STRATEGY, CHOICE AND THE SKILLED LEGAL NEGOTIATOR

LARRY CRUMP* AND JEFF GIDDINGS#

This article provides an overview of competitive or distributive negotiation strategy and integrative or problem solving negotiation strategy, and then asks: what factors determine the strategy that should be selected in a specific negotiation? The article develops a framework of primary and secondary factors that can influence each side in choosing a negotiation strategy. This list may be of some value to negotiation researchers, but also offers guidance to assist the legal negotiator to engage their client in a discussion so that they are able to make this fundamental decision on strategy together. This guidance can also assist the legal negotiator in preparing for the negotiation strategy that will be selected by the other side.

I INTRODUCTION

Almost all lawyers[1] are involved in professional negotiations on a regular basis. The contexts of such negotiations can vary greatly but there are important similarities in terms of acting as an agent for a client, owing ethical responsibilities to that client and others, as well as conducting the negotiation within a law-related framework. Legal negotiations tend to be linked either to a particular piece of potential or actual litigation or to the facilitation of some type of transaction.[2]

The skills that a legal negotiator should bring to a negotiation include knowledge of how legal processes are likely to impact on the dispute or transaction in question, including issues of proof, delay and costs. The lawyer needs to possess an informed understanding of their client's interests and concerns and the strengths and weaknesses of the client's legal position. Having reality-tested the client's views and assertions, the legal negotiator needs to maintain a relatively objective perspective, being prepared to consider proposals and viewpoints that would be summarily rejected by a party unable to accept that there may be other perspectives, and a need for creativity and compromise in order to reach an agreement. The lawyer also requires the ability to effectively and accurately put any agreement reached into writing.

* Senior Lecturer, Department of International Business and Asian Studies, Griffith University.
# Associate Dean (Curriculum, Teaching & Learning), Law School, Griffith University.

1 The words 'lawyer' and 'legal negotiator' are used interchangeably, and cover both solicitors and barristers.

2 Robert Bastress and Joseph Harbaugh, *Interviewing, Counselling and Negotiating: Skills for Effective Representation* (1990) 389-90.

The importance of legal negotiation skills can be usefully illustrated through reference to Gerald Williams' classic 1982 study of the negotiation actions of lawyers in Iowa, USA.[3] Williams had 20 pairs of lawyers negotiate a personal injury claim involving exactly the same set of materials. The variation in approaches taken and outcomes achieved were striking. Seventeen of the 20 pairs reached agreement with the sum payable by the defendant varying from $15,000 to $95,000.[4] A more than six-fold difference in the settlement reached on the same set of 'facts' demonstrates the importance of the skills and the strategic choices of each negotiator.

This article considers the decisions lawyers make regarding strategies to be used in any negotiation. Much has already been written on both the merits and the mechanics of different strategies yet the issue of how to choose between those strategies warrants further attention. Choice of strategy is critical because no single strategy will be effective in relation to all negotiations. A range of important factors should be considered when deciding on strategy.

II UNDERSTANDING NEGOTIATION STRATEGY

There was a time when the skilled negotiator did not have to think about the type of strategy to employ in a given situation, as there was no recognition that multiple negotiation strategies were available. Eighty years ago, state-of-the-art negotiation knowledge was based on a single approach. Competitive, adversarial and distributive bargaining are the terms most often found in the literature to describe this negotiation strategy. In conducting this strategy a skilled negotiator assesses the importance that the other party places on a particular outcome and then attempts to influence the other party's perception of that outcome, often seeking to lower their expectations. The skilled negotiator also seeks to manage the other party's perception of their own preferred outcome. Information is carefully guarded, while obtaining information from the other party is a top priority. Position taking, logical reasoning, argumentation, concession making and commitments are fundamental parts of the process, as distributive bargaining is often perceived as a competition over obtaining the greatest amount of a limited resource – even when there is enough for everyone.[5]

All this changed in the 1920's with the publication of *Creative Experience* by Mary Parker Follett and, later, The *Collected Papers of Mary Parker Follett.*[6] Follett introduced the world to the idea that differences can be integrated through an investigation and an understanding of the desires or interests of each party. In

3 Gerald Williams, *Legal Negotiation and Settlement* (1983) 5-10.
4 Ibid.
5 For details on conducting a competitive strategy see Thomas C Schelling, *The Strategy of Conflict* (1960); G Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (1999); Roy J Lewicki et al, *Essentials of Negotiation* (3rd ed, 2004).
6 See Mary Parker Follett, *Creative Experience* (1924); Henry Metcalf and Lionel Urwick (eds), *Dynamic Administration: The Collected Papers of Mary Parker Follett* (1942).

this way, neither party need dominate the other and neither party need compromise as each can achieve what is desired through an integration of interests.

