satisfies the interests of both parties.

Integrative bargaining recently has received widespread attention as the result of the publication of Professors Roger Fisher and William Ury's popular text, *Getting to Yes: Negotiating Agreement Without Giving In*.¹⁰⁵ Professors Fisher and Ury's negotiation strategy is largely based on integrative bargaining theory, although it goes

10. The other should be rewarded for cooperating, the level of reward being graduated to the other's level of cooperation.

Lindskold, *Trust Development, the GRIT Proposal, and the Effects of Conciliatory Acts on Conflict and Cooperation*, 85 *PSYCHOLOGICAL BULL.* 772, 775-77 (1978).

101. See C. OSGOOD, *supra* note 36, at 69-71; G. WILLIAMS, *supra* note 3, at 50-52.

102. See G. WILLIAMS, *supra* note 3, at 18. It is important to remember, however, that Professor Williams uses the descriptive term "cooperative" in a somewhat different manner than it is used here. See *supra* notes 50-53 and accompanying text.

103. See R. FISHER & W. URY, *supra* note 3, at 10-11; D. PRUITT, *supra* note 19, at 137-200; G. WILLIAMS, *supra* note 3, at 76-77.

104. See R. WALTON & R. MCKERSIE, *supra* note 34, at 126-37; Lowenthal, *supra* note 5, at 73-74.

105. R. FISHER & W. URY, *supra* note 3.

beyond integrative theory in important ways.¹⁰⁶ The authors call their strategy principled negotiation¹⁰⁷ and identify four basic points to this approach:

- People: Separate the people from the problem.
- Interests: Focus on interests, not positions.
- Options: Generate a variety of possibilities before deciding what to do.
- Criteria: Insist that the result be based on some objective standard.¹⁰⁸

The first point distinguishes integrative bargaining from both cooperative bargaining and competitive bargaining, according to Professors Fisher and Ury.¹⁰⁹ The competitive bargainer believes that his relationship with the opponent is important, because he seeks to change the opponent's position through sheer willpower.¹¹⁰ The cooperative negotiator builds trust in order to reach a fair agreement. In contrast, Professors Fisher and Ury's principled negotiator attempts to separate the interpersonal relationship between the negotiators from the merits of the problem or conflict.¹¹¹

Professors Fisher and Ury's second and third points are the standard components of integrative bargaining theory. The negotiation dance of concession matching or positioning, which is a part of both competitive and cooperative behavior, often obscures the parties' real interests.¹¹² A major component of integrative bargaining is the free exchange of information between the negotiators so that each party's motives, goals, and values are understood and appreciated.¹¹³

Integrative bargaining attempts to locate a solution that satisfies both parties' respective interests.¹¹⁴ Professor Dean Pruitt, a social psychologist, identifies several types of integrative agreements. The most dramatic integrative solution emerges when the parties "brainstorm" and develop a new option that satisfies the significant needs of both parties.¹¹⁵ The second type of integrative bargaining is often referred to as "logrolling."¹¹⁶ In logrolling, each negotiator agrees to make concessions on some issues while his counterpart concedes on other issues; the agreement reconciles the parties' interests to the extent that the parties have different priorities on the issues. For example, a plea bargaining agreement might provide that the defendant will plead guilty to a felony, and the prosecutor will recommend that the defendant receive

106. See *infra* notes 128-31 and accompanying text.

107. R. FISHER & W. URY, *supra* note 3, at xii. Professors Fisher and Ury reject the argument that principled negotiation cannot be applied to situations where the interests of the parties conflict. *Id.* at xiii. They believe principled negotiation is an all-purpose strategy. *Id.*; see also *infra* notes 128-31 and accompanying text.

108. R. FISHER & W. URY, *supra* note 3, at 11.

109. *Id.* at 8-9, 11, 20-21.

110. *Id.* at 6.

111. *Id.* at 11.

112. *Id.* at 11, 41-57. Professors Fisher and Ury offer the 1978 peace negotiations between Israel and Egypt as an example. Egypt insisted that Israel return the entire Sinai peninsula, which had been occupied by Israel since the 1967 Six Day War, to Egyptian sovereignty. Israel insisted upon keeping portions of the Sinai so that Egyptian tanks would not be poised on Israel's border. Neither side could accept the results of repeated attempts to divide the territory. At the Camp David negotiations, the parties agreed to return the entire Sinai to Egyptian sovereignty, but also agreed to demilitarize major portions of it, thus satisfying the underlying interests of both parties. *Id.* at 42-43.

113. See *id.* at 45-54; see also D. PRUITT, *supra* note 19, at 170-75.

114. See R. FISHER & W. URY, *supra* note 3, at 58-83; D. PRUITT, *supra* note 19, at 141-62.

115. See R. FISHER & W. URY, *supra* note 3, at 64-79; D. PRUITT, *supra* note 19, at 154-62.

116. D. PRUITT, *supra* note 19, at 153-54.

probation.¹¹⁷ Defendants are often most concerned with the possibility of imprisonment; the prosecutor, in a particular case, may care more about securing a felony conviction than she does about the defendant's sentence.

Another form of integrative bargaining is described by Professor Pruitt as "cost cutting."¹¹⁸ A negotiator, in order to reach an agreement, may find ways to diminish the tangible or intangible costs to the opponent when the opponent accepts an agreement that satisfies the negotiator. For example, a management attorney who agrees to the wage demands of a certain type of worker might be concerned that in the future the union will expect similarly generous agreements for other workers. The union negotiator may reassure management that she understands that this wage agreement for certain employees stems from special circumstances, such as historical inequities, and that similar wage concessions should not be expected for other employees.¹¹⁹

Several procedures facilitate reaching an integrative agreement. The free exchange of information and brainstorming efforts to invent options for mutual gains were discussed previously. In addition, the possibility of logrolling suggests that disputed issues should be considered simultaneously rather than sequentially.¹²⁰ The negotiator should also develop a set of goals and other requirements in order to generate and screen alternative proposals.¹²¹ To the extent that the parties exchange negotiating proposals, the integrative negotiator should try to incorporate into his proposal some element of an opponent's previously suggested solution.¹²² Finally, the negotiator should continually alter his own proposal incrementally so he only gradually reduces the level of benefit to be realized by his client. This behavior is referred to by Professor Pruitt as "heuristic trial and error."¹²³

Traditional integrative bargaining strategy does not have universal applicability.¹²⁴ The strategy is utilized most easily when the parties share a problem-solving orientation, and either an identifiable mutual gain option is available or multiple issues which can be traded off against one another exist.¹²⁵ It is less useful when the parties disagree on only a single issue and the parties' interests are inherently

117. See *infra* notes 283-86 and accompanying text.

118. D. PRUITT, *supra* note 19, at 142-48.

119. The last form of integrative bargaining identified by Professor Pruitt is "compensation." *Id.* at 148-53. The opponent is indemnified for the costs he experiences in agreeing to an outcome acceptable to the negotiator. Compensation is therefore closely related to logrolling. Although with logrolling an opponent is "compensated" by a concession on another issue in dispute between the parties, Professor Pruitt's compensation is a broader concept.

120. D. PRUITT, *supra* note 19, at 165-67.

121. Professor Pruitt refers to these explicitly articulated goals as "a search model." *Id.* at 167.

122. *Id.* at 169.

123. *Id.* at 175.

124. See G. WILLIAMS, *supra* note 3, at 76-77.

125. See H. RAIFFA, *supra* note 67, at 131.

opposed. Examples of situations that present direct conflicts include personal injury litigation¹²⁶ and plea bargaining.¹²⁷

Professors Fisher and Ury urge the “principled negotiator” to insist upon a result based on objective criteria when the parties’ interests seem to directly conflict and no mutually advantageous solution appears to be available.¹²⁸ In this situation, they recommend the following steps:

1. Frame each issue as a joint search for objective criteria.
2. Reason and be open to reason as to which standards are most appropriate and how they should be applied.
3. Never yield to pressure, only to principle.¹²⁹

By stressing the desirability of reaching a fair decision, Professors Fisher and Ury appear to be borrowing from the principles of the cooperative strategists, especially from Professor Otomar Bartos.¹³⁰ With this addition to traditional integrative bargaining, Professors Fisher and Ury claim to have found an “all-purpose strategy”¹³¹ that can be used in any negotiation regardless of the number of issues, the nature of the issues, or the orientation of the opposing party.

D. *The Strategic Choice Model*

The three negotiation strategies outlined above are not mutually exclusive; frequently a negotiator will use more than one strategy in a single negotiation.¹³² Some issues in a negotiation may lend themselves to an integrative approach, while others must be resolved through competitive or cooperative bargaining. Furthermore, most negotiations that begin with competitive approaches will culminate prior to agreement with either cooperative or integrative bargaining.¹³³ Social psychologist Professor Dean Pruitt, in his strategic choice model of negotiation, recognizes that various negotiation strategies will be used in the same negotiation.¹³⁴ The strategic choice model suggests that the negotiator must choose between engaging in competitive behavior, making a unilateral concession, and suggesting an integrative proposal at every point in the negotiation process. These alternative tactics correspond closely with the competitive, cooperative, and integrative strategies previously outlined.

126. Even in personal injury litigation, Professor Williams points out, some opportunities for mutual gain exist. See G. WILLIAMS, *supra* note 3, at 76–77. Both parties benefit from tort settlements because they avoid incurring attorneys’ fees and other costs associated with trial. Damages in personal injury actions are increasingly being paid in “structured settlements” over a period of time; such settlements may meet the interests of both parties. See Krause, *Structured Settlements for Tort Victims*, 66 A.B.A. J. 1527 (1980); see also *infra* note 225 and accompanying text.

127. Once again, some opportunity for mutual gain may be present in the plea bargaining scenario. The prosecutor may be most concerned with her conviction record and the defendant may be most concerned with the length of incarceration. Thus, a conviction with a short sentence would serve both parties’ interests. See *infra* notes 283–86 and accompanying text.

128. R. FISHER & W. URY, *supra* note 3, at 11, 84–98.

129. *Id.* at 91.

130. See O. BARTOS, *supra* note 90, at 298–302; Bartos, *supra* note 19, at 24.

131. R. FISHER & W. URY, *supra* note 3, at xiii.

132. See Lowenthal, *supra* note 5, at 74–75; Menkel-Meadow, *supra* note 11, at 759 n.10.

133. See *infra* notes 137–39 and accompanying text; see also D. PRUITT, *supra* note 19, at 131–35.

134. D. PRUITT, *supra* note 19, at 15; see also Pruitt, *supra* note 20, at 167.

Professor Pruitt further suggests that negotiations frequently will progress from a competitive stage to what he refers to as a coordinative stage.¹³⁵ During the competitive stage, the negotiator tries to persuade the opponent to move toward the negotiator's position and to convince the opponent that the negotiator's own position is firm.¹³⁶ Eventually, however, if the parties are to agree, they must engage in either cooperative or integrative bargaining.¹³⁷ The competitive antagonism between the parties diminishes as each negotiator's own goals and expectations are tempered by realism; trust is engendered as the negotiators recognize that the opponent's expectations have also been lowered. At this point, the parties are psychologically ready to trade concessions or engage in problem-solving in order to resolve the conflict.

Often, competitive behavior and cooperative behavior alternate within a single negotiation or even occur simultaneously; different issues will be at varying stages of resolution, and agreements resulting from cooperative or integrative bargaining will often produce new issues to be resolved by the parties. Negotiators, however, cannot easily shift between competitive tactics and cooperative or integrative tactics in all instances. Successful competitive tactics, which attack the opponent and his case, jeopardize the positive working relationships necessary for the cooperative and integrative strategies.¹³⁸ The combination of competitive strategies and cooperative or integrative strategies will typically occur only at different phases of a negotiation process¹³⁹ or on easily separable and distinct issues.

III. FACTORS SUGGESTING THE OPTIMAL NEGOTIATION STRATEGY

Proponents of each negotiation theory outlined above sometimes promise that their strategy will always yield the best result.¹⁴⁰ However, social psychologists, and

135. D. PRUITT, *supra* note 19, at 131-35. See generally C. STEVENS, STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION 11 (1963).

136. Professor Pruitt identifies five purposes for the competitive stage:

1. Posturing before constituents to make it seem that the bargainer is working vigorously on their behalf. This image should make it easier for the bargainer later to recommend a coordinative approach without being labeled as *soft* or *disloyal* by his or her constituents.
2. Clarifying one's own goals and priorities.
3. Assessing how far the other can be pushed into making concessions. Until such a test has been made, at least one of the parties is likely to be unwilling to conclude an agreement because of the belief that more can be achieved through competitive posturing.
4. Demonstrating firmness with respect to one's major goals. It is generally believed that the other party will remain in a competitive stance until the bargainer seems unlikely to make further unilateral concessions. Hence bargainers must establish an image of firmness before switching to coordinative behavior.
5. Narrowing the range of possible outcomes to the point where a large perceived divergence of interest no longer exists.

D. PRUITT, *supra* note 19, at 135.

137. *Id.* at 132-34.

138. See *infra* notes 180-84 and accompanying text.

139. See *infra* notes 195-98 and accompanying text.

140. For example, Professors Fisher and Ury regard their principled negotiation, based primarily upon an integrative strategy, as an all-purpose strategy. R. FISHER & W. URY, *supra* note 3, at xiii. Professors Fisher & Ury claim that [p]rincipled negotiation can be used whether there is one issue or several; two parties or many; whether there is a prescribed ritual, as in collective bargaining, or an impromptu free-for-all, as in talking with hijackers. The method applies whether the other side is more experienced or less, a hard bargainer or a friendly one.

Id. Professor Fisher's advocacy of principled negotiation has mellowed somewhat. See Fisher, *supra* note 12, at 120.

recently a few legal negotiation theorists, more realistically have suggested that the choice of the appropriate bargaining strategy depends on a number of factors.¹⁴¹ Analytically, the choice of an effective negotiating strategy is a two-step process. First, the negotiator should decide whether the competitive strategy or one of the noncompetitive strategies, either the cooperative or the integrative strategy, is more likely to be advantageous. If the initial analysis suggests a noncompetitive strategy, the negotiator must elect either the cooperative or the integrative strategy. Obviously, the sequence of these two decisions may affect the choice of strategy in some cases. Proponents of integrative bargaining claim that the negotiator should first consider whether opportunities for integrative solutions exist;¹⁴² only if such opportunities do not exist should the negotiator consider the choice between the competitive and cooperative strategies.¹⁴³ It is argued here, however, that the negotiator should first consider the opponent's negotiating strategy before evaluating other determinative factors. If the opponent pursues a competitive strategy, then both the integrative and cooperative strategies may leave the negotiator vulnerable to exploitation. Accordingly, the negotiator should first decide whether the opponent has the requisite attitude necessary for the noncompetitive strategies to be successful: trust, for the cooperative strategy, or problem-solving orientation, for integrative bargaining.

It is important to remember that the choice of a negotiation strategy is a decision to be made jointly by the attorney and the client. Even though the *Model Rules of Professional Conduct* assign decisions regarding "legal tactical issues" and the "means of representation" to the attorney,¹⁴⁴ the client "has a right to consult with the lawyer about the means to be used in pursuing those objectives."¹⁴⁵ Further, the attorney is bound by "a client's decision whether to accept an offer of settlement of a matter."¹⁴⁶ Thus, the original offer or demand in a negotiation and all subsequent concessions must be approved by the client. Optimally, this division of authority between the attorney and the client suggests that the attorney should discuss possible negotiation strategies with the client and receive input from her before and during the negotiation.¹⁴⁷

141. See generally D. PRUITT, *supra* note 19, at 30-45, 84-96, 107-33, 195-200 for examples of social psychologists who espouse this view. Legal negotiation theorists who agree include Lowenthal, *supra* note 5, at 92-112, and Menkel-Meadow who also criticizes the earlier negotiation literature and comments: "What is astounding about the conventional literature on tactics and strategies is the assumption of universal applicability." Menkel-Meadow, *supra* note 11, at 776.

142. See, e.g., R. FISHER & W. URY, *supra* note 3, at 59-83.

143. Professors Fisher and Ury recognize that the negotiator "will almost always face the harsh reality of interests that conflict." *Id.* at 84. In these instances, Professors Fisher and Ury recommend the use of "objective criteria," *id.* at 84, which essentially mirrors the cooperative strategy, see *supra* notes 89-102 and accompanying text. Finally, if the opponent continues to use competitive tactics, Professors Fisher and Ury indicate that the negotiator may be forced to present a "take it or leave it" choice to the opponent, R. FISHER & W. URY, *supra* note 3, at 147, or walk away from the negotiations, see *id.* at 95-96. To summarize, Professors Fisher and Ury's model, in contrast to the model presented here, suggests that the negotiator begin with an integrative strategy, change to the cooperative strategy if the integrative strategy fails, and, finally, switch to the competitive strategy if the cooperative strategy fails.

144. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment (1983).

145. *Id.*

146. *Id.* Rule 1.2(a). For an excellent analysis of why clients should make these decisions, see D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 2, 13-16 (1974).

