Throughout my legal career I have studied the Chicken Game. The Chicken Game is not really a game. It is a form of negotiation. Years ago I silently observed a game of chicken intensely played between a prosecutor and a defense attorney. The prosecutor had the upper hand, but the defense attorney had some cards to play. The defendant had a viable defense. The charging statute was ineptly drawn, ambiguous, and unduly broad. The defendant had no criminal record. Two State’s witnesses had been convicted of fraud. In my mind, a jury trial presented a good chance for a “not guilty” verdict, or perhaps a hung jury. After the prosecutor and defense attorney sparred back and forth awhile, the defense attorney advised his client to plead “guilty.” The defense attorney chickened-out too early. That’s when I got the idea for this article. I hope the article will stimulate your thinking when you play the Chicken Game.

What is the Chicken Game? There are different versions of the Chicken Game, but in one well-known version, two drivers drive from opposite directions toward one another keeping the left wheels of their vehicles on the center white line. The first to veer off the white line becomes the “Chicken”; the other, the “Winner.” Tragically, there are instances where neither driver veered away soon enough, resulting in the death of both drivers. The movie Rebel Without a Cause illustrates this tragic version of the Chicken Game. Two teenagers, James Dean and another, raced stolen cars headlong toward a cliff over the ocean. The one who stopped or bailed out first would be dubbed Chicken. The one who bailed out last would be the Winner. When Dean’s opponent at the last minute tried to bail out, his coat sleeve caught in the door. Desperate efforts to free himself failed, and he drove off the cliff to his death. Dean was ultimately the Chicken, but his opponent, the Winner, experienced a fatal victory.

Does the Chicken Game apply in business? You bet! The Chicken Game applies to just about every form of negotiation: labor strikes, proposed mergers, business acquisitions. Consider as an example, the vigorous battle between Andrew Carnegie and George Pullman to acquire and control the railroad sleeping car industry in the 1860s. Carnegie founded Carnegie Steel. Pullman invented the railroad sleeping car — the “Pullman car.” Both men vied for the company at a meeting in a New York hotel and happened to be walking up some stairs side-by-side when inspiration struck Carnegie like a bolt of lightning. Carnegie told Pullman that the two of them were plain fools for continuing to butt heads and suggested they join forces. Carnegie triumphantly stated in his autobiography that he had stumbled upon a selling point, a weak spot, in Pullman’s makeup — his ego. So when Pullman asked Carnegie what they would call the company, Carnegie replied, “Pullman, of course!” The success of the resulting merger illustrates an important principle in playing the Chicken Game: know, and take advantage of, your opponent’s weaknesses.

A personal story illustrates another important Chicken Game principle. During the Great Depression, Mr. Ed, a friend of my Dad, was in the retail furniture business and fell behind in his payments to the bank. The bank’s president hounded Mr. Ed for payment. The president finally gave Mr. Ed an ultimatum: pay by noon the following day or face foreclosure. Mr. Ed told the president that he could not pay. The president...
responded, “Then, the bank will foreclose on your note.” Mr. Ed grabbed the keys to his store, slammed them on the president’s desk, and replied, “I’ll save you the trouble. Here’s the %$@*&& keys. Now, you are in the furniture business!” With that, Mr. Ed stomped out of the bank. Trailing behind, the president pleaded with him to re-consider. Mr. Ed finally relented, “Well, all right but I need at least a 90-day extension and may need even more time.” The president conceded. Mr. Ed won that Chicken Game because he knew the bank did not want to be in the furniture business. As the story illustrates, what your opponent knows or doesn’t know about your side can turn the tide in your favor.

**Does the Chicken Game apply to international relations?** History provides many examples of international Chicken Games. Consider the Cuban-Russian Missile Crisis during President John F. Kennedy’s administration. Russia had become a nuclear threat to the United States resulting in a scary, very real Chicken Game among the United States, Russia, and its ally Cuba. Had Russia not backed off, perish the thought. During the Cold War the term “brinkmanship” was coined, by Secretary of State John Foster Dulles, who advocated the policy against the Soviet Union. Secretary Dulles explained that brinkmanship is the ability to get to the brink of war, without going to war. This point might be reached through diplomatic maneuvers by creating the impression that one is willing to use extreme methods rather than concede. During the Cold War, the threat of nuclear force was often used as such a deterrent. Fortunately, the United States won that Chicken Game.