Fisher and Ury popularised and operationalised Follett's groundbreaking insight in their classic work *Getting to Yes*[7] but in doing so they also overstated the case for an integrative or problem solving approach to negotiation.[8] Fisher and Ury argued that integrating interests could solve all problems. Today we know this is untrue as some conflicts can only be solved through a distributive strategy (eg, when one party wants war and another party seeks peace, the latter would be unwise to only rely on a problem solving approach). Nevertheless, an integrative strategy can be very valuable even in negotiations that initially appear to be distributive. A skilled negotiator applies an integrative negotiation strategy by focusing on both commonalities and differences, while attempting to address needs and interests – not positions. Such negotiators have a commitment to meeting the needs of all involved parties through an exchange of information and ideas, while inventing options for mutual gain and using objective criteria in making joint decisions.[9]

Often our negotiation goals can be accomplished by a distributive strategy, integrative strategy or a hybrid strategy that includes elements of both. Why should it matter which strategy is adopted? Difficult decisions must be made in a world of scarce resources where everyone cannot have everything they desire. A distributive strategy can be highly efficient in dividing scarce resources, but this type of strategy does not always divide resources effectively. For example, in a messy partnership dispute, one business partner may receive property that she or he really did not desire – property that the other business partner may actually wish to have. Such outcomes can occur because in a distributive negotiation the two sides carefully guard the information they disclose. An integrative approach can be much more effective in dividing scarce resources but in addition, this strategy is also able to identify unique and creative ways to utilise resources to obtain maximum value for both sides.

Sometimes an integrative strategy can identify hidden resources – tangible value that neither party knew existed until they began to talk openly about their goals, interests and constraints. As Follett asserts, each party may be able to achieve what is desired through an integration of interests, while Fisher and Ury counsel that the skilled negotiator should always seek to expand the pie before dividing

7 Roger Fisher and William Ury, *Getting to YES: Negotiating Agreement Without Giving In* (1981). This book refers to integrative, problem solving or mutual gains strategy as 'principled negotiation'. This term was never widely adopted because it has conceptual flaws, although the specific negotiation methodology advocated by Fisher and Ury has gained wide currency.

8 See Roy J Lewicki, David M Saunders and Bruce Barry, *Negotiation* (5th ed, 2006) especially ch 2; Dean G Pruitt and Peter J Carnevale, *Negotiation in Social Conflict* (1993) especially chs 1, 3 and 4; Shell, above n 5, especially chs 1 and 7; Nadja M Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation: Theory and Techniques* (1998) especially ch 2; Leigh Thompson, *The Mind and Heart of the Negotiator* (2001) especially ch 3.

9 Lewicki, Sanders and Barry, above n 8, 72-5; Shell, above n 5, 8-14; Fisher and Ury, above n 7, 13.

it. This is not fantasy. Hidden resources can be identified in a negotiation and new resources can be brought to the table if a skilled negotiator understands *when* and *how* to apply an integrative strategy.

Unfortunately, an integrative strategy also harbours the potential for exploitation because as soon as you tell the other party how badly you need something the price doubles – especially if the other party is fundamentally competitive in their orientation to life.[10] As such, deciding on an overall strategy is seldom a final decision but a choice that should always be open to review. In this regard, it is useful to gain some understanding into the study and practice of negotiation strategy. It is also useful to consider strategy in the context of lawyer-client relations, as this article has been prepared to do, to assist the lawyer in making decisions about negotiation strategy.

Although some scholars claim that the study of adversarial or distributive bargaining is neglected in the academic literature[11] this is not exactly correct, as one only needs to know where to look in the literature.[12] Developments in the study of integrative strategy over the last twenty years have brought substantial attention to the field of negotiation and to the study of strategy. Prior to *Getting to Yes*, few scholars (except for researchers in international relations and industrial relations) had any interest in studying negotiation. Now scholars from many academic disciplines have been drawn to study all aspects of negotiation strategy, in part because of the popularisation of an integrative approach to negotiation. Academic conferences sponsored by the International Association for Conflict Management, the Conflict Management Division of the Academy of Management (in America), and NEGOCIA (in France) demonstrate a strong interest in the study of both distributive and integrative negotiation strategies.[13] Insights from other disciplines can be very valuable to legal negotiators.