147. See generally D. BINDER & S. PRICE, *supra* note 5, at 135-76.

A. Choosing Between a Competitive and a Noncompetitive Strategy

1. The Opponent's Negotiation Strategy

The single most important factor to consider in choosing between a competitive and noncompetitive strategy is the opponent's likely negotiating strategy. To be successful, the cooperative and integrative approaches require that both the negotiator and her opponent adopt the same strategy.¹⁴⁸ Thus, a negotiator who is paired against a competitive opponent should not adopt a cooperative strategy, because her cooperative tactics will be exploited.¹⁴⁹ Instead of reciprocating the cooperative

148. See *supra* notes 98–99 and accompanying text (cooperative strategy); G. WILLIAMS *supra* note 3, at 53–54; see also D. PRUITT, *supra* note 19, at 182–92 (integrative theory).

Proponents of the cooperative theory, see C. OSGOOD, *supra* note 36; Bartos, *supra* note 19, and proponents of the integrative theory, see generally R. FISHER & W. URY, *supra* note 3, at xiii, 112–13, claim their theories will work even against a competitive negotiator. However, if the opposing negotiator refuses to match the cooperative or integrative approach, these strategists essentially prescribe a return to a competitive strategy. Professors Fisher and Ury admit:

If the other side truly will not budge and will not advance a persuasive basis for their position, then there is no further negotiation. You now have a choice like the one you face when you walk into a store which has a fixed, nonnegotiable price on what you want to buy. You can take it or leave it.

Id. at 95.

149. The harm that is inflicted on the cooperative negotiator when negotiating with a competitive opponent is demonstrated by the results in the Prisoner's Dilemma Game. For descriptions of variations on this experimental game, see G. BELLOW & B. MOULTON, *supra* note 1, at 475–76; E. MCGINNIES, *supra* note 80, at 417–18, 423–24; D. PRUITT, *supra* note 19, at 102–10; H. RAIFFA *supra* note 67, at 123–26. In its original form, the Prisoner's Dilemma Game can be summarized as follows:

[T]wo suspects have been taken into custody by the police. They are interviewed separately by the district attorney, who tries to convince each one to turn state's evidence in order to obtain a lighter sentence. Both prisoners know that if neither confesses the worst that will happen to them is a light sentence for vagrancy. If one confesses and the other does not, the one who confesses will be given lenient treatment while the one who refuses to confess will have the book thrown at him. On the other hand, if both confess, then both will be punished with moderate rather than severe sentences. Each prisoner thus has two strategies—to confess or not to confess—and different payoffs, or consequences, are associated with each course of action.

Suppose that the payoff matrix shown [in the figure below] obtains for the parties to this dilemma. The dilemma for each suspect is obvious. If neither knows what choice the other has made, and if each chooses the alternative most advantageous to himself with no consideration for the other, then both will receive sentences of eight years. A moment's consideration will reveal why this is so. The rules of the game, it should be recalled, specify the outcome for each combination of choices. The strategy elected by A determines the row in which the outcome will fall and that chosen by B determines the column. The joint outcome is designated by the point of intersection.

		Prisoner B	
		Does not confess	Confesses
Prisoner A	Does not confess	1 year for A; 1 year for B	20 years for A; 6 months for B
	Confesses	6 months for A; 20 years for B	8 years for A; 8 years for B

Figure: Payoff Matrix for the Prisoner's Dilemma (Adapted from Brown 1965)

From A's point of view, the verbal problem-solving process probably goes something like this: "If I do not confess, I may get only one year. But if B turns state's evidence, then I will get twenty years. On the other hand, if I confess, I may get only six months, and the worst I can get is eight years. I had better confess and avoid the possibility of a twenty-year sentence." If B reasons the same way, then the outcome is a moderate penalty for both.

If A and B can trust one another, then each is better off not confessing, since the maximum sentence that each can receive is one year. In the absence of mutual trust, the best they can achieve is a compromise eight-year

negotiator's concessions, the competitive opponent will interpret the concessions as a sign of weakness and will grant fewer concessions. The cooperative negotiator loses both position and image in this situation¹⁵⁰ and moves no closer to agreement. The cooperative strategy succeeds only if the opponent reciprocates and makes concessions.¹⁵¹ Although the integrative strategy is somewhat less vulnerable to exploitation by a competitive negotiator than the cooperative approach, it also requires an exchange of information and a responsiveness to the other negotiator's interests and needs; these tactics may be exploited by the competitive negotiator who will refuse to exchange information and respond to the adversary's needs.¹⁵²

A noncompetitive strategy thus is contraindicated if the opponent pursues a competitive strategy¹⁵³ and the negotiator cannot induce him to change to a noncompetitive strategy.¹⁵⁴ If the opponent pursues a noncompetitive strategy, the negotiator can choose between competitive and noncompetitive strategies on the basis of other factors suggested below.¹⁵⁵ In the rare instances in which the negotiator is not concerned about the parties' continuing relationship and the negotiator has a feasible alternative if negotiations break down, the competitive strategy may be used successfully to exploit an unskilled noncompetitive negotiator.¹⁵⁶ Of course, the attempted use of a competitive strategy to exploit a noncompetitive negotiator-opponent may cause an impasse, particularly when the noncompetitive negotiator senses this

sentence. They have then arrived at what can be called a *noncooperative equilibrium point* (Shubik, 1964). If the suspects were to cooperate, in effect, to form a *coalition* against the prosecutor, then they could achieve a better mutual outcome by escaping with one-year sentences. Effectively, what each has done is to envision the worst thing that could happen to him for either confessing or not confessing. He then selects the lesser of these two evils, thus fixing his strategy. In A's case, this means selection of the row, and in B's case selection of the column, corresponding to "confess."

E. MCGINNIES, *supra* note 80, at 417-18.

A prisoner's decision to confess is obviously a decision to cooperate with the other prisoner. If both prisoners cooperate, their interests are well served. However, if one makes the cooperative choice and the other the competitive choice, the competitor fares very well while the cooperator is severely injured. See Donohue, *Analyzing Negotiation Tactics: Development of a Negotiation Interact System*, 7 HUM. COM. RESEARCH 273, 285 (1981) ("Individuals using tactics with greater attacking power relative to their opponents were more successful negotiators.").

The Prisoner's Dilemma Game is used by game theorists as an experimental tool to study negotiation. Game theory is a mathematical discipline used to study joint decisionmaking in conflict situations. See generally A. RAPOPORT, *TWO-PERSON GAME THEORY: THE ESSENTIAL IDEAS* (1966). The participants in game theory experiments, while attempting to maximize their own outcomes, must take into account the actions of other participants—they aspire to different goals and their actions affect, in part, the participants' joint outcome. See G. BELLOW & B. MOULTON, *supra* note 1, at 469-70. For a discussion of the limitations of game theory in understanding negotiations in the real world, see H. RAIFFA, *supra* note 67, at 1-6.

150. See *supra* text accompanying note 74.

151. See D. PRUITT, *supra* note 19, at 170-75.

152. See Pruitt, *supra* note 20, at 168. See generally R. FISHER & W. URY, *supra* note 3, at 41-57; D. PRUITT, *supra* note 19, at 166-67. Professor Menkel-Meadow, an advocate of the problem-solving approach, admits that "totally uninhibited information sharing may be . . . dysfunctional . . ." Menkel-Meadow, *supra* note 11, at 822.

153. See C. OSGOOD, *supra* note 36, at 75-84; D. PRUITT, *supra* note 19, at 116-18; Chertkoff & Esser, *A Review of Experiments in Explicit Bargaining*, 12 J. EXPERIMENTAL SOC. PSYCHOLOGY 464, 480-82 (1976); Wall, *Operantly Conditioning a Negotiator's Concession Making*, 13 J. EXPERIMENTAL SOC. PSYCHOLOGY 431, 431-40 (1977).

154. See *supra* text accompanying notes 98-100 for the steps a cooperative negotiator should take when the opponent does not reciprocate with concessions. See generally R. FISHER & W. URY, *supra* note 3, at 112-18 (integrative strategy).

155. See *infra* notes 163-214 and accompanying text.

156. The unskilled cooperative negotiator makes concessions in order to build trust and to establish the expectation of reciprocal concessions, see *supra* text accompanying notes 90-91, but is sufficiently naive that he does not terminate his pattern of giving unilateral concessions when the opponent fails to reciprocate, see *supra* text accompanying notes 98-100.

exploitation and responds defensively.¹⁵⁷ If a negotiator shapes her own strategy around the opponent's negotiating strategy, she must determine the nature of her opponent's strategy or what it will be in the future. Predictions about which strategy an opponent will employ can be gleaned from at least four sources:

(1) *The Opponent's Early Strategy in the Instant Negotiation.*¹⁵⁸

The opponent's early moves in a negotiation, such as his opening bid and subsequent concessions, often indicate whether he is using a competitive strategy. The display of a combative personal style as the bargaining begins and the use of threats are also indicators of this strategy.

(2) *The Opponent's Strategy in Past Negotiations.*¹⁵⁹

The opponent's past history of negotiation tactics, either with the negotiator personally or with others, may suggest the approach the opponent is likely to employ in the instant negotiation. Knowledge about the opponent's personality, whether he is argumentative or amiable, may also be a strategy indicator.¹⁶⁰

(3) *The Strategy of Similarly Situated Negotiators.*

The negotiator may have no information about her specific opponent, but may have considerable information about the past performance of similarly situated negotiators. All claims adjusters for a particular insurance company may tend to use a competitive strategy; all labor lawyers representing a vocal union may be competitive in the opening rounds; most prosecutors working with a busy office may be cooperative.¹⁶¹

(4) *The Negotiator's Favored Strategy if She Were in the Opponent's Position.*¹⁶²

A negotiator may be able to anticipate the opponent's strategy by placing herself in the opponent's position and determining what strategy she would use if confronted with the pressures and incentives facing the opponent.

2. Relative Bargaining Power

The second factor the negotiator should consider in choosing a negotiation strategy is the relative power of the negotiator and the opponent. Power can be defined as the capacity to influence the opponent.¹⁶³ The critical factor in negotiations is not power itself, but rather the opponent's perception of power.¹⁶⁴ A negotiator's power

157. See G. WILLIAMS, *supra* note 3, at 51–52. Professor Williams found that settlement impasse resulted in twice as many cases when *cooperative* negotiators deemed ineffective by their colleagues were involved than when *competitive* negotiators deemed ineffective by their colleagues were involved. *Id.* at 51.

158. See D. PRUITT, *supra* note 19, at 125. Observation of the opponent's early strategic moves does not reveal, of course, whether the opponent will continue to use the same strategy or will switch to another strategy. See *supra* text accompanying notes 132–39. For example, some of the negotiation strategies suggested later in this article include a transition from an initially competitive strategy to a noncompetitive strategy. See *infra* text accompanying notes 290–305 (defense attorney's strategy in plea bargaining).

An opponent's early cooperative moves which involve risks or costs to the opponent are more likely than less risky moves to be true indicators of a cooperative strategy. For example, by sharing information the opponent risks possible detrimental use of that information by the negotiator. This signals the opponent's intention to adopt a cooperative approach. D. PRUITT, *supra* note 19, at 125. Similarly, the opponent's initial moves should be regarded as less reliable indications of a cooperative approach if there are other plausible reasons for his moves or if the concessions are attributable to weakness. *Id.* at 126.

159. See Lowenthal, *supra* note 5, at 111.

160. See *infra* text accompanying notes 199–208.

161. See *infra* notes 263, 273–74 and accompanying text.

162. See D. PRUITT, *supra* note 19, at 40–41, 128–29.

163. See *id.* at 87; see also S. BACHARACH & E. LAWLER, BARGAINING: POWER, TACTICS, AND OUTCOMES 37–40 (1981); Tjosvold & Okun, *Effects of Unequal Power on Cooperation in Conflict*, 44 PSYCHOLOGICAL REP. 239, 239–42 (1979).

164. See D. PRUITT, *supra* note 19, at 87–88.

results from the negative consequences she can inflict on an opponent if an agreement is not reached and from the benefits that the negotiator can bestow on an opponent if a settlement is achieved.

The extent of a negotiator's power over an opponent depends largely on the alternatives available to the opponent if an agreement is not reached.¹⁶⁵ If not reaching an agreement produces severe consequences for the opponent, then the negotiator has great leverage to dictate the terms of an agreement.¹⁶⁶ Conversely, if the opponent has other viable options if attempts at an agreement fail, a negotiator has relatively little power. In the litigation context, a negotiator's power is therefore dependent on both the likely outcome at trial and the opponent's costs of proceeding through trial.¹⁶⁷ In addition, the ability to inflict negative consequences or to bestow benefits on the opponent, other than those arising directly from the agreement or the failure to reach an agreement, increases a negotiator's power.¹⁶⁸ Finally, the relative power of the negotiators is affected not only by the alternatives available to the parties, but also by the parties' respective commitment to the issues at stake.¹⁶⁹ If one negotiator values an outcome on a particular issue very highly, then his power or ability to influence the outcome of negotiations on that issue increases.

When a negotiator's power is greater than that of her opponent, she may choose either a competitive or a noncompetitive strategy. A negotiator with a viable alternative to a negotiated agreement is exposed to minimal risk if she chooses the competitive strategy, despite the increased risk of settlement impasse. In addition, threats made by a powerful negotiator who uses a competitive strategy will be

165. See S. BACHARACH & E. LAWLER, *supra* note 163, at 60-62; R. FISHER & W. URY, *supra* note 3, at 106-08. Professors Fisher and Ury use the phrase "Best Alternative To a Negotiated Agreement" or "BATNA" to identify the "standard against which any proposed agreement should be measured." *Id.* at 104; see also Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAVIORAL SCIENTIST 149, 156-57 (1983).

166. Professors Fisher and Ury note that power in negotiations often has little to do with wealth and power in other contexts.

Consider a wealthy tourist who wants to buy a small brass pot for a modest price from a vendor at the Bombay railroad station. The vendor may be poor, but he is likely to know the market. If he does not sell the pot to this tourist, he can sell it to another. From his experience he can estimate when and for how much he could sell it to someone else. The tourist may be wealthy and "powerful," but in this negotiation he will be weak indeed unless he knows approximately how much it would cost and how difficult it would be to find a comparable pot elsewhere. He is almost certain either to miss his chance to buy such a pot or to pay too high a price. The tourist's wealth in no way strengthens his negotiating power. If apparent, it *weakens* his ability to buy the pot at a low price. In order to convert that wealth into negotiating power, the tourist would have to apply it to learn about the price at which he could buy an equally or more attractive brass pot somewhere else.

R. FISHER & W. URY, *supra* note 3, at 106-07 (emphasis in original).

167. One commentator described negotiated settlements in civil cases in this manner:

Litigants settle out of court for only one reason: each thinks he obtains through the settlement agreement an outcome at least as good as his estimated outcome in court. Therefore, all settlement negotiations proceed within the confines of the parties' anticipations of the result of the contemplated lawsuit. Each party's bargaining limit is determined by his evaluation of the probable dollar outcome in court, adjusted for the probable dollar costs of litigation and settlement.

Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67, 70-71 (1969).

168. For example, in plea bargaining the prosecutor may charge the defendant with other, more serious crimes if the defendant refuses to enter a guilty plea. See *United States v. Goodwin*, 457 U.S. 368, 377-80 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 360-65 (1978).

169. See S. BACHARACH & E. LAWLER, *supra* note 163, at 61-63. As used in this context, commitment means the value of the outcome to the negotiator or his "motivational investment." *Id.* at 62. It is not used in the same sense as commitment tactic, a part of the competitive strategy. See *supra* text accompanying notes 81-84.

perceived as more credible and will more likely lead to concessions by an opponent than would threats by a weaker negotiator.¹⁷⁰

The less powerful negotiator has two options available: (1) she can attempt to increase her own power and decrease that of her opponent, or (2) she can pursue a noncompetitive strategy.¹⁷¹ The negotiator may be able to alter the relative distribution of power within a negotiation; for example, she may convince the opponent to reconsider the attractiveness of the opponent's "best alternative to a negotiated agreement." If a negotiator succeeds in reducing her opponent's power advantage, any negotiation strategy will more likely lead to a favorable outcome because the opponent will be more likely to make concessions.

Noncompetitive strategies are more effective than competitive strategies for low-power negotiators; the competitive strategy fails for the low-power negotiator because his threats are not credible and his positions are not viewed by the opponent as firm and unyielding.¹⁷² Instead, the opponent perceives that she has greater power and believes that she can extract further concessions from the negotiator.¹⁷³ Therefore, the greater the opponent's power over the negotiator, the greater the negotiator's incentive to engage in cooperative or integrative bargaining.¹⁷⁴ Fortunately for less powerful negotiators, empirical research suggests that powerful and high-status negotiators are likely to respond favorably to noncompetitive bargaining strategies.¹⁷⁵ Experiments indicate that subjects who were in low-status situations received better results against high-status opponents when they used appeals based on justice rather than when they used appeals based on their constituencies' self-advancements.¹⁷⁶ This is true in part because normative concerns constrain the use of power, and because powerful negotiators are inclined to be generous toward less powerful negotiators.¹⁷⁷ A powerful negotiator's belief that her opponent is committed to justice motivates her to act in a just manner and often counteracts the tendency to believe that one's own bargaining position is superior and that concessions are

170. See *supra* note 80.

171. See D. PRUITT, *supra* note 19, at 87-88; Fisher, *supra* note 165, at 151.

172. D. PRUITT, *supra* note 19, at 113-15.

173. See *supra* text accompanying notes 163-66.

174. Social psychologists' surveys of existing negotiating behavior have generally shown that negotiators with greater power than their opponents are more likely to adopt a competitive approach. See S. BACHARACH & E. LAWLER, *supra* note 163, at 89-96. These research results are consistent with the "zero-sum" approach, which suggests that an increase in the negotiator's bargaining power increases the toughness of the negotiator's concession tactics. See *id.* at 90-92. A conflicting theory, the "variable-sum" approach, suggests instead that an increase in the negotiator's bargaining power decreases the opponent's toughness. *Id.* at 92.

