

ROBERT'S RULES ON NEGOTIATION

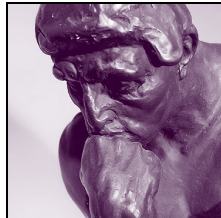
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NOVEMBER 17, 2005



For the negotiator, a certain excitement is drawn from the thrill of chasing a target, negotiating the terms and completing the deal. We do not often spend enough time, however, concentrating on the unconscious and perhaps even programmed aspects to the way we negotiate. The profoundly human influences, including psychological and legal cultural barriers can ambush the best lawyer and distort reasoned decision-making. Although academics refer to these factors as cognitive traps, we at Appropriate Dispute Resolution view them as negotiation "quicksand".

Knowing how to navigate through the quicksand is central to position maximization. A negotiator must identify and expose hidden traps, biases, false perceptions - even using a separate settlement counsel to change the game when needed - to maximize gains. Since case precedent and experience drive our legal industry, we thought a few negotiation stories could help us illustrate the point. We will introduce to you the theory and principles as we go.



Thus, recognizing the value of a well drawn negotiation story, we give you this negotiation experience¹ from inside the lion's den...

Seemingly embarking on at best a risky path, two of the protagonists agree to meet

their opponent to talk settlement of a class action suit on the home field of the largest defense firm in northern California. Leon and Bishop are met in the lush conference room on a top floor of a prestigious high-rise overlooking the San Francisco Bay by the senior litigation partner of the firm. He is surrounded by an armada of defense lawyers representing the many layers of defendants in the case; a cadre of senior vice-presidents from the various corporate defendants round out the ominous presence found in the war room.

As his invective unfolds, the senior partner draws on the oft-used reference that all in attendance are realists and professionals, highlighting the defense view that litigation is costly "...even when we win." Candidly disparaging class action suits as "legal blackmail... [that] should be resisted forcefully...", he explains as he gestures to all on his side of the table the basis upon which the assemblage is willing to settle the case "to save litigation costs." Reminding Leon and Bishop of the consequences of failing to accept – a withdrawn offer and unlimited dollars poured into the defense to assure a win – the senior partner (Crosby) lays on the offer:

"We're prepared to pay your class of clients \$1 million" – Crosby said \$1 million very slowly to let it sink in – "for any real or imagined slight they have endured and," he looked at Leon closely, "\$1 million in fees and costs to your firm for its efforts in this matter." ...

¹ An excerpt from the novel *The Lawyers: Class of '69*, John M. Poswall, Jullundur Press (2003).

“Marty” – [Leon] knew no one called Martin Crosby Jr. anything but Mr. Crosby – “you invite me over here, threaten me, and then insult me and my clients, and conclude with offering me what amounts to a bribe to sell out my clients. I think I should report you to the State Bar.” ...

“A Negotiator Must Identify and Expose Hidden Traps, Biases, ... false perceptions, to change the game when needed.”

Smiling as he rose from his chair, leaning both hands on the vast conference table, Leon affixes his gaze on each defense counsel and corporate VP and then proceeds.

“Here’s how it’s going to be gentlemen. We will settle with each group separately. The first group will pay the least; the next a bit more; and so on. The last to settle will pay the most.”

“You should know that I met with Jack Merchant [a defense lawyer not in the room] on Saturday and Sunday, and we have arrived at a settlement, signed last night, that includes all of the provisions I just outlined. The lenders group of defendants have [sic] agreed to pay \$40 million in settlement with our guarantee that each remaining group will pay more.”

Sensing the rising tide of angst and dismay as he again perused the now-listing armada, Leon concludes, “So gentlemen, I suggest each of you call

me when you are ready.” With that, he and Bishop exit the war room...

While there is something to be said (though perhaps not easily understood) for home-field advantage, there really is no better feeling than going into someone else’s house and playing their game better than they do. Remember, if you can’t change people’s behavior (and you probably can’t), change the game. The old adages of out preparing the opponent still apply...



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