As noted previously, Follett identified three primary strategies: domination, compromise and integration. Today, compromise is considered to be a technique or tactic that is a part of a strategy. The range of tactics or planned behaviours that can be utilised in a negotiation is immense, while the number of strategies is much smaller. This is because a strategy is a general philosophical approach about how a course of action should be pursued. An understanding of strategy cannot be considered without also recognising that this concept is intertwined

10 Pruitt and Carnevale, above n 8, 42-3 and 47-8; Lewicki, Saunders and Barry, above n 8, 60-9.

11 Ross P Buckley, 'Adversarial Bargaining: The Neglected Aspect of Negotiation' (2001) 75 *Australian Law Journal* 181-9.

12 See, eg, *Journal of Conflict Resolution, International Journal of Conflict Management*, or *International Negotiation Journal*. Moreover, all the major negotiation textbooks draw on the substantial literature on adversarial or distributive bargaining in providing useful guidance for developing competitive strategy. See Lewicki et al, above n 5; Shell, above n 5. See also Robert H Mnookin, Scott R Peppet and Andrew S Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000); Thompson, above n 8; Michael Watkins, *Breakthrough Business Negotiation: A Toolbox for Managers* (2002).

13 Conflict Management Division of the Academy of Management <http://aom.pace.edu/cmd/> at 16 July 2005; The International Association for Conflict Management <www.iacm-conflict.org> at 16 July 2005 and NEGOCIA <http://www.negocia-evenementiel.com/biennale_negociation_dec_2003/index.html> at 16 July 2005.

with goals. Goals are what we want in a negotiation and strategy is how we attempt to achieve our goals. Strategy is the overall approach that guides specific actions or tactics.[14]

Contemporary understanding of the range of possible negotiation strategies is drawn from the field of management and the work of Blake and Mouton who developed a model of management styles in the 1960s.[15] Over the years, this management model has been applied to negotiation but adapted to respond to the specific circumstances that exist in this field of study. Often referred to as the *Dual Concern Model*, this negotiation model seeks to predict the type of strategy that a party might choose based on two critical factors that could influence her or his behaviour. One factor is a party's concern about their own outcomes and the other factor is their concern about the other party's outcomes. These two factors can be arranged on vertical and horizontal axes to produce four corresponding dimensions. Figure one below illustrates the relationship between these two factors and the four dimensions of strategy.[16]

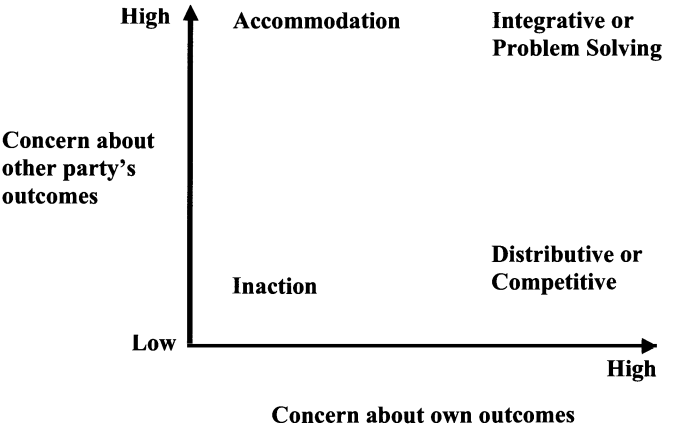

Figure One: Dual Concern Model

A competitive or distributive strategy and an integrative or problem solving strategy were each defined earlier in this article. Briefly, the Dual Concern Model predicts that when a party has a high concern for their own outcomes and a low concern for the other party's outcomes then a distributive or competitive strategy is more likely. On the other hand, when a party has a high concern for their own

14 For enlightened discussion on strategy see Schelling, above n 5. Also see John McDonald, *Strategy in Poker, Business and War* (1963); Morton Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes* (1973).

15 This model identifies five management styles based on whether a manager has a high or low concern for people/relationships and a high or low concern for production task. These two factors exist on a vertical and horizontal axis to predict management style. See Robert Blake and Jane Mouton, *The Managerial Grid* (1964) 1-17.