175. See Cook & Emerson, *Power, Equity and Commitment in Exchange Networks*, 43 AM. SOC. REV. 721, 737 (1978); Tjosvold, *Commitment to Justice in Conflict Between Unequal Status Persons*, 7 J. APPLIED SOC. PSYCHOLOGY 149, 160 (1977).

176. See Tjosvold, *supra* note 175, at 160. See generally Hamner & Baird, *The Effect of Strategy, Pressure to Reach Agreement and Relative Power on Bargaining Behavior*, in BARGAINING BEHAVIOR 247, 265 (H. Sauermann ed. 1978).

177. See Cook & Emerson, *supra* note 175, at 737. In his study of negotiation tactics, Professor Donohue conjectured that a negotiator's cooperative moves would result in a corresponding increase in his opponent's competitive moves. Donohue, *supra* note 149, at 285. Experimental results, however, indicated that after a cooperative move, 66% of the opponents used cooperative tactics. *Id.* Professor Donohue postulates that these results "may reflect a norm of reciprocity or cooperativeness in the negotiation in which it became unacceptable to kick a person when he/she was down." *Id.*

unwarranted.¹⁷⁸ A noncompetitive strategy, therefore, appears more likely than a competitive one to yield favorable results for a negotiator who faces a more powerful opponent. Other social scientists, particularly Professors W. Clay Hamner and Lloyd Baird, have reached the slightly different conclusion that “[p]erhaps the only way to offset the disadvantage of low power is to be tough initially and then become more yielding over time.”¹⁷⁹

3. *Future Dealings with the Opponent*

The third important factor to consider in choosing a negotiating strategy is the likelihood of future interaction with the opposing party. When a relationship between the parties will likely continue, a noncompetitive approach is recommended,¹⁸⁰ because the competitive strategy often generates distrust and ill will. These negative feelings may harm the negotiator in future dealings with the opponent.¹⁸¹ Although occasionally a negotiator who anticipates a continued relationship with the opponent may desire to use a competitive strategy in order to establish a strong bargaining image and discourage future exploitation by an opponent, another strategy will usually be preferred; the competitive strategy often results in social disapproval within the bargaining community and retaliation for violating fairness norms.¹⁸² If a negotiator knows that the negotiation is a one-shot transaction, she can afford to use a competitive strategy; but if the negotiators will have repeated contact, like the situation facing a prosecutor and a public defender,¹⁸³ a noncompetitive approach is suggested. Empirical research of existing negotiation practice demonstrates repeatedly that a negotiator will adopt either a cooperative or an integrative approach when she expects future contact with the opponent and the opponent acts cooperatively or appears to be a cooperative person.¹⁸⁴

4. *The Attitude of the Negotiator's Client*

The choice of the best negotiating strategy may also depend on whether a negotiator is representing himself or a client.¹⁸⁵ As previously noted, the formal

178. See Tjosvold, *supra* note 175, at 158–59.

179. Hamner & Baird, *supra* note 176, at 265.

180. See D. PRUITT, *supra* note 19, at 39–40, 109–12; Lowenthal, *supra* note 5, at 105–09; Roering, Slusher & Schooler, *Commitment to Future Interaction in Marketing Transactions*, 60 J. APPLIED PSYCHOLOGY 386, 386–87 (1975); Rubin, *supra* note 90, at 137.

181. See Pruitt, *supra* note 20, at 184; Roering, Slusher & Schooler, *supra* note 180, at 386–87.

182. A study by Professor Slusher suggests that negotiators who are concerned about enhancing prospects for a good future working relationship with the opponent should avoid entering the negotiation with a cooperative orientation and a plan to switch to a competitive strategy at a later stage. Goodwill between the negotiators is more likely to result when the negotiator changes from an early competitive strategy to a cooperative orientation. The study, unfortunately, did not consider the prospect of using a cooperative strategy throughout the negotiation. See Slusher, *Counterpart Strategy, Prior Relations, and Constituent Pressure in a Bargaining Simulation*, 23 BEHAVIOR SCI. 470, 476 (1978).

183. See *infra* text accompanying notes 271–74.

184. See Gruder, *Relationships with Opponent and Partner in Mixed-Motive Bargaining*, 15 J. CONFLICT RESOLUTION 403, 413–15 (1971); Roering, Slusher & Schooler, *supra* note 180, at 386–87; see also D. PRUITT, *supra* note 19, at 39–40, 109–12.

185. See D. PRUITT, *supra* note 19, at 41–45, 120–21; Lamm, *Group-Related Influences on Negotiation Behavior: Two-Person Negotiation as a Function of Representation and Election*, in BARGAINING BEHAVIOR 284, 297–302 (H. Saueremann ed. 1978).

norms governing the practice of law provide that the client establish certain parameters for the choice of a negotiation strategy.¹⁸⁶ Beyond this, the attorney's desire to maintain rapport with an adversarial client often necessitates the adoption of a competitive strategy.¹⁸⁷ Visibly competitive tactics may convince a client otherwise not inclined to trust his attorney that his attorney is representing his interests and is not "selling out" to the opponent.¹⁸⁸ In simulated negotiations, social scientists have found that representatives who are accountable to constituents are more likely to be tough and to use competitive tactics.¹⁸⁹

5. Pressure to Reach Agreement

Various kinds of pressure to reach an agreement may also affect the choice of the most appropriate negotiation strategy. Clients often desire an early conclusion to negotiations for a number of reasons: they may need settlement proceeds immediately, desire to minimize legal fees and other expenses resulting from prolonged negotiations, and want to minimize the psychological strain associated with continued conflict.¹⁹⁰ Pressure to reach an agreement also results from imminent trial deadlines and judicial attempts to settle cases. Finally, expeditious settlement is often a necessity for attorneys who have heavy caseloads, such as urban prosecutors and public defenders. Pressure to settle a case quickly, from whatever source, suggests using a noncompetitive strategy,¹⁹¹ and usually a cooperative strategy as opposed to an integrative one.¹⁹² Social scientists' research shows that time pressures result in lower demands, faster concessions, and lower aspiration levels.¹⁹³ Although these

186. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983); see also *supra* text accompanying notes 144-47.

187. See generally D. BINDER & S. PRICE, *supra* note 5, at 147-55. If a negotiator represents a radical constituency, he may have to play conflicting roles in order to achieve the best possible result. To convince his constituency that he is firmly committed to its goals, the negotiator may be obliged to behave competitively in public. The negotiator may recognize, however, that the extreme position advocated by his constituency is untenable; consequently, he may adopt a more moderate approach during private sessions when the opponent understands that the public display of competitiveness is for the benefit of the negotiator's constituency. See R. WALTON & R. MCKERSIE, *supra* note 34, at 417-19; see also *infra* text accompanying notes 381-85.

188. See *infra* notes 277-79, 381-85 and accompanying text.

189. See D. PRUITT, *supra* note 19, at 42, 120-21, 196; Lamm, *supra* note 185, at 297. Professor Lamm's experiment was designed to detect whether a difference exists in the negotiation behavior of persons negotiating for themselves as opposed to those negotiating for a constituency. The results indicated that the negotiation performance of nonelected representatives did not differ from that of negotiators who were bargaining for themselves. However, representatives who were elected by their constituencies presumably felt greater pressure to obtain good results and responded by bargaining with "greater toughness." *Id.* at 284. Ironically, this tough strategy was found to result in inferior outcomes for their constituencies. The risky negotiation tactics employed by the tough negotiators frequently resulted in negotiation breakdowns and lower profits. *Id.*

When the constituency attends the negotiation, the gender of the representative and his or her constituency may be a significant factor in predicting which strategy will be employed. Research indicates that male negotiators representing male constituencies are likely to negotiate competitively when their clients are present during negotiations. Female representatives of female constituencies, on the other hand, believe that their constituents expect them to behave more cooperatively during negotiations; thus, the presence or absence of the constituency has little effect on the female negotiator's strategy. See Benton, *Bargaining Visibility and the Attitudes and Negotiation Behavior of Male and Female Group Representatives*, 43 J. PERSONALITY 661, 675-76 (1975).

190. See D. PRUITT, *supra* note 19, at 30-31.

191. See *id.*; see also Hammer, *supra* note 43, at 465.

192. See D. PRUITT, *supra* note 19, at 121-22; Pruitt, *supra* note 20, at 171-72.

193. See D. PRUITT, *supra* note 19, at 30-31.

studies are descriptive and do not necessarily intend to recommend a cooperative strategy, they indicate that each negotiator will likely reciprocate the other's concessions when the parties are pressured to reach an agreement.¹⁹⁴ Further, concession-granting often concludes negotiations quickly; competitive tactics and proposed integrative solutions require further responses from the opponent as part of continued negotiation and therefore involve more time.

6. *The Stage of the Negotiation*

In most negotiations, not just those in which considerable pressure to reach agreement is felt, the negotiator's choice of strategic moves may depend on the stage of the negotiation.¹⁹⁵ The possibility of changing strategies during a negotiation previously was described as feasible under the strategic choice model.¹⁹⁶ Competitive strategic moves serve important functions early in the negotiation.¹⁹⁷ They suggest to the opponent that the negotiator will not concede easily and also help to convince the client that the negotiator is working vigorously on his behalf.¹⁹⁸ In order for the negotiators to reach an agreement and conclude the negotiations, however, at least one of the parties must make a noncompetitive move: either one or both parties must make concessions or devise an integrative solution.

7. *The Negotiator's Personality*

Although the negotiator's personality should not dictate her choice of negotiation strategy,¹⁹⁹ personality inevitably affects the ability of the negotiator to implement a particular strategy.²⁰⁰ Therefore, a negotiator must consider her own personality when choosing a strategy. Research demonstrates that negotiators who exhibit personality traits such as authoritarianism,²⁰¹ high self-esteem,²⁰² risk aversion,²⁰³ and strong internal control²⁰⁴ are more likely to choose a competitive approach; presumably these same traits increase the likelihood that a negotiator will be effective in employing a

194. See Hamner, *supra* note 43, at 464.

195. See generally I. MORLEY & G. STEPHENSON, *THE SOCIAL PSYCHOLOGY OF BARGAINING* 38-40 (1977); D. PRUITT, *supra* note 19, at 131-35; G. WILLIAMS, *supra* note 3, at 70-72, 77-82, 84-86.

196. See *supra* notes 132-39 and accompanying text; see also G. WILLIAMS, *supra* note 3, at 81-82; Lowenthal, *supra* note 5, at 75.

197. See D. PRUITT, *supra* note 19, at 132, 135.

198. See *id.* at 135. See generally Donohue, *supra* note 149, at 285.

199. See *supra* notes 54-55 and accompanying text.

200. See G. WILLIAMS, *supra* note 3, at 41-42; Lowenthal, *supra* note 5, at 109-12; Menkel-Meadow, *supra* note 11, at 836-38.

201. See, e.g., Berkowitz, *Alternative Measures of Authoritarianism, Response Sets, and Prediction in a Two-Person Game*, 74 J. SOC. PSYCHOLOGY 233 (1968); Deutsch, *Trust, Trustworthiness and the F Scale*, 61 J. ABNORMAL & SOC. PSYCHOLOGY 138 (1960); Haythorn, Couch, Haefner, Langham & Carter, *The Behavior of Authoritarian and Equalitarian Personalities in Groups*, 9 HUM. REL. 57 (1956); Wrightsman, *Personality and Attitudinal Correlates of Trusting and Trustworthy Behaviors in a Two-Person Game*, 4 J. PERSONALITY & SOC. PSYCHOLOGY 328 (1966).

202. See, e.g., C. KARRASS, *supra* note 8, at 87-88; Faucheux & Moscovici, *Self-Esteem and Exploitive Behavior in a Game Against Chance and Nature*, 8 J. PERSONALITY & SOC. PSYCHOLOGY 83 (1968). But see R. WALTON & R. MCKERSIE, *supra* note 34, at 194-95.

203. Harrett, Cummings & Hamner, *supra* note 19, at 340.

204. *Id.*

competitive strategy and in undermining the opponent's belief in his own position.²⁰⁵ Conversely, cognitive complexity (intelligence),²⁰⁶ and passivity, which Professor Gerald Williams refers to as "a clear tendency to be a milquetoast,"²⁰⁷ are personality traits identified with persons who typically pursue a noncompetitive approach. A person who is able to develop trust and good working relationships and who is able to persuade is likely to be effective as a cooperative negotiator.²⁰⁸

8. Negotiation Norms

Finally, the norms associated with a negotiation strongly affect the choice of a negotiation strategy.²⁰⁹ These norms include both formal rules governing professional conduct²¹⁰ and informal but generally accepted conventions of the negotiation context. For example, Professor Gerald Williams' survey of Phoenix lawyers suggests that the mere threat of filing a lawsuit in a commercial or real property dispute is regarded as a "heavy-handed" tactic, likely to incur the wrath of the opponent and be counterproductive.²¹¹ The informal norm in these disputes, therefore, suggests the use of a noncompetitive strategy. On the other hand, personal injury specialists regard a desire to settle a case either prior to filing a lawsuit or perhaps even more than a few months before trial as a dangerously noncompetitive tactic likely to lead to exploitation by the predominantly competitive negotiators in that environment. The relative acceptance of competitive and noncompetitive strategies may also depend on the geographic area in which an attorney practices.²¹² More generally, Professor Williams' survey of the negotiating traits of lawyers suggests two very important conclusions about negotiations in the legal context: lawyers use predominantly noncompetitive strategies,²¹³ and they expect opposing counsel to reciprocate.²¹⁴

205. See *supra* notes 58–60 and accompanying text.

206. See generally Driver, *Individual Differences as Determinants of Aggression in the Inter-Nation Simulation*, in *A PSYCHOLOGICAL EXAMINATION OF POLITICAL LEADERS* 335 (M. Hermann ed. 1977); Phelan & Richardson, *Cognitive Complexity, Strategy of the Other Player, and Two-Person Game Behavior*, 71 *J. PSYCHOLOGY* 205 (1969).

207. G. WILLIAMS, *supra* note 3, at 41.

208. See *supra* notes 89–93 and accompanying text.

209. See G. WILLIAMS, *supra* note 3, at 44, 81–82; Lowenthal, *supra* note 5, at 98–105.

210. Several of the provisions of the Model Rules of Professional Conduct regulate attorneys' conduct in bargaining. See Lowenthal, *supra* note 5, at 100–05. For example, rule 3.3(a)(1) provides that "[a] lawyer shall not knowingly make a false statement of material fact or law" MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (1983). This rule restricts, at least at its periphery, the competitive strategy.

211. G. WILLIAMS, *supra* note 3, at 81–82.

212. *Id.* at 44.

213. Professor Williams' survey did not consider competitive, cooperative, or integrative strategies as defined in this article. Instead, Professor Williams asked the surveyed attorneys to describe an opponent in a negotiation, using any of 137 characteristics listed in his questionnaire, and to rate the attorney as an effective, average, or ineffective negotiator. *Id.* at 17. Using the results, Professor Williams was able to place most of the negotiators into either a cooperative category or a competitive category, according to the groups of personal characteristics used to describe them. *Id.* at 18–25. Professor Williams found that 65% of all attorneys studied possessed personality traits which he described as "a cooperative approach to negotiation"; only 24% of the attorneys studied used a competitive approach. *Id.* at 18.

214. The surveyed attorneys described even those competitive attorneys that they found effective to be egotistical and arrogant. *Id.* at 23. They described 38% of the cooperative attorneys as effective, but only 6% of the competitive attorneys as effective. *Id.* at 19. Only 2% of the cooperative attorneys were regarded as ineffective, as compared to 8% of the competitive attorneys. *Id.* These ratings, completed by the negotiators' opponents, probably are not objective indications of the attorneys' effectiveness; however, they strongly suggest the perceived conventional practices among lawyer-negotiators and how those who deviate from the norm are viewed.

B. Choosing the Appropriate Noncompetitive Strategy: Cooperative or Integrative?

If a negotiator determines that a noncompetitive strategy will be most advantageous, he must then choose between a cooperative or an integrative strategy. As previously described, these two noncompetitive strategies are distinct.²¹⁵ The cooperative negotiator grants concessions in order to build a moral obligation for the opponent to reciprocate.²¹⁶ The integrative bargainer seeks to invent options that will satisfy the underlying interests of both parties.²¹⁷ Factors to consider in choosing between the two noncompetitive approaches are discussed below.

