

ROBERT'S RULES ON NEGOTIATION: POWER

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No one knows your case better than you. For the negotiator, however, power often comes NOT from the discussion over substance or the case issues but from the parallel negotiation over the rules of the game.

Masked in legal positions and often advanced through nonverbal communications, the parallel, "shadow negotiation"¹ tests for strengths, weakness, flexibility and give. In our last Ezine on "Negotiation Quicksand" we discussed with you how to navigate through psychological and legal-cultural barriers that can trap lawyers and distort rational decision-making.

Our power discussion in this issue completes the foundational negotiation equation. How well you direct the shadow negotiation and encourage your counterpart to collaborate will likely determine your success in finding a solution. We stay with the case precedent and experience drivers, giving you a dramatic exhibition of power in a very effective use of the "exploding offer"...



In his memoirs, renowned civil rights lawyer Guy Saperstein regales us with his negotiating experience in the discrimination class action brought by African American customers against Denny's restaurant chain.²

¹ Kolb, Deborah (2001) *Shadow Negotiation*. New York: Simon & Schuster.

² Saperstein, Guy T. (2003) *Civil Warrior: Memoirs of A Civil Rights Attorney*. Berkeley, CA: Berkeley Hills Books.

The story begins with Denny's lawyer, Tom Pfister, trying to paint the picture of a remorseful Denny's. He described the corrective action it had begun and its willingness to go further, which was little more than what was required to comply with the existing U.S. Department of Justice agreement. Mr. Pfister's added proposal that Denny's would donate \$3 million to various civil rights groups was cut off and met with a demanding "Is that it?" from an agitated Mr. Saperstein. Receiving Mr. Pfister's affirmative response, Mr. Saperstein angrily explained "...we are not seeking charity; we are seeking damages for Denny's reprehensible behavior."

Expressing a mixture of anger and astonishment that the offer disregarded the seriousness of the lawsuit, Guy opined "...that time spent in settlement negotiations with Denny's is time wasted." He then laid down the gauntlet: if Denny's was to maintain any credibility, by 10:00 the next morning it would need to offer a minimum of \$20 million to settle the class's damages claims...

"...That \$20 million offer which Denny's is going to make tomorrow morning will NOT settle this case. It is only Denny's down payment – a tangible expression of good faith that will allow Denny's to continue these discussions. In the end, Denny's will have to pay far more than \$20 million to settle this case."

As the story goes, Tom "and his cohort" (Denny's president) left the building. Guy

and his folks made the long walk from the conference room to his office amidst what he described as a “mood heavy with gloom.” Colleagues in Guy’s office voiced negative responses to his approach, thinking that he had overplayed his hand: they expected that Denny’s would not be back the next morning or any time soon for settlement discussions.

Guy remained confident: “We broke them today. Just watch.”

Guy recounts what unfolded the next morning when he arrived at his office and found Tom waiting for him in the reception area: “Tom, a former USC basketball player and still trim and athletic, rose to his full height of about 6’3”, shook my hand, and said, ‘You’ve got your \$20 million’.” The case ultimately settled, including a Denny’s payment of \$54.4 million, the largest reported settlement in a public accommodations case in history.

This real life negotiation illustrates for us the powers of commitment, good alternatives, and legitimacy. The exploding offer gives the demanding party the power to impose terms backed up by tight time limits that force early capitulation, increasing the value of the deal for the demanding party. This bold use of the exploding offer was enhanced considerably by Mr. Saperstein’s reputation – as Denny’s knew, he had tried and won \$250 million in a gender discrimination class action against State Farm Insurance.

While the exploding offer is in fact an offer in the traditional sense, make no mistake that this power maneuver carries the risk that it may be the last offer. In our story, Denny’s attempted its own power play, not anticipating Mr. Saperstein’s powerful response and test of its resolve. The parameters of the Denny’s negotiation are set by capitulation to or rejection of the exploding offer. Tom’s rejection could have

terminated negotiations and, perhaps, the relationship between the negotiators as well.

The question is, could Tom have defused the power of the exploding offer through a power test of his own? Through the principled response of being reasonable first, could he have turned away the attempt to put him on the defensive, thus blocking the effort to undermine the credibility of Denny’s original offer? While there is something to be said for a well executed power play, there may be no better feeling than defusing one.

Perhaps the old adages of out preparing the opponent apply once again...



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