16 See Dean G Pruitt, 'Strategic Choice in Negotiation' (1983) 27 *American Behavioral Scientist* 167; Grant T Savage, John D Blair and Ritch L Sorenson, 'Consider both Relationship and Substance when Negotiating Strategically' (1989) 3 *Academy of Management Executive* 40.

outcomes and the other party's outcomes then an integrative or problem-solving strategy is more likely.

When a party has a low concern about their own outcomes and a low concern for the other party's outcomes the most likely strategy will be one of inaction. Normally, a lawyer will not be approached by a client that operates in this dimension, as they would obviously have no motivation to contact a law firm about such a concern. However, in a lawyer's personal life they, like everyone else, will often utilise a strategy of inaction. Here the mental and emotional response is 'can't be bothered – this is not an issue that warrants attention'. Such events occur around all of us all the time, while it is our perception of the significance of these events to ourselves and to others that result in inaction.

When a party has a low concern about their own outcomes but simultaneously has a high concern about the other party's outcomes, the Dual Concerns Model predicts that a strategy of accommodation will be pursued. Accommodation involves lowering one's own goals or aspirations so that the other party can achieve their goals. It is possible that a client may approach a lawyer to seek advice about a problem or opportunity with the intent of pursuing a strategy of accommodation. In this case the client would probably seek advice on the legal implications of such a strategy, as compared to a more active strategy (eg, distributive or integrative). The lawyer may also be asked to assist in facilitating this act of accommodation, but usually accommodation may not require the assistance of legal expertise once the decision is made to employ this specific strategy. On the other hand, a client with a clear set of goals that is being obstructed will not appreciate a lawyer that adopts an accommodation strategy. Moreover, a lawyer that utilises an accommodation strategy could be found to have violated their professional code of ethics.

However, in their organisational and personal lives, a legal professional will often find an accommodation strategy useful (ie, some times the best way to get along is to go along). For example, it is Thursday evening and a junior lawyer has tickets to an important sporting event. Unfortunately, the lawyer's supervising partner has received an ultimatum from a valued client to have a specific bit of legal analysis on the client's desk by the following morning. The senior partner tells the lawyer that not only will they be working late into the evening tonight but will also be required early tomorrow. In this case, the law clerk most likely adopts a strategy of accommodation.

A lawyer will likely use all four negotiation strategies on a regular basis in their own organisational and personal negotiations, but when serving clients they are most likely to only use an integrative strategy or distributive strategy. In representing clients, a fundamental decision must be made early in the process about the type of general strategy to be pursued recognising that distributive tactics may co-exist in an integrative strategy and integrative tactics can co-exist in a distributive strategy. However, at a general philosophical level does the skilled legal negotiator adopt a distributive or integrative strategy for a specific

client? This fundamental issue is not a lawyer's decision; rather this is a decision that should be made based on the client's informed instructions and made jointly by the client and their lawyer.

Now that an understanding of negotiation strategy has been achieved this article can turn to its primary purposes: (i) to assist the lawyer in identifying the specific factors that indicate whether an integrative or distributive strategy will most likely produce an outcome for the client that is of greatest value at the lowest tangible and intangible cost (ie, client satisfaction); and (ii) to help the lawyer to learn how to engage the client in a discussion so that they are able to make this fundamental decision on strategy together. After considering these two issues this article concludes by offering a framework for selecting strategy in legal negotiations.

III FACTORS INFLUENCING CHOICE OF STRATEGY

The Dual Concern Model identifies two critical factors that a lawyer can use in helping to make a joint strategy decision with a client about overall strategy. Although these two factors are important, many other factors are equally important in deciding to use a distributive or integrative strategy. This section examines many other factors that influence choice of strategy in conducting a negotiation. This article extends the work begun by Gifford[17] twenty years ago, although the field of negotiation has developed exponentially in the period since this work first emerged. We now know much more about strategy and the factors that can influence choice in strategy selection. An understanding of these factors will prepare a lawyer to make such choices in cooperation with their client. Organising these factors into a typology will also assist the negotiation researcher in seeking further understanding of strategy and choice in negotiation.