Recently, the Chicken Game played out again between the United States and Russia when the United States offered to exchange ten Russian agents for Russia’s release of four Russians (yes, Russians) imprisoned in Russia for eleven years for spying for the West. Initiated by the United States, the agreement was reached, and the ten Russian agents were flown back to Russia just eleven days after their arrests in the United States. Thus, bringing a swift, successful end to a Chicken Game evoking memories of Cold War style bargaining, a/k/a brinkmanship. Happily, the exchange of prisoners underscores a new-era relationship between Moscow and Washington. But the game continues today, as North Korea and Iran flex potential nuclear muscles.

**Does the Chicken Game apply to the practice of law?** Both civil and criminal cases present opportunities for the Chicken Game. Criminal plea-bargaining provides a perfect example. When a person is charged with committing a criminal offense, the prosecutor and defense counsel often “dance back and forth” in an effort to resolve a case without a formal trial. If the defendant accepts the prosecutor’s first offer, he loses the advantage of a better offer. For example, if the prosecutor offers to dismiss a first-degree murder charge in exchange for the defendant’s guilty plea, the defendant loses any chance of acquittal, but avoids the risk of the death penalty.

If the defendant refuses the offer, the prosecutor must decide whether to “sweeten” the plea offer, stand firm, or try the case. In most cases, accepting the first offer is unwise.

**Why is it unwise to accept the first offer?** Many defense attorneys fail to consider that most prosecutors do not want to try a case. Prosecutors have full caseloads and little to lose by sweetening a plea offer. To obtain the best offer for a client, a defense attorney should investigate all of the angles, find the holes in the State’s case, and identify strong points of defense. If the defense attorney wants to win the Chicken Game, the attorney must give the prosecutor something worthy of a sweetened deal. A defense attorney who approaches a prosecutor with something solid, something real, will have a better chance of obtaining a better deal for the client. If the prosecutor offers a better deal, defense counsel wins that Chicken Game.

**Why do prosecutors offer better deals?** Large caseloads make it impossible for any prosecutor’s office to try every criminal case. Attempting to try every case creates a backlog in the courts. This fact alone motivates both sides to resolve the case through plea-bargaining. The public and the news media often criticize the plea-bargaining process as resulting in lesser punishments, but there are cases in which the plea-bargaining process results in more severe punishment. Consider the situation of a hypothetical district attorney and the defendants he prosecutes.

Assume the district attorney must resolve 100 cases per year with a budget of $100,000. With only a $1,000 to spend on investigating and prosecuting each case, half of the defendants will be acquitted. But if the district attorney can convince 90 defendants to accept a plea bargain, the district attorney can focus his resources on the 10 defendants who do not plead guilty, spend $10,000 on each case, and perhaps get a conviction rate of 90%.

Assume further that a defendant probably faces a 90% chance of conviction if he goes to trial and makes his choice accordingly. He should reject any proposed deal that is worse for him than a 90% chance of conviction but may well accept one that is less attractive than a 50% chance of conviction, leaving him worse off than he would be in a world without plea-bargaining. All defendants would be better off if none of them accepted the district attorney’s offer, but each is better off if they accept. They are caught in a many-player
version of the Chicken Game.

Here’s how the Chicken Game can play out in a criminal case. Consider the following scenario. An elderly victim is fatally shot. The murder weapon is not found. A 60-year-old man with a prior conviction for aggravated assault is charged. There’s one eye witness — the defendant’s girlfriend — Suzy Q — plus some circumstantial evidence pointing to the defendant. There is also a tape recording of an argument between the victim and the defendant in which the victim threatens to kill the defendant over a business transaction. Thirty days later, Suzy Q states that the victim burst into the defendant’s office, carrying a .32 calibre pistol, and that the defendant took a loaded .45 revolver from his desk drawer and shot the victim.

After waiving arraignment, defense counsel files various motions, including motions to quash the indictment and to suppress the tape recording. At the pre-trial hearing, defense counsel and the prosecutor discuss the possibilities of a guilty plea, reduction to a lesser offense, dismissal of the indictment, and a trial either before the court or a jury. The prosecutor offers 25 years “hard time.” Defense counsel says, “No way.” The prosecutor reminds defense counsel that Suzy Q provided a written statement identifying the defendant as the killer and stating that the defendant owned a .45 revolver. Defense counsel reminds the prosecutor that he was not present when Suzy Q made her statement and he has not cross-examined Suzy Q.