1. The Nature of the Negotiation

First, a negotiator must consider whether the negotiation is a zero-sum negotiation or a non-zero sum negotiation. In some negotiations, the parties seek to divide a fixed pie, a finite amount of resources or widgets; the gain of one party necessarily comes at the expense of the other party.²¹⁸ This type of bargaining situation has been referred to by various negotiation theorists as a zero-sum game,²¹⁹ distributive bargaining,²²⁰ or share bargaining.²²¹ Examples of zero-sum negotiations include the bargaining between the buyer and the seller about the cash price of a used car, and the negotiations between the prosecutor and a defense attorney about the length of a recommended sentence.

Many negotiations, on the other hand, involve a non-zero sum²²² or problem-solving²²³ situation. In these cases, collaboration between the two negotiating parties may increase the total number of widgets or the resources available to the parties.²²⁴ For example, a profit sharing arrangement may increase both workers' wages and corporate profits if it induces the workers to increase their productivity. Although many negotiation problems have non-zero sum aspects, it is unrealistic to view all negotiations, such as those between a repeat felony offender and a prosecutor or between a paraplegic accident victim and the negligent driver's insurance company,

215. See *supra* notes 40–47 and accompanying text.

216. See *supra* note 91 and accompanying text.

217. See *supra* notes 114–17 and accompanying text.

218. For another discussion of the distinction between zero-sum and non-zero sum negotiations, see Lowenthal, *supra* note 5, at 95–96.

219. See E. MCGINNIES, *supra* note 80, at 414. The term is borrowed from game theory. See *supra* note 149 for texts that discuss game theory.

220. See R. WALTON & R. MCKERSIE, *supra* note 34, at 4.

221. See C. KARRASS, *supra* note 8, at 127.

222. See E. MCGINNIES, *supra* note 80, at 417–19.

223. See C. KARRASS, *supra* note 8, at 128.

224. Professor Pruitt illustrates a non-zero sum situation with the example of a married couple trying to decide where to spend a vacation. D. PRUITT, *supra* note 19, at 137. The wife prefers the seashore, but the husband prefers the mountains. The most important interest underlying the wife's preference is that the seashore allows swimming and sunning; the husband, on the other hand, values fishing and hiking. The parties engage in integrative bargaining and find a new alternative that satisfies both of their underlying interests: they agree on an inland resort with a lake and a sandy beach near a state park that affords hiking and fishing. By examining their underlying interests, the parties find a non-zero sum solution that increases their total satisfaction beyond either of the original alternatives. *Id.*

as predominantly non-zero sum situations.²²⁵ Integrative bargaining is a feasible approach only to the extent that a negotiation has non-zero sum aspects. If the bargaining context is a zero-sum situation and all the factors predominantly suggest a noncompetitive strategy, the cooperative strategy is recommended.

2. *The Number of Disputed Issues*

Second, a negotiator must consider the number of disputed issues when choosing between the cooperative and integrative negotiation strategies. The more issues that the parties must negotiate, the greater the opportunity for integrative bargaining.²²⁶ One type of integrative bargaining previously discussed, logrolling,²²⁷ depends on the existence of multiple issues. Because each negotiator values the importance of various issues differently, a negotiator will be able to satisfy the other party's interests, as well as his own, by trading concessions on issues. Accordingly, the existence of multiple issues suggests the adoption of an integrative approach.²²⁸

3. *The Desire to Maximize Joint Benefit*

The successful use of the integrative strategy, as opposed to the cooperative strategy, ultimately depends on the parties' shared desire to maximize both their own and the opponent's gains.²²⁹ Several identifiable characteristics of a negotiation can contribute to the requisite motivation. First, when the negotiators have high aspira-

225. However, the negotiator must be aware that integrative solutions may be promising even in situations that appear to be strictly zero-sum problems. For example, even the settlement between a parapalegic victim and an insurance company may have integrative aspects. Although the interests of the parties in the amount of the settlement directly conflict, the parties may be able to agree to a structured settlement with periodic payments to the injured plaintiff over the remainder of the plaintiff's life. The structured settlement satisfies the claimant's need for replacement income, but decreases the insurance company's out-of-pocket expenses. See Bielawski, *Structuring Settlements: Avoiding Pitfalls*, TRIAL, June 1983, at 47; Lampo & Waldeck, *Structured Settlements: A Primer*, 39 J. Mo. B. 181 (1983); Wisner & Atkinson, *Structuring Settlements: Winning Isn't Everything*, TRIAL, June 1983, at 50. Professors Fisher and Ury's model of principled negotiation emphasizes the possibility and the desirability of finding opportunities for integrative solutions when they are not immediately obvious. See R. FISHER & W. URY, *supra* note 3, at 41-46, 58-83; see also Menkel-Meadow, *supra* note 11, at 772-75, 785-89. Professor Menkel-Meadow concludes that "[n]ot every legal dispute or transaction can be transformed into a non-zero sum or cooperative game, but zero-sum games in legal negotiations may be more the exception than the rule." *Id.* at 787.

226. See Lowenthal, *supra* note 5, at 96-98. See generally H. RAIFFA, *supra* note 67, at 131-42, 145-65.

227. See *supra* text accompanying notes 116-17.

228. If multiple issues make integrative bargaining possible, then the existence of multiple parties make integrative bargaining necessary. See H. RAIFFA, *supra* note 67, at 251-55, 285-87. See generally *id.* at 251-326. For example, Professor Raiffa describes concession-based negotiations, whether competitive or cooperative, in a multiparty setting as follows:

Consider the dance of packages. Before a meeting takes place with all parties, a subset of the parties might get together and concoct a package to be offered by their loose coalition. At a later stage two separate coalitions, offering different opening packages, might join forces and devise a compromise package. If there are fifteen parties, there may on the table initially be six packages, which may fuse to four and then to three. Packages change continually: some fuse; others fractionate and come together with shifting coalitions. Likewise, building up a contract issue by issue gets harder and harder to do when parties are added.

Id. at 253.

Multiparty bargaining requires frequent logrolling, see *supra* notes 116-17 and accompanying text, and the use of other integrative techniques, see H. RAIFFA, *supra* note 67, at 211-14, 254-55. The study of strategy in multiparty negotiations is based on coalition analysis. See H. RAIFFA, *supra* note 67, at 257-74.

229. See D. PRUITT, *supra* note 19, at 112-13; Menkel-Meadow, *supra* note 11, at 836-38.

tions and high limits in negotiations, an integrative approach is recommended.²³⁰ High limits and aspirations complicate making concessions, and, therefore, discourage the use of a cooperative strategy.²³¹ Second, both parties' possession of high power or high threat capacity—if each can inflict substantial harm on the other party—also contributes to the motivation for integrative bargaining.²³² In this context, other negotiation strategies will often be counterproductive: the competitive strategy may lead to stalemate,²³³ while the cooperative strategy risks exploitation.²³⁴ Finally, deadlocked negotiations on one hand, and pressure to reach agreement quickly on the other hand, affect the utility of integrative negotiations in very different ways. Deadlock often suggests that the parties regard themselves as unable to bargain cooperatively by making further unilateral concessions; integrative bargaining may emerge at this point.²³⁵ Conversely, pressure to reach agreement quickly will most likely lead to a pattern of concession-granting and a cooperative strategy,²³⁶ instead of the integrative strategy which requires more time to explore the possibilities of brainstorming²³⁷ and logrolling.²³⁸

IV. SYSTEMIC CHOICE OF NEGOTIATION STRATEGIES: AN EXPOSITION AND THREE EXAMPLES

A. *Negotiation Context as the Critical Variable*

A mere list of factors to consider in deciding on an optimal negotiation strategy is of limited practical use. Of course, when all factors suggest a single strategy, no problem arises.²³⁹ As Professor Gary Lowenthal admits after his discussion of similar factors, "When the factors analyzed . . . point in different directions, however, strategy decisions obviously are more complicated, and it is extremely difficult to determine the extent to which the two modes of negotiation can be combined in a single bargaining interaction."²⁴⁰ Negotiation theorists have failed to provide negotiators with a method for either ranking the importance of the factors or weighing the effects of various factors. Even if this were possible (and it probably is not) the practicing lawyer would be required to engage in a complicated weighing or analyzing process on an ad hoc basis prior to each negotiation.

230. The term high limits indicates that the minimum settlement which is acceptable to the negotiator is relatively near the negotiator's original position. See D. PRUITT, *supra* note 19, at 25–26; see also *supra* notes 103–04 and accompanying text.

231. D. PRUITT, *supra* note 19, at 119–20; Pruitt, *supra* note 20, at 169.

232. See D. PRUITT, *supra* note 19, at 113–15. Conversely, mutual threat capacity may discourage integrative solutions when one or both parties use this capacity because such actions result in hostile feelings that block joint efforts. See *id.* at 114–15; see also Deutsch & Krauss, *The Effect of Threat Upon Interpersonal Bargaining*, 61 J. ABNORMAL & Soc. PSYCHOLOGY 181, 188 (1960).

233. See *supra* note 87 and accompanying text.

234. See *supra* notes 98–100 and accompanying text.

235. See D. PRUITT, *supra* note 19, at 121–23.

236. *Id.* at 30–31, 121.

237. See *supra* text accompanying note 115.

238. See *supra* text accompanying notes 116–17.

239. See Lowenthal, *supra* note 5, at 112.

240. *Id.*

The factors that determine the likelihood of success of each bargaining strategy, however, do not occur randomly within the legal system. These factors repeatedly occur within the contexts, categorized by the substantive law involved, in which particular types of cases are negotiated. For example, attorneys who represent labor unions will almost inevitably be pushed, in the initial stages of negotiations, toward adopting a competitive strategy so that their clients perceive them as vigorous advocates.²⁴¹

The optimal negotiation strategy depends on the negotiation context.²⁴² If it is possible to identify factors that will be present in most negotiations of a particular kind, such as labor negotiations, personal injury negotiations, or plea bargaining, then it is possible to recommend a negotiation strategy for each context which is likely to be the optimal strategy. The negotiator needs to weigh and prioritize various factors only once to determine the appropriate standard operating procedure for a particular type of negotiation.²⁴³ Of course, idiosyncratic factors, such as an opposing negotiator with an unusually antagonistic personality, might occasionally make the recommended strategy inappropriate.²⁴⁴ Nevertheless, it would be a major accomplishment for negotiation theorists if they could teach lawyers, law students, and other negotiators which strategy is most likely to succeed within a particular specialty.

The subsequent parts of this section apply the factors that affect the choice of a negotiation strategy discussed above to the choice of negotiation strategies facing attorneys in three distinct negotiation situations: plea bargaining, personal injury negotiations, and collective bargaining. In each context, certain systemic characteristics which are likely to be present in most specific bargaining transactions are

241. See *infra* note 377 and accompanying text; see also R. WALTON & R. MCKERSIE, *supra* note 34, at 205.

242. Professor Menkel-Meadow reports that she previously attempted to develop a typology of cases with the more limited objective of identifying which classifications of cases were zero-sum and which were non-zero sum; however, she concluded "that although some case types may seem to be more determinately zero-sum, there are within each case type many individual cases that may be subject to non-zero sum resolutions." Menkel-Meadow, *supra* note 11, at 785 n.120. She warns that any attempted classification of cases may lead to "the stigmatizing effect of labeling certain case types as uniformly zero-sum. The stereotyping of cases may limit solutions in the very cases we hope to solve more creatively." *Id.* Professor Menkel-Meadow is correct in identifying this risk. The model proposed here attempts to mitigate that risk by acknowledging the importance of idiosyncratic factors which may justify modification of the recommended strategies. See *infra* notes 244, 305-06 and accompanying text.

243. Predictions about human behavior play a key role in a variety of decisions other than those concerning the choice of a negotiation strategy, including releases from prison and admissions to educational institutions. See generally Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1408-09 (1979). One of two competing approaches can be used to aid the decisionmaker: clinical or statistical. *Id.* at 1420-21. The clinical method "relies on the subjective judgment of experienced decisionmakers, who evaluate each applicant on an individual basis . . ." *Id.* at 1420. The statistical method makes predictions based on "a predetermined rule for counting and weighting key characteristics." *Id.* Surprisingly, the available empirical evidence suggests that the statistical method yields fewer predictive errors than the clinical method. *Id.* at 1424. In addition, the statistical method takes less time and skill. *Id.* at 1425. To the extent that negotiators currently are conscious of their choices of negotiation strategy at all, they use a clinical method. If negotiators apply the factors discussed above on an ad hoc basis to individual strategic choices during negotiations, then they will use a more informed clinical approach. On the other hand, to the extent that negotiators choose a negotiation strategy based on the single variable of the substantive negotiating context, they will use an implicitly statistical approach.

244. See *supra* notes 199-208 and accompanying text. Certain factors that affect the choice of negotiation strategy may be recurring ones, but they do not relate to the substantive milieu. Examples of such variables include the gender of the opposing negotiator, see, e.g., H. EDWARDS & J. WHITE, *supra* note 3, at 363-65; J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 169-74 (1975); Wall & Virtue, *Women as Negotiators*, BUS. HORIZONS, Apr. 1976, at 67, or the race or culture of the negotiator, see, e.g., C. PECK, *CASES AND MATERIALS ON NEGOTIATION* 233-34 (2d ed. 1980); J. RUBIN & B. BROWN, *supra*, at 162-65.

identified. Therefore, a standard operating procedure can be prescribed for attorneys operating within each area. Not surprisingly, the strategies recommended here by applying the factors previously discussed are similar to the ones currently recommended by skilled and experienced negotiators who gleaned their insights from the school of hard knocks. This rough correlation helps validate the method outlined here to analyze and choose an optimal strategy and supports this method's potential use to recommend negotiation strategies in other contexts.

B. *The Defense Attorney's Strategy in Plea Bargaining*²⁴⁵

It is possible to recommend a plea bargaining strategy likely to be effective in most cases, because the plea bargaining process generally exhibits certain characteristics that determine which strategy is likely to succeed, even though the specific mechanics of plea bargaining and behavior patterns of prosecutors and defense attorneys vary from one locality to another²⁴⁶ and from one case to another. The defense attorney's negotiation strategy²⁴⁷ is construed broadly here to include not only formal plea discussions, but also tactical considerations in deciding whether to file particular motions,²⁴⁸ how to handle discovery and the exchange of information in

245. Plea bargaining is the process of negotiation between the prosecutor representing the government and the attorney representing the defendant in a criminal case. See generally J. BOND, PLEA BARGAINING AND GUILTY PLEAS §§ 1.01–09 (1978); L. KATZ, JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 193–202 (1972); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OF INNOCENCE WITHOUT TRIAL 78–104 (1966). In exchange for foregoing his right to a jury trial, the defendant typically receives some consideration for his guilty plea. Most frequently, the prosecutor makes a concession by allowing the defendant to plead to a reduced charge or a lesser included offense that reduces the maximum punishment the judge can impose. See J. BOND, *supra*, § 1.07[3]; D. NEWMAN, *supra*, at 79–83. In the alternative, the prosecutor may dismiss some of the multiple charges against the defendant in exchange for a guilty plea to one or more offenses. See J. BOND, *supra*, § 1.07[4]. In other cases, the prosecutor may agree to recommend a sentence to the judge that is favorable to the defendant. *Id.* § 1.07[5]; White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 443 (1971). Less frequently, a desire to avoid a felony record or a record with convictions on certain crimes, such as sex offenses which carry negative connotations and a repugnant label, motivates a defendant to plead guilty. See D. NEWMAN, *supra*, at 105–11. Defendants sometimes plead guilty in exchange for the prosecutor's promise not to file additional charges. See *United States v. Goodwin*, 457 U.S. 368 (1982) (Absent prosecutorial vindictiveness, due process is not violated when a defendant is indicted on a felony charge after refusing to plead guilty to pending misdemeanor charges arising from the same incident.); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (So long as the accused is plainly subject to the more serious charges, due process does not prohibit the prosecutor from carrying out a threat to reindict the accused on more serious charges if he refuses to plead guilty to the offense originally charged.); J. BOND, *supra*, § 1.07[6]. Defendants may also plead guilty in exchange for a recommendation that a sentence be served in a certain custodial facility. See *People v. Dreusike*, 42 A.D.2d 920, 348 N.Y.S.2d 258 (1973) (youthful offender sought reformatory sentence rather than commitment to state prison); J. BOND, *supra*, § 1.07[6]. In many cases, defendants who plead guilty receive more lenient sentences even without an implicit bargain with the prosecutor or judge. See D. NEWMAN, *supra*, at 60–62.

246. See D. NEWMAN, *supra* note 245, at 78–90; Klonoski, Mitchell & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 OR. L. REV. 114, 116 (1971).

247. The development and implementation of a strategy for plea bargaining initially may seem unrealistic, because many cases are resolved in face-to-face conferences between the defense attorney and the prosecutor that last one or two minutes or even less. See M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 35 (1977). This routine slotting of cases, and the essentially bureaucratic decisions by prosecutors as to what concessions will be made, occur in many misdemeanor cases. See *id.* at 35–40. A more sophisticated process of offer and counter-offer usually occurs in felony cases. See *id.* at 41–46. See generally A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 85–144 (1976).