A *Client's Perception of Other Side*

How does your client perceive the other side? Is the other side viewed as an opponent that needs to be defeated or as a potential partner that may be useful in helping your client in goal achievement? Your client's perception of the situation will play an important role in establishing their understanding of what is possible. Your client's perception will also determine their goals and often establish the methods that they wish to pursue to achieve these goals. How valid is your client's view given the facts and an objective analysis of the circumstances? Research demonstrates that two people can observe the same situation and see different things resulting in a different definition of the situation.[18] The skilled lawyer will want to examine the facts and circumstances and encourage their client to consider any realistic alternative conclusion. In so doing the lawyer may be able to help their client see the situation in a more pragmatic light. Client goals and the methods for achieving these goals should be re-examined as new

17 Donald G Gifford, 'A Context-Based Theory of Strategy Selection in Legal Negotiation' (1985) 41 *Ohio State Law Journal* 60.

18 Pruitt and Carnevale, above n 8, 84.

understandings of the situation emerge through such discussion.

B *Negotiation Strategy Selected by the Other Side*

Gifford describes the strategy chosen by the other party as the single most important factor in selecting one's own strategy.[19] If the other side is clearly behaving in a competitive and hostile manner, and if this approach seems to persist then the skilled legal negotiator would be advised to respond with a distributive strategy. Axelrod's findings on the effectiveness of a tit-for-tat approach in negotiations are consistent with this view.[20] On the other hand, if the other side seems willing to cooperate and use an integrative approach, the skilled legal negotiator should consider adopting a similar strategy. This view is consistent with the principle of reciprocation, that one should repay, in kind, what another person has provided.[21]

Indicators of the strategy that the other side may choose include their initial approach or strategy in the current negotiation, their strategy in previous negotiations, their reputation, the strategy usually chosen by similarly situated negotiators, the strategy that the negotiator would adopt if in the other side's position and specific elements within their personality.[22] Regarding this last point, competitive approaches are likely to appeal to those who are fundamentally authoritarian, are risk averse and like to be in control. At the same time, a range of negotiation texts and articles refer to the need for each negotiator to develop an approach that suits them as an individual.[23] In the final analysis the skilled legal negotiator will be able to select the most appropriate strategy not because it fits their personality but because it fits the situation.

C *Goal Structure (The Structural Relationship between Party Goals)*

Goals drive negotiation strategy,[24] which is to say that the goals and interests of each side serve to primarily define the negotiation situation. What is the structural relationship between the goals of each party? This is the critical question. For example, in some negotiations the goal of each side relates in such a way so that one party achieves nothing if the other party achieves their goal. This structural relationship is known as a contest – a purely competitive situation (eg, a race that only has one first place winner with all others as losers). On the other hand, in some negotiations we find that if one party achieves their goal it results in another party automatically achieving their goal without having to spend any effort (ie, a free rider). This is known as a purely cooperative situation.[25] Most negotiations exist between these two extremes, which is to say

19 Gifford, above n 17, 60.
20 Robert Axelrod, *The Evolution of Cooperation* (1984), 32.
21 Richard Birke and Craig R Fox, 'Psychological Principles in Negotiating Civil Settlements' (1999) 4 *Harvard Negotiation Law Review* 1, 51.
22 Gifford, above n 17, 62.
23 See Spegel, Rogers and Buckley, above n 8, 2-4; Bastress and Harbaugh, above n 2, 390.
24 Lewicki et al, above n 5, 25.

that the structural relationship between each party's goals produces both an element of cooperation (eg, a buyer needs a seller and a seller need a buyer) and an element of competition (eg, a sale with price as the only issue means that gains for one party are automatically losses for the other party).

To complicate matters, parties in a negotiation often have multiple goals, while each goal generally exists on its own purely competitive to purely cooperative continuum. To gain insight into how this structural relationship should be managed through strategy selection the negotiator must identify and assess the relationship between each goal for both sides. As a general rule, where the structural relationship between party goals is fundamentally cooperative, then an integrative strategy should be pursued. Where the structural relationship between party goals is fundamentally competitive, then a distributive strategy should be pursued.

At times a skilled legal negotiator will expect to use a cooperative strategy yet the other side behaves in a competitive manner by utilising a distributive strategy – perhaps because this approach is fundamental to the other negotiators' personality. If the other negotiator and their client cannot be educated as to the potential benefits of engaging together in an integrative strategy then it is advised to reciprocate with a distributive approach.

Your client's perception of the situation, including their concern about their own outcome and the outcome of the other party, the fundamental nature of the other party and the strategy they select, and the structural relationship between party goals are the primary factors that require consideration when examining strategy choice. However, there are a number of secondary factors that also require consideration. Furthermore, depending on the context, these secondary factors can assume greater or lesser significance in strategy selection in a specific negotiation. These secondary factors are considered now.