So, the Chicken Game begins! Defense counsel demands a hearing on his pre-trial motions. The prosecutor threatens that all deals will be off if the defendant pursues his motions — in short, that the State will press life imprisonment. The prosecutor reminds defense counsel about Suzy Q’s incriminating statement and insists Suzy Q would make a credible witness. Defense counsel responds by reminding the prosecutor about the victim’s prior threats toward defendant and that the victim was carrying a loaded pistol when defendant shot him. “That may be,” the prosecutor says, “but Suzy Q said the victim never pointed his weapon at the defendant.” At that point, defense counsel demands a hearing on his pretrial motions. The prosecutor withdraws his prior offer. Judge Penn, as expected, overrules the motion to quash all other pretrial motions, and sets the case for jury trial. The future looks bleak indeed for the defendant. But the Chicken Game is far from being over.

A jury of 8 men and 4 women is seated. The indictment is read and the defendant pleads “Not Guilty.” The State puts on several witnesses, including the medical examiner, homicide detectives, and EMS personnel. The State introduces the tape recording of the argument between the defendant and the victim.

Judge Penn recesses for lunch. Hungry members of the press, courtroom spectators, and courthouse personnel all wait to hear Suzy Q testify and “drop the hammer” on the defendant. After the noon recess, the prosecutor dramatically announces, “The State of Texas calls Miss Suzy Q as its next witness.” At that point, the Chicken Game comes to a screeching halt.

Defense counsel asks to approach the bench to confer with Judge Penn and the prosecutor in chambers. In chambers, defense counsel files a


5 Tex. R. Evid. 504; Pat Priest, Texas Courtroom Criminal Evidence § 5-4(b)(1) (1998). Under the husband/wife privilege, a person cannot be compelled to testify against a spouse about communications between the couple during the marriage.

6 On the Internet, use a Google or Yahoo search for: “The Chicken Game.” The search will result in a surprisingly long list of useful and interesting articles, books, and citations about the “Chicken Game.”
motion signed by both Suzy Q and the
defendant to prevent the district attorney
from calling Suzy Q as a witness. Why?
Because the defendant and Suzy Q were
married! Defense counsel presents a
certified copy of a marriage certificate
showing that the defendant and Suzy Q
were married before the victim
was shot. The defendant and Suzy Q
rely on the spousal privilege." Judge
Penn grudgingly grants the motion,
preventing the shocked prosecutor
from calling Suzy Q to testify! No
eyewitness. Game over!

But the game could have played out
differently. What if the defendant
and Suzy Q had not been married? The
prosecutor obviously would have
had the upper hand, assuming Suzy Q
was available to testify. In that case the
defendant would have had to try to plea
bargain, provided the prosecutor was
willing. If the prosecutor was unwilling,
the defendant would have been in
trouble. However, if the defendant knew
that Suzy Q had departed for “parts
unknown” and possibly, probably, or
actually could not be found to testify,
the ball would have switched back to
defendant’s “court,” especially if the
prosecutor were unaware of Suzy Q’s
unavailability. These variables show that
the Chicken Game depends a lot upon
who knows what when negotiations
reach a critical stage.

**Conclusion.** The Chicken Game
is also played in civil cases as well.
Indeed, the game is played in all
sorts of dealings, too numerous to list
here. When engaging in the process
of negotiation, perhaps as a game of
Chicken, consider the suggestions
on page 8, as the game is and will
continue to be part of our lives. Those
interested in learning more about the
Chicken Game will find the citations
in the endnotes helpful.⁶

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**Hey, Man — I’m a Professional!**

The late District Judge Jim Barlow witnessed more than his share
of bizarre courtroom antics during his long and distinguished career.
“Judge Jim” always ran a tight ship, but that did not cause him to limit
a defendant’s right to be represented as the attorney chose. He told of
one particular incident that bears repeating — not only from the humor
aspect — but as a reminder that a jury makes its own decisions, regardless
of the shortcomings or tactics of counsel.

As Judge Jim told it, a local man was on trial for stealing meat. He had to
go to trial because he had a less-than-pristine criminal record. “One more guilty
verdict, and off he would go for life.” The local lawyer, long since deceased,
put his client on the stand, and the questioning went something like this:

Q. Now, Henry, this is not the first time you have been
in court, is it?

A. No, sir.

Q. And, as a matter of fact, you have been convicted of
thief and burglary?

A. Yes, sir.

Q. And you have also been convicted of running a three-card-monte game?

A. Yes, sir.

Q. Now, Henry, did you steal this meat?

A. No, sir, I don’t do no small-time crime; it ain’t worth it.

The jury walked him! The foreman told Judge Barlow, after the
verdict, that they admired the man’s honesty.

— Faithfully recorded by Jack Pasqual.