248. See, e.g., M. HEUMANN, *supra* note 247, at 61–69; see also *infra* notes 298–300 and accompanying text.

plea bargaining,²⁴⁹ the timing of the guilty plea, and all informal discussions with the prosecutor.²⁵⁰

The first factor a defense attorney should consider in choosing a negotiation strategy is the strategy of the opponent—the prosecutor.²⁵¹ Although few prosecutors consciously design a purposeful negotiation strategy, an identifiable pattern exists in most prosecutors' opening demands and concessions. This pattern can usefully be identified as a strategy. Even though the exact concessions granted by prosecutors in plea bargaining are characterized by prosecutor individuality,²⁵² the prosecutor's overall strategy, in most cases, is substantially defined by certain characteristics of the criminal justice system and the prosecutor's role in it.

The charges initially filed against the defendant, together with the probable sentence after conviction, determine the prosecutor's opening demand in plea bargaining negotiations. In almost all cases, the prosecutor's opening demand mirrors what would be expected from a negotiator who follows the competitive strategy: a high, but credible, demand. The initial charge is usually a high demand both because the prosecutor has overcharged²⁵³ and because legislatively defined criminal sen-

249. See generally 3 A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 103 (1978).

250. See Allen & Strickland, *Negotiating Pleas in Criminal Cases*, PRAC LAW, Jan. 1971, at 35, 39; Penn, *Negotiations in a Criminal Case—Defense*, in ILLINOIS INST. FOR CONTINUING LEGAL EDUC., *supra* note 2, § 13.7.

251. See F. BAILEY & H. ROTHBLATT, HANDLING MISDEMEANOR CASES 20–21 (1976).

252. Empirical studies of prosecutors' plea bargaining practices demonstrate the individuality and inconsistency of concessions made by prosecutors in plea bargaining. See, e.g., White, *supra* note 245, at 448; see also Lagoy, Senna & Siegel, *An Empirical Study of Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 AM CRIM. L. REV. 435, 462 (1976); Comment, *Factors Affecting the Plea Bargaining Process in Erie County: Some Tentative Findings*, 26 BUFFALO L. REV. 693, 700–02 (1977). In surveys of bargaining practices among New York and Philadelphia prosecutors, defense attorneys reported marked disparities in concessions offered by individual prosecutors. See White, *supra* note 245, at 448. Similarly, a study of plea bargains in the Erie County, New York, District Attorney's office found that the prosecutors studied handled similar cases differently; however, the differences may not be statistically significant given the size of the sample. Comment, *supra*, at 702. Finally, Professors Lagoy, Senna, and Siegel, after their plea bargaining study of actual prosecutors and defense attorneys using simulated case histories, concluded:

As a result of this project, the major impression with which one is left is that of prosecutorial individuality. This is certainly consistent with traditional prediction of wide prosecutorial discretion. But the degree to which information selection, sorting, and weighing vary even within the same office tends to confirm the worst fears of critics—that equal defendants will receive unequal treatment from prosecutors seated at opposite sides of the same desk.

Lagoy, Senna & Siegel, *supra*, at 462. The recognition of individual differences in the size and frequency of prosecutorial concessions in plea bargaining, however, does not contradict the argument that prosecutors will follow an identifiable pattern in plea bargaining. See *infra* notes 281–89 and accompanying text.

253. Most prosecutors overcharge, at least in the sense that they file the most serious crimes that the evidence will support, even when conviction on the charged offenses is questionable. See L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 57–59 (1977); Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 500–07 (1980); Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 47–49. "Overcharging" is an ambiguous term. Sometimes it is used to refer to the filing of charges when the prosecutor does not even have sufficient evidence to support a finding of probable cause. This type of overcharging clearly violates the formal norms governing the prosecutor in plea bargaining. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983); see also *supra* note 210 and accompanying text; Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174, 178–80 (1965). Some commentators even consider it overcharging to charge provable offenses when equitable factors suggest that these charges are inappropriately harsh. See Gifford, *supra*, at 49; see also 1 AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE § 3–3.9(b) (2d ed. 1980).

tences are generally unrealistically lengthy.²⁵⁴ Overcharging allows the prosecutor to make concessions, in the form of reduced charges, to the defendant in order to encourage him to plead guilty.²⁵⁵ The initial charge also is a threat to the defendant:²⁵⁶ if he does not enter into an agreement, then he might be convicted on more serious charges and serve a longer sentence.²⁵⁷

Although the prosecutor's strategy may include both competitive and cooperative tactics as plea bargaining proceeds, her strategy will probably become predominantly cooperative.²⁵⁸ The primary factor accounting for the frequency of a cooperative strategy among prosecutors in the later stages of plea bargaining is the prosecutor's unique role as a "minister of justice."²⁵⁹ The prosecutor's goal is not to maximize the length of the defendant's sentence or even the severity of the crime to which the defendant pleads. Empirical studies suggest that a prosecutor's attempt to individualize justice by considering equitable factors about the circumstances of the offense and the characteristics of the offender,²⁶⁰ such as the youth of the defendant, the lack of a prior criminal record, and provocation by the victim, provides the primary motivation for a prosecutor to make bargaining concessions.²⁶¹ The prosecutor's orientation in bargaining, therefore, parallels that of the cooperative negotiator, who attempts to achieve a fair solution. Other factors contribute to the prosecutor's cooperative orientation. These factors include her continuing relationship with defense attorneys,²⁶² pressures from judges and large caseloads to reach agreement,²⁶³ and the prevailing cooperative norms of plea bargaining.²⁶⁴ Finally, in

254. Sentences are often set by legislatures with heinous crimes and political reaction in mind; thus, statutory sentences often reflect neither what an appropriate sentence would be nor what sentence the defendant will ultimately serve. See TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 31-34 (1976).

255. See *supra* note 78 and accompanying text.

256. See *supra* note 80 and accompanying text.

257. An analysis of plea bargaining practices in New York City revealed that the average sentences for defendants who elected to go to trial was almost twice that of similar defendants who pleaded guilty. See Zeisel, *The Offer That Cannot be Refused*, in F. ZIMRING & R. FRASE, THE CRIMINAL JUSTICE SYSTEM MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW 558-61 (1980). Another competitive tactic the prosecutor may use is a threat to charge additional offenses if the defendant does not enter a guilty plea. See *United States v. Goodwin*, 457 U.S. 368, 370-80 (1982).

258. See *supra* notes 132-39 and accompanying text for a discussion of how a negotiator will often change strategies during the course of a negotiation, usually from a competitive to a noncompetitive approach.

259. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 comment (1983).

260. See M. HEUMANN, *supra* note 247, at 102-10; L. MATHER, PLEA BARGAINING ON TRIAL?: THE PROCESS OF CRIMINAL-CASE DISPOSITION 87-88 (1979); D. NEWMAN, *supra* note 245, at 114-30; see also Gifford, *supra* note 253, at 42-45.

261. See Gifford, *supra* note 253, at 44. In a similar context, the American Bar Association's *Standards for Criminal Justice* provides that "[t]he prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction." AMERICAN BAR ASS'N, *supra* note 253, § 3-3.9(b).

262. See *infra* notes 271-74 and accompanying text.

263. See *supra* note 191 and accompanying text.

264. See *infra* notes 280-82 and accompanying text. In addition, formal norms or rules govern the prosecutor's strategy in bargaining and prevent the use of some competitive tactics. See, e.g., *supra* note 253. For example, competitive negotiators selectively withhold information, see *supra* notes 68-71 and accompanying text, but the prosecutor is constitutionally prevented from withholding information helpful to the defendant, see *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (state violates due process when it fails to disclose to the defendant exculpatory evidence within its possession); see also *United States v. Agurs*, 427 U.S. 97, 108-10 (1976). Furthermore, the prosecutor is constitutionally prohibited from using certain kinds of threats in plea bargaining. Among the pressures the government may not use to encourage pleas are "actual or threatened physical harm," *Brady v. United States*, 397 U.S. 742, 750 (1970), "mental coercion

most cases the prosecutor can afford to adopt a noncompetitive rather than a competitive strategy because she is not highly accountable to a constituent.²⁶⁵ Unlike the defense attorney, whose concessions in plea bargaining must be ratified by his client, the prosecutor makes independent decisions about bargaining concessions. In any particular case, specific circumstances may influence the prosecutor to adopt a competitive strategy.²⁶⁶ However, the pattern of prosecutorial conduct discussed above is prevalent enough to strongly influence the defense attorney's selection of a negotiation strategy.

The second factor a defense attorney should consider in choosing a negotiation strategy is the relative bargaining power of the defense attorney compared to that of the prosecutor. In most cases, the prosecutor possesses much greater power in plea bargaining than does the defense attorney.²⁶⁷ The consequences for the defendant of failing to achieve an agreement with the prosecutor, that is, the defendant's "best alternative to a negotiated agreement,"²⁶⁸ are not attractive. Most defendants have little chance of being acquitted if they proceed to trial. According to Professor Milton Heumann, "[M]ost of the defendants are factually guilty and have no legal grounds to challenge the state's evidence."²⁶⁹ If convicted after trial, most defendants will receive a sentence considerably longer than if they had pleaded guilty.²⁷⁰

The defense attorney's plea bargaining strategy frequently will be affected by his desire to maintain good working relationships with the prosecutor and the judge.

overbearing the will of the defendant," *id.*, and "threatened prosecution on a charge not justified by the evidence," *id.* at 751 n.8; *see also* *Waley v. Johnston*, 316 U.S. 101, 104 (1942). Additionally, the government may not establish a sentencing scheme that provides for the death penalty for every defendant convicted at trial, but that allows defendants who plead guilty to receive more lenient sentences. *United States v. Jackson*, 390 U.S. 570, 581-82 (1968).

265. *See Gifford, supra* note 253, at 53-54, 66-67. Most state and local prosecutors are popularly elected and, in theory, can be defeated if the public disapproves of plea bargaining policies. In reality, however, most plea bargaining decisions are not highly publicized, and elections of prosecutors are not referenda on bargaining tactics.

266. The prosecutor probably will not make unilateral concessions in bargaining if a repeat felon is charged with a heinous crime and an outraged public is watching the case closely. In that situation, the assumptions that have been made about the likelihood that the prosecutor will make unilateral concessions on equitable grounds, and the lack of public accountability, are invalid. The presence of strong countervailing factors in a particular case may lead prosecutors to adopt a competitive strategy.

267. *See Gifford, supra* note 253, at 45-51; *see also supra* note 168 and accompanying text.

268. *See supra* notes 165-69 and accompanying text.

269. M. HEUMANN, *supra* note 247, at 61. Professor Heumann found that "experienced defense attorneys agree that of the approximately 90% of the defendants who are factually guilty, most have cases devoid of any legally disputable issue." *Id.* at 60; *see also* P. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* 34-35 (1978); Mather, *Some Determinants of the Method of Case Disposition: Decision-Making By Public Defenders in Los Angeles*, 8 *LAW & SOC'Y REV.* 187, 187-88 (1973).

270. *See Zeisel, supra* note 257, at 560-61. A survey conducted by the *Yale Law Journal* among federal district court judges revealed that prison terms for defendants who pleaded guilty were discounted by 10% to 95% of the length of incarceration that would have been imposed after trial and conviction. Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 *YALE L.J.* 204, 206-09 (1956); *see also* Brereton & Casper, *Does it Pay to Plead Guilty?: Differential Sentencing and the Functioning of Criminal Courts*, 16 *LAW & SOC'Y REV.* 45 (1981); Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes*, 1 *J. CRIM. JUST.* 27, 31 (1973).

The prosecutor's power advantage that results from the defendant's unattractive "best alternative to a negotiated agreement" is to some extent offset by two factors. First, most prosecutors often face considerable pressure to settle cases because their overwhelming caseloads allow them to try only a fraction of their cases. *See supra* notes 209-10 and accompanying text. Second, defense attorneys probably are more committed to a favorable outcome in a particular case than are busy prosecutors who are not directly accountable to a constituency. *See supra* notes 265-66 and accompanying text. As previously discussed, a high degree of commitment to an issue can increase a negotiator's relative bargaining power. *See supra* note 169 and accompanying text. Despite these two factors, prosecutors have substantially more power than defendants in most cases.

Professor Abraham Blumberg, after his exhaustive study of the criminal justice system in an urban setting, noted that "lines of communication, influence, and contact with those offices . . . are essential to the practice of criminal law."²⁷¹ According to Professor Blumberg, the lawyer who regularly works with criminal cases needs to develop "an ongoing 'account' with the prosecution office which he can draw upon from time to time to meet the exigencies of a particular case."²⁷² This need for a continuing positive working relationship coupled with the necessity of disposing of a large number of cases leads to symbiotic relationships among the prosecutor, defense attorney, and judge. Professors Arthur Rosett and Donald Cressey describe the group comprised of these three actors as the "committee on criminal justice."²⁷³ According to Professors Rosett and Cressey, these parties develop an accommodative working relationship: "Day by day, judges, prosecutors, defenders, and probation officers encounter the same basic types of cases In time, courthouse workers develop a group sense of justice. They come to understand each other and learn to take each other's views into account."²⁷⁴

A primary reason for the courthouse subculture is the defense attorney's need, as well as the prosecutor's, to dispose of cases quickly. This pressure to reach agreement is an additional, independent reason to adopt a cooperative approach.²⁷⁵ Defense attorneys cannot afford to use competitive tactics and risk stalemate, because their time limitations permit them to try only a few cases. Professors Rosett and Cressey state that if plea bargaining participants were to employ competitive strategies, then "the workday of the courthouse would be so crammed with bluffs, counter bluffs, and counter-counter bluffs, that there would be no time for dispositions."²⁷⁶

Although many of the described factors may suggest the adoption of a noncompetitive strategy, the defense attorney's need to maintain good rapport with a client

271. A. BLUMBERG, *CRIMINAL JUSTICE* 47 (1967).

272. *Id.* at 105. Professor Alschuler convincingly argues that the public defender's need to maintain a good working relationship results in a severe ethical problem:

Perhaps the most common criticism of public defender systems is that defenders sacrifice some clients for the benefit of others. A defender assigned to a particular courtroom may well see more of the prosecutor assigned to that courtroom than he does of his wife, and when adversaries in the criminal justice system become too close, they may choose to help each other at the expense of the persons and the interests that they have been hired to serve. Moreover, with a grinding, overwhelming caseload, a public defender may "play for the average" and fail to represent individual clients with the vigor demanded by elementary concepts of professional responsibility.

Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179, 1210 (1975). *See generally id.* at 1210-24.

273. A. ROSETT & D. CRESSEY, *supra* note 247, at 173.

274. *Id.* at 85-86. Unfortunately, defense attorneys face a variety of subtle, and not so subtle, pressures to maintain a noncompetitive orientation with the prosecutor other than those dictated by the best interests of their clients. *See id.* at 126-27. Defense attorneys are more likely to identify with judges and prosecutors who represent law abiding society than with criminals from the lower class. Their careers and their social lives may be furthered by a cooperative orientation; cooperation makes it possible to dispose of cases more quickly. *See infra* notes 275-76 and accompanying text. Even if the use of a cooperative strategy may be motivated by the wrong reasons, however, it does not necessarily follow that a competitive strategy would serve clients' interests better. *See infra* notes 298-300 and accompanying text.

Not surprisingly, the relationships between the prosecutor and the public defenders who work with her are generally more accommodative and less adversarial than relationships between the prosecutor and private attorneys. *See Alschuler, supra* note 272, at 1210-24; Kray & Berman, *Plea Bargaining in Nebraska—The Prosecutor's Perspective*, 11 *CREIGHTON L. REV.* 94, 128-29 (1977).

275. *See* A. ROSETT & D. CRESSEY, *supra* note 247, at 104-08, 127-28; Alschuler, *supra* note 272, at 1248-55.

276. A. ROSETT & D. CRESSEY, *supra* note 247, at 108.

who is hostile toward the prosecutor may lead him to employ a different approach. A competitive strategy is probably advantageous to convince the client that the attorney is “on his side.”²⁷⁷ Defendants are very critical of plea bargaining, usually because they perceive that their attorneys are insufficiently adversarial in representing their interests and are too inclined to sell-out their interests.²⁷⁸ One defendant in a survey conducted by Professor Jonathan Casper complained that the public defender’s first thought is to “cop out.”²⁷⁹ This attitude may be exacerbated if the defense attorney adopts a noncompetitive strategy.

Finally, in choosing between a competitive and a noncompetitive strategy, the defense attorney should consider the norms that govern the tenor of the relationship between the prosecutor and the defense attorney in plea bargaining.²⁸⁰ Generally, prosecutors expect that defense attorneys will be cooperative in plea bargaining;²⁸¹ they punish attorneys who are too adversarial in representing their clients by refusing to grant the typical plea bargaining concessions to these attorneys’ clients.²⁸²

The issues negotiated in plea bargaining are predominantly zero-sum issues,²⁸³ but some opportunities for integrative bargaining may exist. At first glance, it appears inherently difficult to reconcile the interests of an accused murderer and a prosecutor, pressured by an outraged community to convict the defendant, and to find a solution that will benefit both negotiators. Most cases, however, will offer some potential for integrative bargaining, because the prosecutor and the defendant prioritize the issues at stake differently. Prosecutors are most interested in obtaining a conviction,²⁸⁴ while defendants are most interested in minimizing the length of the sentence.²⁸⁵ Guilty plea agreements that allow the prosecutor to convict a defendant on a charge which accurately reflects the seriousness of the crime but that provides for a comparatively light sentence (that is, a light sentence recommendation or a light sentence contained in the statute to which the defendant pleads guilty) may serve the interests of both the prosecutor and the defendant. All parties may also want to avoid the expense, anxiety, and time consumed by litigation. Finally, an inventive defense attorney can use the

277. See generally A. BLUMBERG, *supra* note 271, at 88–94; J. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 77–92 (1972); Alschuler, *supra* note 272, at 1241–48. Professor Alschuler quite correctly observes that many defense attorneys who use a cooperative strategy for the wrong reasons are “selling out” the interest of their clients. Alschuler, *supra* note 272, at 1209–13, 1219–24; see also Gifford, *supra* note 253, at 49–51.