D *Relative Bargaining Power*

Bargaining power is determined by the negative consequences that can be inflicted on the other party if agreement is not reached. This depends largely on the alternatives available to either party if agreement is not reached.[26] At the negotiation table, power is often secured by having a better alternative. The party that is least dependent on the other will generally be the party with more power. One way to gain power at the negotiation table is to look for or develop viable alternatives.[27] However, techniques have been developed to counter asymmetric power relations by using appeals based on justice rather than advancement of

25 See Morton Deutsch, 'Cooperation and Trust: Some Theoretical Notes' in Marshall R Jones (ed), *Nebraska Symposium on Motivation* (1962) 276-7; Richard E Walton and Robert B McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (1965) 127-8.

26 Bastress and Harbaugh, above n 2, 402.

27 Fisher and Ury, above n 7, 104-5; David Lax and James Sebenius, *The Manager as Negotiator: Bargaining For Cooperation and Competitive Gain* (1986) 62.

their client's interests.[28] Thus, an integrative strategy (appealing to both parties shared interest in achieving a fair outcome) may be more successful for a negotiator facing someone with greater bargaining power.

A powerful negotiator can always choose to behave in a competitive manner but they need not make such choices. For example, the structural relationship between goals may suggest an integrative strategy and the powerful party may recognise this opportunity. The point here is that when power relations are unequal the powerful have a choice between selecting distributive or integrative strategies, while the negotiator with less power is often faced with being either accommodative or integrative. A less powerful party may behave in a distributive manner but they must do so with greater caution.

E *Future Dealings with the Other Party*

When the relationship is a continuing one, a cooperative or problem-solving approach is both recommended and more likely.[29] The distrust and ill will that can be generated by a competitive strategy will likely impact on future dealings. Vanover notes that strategy choice and goal achievement becomes complicated when there are a series of negotiations between the same parties.[30] Lax and Sebenius also consider repetitive negotiation behaviour between the same parties. Players cooperate when they know that their current actions can affect future payoffs, when they believe that a defection now will lead to sufficient defection by their opponent to make the initial move undesirable.[31] The skilled legal negotiator will need to consider if their client and the other side are expecting to have a continuing relationship after the negotiation and if so take this into consideration in strategy selection. On the other hand, if the two sides do not expect to maintain relations after the negotiation then this factor becomes less important in strategy selection.

F *Attitude of the Client*

A lawyer negotiating on behalf of a client has a professional responsibility to act on the client's instructions.[32] In some cases, a lawyer's desire to maintain rapport with an adversarial client may dictate the use of an adversarial approach.[33] This raises the challenge for lawyers of seeking to ensure that the client's goals and instructions are consistent and that the client understands the likely consequences of their choices in relation to negotiation. The skilled legal negotiator should review and re-review with their client the strategic choices available and the strengths, weakness, advantages and disadvantages of each approach for a specific situation.

28 Gifford, above n 17, 64.
29 Lewicki et al, above n 5, 32.
30 Joseph W Vanover, 'Utilitarian Analysis of the Objectives of Criminal Plea Negotiation and Negotiation Strategy Choice' (1998) *Journal of Dispute Resolution* 183, 192.
31 Lax and Sebenius, above n 27, 160.
32 Ysaiah Ross, *Ethics in Law* (3rd ed, 2001) 240-2.

The lawyer should clearly understand what the client wants to achieve, how the client wants to achieve their goals and the reason or rationale behind the client's preferred strategy. Reality-testing the client's expectations and understandings is a critical part of the legal negotiator's role. The various factors that impact on strategy choice need to be explained to the client to enable an informed decision to be made as to the best approach to both the problem and to the legal negotiation. The skilled legal negotiator should explore with the client any logical inconsistency between goals, strategy choice and the reason for this choice.

G *Pressure to Reach Agreement*

Time pressures can be very influential in determining negotiation strategy by increasing competitive behaviour, especially when a negotiator is accountable to a client.[34] When there is conflict, clients often want the matter over with, may have cost concerns and an urgent need for settlement proceeds. Granting a concession is likely to result in negotiations concluding more quickly.[35] Pressure to reach an agreement can move parties toward more distributive methods because these methods are more time-efficient.[36] The skilled legal negotiator needs to confer with their client about the trade-off between achieving goals efficiently and the real value that may be lost because integrative methods are not being utilised.

H *Stage of Negotiation*

Competitive strategic moves tend to be prominent in the early stages of negotiations. Early competitive moves indicate to the other negotiator the intention to take a tough stance such that any concessions will not be made easily. It can also help convince the client that the lawyer is working vigorously on their behalf.[37] Such initial action can be important and necessary in some negotiations. However, it is also essential to recognise that often parties begin to build a relationship during the early stage of a negotiation. A strong relationship can be valuable for managing conflict that will likely emerge in a negotiation. As such, it is useful to spend time focusing on relationship building in the early stages of a negotiation.[38] This can be facilitated by identifying party goals that have a structural relationship that is fundamentally cooperative in nature and then discussing these issues first, while saving the more difficult competitive goals for later. By building the negotiation agenda in this manner, the two sides may be able to establish a track record of small successes that can serve as a foundation

33 Gifford, above n 17, 66.

34 Ronald J Gilson and Robert H Mnookin, 'Disputing through Agents: Cooperation and Conflict Between Lawyers in Litigation' (1994) 94 *Columbia Law Review* 509, 527-9.

35 Frank Tutzauer, 'The Communication of Offers in Dyadic Bargaining' in Linda L Putnam and Michael E Roloff (eds), *Communication and Negotiation* (1992) 67-82.

36 Lewicki et al, above n 5, 71-2.

37 Gifford, above n 17, 67.

38 Leonard Greenhalgh and Deborah I Chapman, 'Joint Decision Making: The Inseparability of Relationships and Negotiation' in Roderick Moreland Kramer and David M Messick (eds), *Negotiation as Social Process* (1995) 251; Leonard Greenhalgh, *Managing Strategic Relationships* (2001).

for responding to those issues that are fundamentally competitive in nature.

I *Norms*

Both formal rules and informal conventions as to the conduct of particular types of negotiation are influential in strategy selection. For example, some studies contrast the more cooperative initial approach generally taken in commercial disputes with the more competitive approach taken in personal injury matters.[39] There are also important issues to be considered in relation to the impact of legislation and ethical rules designed to prevent or limit the misleading conduct that is often viewed as part and parcel of a competitive style of negotiation.[40]

Schneider has updated Williams' 1976 survey of lawyer attitudes in negotiation.[41] Her 2002 findings confirm those of Williams in terms of most lawyers characterising themselves as cooperative negotiators who consider this strategy to work best for clients. Problem-solving negotiators are viewed as understanding their clients better, are easier to work with and ethical. Adversarial negotiators are viewed as arrogant, rigid, aggressive and as making extreme opening demands. On the basis of the survey data, Schneider observed: 'As adversarial bargainers became nastier in the last 25 years, their effectiveness ratings have dropped.'[42]

IV STRATEGY AND CHOICE: A FRAMEWORK

Other factors that can influence choice of strategy await identification. The present discussion identifies the more important factors based on a comprehensive review of the literatures in law and negotiation. Table one below provides a set of questions that can assist the skilled legal negotiator in engaging their client in a discussion about choices in negotiation strategy. Answers to such questions by the client will provide the skilled legal negotiator with guidance about strategy selection. Negotiation researchers may also find this typology of value in conceptualising and understanding the relationship between negotiation strategy and choice. Table one is divided into primary and secondary factors. Primary factors are relevant in every negotiation and secondary factors are important but not relevant to every negotiation.

39 Gifford, above n 17, 68.

40 In relation to *Trade Practices Act 1974* (Cth) s 52, see W J Pengilly, 'But You Can't Do That Anymore! The Impact of Section 52 on Common Negotiation Techniques' (1993) 1 *Trade Practices Law Journal* 113. In relation to the viability of ethical rules to prevent lying in negotiation, see James J White, 'Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation' (1980) *American Bar Foundation Research Journal* 921.