278. See A. BLUMBERG, *supra* note 271, at 88; J. CASPER, *supra* note 277, at 77–92; Alschuler, *supra* note 272, at 1241–48.

279. J. CASPER, *supra* note 277, at 107.

280. Other, more substantive, plea bargaining norms suggest how a particular case ought to be resolved, *i.e.*, “what is the case worth?” Hyman, *Bargaining and Criminal Justice*, 33 *RUTGERS L. REV.* 3, 37 (1980). For example, when the defendant is charged with two counts, burglary and grand theft, the going rate might be that the prosecutor routinely will accept a plea to one count of grand theft. *Id.* at 32–38. The prevailing norm might also suggest that further reductions are possible when certain mitigating factors, such as the lack of a prior record, exist. See *supra* notes 259–61 and accompanying text.

281. See A. ROSETT & D. CRESSEY, *supra* note 247, at 90–92; Hyman, *supra* note 280, at 36–37.

282. See M. HEUMANN, *supra* note 247, at 61–69; see also *infra* notes 298–300 and accompanying text.

283. See *supra* notes 218–21 and accompanying text.

284. See White, *supra* note 245, at 445–48.

285. See M. HEUMANN, *supra* note 247, at 69–70.

integrative techniques of brainstorming to generate nonincarceration sanctions, such as restitution.²⁸⁶

Application of the factors used in choosing a negotiation strategy to the situation generally facing the defense attorney in plea bargaining suggests the adoption of a predominantly cooperative strategy coupled with some early competitive tactics and integrative solutions whenever feasible.²⁸⁷ Of course, other factors in a particular case that are inconsistent with the characteristics of the typical plea bargaining system described above, such as a case in which there is a good chance of acquittal at trial or a case that involves a prosecutor who is personally very competitive or antagonistic, should cause an attorney to modify the recommended strategy. Nevertheless, in the same way that cross-examination tactics recommended by trial practice teachers²⁸⁸ can be generally followed by the trial attorney, the recommendations for a plea bargaining strategy discussed above should form the foundation for a defense attorney's effective plea bargaining strategy. Of course, the defense attorney's negotiation strategy always must be determined within the parameters established by the client.²⁸⁹

In the early phases of the negotiation, the defense attorney should begin with a competitive strategy, but in a cooperative style. Even though several practice manuals suggest that defense attorneys should be extremely cooperative and seek to achieve a guilty plea agreement early in plea bargaining,²⁹⁰ negotiation theory establishes at least four reasons that the defense attorney's early tactics should be competitive. First, the government's opening demand, usually characterized by overcharging and excessively long legislatively-determined prison sentences, is very competitive.²⁹¹ As previously discussed, a negotiator who uses a cooperative strategy against a competitive negotiator is severely disadvantaged.²⁹² Thus, a defense attorney risks exploitation if he begins negotiations with a cooperative strategy. Second, the defendant usually has low bargaining power; some social scientists recommend that the less powerful negotiator begin competitively and become more cooperative later in the negotiation.²⁹³ Third, it may be necessary to adopt a competitive strategy

286. See A. AMSTERDAM, *supra* note 249, § 211; Penn, *supra* note 250, §§ 13.12–13; see also *supra* notes 114–17 and accompanying text.

287. The recommended strategy, therefore, follows Professor Pruitt's strategic choice model, which allows the negotiator to use different negotiating strategies sequentially within a single negotiation. See D. PRUITT, *supra* note 19, at 15; see also *supra* notes 132–39 and accompanying text. The described strategy also is consistent with Professor Pruitt's observation that negotiations frequently progress from a competitive stage to a less competitive stage. See D. PRUITT, *supra* note 19, at 132–35; see also *supra* notes 137–39 and accompanying text.

288. For example, trial attorneys are admonished to use predominately leading questions when cross-examining a witness. See, e.g., P. BERGMAN, TRIAL ADVOCACY. IN A NUTSHELL 172–82 (1979); J. JEANS, TRIAL ADVOCACY 315–16 (1975); T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 247–48 (1980). However, in a few instances, such as when the answer to the question is already known or is unimportant, or when an unexpected answer defies common sense, a nonleading question can be used. See J. JEANS, *supra*, at 316; T. MAUET, *supra*, at 248. As in the case of recommended negotiation strategies, recommendations for the style of questions for cross-examination are not based on formal binding rules of evidence. Rather, they are based on predictions about how people behave, specifically how witnesses will respond to the questions, and how jurors will respond to the questions and answers.

289. See *supra* text accompanying notes 144–47.

290. See, e.g., A. AMSTERDAM, *supra* note 249, § 201.

291. See *supra* notes 253–54 and accompanying text.

292. See *supra* notes 98–100 and accompanying text.

293. See Hamner & Baird, *supra* note 176, at 265; see also *supra* notes 172–79 and accompanying text.

initially to communicate to the prosecutor that the attorney intends to zealously represent the client²⁹⁴ and that he will not “cave in” because of his caseload or other personal or institutional pressures. Finally, early competitive moves often convince the client that his attorney intends to represent him vigorously; this improves client relations.

A competitive strategy is recommended for the defense attorney early in plea bargaining but the question remains: What specific competitive tactics should be used? The defense attorney should attempt to obtain unilateral concessions from the prosecutor by asking the prosecutor about her sense of “what the case is worth” and what charge reductions she can make, without indicating the defendant’s willingness to plead to any charge at all.²⁹⁵ Similarly, in the early stages of negotiation, the defense attorney should seek the fullest possible discovery from the prosecutor. At the same time, he should withhold, or only selectively disclose, his client’s version of the facts and other evidence available to him.²⁹⁶ The attorney can also reduce the prosecutor’s power advantage by insisting that the prosecutor deal only with provable offenses and with a realistic penalty, instead of with overcharges and the statutorily defined penalty maximums.²⁹⁷

Most important, defense attorneys should raise with the prosecutor valid defenses, motions, and other issues as part of their negotiation strategy. Doing so, however, can entail considerable risks and costs for defense attorneys. Judges and prosecutors sometimes view such motions and legal challenges with hostility,²⁹⁸ and they may retaliate against the defense attorney later in the plea bargaining process by refusing to make discretionary reductions based on the equities of the case. Defense attorneys who file motions that prosecutors view as frivolous may never get a break in plea bargaining. Accordingly, the defense attorney should pursue viable legal issues, but should try to maintain a cooperative relationship with the prosecutor. Sometimes the defense attorney can informally raise legal challenges to the

294. See D. PRUITT, *supra* note 19, at 134–35; see also *supra* notes 59–67 and accompanying text.

295. See A. AMSTERDAM, *supra* note 249, § 209.

296. A majority of prosecutors surveyed in Oregon indicated that it was proper for the defense attorney to withhold information during plea bargaining. Klonoski, Mitchell & Gallagher, *supra* note 246, at 125. As previously discussed, the competitive negotiator seeks to gain information from his opponent at the same time he withholds information from his opponent. See *supra* notes 68–71 and accompanying text.

297. See *supra* notes 253–57 and accompanying text. For example, when the prosecutor has overcharged in an assault case, the defense attorney’s opening position should be, “What we’re really dealing with here is a simple assault, not a felonious assault; we both recognize that.” The defendant’s perception of the prosecutor’s relative power will be diminished greatly if the defense attorney explains overcharging, the offenses that are provable, and that the likely sentences to be imposed are much shorter in length than the prosecutor suggests. These bluff-calling tactics are competitive tactics. The defense attorney can also reduce the prosecutor’s power advantage by developing a reputation as a competent trial attorney who is willing to try cases, see A. AMSTERDAM, *supra* note 249, § 101, and by investigating and preparing each case fully, see F. BAILEY & H. ROSENBLATT, *supra* note 251, at 20.

298. See M. HEUMANN, *supra* note 247, at 61–75. Professor Heumann found that defense attorneys who filed numerous motions were punished by prosecutors, who refused to make favorable sentence recommendations, to reduce charges in plea bargaining, and to disclose information about cases. Judges also punished these defense attorneys, and their clients, by increasing the length of the defendants’ sentences after trial. One public defender told Professor Heumann:

I went up to introduce myself to the judge, and there were some other attorneys in there . . . [T]he judge said: “Well, we’ll see you tomorrow and, well, just play along with everyone else. Don’t file a lot of motions Don’t mess around like those legal-aid attorneys, filing all their motions. Don’t file a lot of motions and don’t make a lot of noise.”

Id. at 63.

government's case. If legal challenges are presented in this manner, the prosecutor is often more willing to make appropriate dismissals or reductions than if a formal motion is filed in court.²⁹⁹ In addition, the defense attorney can often place on an obstreperous client the responsibility for competitive tactics, such as refusing to enter pleas or raising certain defenses, and still maintain a cordial personal working relationship with the prosecutor.³⁰⁰

It is important to reiterate the distinction between negotiation strategy and negotiation style.³⁰¹ If an attorney hopes to appeal to the prosecutor's equitable discretion later in the negotiation, his personal style should be accommodative, not antagonistic. The defense attorney should attempt to argue defenses and other legal issues vigorously, while maintaining cordial personal relationships. An attorney with an accommodative personal style can often switch from a competitive to a cooperative strategy during a negotiation. It is more difficult for an antagonistic attorney to build a relationship on trust and seek discretionary favors from a prosecutor later in a negotiation.

Following the initial stages of plea bargaining, virtually all the factors discussed previously suggest adopting a noncompetitive strategy for plea bargaining. Usually the cooperative strategy will be more effective than the integrative strategy, although some opportunities for integrative solutions may exist.³⁰² The following factors suggest the adoption of a noncompetitive strategy:

- (1) the prosecutor will probably use a cooperative strategy;
- (2) the prosecutor has greater bargaining power;
- (3) an amicable continuing relationship between the defense attorney and the prosecutor should be maintained;
- (4) various pressures to reach agreement exist; and
- (5) the prevailing norms in plea bargaining mandate the use of cooperative tactics.

The prosecutor's use of a cooperative strategy supports the adoption of a noncompetitive strategy. In most cases, the prosecutor views her role as one requiring her to individualize justice by taking into account the circumstances of the offense and the characteristics of the offender.³⁰³ Prosecutors will react more favorably in this role if defense attorneys appear to be working with them to evaluate the culpability of the defendant. If the probable outcome of the case is a plea by the defendant, the defense attorney should share information freely with the prosecutor³⁰⁴ and seek to identify those mitigating factors that would induce the prosecutor to make bargaining concessions.

Finally, the defense attorney should urge integrative solutions whenever feasible. Often plea bargaining is not a zero-sum situation,³⁰⁵ and the defense attorney should seek agreements in appropriate cases that allow the prosecutor to obtain a

299. *See id.* at 72.

300. *See A. AMSTERDAM, supra* note 249, § 212.

301. *See supra* notes 48–53 and accompanying text.

302. *See supra* notes 284–86 and accompanying text.

303. *See supra* notes 259–61 and accompanying text.

304. *See supra* notes 112–13 and accompanying text; *see also* Allen & Strickland, *supra* note 250, at 39–40.

305. *See supra* notes 283–86 and accompanying text.

conviction at the same time that the client is protected from a long prison term. Restitution and other alternatives to incarceration may satisfy both the prosecutor's need for a sanction and the defendant's desire to avoid incarceration.

Both the competitive and the noncompetitive strategies have advantages and disadvantages in plea bargaining. In a particular case, one aspect of the bargaining context may suggest the adoption of one strategy over the other. If the prosecutor's case is weak and conviction is unlikely, the use of a competitive strategy becomes more attractive. If an inexperienced prosecuting attorney wants to gain more trial experience, a defense attorney's cooperative strategy is unlikely to yield substantial concessions. When deciding on a negotiating strategy, the defense attorney should always determine the factors that distinguish the instant case from the usual plea bargaining situation. If these factors are important, the attorney may want to modify the suggested strategy. Even if the attorney modifies the recommended strategy in a particular case with unusual characteristics, however, this recommendation at least provides the criminal defense attorney with a starting point. Thus, this proposed strategy is a more useful tool for the practicing criminal defense attorney than either a mere list of factors to be applied on an ad hoc basis or the admonishment that he will learn to plea bargain as he gains experience.

In summary, negotiation theory suggests that the plea bargaining strategy most likely to succeed in a typical case is one which begins with a competitive approach and progresses to a cooperative approach as negotiations continue. To accomplish this strategy switch, the defense attorney should attempt to maintain a cordial and accommodative relationship with the prosecutor, even during the early phases of bargaining. It is difficult to compare this strategy with the "state of the art" recommendations of practicing criminal defense attorneys, because practicing lawyers give inconsistent advice. Some commentators recommend a cooperative strategy designed to reach an agreement as quickly as possible;³⁰⁶ others suggest that cooperating with the prosecutor is equivalent to selling out.³⁰⁷ The strategy recommended above, however, appears likely to be the most effective in the plea bargaining context.

C. The Plaintiff's Strategy in Personal Injury Negotiations

The plaintiff's personal injury attorney encounters systemic characteristics different from those encountered by the defense attorney in plea bargaining. These characteristics generally suggest a somewhat different strategy than that recommended for plea bargaining. In particular, the greater bargaining power of the plaintiff's attorney, the greater likelihood that the opponent will use competitive tactics, and the lesser importance of a continuing relationship with the other negotiator may all suggest that a competitive strategy is more advantageous in personal injury

306. See Penn, *supra* note 250, § 13.7; see also Allen & Strickland, *supra* note 250, at 39.

307. See Alschuler, *supra* note 272, at 1312. See generally Alschuler, *The Supreme Court, The Defense Attorney, and The Guilty Plea*, 47 U. COLO. L. REV. 1, 42-48 (1975); Berger, *The Case Against Plea Bargaining*, 62 A.B.A. J. 621, 622 (1976); Bosco, *Some Comments Concerning the Roles of Judges, Prosecutors and Defense Attorneys in Plea Bargaining*, 1978 TRIAL LAW. GUIDE 377, 408-10.

negotiations than in plea bargaining. This recommendation assumes a personal injury case of significant value; in the small or medium-sized case, economic reality dictates settlement because the costs of litigation exceed the value of the claim.³⁰⁸ As a result, negotiations of smaller claims, at least between experienced negotiators, are likely typified by the use of a cooperative strategy³⁰⁹ and an attempt to find a fair and just value for the claim.

The plaintiff's attorney probably will be negotiating with two different representatives of the defendant's insurance company—the claims adjuster (prior to the filing of a lawsuit) and the attorney hired by the insurance company. Professor H. Laurence Ross, a social scientist who has studied the claims process in great detail, concludes that for these individuals, “organizational pressure would seem to be a more important factor than personality in affecting the outcome of claims.”³¹⁰ Certain structural characteristics of the claims adjustment process suggest that the claims adjuster's strategy will be competitive; other pressures on the adjuster, however, influence him to adopt a cooperative strategy.

The adjuster will likely begin the negotiations with a competitive strategy. Claims adjusters are trained to settle cases quickly with the claimant for an amount far less than an attorney, once retained, would regard as a fair settlement value.³¹¹ Quite frequently, the claims adjuster begins competitively and argues that if the claimant were to hire an attorney, then the attorney would “take half” and leave the claimant with less than if she were to settle immediately.³¹² Even after the claimant hires an attorney, adjusters often test the plaintiff's attorney with competitive tactics to determine whether the attorney, because she is naive, unprepared, or impatient, will settle for less than the fair value of the case.³¹³ More generally, the adjuster's adversarial orientation causes him to disbelieve the claimant's position until more facts are revealed as a result of discovery and further investigation.³¹⁴

The relationship between the claims adjuster and the insurance company facilitates the use of the competitive strategy, because the adjuster's power to make concessions is limited. His settlement authority frequently is strictly confined; therefore, he cannot reciprocate the concessions made by the plaintiff's counsel without consulting his superiors.³¹⁵ In addition, insurance companies may set the reserve³¹⁶ on a case unrealistically low so that the plaintiff's demand can be met with

308. An insurance company reports that 60% of its liability cases are settled before the filing of a lawsuit. See A. AVERBACH, *HANDLING ACCIDENT CASES* § 176 (1973).

309. See *id.* § 182; see also 4 J. KELNER, *PERSONAL INJURY. SUCCESSFUL LITIGATION TECHNIQUES* 1453 (1978); H. ROSS, *SETTLED OUT OF COURT. THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 20–21 (1970); Davis, *Settlement Negotiations: Strategy and Tactics*, *TRIAL*, July 1983, at 82, 83.

310. H. ROSS, *supra* note 309, at 235.

311. See generally *id.* at 45–54.

312. J. SINDELL & D. SINDELL, *LET'S TALK SETTLEMENT. THE PREPARATION, NEGOTIATION AND SETTLEMENT OF PLAINTIFFS' PERSONAL INJURY CASES* 312 (1963).

313. *Id.* at 309–13.

314. See A. CONE & V. LAWYER, *THE COMPLETE PERSONAL INJURY PRACTICE MANUAL* 165 (1983).

315. See *id.* at 164–65.

316. A reserve is the amount an insurance company sets aside, after receiving a claim, to pay the eventual settlement or judgment. J. KELNER, *supra* note 309, at 1469.

the statement that "our reserve is only \$15,000."³¹⁷ These techniques constitute a competitive tactic known as the "negotiation without authority" ploy.³¹⁸ Similarly, while the insurance adjuster conceals his own information, he typically expects the plaintiff's attorney to disclose the fruits of her investigation.³¹⁹

After the plaintiff's attorney demonstrates that she understands the value of the case, the adjuster will probably negotiate cooperatively³²⁰ and yield to the pressure to settle quickly as many cases as possible.³²¹ As a result, insurance companies pay many questionable claims. In serious cases, "danger value" may be paid, even in the absence of apparent liability, to avoid the risk that a jury might be swayed by sympathy for the severely injured plaintiff and award her a substantial sum.³²² Conversely, in small cases of questionable liability, "nuisance value" is paid because the costs of processing and trying the case exceed the settlement value for the case.³²³ In addition, claims adjusters often desire to be fair to injured claimants, even in the absence of clear liability; thus, some minimal payment to an injured plaintiff, when liability is questionable or nonexistent, may nonetheless be a good business practice.³²⁴ The pressure on the claims adjuster to settle cases and his desire to be fair suggest that he will adopt a predominantly cooperative strategy in the later phases of negotiation.³²⁵

In summary, the conflicting pressures on the insurance adjuster to adopt a competitive strategy or a noncompetitive strategy are generally resolved in two ways. First, the claims adjuster likely will begin with a competitive strategy and become more cooperative as the negotiation progresses. Second, the claims adjuster probably will behave in accordance with the following principle: If cases can be settled inexpensively they should be, but in any event, they should be settled.

Less has been written about the negotiating strategy likely to be used by counsel for the insurance company or the pressures affecting his choice of strategy. The strategy actually used by insurance defense attorneys includes several competitive tactics. Their initial offers are generally quite low.³²⁶ Settlement rarely occurs early in the process; significant offers are often not made until discovery is completed and the parties are figuratively, and often literally, on the courthouse steps.³²⁷ The

317. See *id.* at 1470.

318. See H. EDWARDS & J. WHITE, *supra* note 3, at 119.

319. See J. SINDELL & D. SINDELL, *supra* note 312, at 315-16. One practitioner recommends: "Never discuss liability with a claims adjuster. He will not be convinced by anything you say, and you will not learn anything about his file by such discussion. You may, however, disclose some facts that will be utilized against you." A. AVERBACH, *supra* note 308, § 190.

320. See Davis, *supra* note 309, at 83-84; Schneider & Mone, *A Positive Approach to Torts Settlements*, *PRAC. LAW.*, Mar. 1971, at 27, 30-31.

321. See H. ROSS, *supra* note 309, at 127-31, 235-36; Kelner, *Techniques of Settlement*, 1966 *PERSONAL INJURY ANNUAL* 771, 777.

322. See H. ROSS, *supra* note 309, at 199.

323. *Id.* at 204; see also *supra* notes 308-09 and accompanying text.

324. See generally H. ROSS, *supra* note 309, at 46-54.

325. *Id.* at 65-66.

326. See Davis, *supra* note 309, at 84; Schneider & Mone, *supra* note 320, at 31-33.

327. See Kelner, *supra* note 321, at 773, 792.

insurance company's defense attorney also uses delay tactics to press an injured and incapacitated defendant toward early settlement.³²⁸

As trial approaches, however, the defense attorney's strategy usually becomes cooperative. The defense counsel recognizes that juries tend to overestimate the impartial value of a case because they sympathize with injured plaintiffs and dislike insurance companies.³²⁹ Furthermore, the attorney knows that his client, the insurance company, desires to avoid, if possible, the attorney's fees associated with trial.³³⁰ Finally, the insurance company has a legal obligation to accept any reasonable settlement offer within the policy limits.³³¹ These reasons suggest that immediately preceding trial, attorneys representing insurance companies are likely to pursue a cooperative strategy and seek a fair and just result.

The second factor that affects the choice of a negotiation strategy, the relative power between the two negotiators, is much different in the personal injury context than in the plea bargaining situation. Usually the personal injury plaintiff has greater negotiating power, but the plaintiff's power varies greatly according to the strength of her case. When the plaintiff's attorney negotiates with the claims adjuster, she has two viable alternatives to a negotiated agreement with the adjuster: further negotiations with the defendant's attorney and trial. On the other hand, the claims adjuster who fails to achieve agreement must report to his superior and explain the failure to close the case and the implicit necessity of paying attorney's fees. All of the previously described pressures on the claims adjuster to settle cases, coupled with the likelihood of a sympathetic jury, increase the plaintiff's attorney's advantage.³³² Of course, if the plaintiff has a weak case that is unlikely to survive a motion for summary judgment or a motion for a directed verdict, then the power advantage is reversed. Generally though, the personal injury attorney's bargaining power advantage over the insurance company suggests that she has the option of choosing between the competitive and cooperative strategies.³³³

Considerations of a possible continuing relationship between the negotiating parties³³⁴ probably is not as important in selecting a negotiation strategy in personal injury negotiations as it is in plea bargaining. In personal injury claims, as in plea

328. Schneider & Mone, *supra* note 320, at 31-32.

329. See H. Ross, *supra* note 309, at 112.

330. See Gosney, *How Insurance Companies Can Reduce Litigation Costs*, 31 FED'N INS. COUNS. Q. 291, 291 (1981).

331. See *Baton v. Transamerica Ins. Co.*, 584 F.2d 907, 912 (9th Cir. 1978); *Beck v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 429 F.2d 813, 819 (5th Cir. 1970); *Young v. American Casualty Co.*, 416 F.2d 906, 910 (2d Cir. 1969), *cert. dismissed*, 396 U.S. 997 (1970). See generally A. WINDT, *INSURANCE CLAIMS AND DISPUTES. REPRESENTATION OF INSURANCE COMPANIES AND INSURED* 186-89 (1982).

332. See Schneider & Mone, *supra* note 320, at 31.

333. See *supra* text accompanying note 170.

334. Professor Ross argues that this factor has no significance at all in choosing a strategy in personal injury litigation:

Bodily injury negotiation is generally a one-time affair, particularly in urban areas where reputations of individuals and even of companies are slow to spread. There is relatively little to be gained or lost in the way of a reputation through the use and display of integrity or determination in this situation.

H. Ross, *supra* note 309, at 143-44.

bargaining,³³⁵ but unlike labor relations,³³⁶ the parties themselves almost never have a continuing relationship: the accident resulting in the personal injury is a one-time affair. A continuing positive working relationship between the *parties*, which would discourage using a competitive strategy, is not necessary. On the other hand, the plaintiff's personal injury attorney may or may not have continuing contact with a claims adjuster or a defense insurance attorney. To the extent that a continuing relationship is probable, she may want to consider a noncompetitive strategy.³³⁷ However, the degree of continuing contact between a personal injury plaintiff's attorney and the insurance company's defense counsel generally is less than the daily interaction between a prosecutor and a public defender. Therefore, this factor usually will not be as significant in choosing the optimal strategy.

The amount of pressure on the plaintiff's personal injury attorney to settle also varies greatly from case to case. In some cases, the injured client who does not have funds to pay medical bills and living expenses pressures her attorney to settle her claim expeditiously. However, injured plaintiffs usually receive some form of financial assistance such as governmental social welfare benefits, first-party insurance proceeds, or wage continuation plan benefits. These benefits significantly diminish the financial pressure on the plaintiff to settle and make the competitive strategy more viable even though it may delay the receipt of compensation. Judicial pressure to settle during the later stages of personal injury negotiations, however, may dictate the use of a cooperative strategy.

The personal injury attorney is accountable to her client; the need for a harmonious relationship with the client generally influences the negotiator to adopt a competitive strategy during the early phases of negotiations.³³⁸ The plaintiff's attorney is bound by the client's decisions regarding settlement,³³⁹ because personal injury negotiations usually involve a single, easily quantifiable issue and because the client's predominant concern is the easily understood dollar amount of the settlement, she probably will be knowledgeable about, and interested in, the various settlement offers and counteroffers. Most personal injury plaintiffs are likely to have high aspirations; many will remain angry at the defendant who injured them or the deep pocket insurance company that initially made miserly offers because it pursued a competitive strategy. The need to placate her client, therefore, may suggest that the plaintiff's attorney adopt a competitive strategy. Later in the negotiations, especially as trial approaches, plaintiffs frequently become less demanding, and the attorney may change her strategy to a more cooperative approach.

The characteristics of personal injury litigation limit the feasibility of the integrative strategy in most cases. Personal injury negotiation is predominantly a

335. The defendant in plea bargaining does not have an ongoing relationship with the prosecutor. However, the defendant's attorney may have an interest in maintaining his working relationship with the prosecutor. *See supra* notes 271-74 and accompanying text.

336. *See infra* note 375 and accompanying text.

337. *See supra* notes 180-84 and accompanying text.

338. *See supra* notes 185-89 and accompanying text.

339. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983); D. BINDER & S. PRICE, *supra* note 5, at 147-53; *see also supra* note 146 and accompanying text.

zero-sum negotiation; each dollar the plaintiff gains is a dollar loss to the defendant.³⁴⁰ Generally, the only significant issue in controversy is the dollar amount of the settlement. The single issue nature of the negotiation prevents the use of logrolling as an integrative technique.

The above analysis suggests that the plaintiff's attorney should use a predominantly competitive strategy in personal injury negotiations. The plaintiff's attorney who adopts a noncompetitive strategy will be severely disadvantaged when negotiating against a claims adjuster or defense attorney who will probably use competitive approaches. Further, the plaintiff's alternatives to a negotiated settlement are more attractive than the criminal defendant's non-negotiation options,³⁴¹ so there is less risk in using the competitive strategy in most cases, even if negotiations break down. The lesser possibility of a continuing relationship between the negotiators and the heavier pressure to settle personal injury cases³⁴² usually will not be sufficiently critical factors to suggest a predominantly cooperative strategy. It is recommended, therefore, that the plaintiff's attorney use a competitive strategy in negotiations with the claims adjuster and in the initial negotiations with opposing counsel. In the final stages of negotiation, the plaintiff's attorney should shift to a cooperative strategy if such a change is suggested by one or more of the following factors:

- (1) opposing counsel uses a noncompetitive strategy;
- (2) the case is weak and is unlikely to survive the defendant's motion for a directed verdict;
- (3) the client's immediate financial situation or other needs exert considerable pressure to settle; or
- (4) further competitive tactics will damage a continuing relationship with opposing counsel, to the detriment of the present client and future clients.

The negotiation strategies recommended by personal injury specialists,³⁴³ or observed in actual practice by those who have studied personal injury negotiation,³⁴⁴ closely mirror the one recommended above, even though personal injury lawyers have not consciously applied the factors identified by social scientists to choose their strategies. These pragmatic tacticians recommend that the personal injury attorney present a high initial demand,³⁴⁵ employ information gathering tactics in the early phases of negotiation,³⁴⁶ make threats,³⁴⁷ make concessions only in response to the

340. To an extent, both the plaintiff and defendant benefit when the parties agree to a structured settlement. See Staller, *Structured Settlements*, in H. MILLER, *ART OF ADVOCACY SETTLEMENT* §§ 10.00–.140 (1983); see also *supra* note 225.

341. See *supra* notes 268–70 and accompanying text.

342. Of course, a client may want to settle the case expeditiously for a variety of nonfinancial reasons including a desire to end the anxiety or inconvenience that accompanies litigation. See D. BINDER & S. PRICE, *supra* note 5, at 138–40, 147–55.

343. See generally H. MILLER, *ART OF ADVOCACY SETTLEMENT* §§ 5.01–.35 (1983); J. SINDELL & D. SINDELL, *supra* note 312; Davis, *supra* note 309; Schneider & Mone, *supra* note 320.

344. See H. ROSS, *supra* note 309, at 149–51.

345. See A. CONE & V. LAWYER, *supra* note 314, at 166; H. MILLER, *supra* note 343, §§ 5.07–.08; H. ROSS, *supra* note 309, at 149–51; Davis, *supra* note 309, at 84; Kelner, *supra* note 321, at 787–88; Schneider & Mone, *supra* note 320, at 33–34.

346. See H. ROSS, *supra* note 309, at 151–58; J. SINDELL & D. SINDELL, *supra* note 312, at 172.

347. See H. ROSS, *supra* note 309, at 155–56; Schneider & Mone, *supra* note 320, at 33.

opponent's concessions,³⁴⁸ make only small concessions,³⁴⁹ and delay settlement until the last possible moment.³⁵⁰ In other words, real world practitioners recommend using all of the tactics that constitute the competitive strategy.³⁵¹ That the competitive strategy is currently the norm in personal injury negotiations provides yet another reason for the personal injury attorney to use this strategy: to use a noncompetitive strategy in a milieu in which attorneys expect the competitive strategy will severely disadvantage the negotiator.³⁵² That the strategy recommended above is consistent with the recommendations of leading personal injury specialists to use competitive tactics in personal injury litigation also supports the validity of the method outlined in this article for selecting an optimal, effective negotiation strategy in other substantive contexts.

D. Management's Strategy in Collective Bargaining

It is more difficult to recommend a general strategy for the management attorney in labor negotiations than it is to recommend a general strategy for the criminal defense attorney or the plaintiff's personal injury attorney.³⁵³ Some factors present in the labor negotiation setting strongly suggest that management's attorneys adopt a competitive strategy,³⁵⁴ while others suggest the use of a noncompetitive strategy.³⁵⁵ A wide variety of negotiation strategies have been observed in practice,³⁵⁶ and labor

348. See H. ROSS, *supra* note 309, at 150; Davis, *supra* note 309, at 83.

349. See H. MILLER, *supra* note 343, § 5.09.

350. See J. SINDELL & D. SINDELL, *supra* note 312, at 373; Davis, *supra* note 309, at 84; Schneider & Mone, *supra* note 320, at 31-32.

351. See generally A. CONE & V. LAWYER, *supra* note 314, at 164-66; H. MILLER, *supra* note 343, §§ 5.01-.35; Davis, *supra* note 309; Kelner, *supra* note 321; Schneider & Mone, *supra* note 320. For a conflicting recommendation, see Wallach, *Settlement in a Personal Injury Case: The Imperfect Art*, 1979 PERSONAL INJURY ANNUAL 779.

352. See Kelner, *supra* note 321, at 776, 797; see also *supra* notes 148-57 and accompanying text.

353. The discussion in this part assumes that the collective bargaining occurs either shortly before the existing contract between management and the union expires or immediately after the contract expires. For a brief, general description of collective bargaining in this, the most common, situation, see generally J. ATLESON, R. RABIN, G. SCHATZKI, H. SHERMAN & E. SILVERSTEIN, COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT 361-64 (2d ed. 1984). Typically, the union will make the first demand. See *id.* at 362. Management is legally obligated to commence negotiations and negotiate in good faith. See generally *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 204 (1964); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Gross, Cullen & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009 (1968).

In the 1980s, a somewhat different type of labor negotiation has emerged. Many companies have pleaded financial exigencies and have sought to reopen contract negotiations during the period covered by an existing contract in order to seek economic concessions from the union. See generally Anderson, *Challenges to Collective Bargaining*, 31 LAB L.J. 470, 472 (1980); Beckman, *Bargaining in an Uncertain Economic Arena—Job Security: The Focus of Union Initiative*, 31 LAB L.J. 465, 469 (1980). In this situation, management obviously presents the first demand and the union is not legally obligated to respond. See generally Driscoll, *A Behavioral-Science View of the Future of Collective Bargaining in the United States*, 30 LAB L.J. 433, 434-36 (1979).

354. See R. WALTON & R. MCKERSIE, *supra* note 34, at 270-73; Craft, *Post-Recession Bargaining: Mutualism or Adversarial Relations?*, 34 LAB L.J. 431 (1983).

355. See R. WALTON & R. MCKERSIE, *supra* note 34, at 126-43; Yoder & Staudohar, *Rethinking the Role of Collective Bargaining*, 34 LAB L.J. 311, 311-15 (1983). A stable and cooperative relationship between the employer and its employees is generally important to both parties, see Mandler, *Collective Bargaining Negotiations*, in ILLINOIS INST'T FOR CONTINUING LEGAL EDUC., *supra* note 2, § 14.1, because of the desire to increase employee morale and productivity and to keep companies competitive, see Yoder & Staudohar, *supra*, at 311-13.