41 Andrea Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) 7 *Harvard Negotiation Law Review* 143.

42 Ibid 196.

Primary Factors:
How concerned is the client with his or her own outcome and with the outcome of the other party?
Does the client see the other side as a potential opponent or a potential partner? How valid is this perception given an objective assessment of the facts and circumstances?
How has the other side been behaving or is behaving in the current negotiation (generally competitive – generally cooperative)?
What is known about the reputation and/or personality of the negotiator(s) on the other side (generally competitive – generally cooperative)?
What are the client's goals (make a list) and what are the goals of the other side? What is the structural relationship (on a competitive – cooperative continuum) between each goal of your client's and the corresponding goal on the other side?
Secondary Factors:
If the relative bargaining power of the parties is unequal will this be a factor in strategy selection for either side?
Do the two sides expect to have continuing relations after the negotiation is concluded? Must the two sides cooperate in implementing any agreement that is negotiated?
Is there consistency between attitudes of the client and their lawyer and the value of such consistency, as it relates to strategy selection?
Is there pressure to reach an agreement and is this pressure influencing the choice of strategy? If so, how can this pressure best be managed?
Is the negotiation stage influencing choice of strategy? If so, how can this pressure best be managed?
How might formal and informal conventions influence choice of strategy?

Table One: A Framework for Negotiation Strategy Selection

The strategy selected in preparation for a negotiation will significantly influence the conduct of that negotiation. If a lawyer prepares for a distributive negotiation, that is what they will most likely have. If a lawyer prepares on the basis that the choice between an integrative and distributive approach depends on how the negotiation commences and then proceeds, they can adapt their approach to suit all circumstances as they emerge. We consider the 'conditionally open' approach endorsed by Lax and Sebenius[43] or the 'cautious cooperative' approach endorsed by Axelrod[44] to be an appropriate strategic choice in preparation for a negotiation.

Planning to pursue a single strategy – distributive or integrative – prior to meeting the other side is risky business. Often, until the two sides hold a first meeting there is insufficient information to know what is actually possible. A lawyer does not have a clear understanding of the other side's interests and goals and how they relate to their client's interests and goals. Moreover, a lawyer does not have any knowledge of the other side's assessment of their client's interests and goals and how the interests and goals of each party relate.

Entering a negotiation with an open mind regarding choice of strategy does not mean entering with a blank mind. Normally, substantial planning is required to effectively prepare for a negotiation.[45] The preparation process includes the need to make and re-make choices related to initial strategy and subsequent changes of strategy. Such decisions should be made as new relevant information is gathered and examined. Some such information can only be gathered through a first meeting. This is why a skilled legal negotiator will reconsider the issue of overall strategy during and after the first meeting with the other side.

Robinson suggests that despite the clear contrast between cooperative and competitive approaches, the complexity of negotiation is such that negotiators can benefit from using both approaches. 'To accomplish the best result, the negotiator must usually plan to use each of these styles at the appropriate moments.'[46] The choice made as to initial strategy to be used in a negotiation will impact on the ability to subsequently change strategy. It is easier to move from a cooperative to a competitive strategy than it is to change from competitive to cooperative. This reinforces the value of the 'conditionally open' approach discussed earlier.

The information available to a legal negotiator and to their client will also change during the process of preparing for and conducting a negotiation. The models used to test negotiation theories tend to assume that pieces of information can only be known by a particular party or are common knowledge. In fact, the information available will be dependent on how the negotiator and their client

43 Lax and Sebenius, above n 27.
44 Axelrod, above n 20. See also Peter Robinson, 'Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy' (1998) 50 *Baylor Law Review* 963, 964, 972-82.
45 See Lewicki et al, above n 5, ch 2; Shell, above n 5, ch 7.
46 Robinson, above n 44, 967-8

prepare for the negotiation and steps they take in order to find out as much relevant information as possible. As such, preparation is critically important.[47]

V CONCLUSION

This article has emphasised the importance of choices made regarding the strategy to be employed during a negotiation. Fixed adherence to one particular model can be a problem, as can a failure to review the strategy choice as circumstances change and new information becomes available. Understanding when to choose and when to change are both crucial to effective strategy selection.

It is the client's goals and expectations that are really important. The lawyer has a significant role in reality-testing with the client, clarifying what is most important to the client. This is linked to the process of identifying the facts. Legal negotiators need to acknowledge the uncertainty of facts as presented by the client and others. The legal negotiator plays a crucial role in clarifying client's interests and goals and explaining to their client the impact that strategic choices may have on the outcomes achieved in current and future negotiations.

Why do negotiated outcomes appear sub-optimal so often? What actions could the parties take that would result in a solution that better maximises resources, that produces solutions that are more elegant, more durable or more satisfying to the parties and other stakeholders influenced by an outcome? There is never a clear answer to such questions, but better understanding about strategy choices will minimise these concerns, while producing higher quality negotiated agreements.

47 Lewicki et al, above n 5, ch 2; Shell, above n 5, ch 7.