356. See Yoder & Staudohar, *supra* note 355; see also Baumgart & Compagnone, *A Survey of Management and Union Advocates' Attitudes About Strategies and Techniques in Labor Negotiation*, in H. EDWARDS & J. WHITE, *supra* note 3, at 306.

specialists disagree on whether to recommend a competitive³⁵⁷ or noncompetitive³⁵⁸ strategy. Idiosyncratic factors also may be more important considerations in labor negotiations than in other areas.³⁵⁹ The existing negotiation norms have been described nebulously as “antagonistic cooperation,”³⁶⁰ and as the “gray area between accommodation and confrontation.”³⁶¹

Labor negotiations consist of a mixture of zero-sum and non-zero sum issues.³⁶² The wage-benefit package³⁶³ is probably the most important issue in a majority of collective bargaining negotiations;³⁶⁴ to some extent, these compensation questions resemble a zero-sum game³⁶⁵ in which the interests of the parties directly conflict. Even here, however, opportunities to use the integrative technique of logrolling³⁶⁶ may exist. Management’s underlying interest is often to minimize the total cost of the wage-benefit package, while the union may be more concerned with a specific issue, such as pensions, insurance, or vacations, that is highly visible to workers or that has been the subject of prior union commitments to the rank and file.³⁶⁷ Other issues in labor negotiations, such as those relating to job security or productivity, offer even more promise for integrative bargaining. Often the management and the union can devise solutions that will improve both job satisfaction and productivity. Therefore, labor negotiations are generally more hospitable to integrative bargaining than the areas of negotiation previously discussed.

The situation facing the management attorney in negotiations is unlike those previously discussed, because the relative bargaining power of the parties may vary greatly from one negotiation to the next,³⁶⁸ although it is likely to be relatively balanced.³⁶⁹ For both parties, the alternative to a negotiated settlement is a strike. Innumerable patterns of relative strike costs exist depending on factors such as the state of the economy,³⁷⁰ the structure of the company,³⁷¹ and the structure of collective bargaining.³⁷² Generally a strike tends to hurt the workers only slightly at the beginning, but more seriously as the strike progresses and the unemployed

357. See, e.g., Craft, *supra* note 354, at 431 (recommending a competitive strategy).

358. See, e.g., Yoder & Staudohar, *supra* note 355, at 311 (recommending a noncompetitive strategy).

359. See H. EDWARDS & J. WHITE, *supra* note 3, at 260; Mandler, *supra* note 355, § 14.1.

360. E. BAKKE, *MUTUAL SURVIVAL: THE GOAL OF UNIONS AND MANAGEMENT* 85 (1966); Craft, *supra* note 354, at 438.

361. Wynn, *The Outlook for Collective Bargaining: Accommodation or Confrontation?*, 31 *LAB. L.J.* 459 (1980); see also H. EDWARDS & J. WHITE, *supra* note 3, at 259–60.

362. See generally R. WALTON & R. MCKERSIE, *supra* note 34, at 161–62.

363. Wage-benefit packages include all forms of compensation for employees including not only wages, but also pensions, insurance coverage, and vacation policies.

364. In the recession bound 1980s, however, job security has probably replaced the wage-benefit package as the issue of first importance in labor negotiations.

365. See R. WALTON & R. MCKERSIE, *supra* note 34, at 11–23; Yoder & Staudohar, *supra* note 355, at 311–15.

366. See *supra* notes 116–17 and accompanying text.

367. The concession by management on a single issue such as pensions serves as a face-saving gesture for the union negotiator. See D. PRUITT, *supra* note 19, at 144–48; see also *supra* notes 118–19 and accompanying text.

368. See R. WALTON & R. MCKERSIE, *supra* note 34, at 32–37.

369. See *id.* at 400.

370. See *id.* at 34. Generally, unions have a power advantage in a strong economy because a strike injures the company more than the workers. The company loses significant production, sales, and profits; on the other hand, workers probably have savings available to use during the strike.

371. See *id.* For example, a strike at one plant of a highly integrated company may be disastrous to the manufacturer.

372. See *id.* at 35. The collective bargaining relationship is affected by factors such as the relative sizes of the union and the employer.

workers approach personal bankruptcy and face the psychological costs of enforced leisure.³⁷³ Conversely, unless the company has excess inventory, the company may be hurt from the beginning.³⁷⁴ No dominant pattern of relative disadvantage can be identified across the spectrum of labor negotiations, except that usually neither party wants a strike and the strike functions as a threat, a competitive tactic. Accordingly, the relative bargaining power of neither union nor management is useful in recommending an across-the-board labor negotiation strategy.

In labor negotiations, the relationships between the negotiators themselves and between their principals are continuing ones; this is an important factor to consider in choosing a negotiation strategy. A positive relationship between management and the union that arises out of collective bargaining negotiations will contribute to the harmonious treatment of workers' grievances and employee relations and will increase morale and discipline. This relationship will also affect future bargaining.³⁷⁵ These factors generally suggest the adoption of a noncompetitive strategy,³⁷⁶ although management may want to use some competitive tactics so that it does not appear to be a pushover for future negotiations.

The opponent's likely strategy may be the most important factor in suggesting a negotiation strategy for the management negotiator. The union negotiation strategy will probably be a competitive one, because the union negotiator is highly accountable to his constituency and the union rank and file members are generally more demanding than union leaders.³⁷⁷ Generally the management negotiator should initially respond to the union's competitive strategy with her own competitive strategy.³⁷⁸ By making an initially competitive offer, the management attorney can help the union negotiator lower the expectations of the workers and convince them that their initial target is unrealistic.³⁷⁹ At the beginning of the negotiations, the management negotiator should also selectively share information with the workers so that their expectations are reduced.³⁸⁰

The management negotiator faces the dilemma of how to achieve the most favorable contract possible, while avoiding a costly strike and maintaining good relationships with the employees. If the management negotiator continues to respond competitively to the high demands of the union negotiators early in the negotiations,

373. *See id.* at 32–33.

374. In a recession bound economy, management will not be hurt by a strike if replacement labor is readily available to substitute for the strikers.

375. *See* R. WALTON & R. MCKERSIE, *supra* note 34, at 201–05.

376. *See id.* at 206. Sometimes, the management's relationship with the union may suggest using a competitive negotiation strategy. *Id.* at 207. This might be true when management sees a chance to get rid of the union, the contract to be negotiated sets a pattern for the industry, or employee relations is a separate and distinct issue from contract negotiations.

377. *See* Baumgart & Compagnone, *supra* note 356, at 310; Mandler, *supra* note 355, § 14.4.

378. *See* R. WALTON & R. MCKERSIE, *supra* note 34, at 283–89; Mandler, *supra* note 355, § 14.4. Conversely, if the management negotiator perceives that union rank and file members believe the union's initial demands to be extreme, then a cooperative initial offer by management may be suggested. This reasonable initial offer may cause workers to lose faith in their union representatives and to exert pressure for a quick settlement.

379. *See* H. EDWARDS & J. WHITE, *supra* note 3, at 260; R. WALTON & R. MCKERSIE, *supra* note 34, at 346; Mandler, *supra* note 355, § 14.4; *see also supra* notes 61–67 and accompanying text.

380. *See* R. WALTON & R. MCKERSIE, *supra* note 34, at 325, 346; Fairweather, *Labor Negotiation Strategy: A Management Perspective*, in H. EDWARDS & J. WHITE, *supra* note 3, at 300.

she risks a breakdown. The conflicting pressures on management negotiators to adopt competitive and noncompetitive strategies often lead labor negotiators to "tacit communications"³⁸¹ and "off the record" talks.³⁸² A tacit communication is a form of veiled cooperative message sent by one negotiator to another and understood by both. It communicates that publicly displayed competitive tactics are for the benefit of the negotiator's constituency and should not be taken seriously by the opposing negotiator. For example, Professors Richard Walton and Robert McKersie give an example of the union negotiator who remarked after a tough bargaining session on grievance problems, "Well, it's too early yet."³⁸³ The message conveyed to the experienced company lawyer was, "We may be bargaining aggressively, but a movement in position will take place subsequently."³⁸⁴ Labor negotiators also engage in off the record conversations—communications in which no formal commitments are made, but in which a problem solving approach predominates and the eventual contours of an agreement often are decided. These two techniques allow the union negotiator to publicly display the competitive tactics required to appease his constituency, while also using a greater degree of cooperative and integrative bargaining to move the parties toward agreement. The management negotiator may also aid the union negotiator by publicly conceding an issue very grudgingly and making a big issue of a small point.³⁸⁵ In this way, management's concession on the issue appears to be a significant one and the employees should develop more positive feelings about both their own negotiator's competence and the company's flexibility.

For the management attorney in labor negotiations, accountability to a constituency probably does not influence the choice of strategy nearly as much as it does for the union negotiator.³⁸⁶ Management officials, while concerned with the final contract, are probably not overly concerned with whether their negotiators appear to be competitive or cooperative during the negotiations.

The analysis presented here suggests specific recommendations for management negotiators which, taken together, fall short of constituting a comprehensive strategy, but which nonetheless are important. In most negotiations, management's opening public position on wages should be a competitive one. The competitive strategy will likely achieve better results on wages,³⁸⁷ give management the bargaining position to make concessions,³⁸⁸ and help reduce the employees' expectations.³⁸⁹ As the negotiation progresses, management's public bargaining position should remain competitive, creating the appearance that concessions are being grudgingly granted and are being forced by an aggressive and effective union negotiator.³⁹⁰ However, simultaneously with public bargaining, the management negotiator should engage in off the

381. See R. WALTON & R. MCKERSIE, *supra* note 34, at 331–38, 347–49; Mandler, *supra* note 355, § 14.4.

382. See R. WALTON & R. MCKERSIE, *supra* note 34, at 336–38; Mandler, *supra* note 355, § 14.10.

383. R. WALTON & R. MCKERSIE, *supra* note 34, at 337.

384. *Id.*

385. See *id.* at 346–47; Baumgart & Compagnone, *supra* note 356, at 312.

386. See R. WALTON & R. MCKERSIE, *supra* note 34, at 298–302.

387. See *supra* notes 218–21 and accompanying text.

388. See *supra* notes 72–84 and accompanying text.

389. See C. STEVENS, *supra* note 135, at 67–69; Baumgart & Compagnone, *supra* note 356, at 309–10, 312.

390. See Baumgart & Compagnone, *supra* note 356, at 312; Mandler, *supra* note 355, § 14.8.

record talks and tacit communications with the union negotiator.³⁹¹ Whether these negotiations will be predominantly competitive or predominantly cooperative depends on nonsystemic factors including the costs of a strike to each party,³⁹² the past bargaining relationships between the principals,³⁹³ and the personalities of the negotiators.³⁹⁴ Certainly on non-wage issues, integrative bargaining should play an important role.³⁹⁵

This recommended strategy of bifurcated public and private negotiations in the labor field is an unusual response to the conflicting pressures exerted by the factors used to select a negotiation strategy. The recommended strategy, however, is consistent with the strategies observed in real world labor negotiations³⁹⁶ and recommended by labor law specialists.³⁹⁷ The recommended strategy can perhaps, after all, be accurately described as antagonistic cooperation.³⁹⁸ In labor negotiations, allowing any single factor to dictate a negotiation strategy could lead to costly strikes³⁹⁹ or concessions that will be ultimately destructive to the company.⁴⁰⁰

V. CONCLUSION

The application of negotiating theory to the practice of law is only beginning to emerge and develop from its embryonic stage. It is now possible to identify three separate strategies: competitive, cooperative, and integrative. Until now, legal negotiation theory has lacked an effective and feasible model for deciding which strategy to employ in any particular situation. Some proponents of each theory claimed that their strategy was the most advantageous in all contexts.⁴⁰¹ In many instances relying on this recommendation was worse than heeding no advice at all. The criminal defense attorney, for example, who learned only competitive tactics and

391. See *supra* note 189 and accompanying text.

392. See R. WALTON & R. MCKERSIE, *supra* note 34, at 32–37.

393. See *id.* at 360–79. Professors Walton and McKersie describe the evolution of the bargaining relationships between the International Union of Electrical Workers and the General Electric Company, *id.* at 360–65, the United Auto Workers and International Harvester, *id.* at 365–68, the United Auto Workers and Studebaker, *id.* at 368–72, the United Auto Workers and General Motors, *id.* at 372–75, the United Steel Workers and the Steel Industry, *id.* at 375–77, the International Longshoremen's and Warehousemen's Union and the West Coast Shipping Companies, *id.* at 377–78, and the United Packinghouse Workers and Armour, *id.* at 378–79.

394. See *supra* notes 199–208 and accompanying text; see also R. WALTON & R. MCKERSIE, *supra* note 34, at 193–200.

395. For example, integrative bargaining will be used to negotiate issues such as job conditions, see Gudenberg, *New Areas of Accommodation*, 31 LAB. L.J. 462, 463–64 (1980); Yoder & Staudohar, *supra* note 355, at 313, and job security and management flexibility, see R. WALTON & R. MCKERSIE, *supra* note 34, at 129–34.

396. See H. EDWARDS & J. WHITE, *supra* note 3, at 259–60; R. WALTON & R. MCKERSIE, *supra* note 34, at 378–79.

397. See R. WALTON & R. MCKERSIE, *supra* note 34, at 173–74, 182–83.

398. See E. BAKKE, *supra* note 360, at 85–116; Craft, *supra* note 354, at 438.

399. See, e.g., R. WALTON & R. MCKERSIE, *supra* note 34, at 360–66, 375–77. Professors Walton and McKersie describe the long and expensive strikes which occurred in the steel industry in 1959, *id.* at 375, at International Harvester in the postwar period, *id.* at 365, and at General Electric in the late 1950s and early 1960s, *id.* at 360–64.

400. See, e.g., *id.* at 368–72. Professors Walton and McKersie use as an example the bargaining relationship between the United Auto Workers and Studebaker which ultimately was partially responsible for the demise of the company. The union-management relationship was regarded publicly as a cooperative one and received considerable nationwide attention. In fact, management's bargaining strategy appears in retrospect to have been a cooperative strategy; management's concessions were not reciprocated. As a result, Studebaker became uncompetitive. *Id.*

401. See, e.g., R. FISHER & W. URY, *supra* note 3, at xiii (principled negotiation which is based largely on integrative theory); C. KARRASS, *supra* note 8, at 25–26 (endorsing the competitive strategy); G. WILLIAMS, *supra* note 3, at 41 (endorsing the cooperative strategy).

then adopted a wholly competitive approach in plea bargaining, frequently received fewer concessions from the prosecutor than the defense attorney who was unschooled in negotiation theory and followed the method by which things had always been done. Other lawyering skills theorists, most notably Professor Gary Lowenthal, moved legal negotiation theory forward by suggesting that the strategy which is likely to be most effective depends on the specific characteristics of a particular case.⁴⁰² Although more sophisticated, this approach had limited practical utility because it required the attorney engaged in negotiations to consider a variety of factors and decide, on an ad hoc basis, which factors were most determinative before each negotiation. The lawyer received no guidance on how to accomplish this.

This article suggests that individual negotiations can be categorized according to the area of practice in which they occur. Within each specialty, certain systemic characteristics recur; these constants make it possible to identify a negotiation strategy likely to succeed in negotiations throughout an entire field. With this model, theory and reality have merged. The theories of the social psychologists, when applied to specific legal negotiation contexts, tell us what experienced and competent practitioners always understood: an effective negotiation strategy for a personal injury attorney differs from an effective strategy for a criminal defense attorney.

This article raises more questions than it answers. It does, however, suggest ways that the theory presented can be both verified and broadened. Fortunately, the possibility to empirically test the recommended negotiation strategies exists. Attorneys who frequently negotiate in a particular context, such as those with extensive plea bargaining experience, could easily be surveyed to determine whether they regard the purely competitive strategy, the purely cooperative strategy, or the hybrid plea bargaining strategy outlined above⁴⁰³ as the most likely strategy to yield favorable results for defendants.⁴⁰⁴ An even more valid empirical project would be to study the results of simulated negotiations between attorneys in which opposing counsel would be instructed to use one of three strategies: a purely competitive strategy, a purely cooperative strategy, or the strategy recommended in this article for the particular type of negotiation. The results of the negotiations then could be compared.⁴⁰⁵ The theory that effective negotiation strategies can be identified systematically should also be tested in substantive contexts other than the three areas discussed in this article.

The teaching and use of this context-based theory for choosing a negotiation strategy should not, however, await empirical verification. It is far better to provide

402. See Lowenthal, *supra* note 5, at 69–92.

403. See *supra* notes 245–307 and accompanying text.

404. This approach was used in the first phase of Professor Williams' research on negotiating patterns of practicing lawyers. See G. WILLIAMS, *supra* note 3, at 15–16. Williams sent questionnaires to Phoenix and Denver attorneys asking them to describe, according to 137 listed characteristics, the attorneys with whom they had negotiated and to rate the negotiating effectiveness of their opponents. Subsequently, follow-up interviews were conducted with 45 Denver attorneys. *Id.*

405. A similar type of empirical research using simulations was used previously to study which factors are important to prosecutors when they decide to make bargaining concessions in plea bargaining. See Lagoy, Senna & Siegel, *supra* note 252, at 442–45. In that study, randomly selected prosecutors were asked to decide which concessions were appropriate in two simulated case histories and to indicate which factors influenced their decisions.

lawyers and law students with a reasoned application of social scientists' theories to legal negotiations than it is to shrug one's shoulders and say that every negotiation is different or that negotiating skills are an art. The former is education; the latter denies the relevance of education to what it is that lawyers do.