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Negotiations and the Art of Communicating – Part III

By Peter J. Winders*

In this three-part series, the author discusses negotiating and communications, skills every bankruptcy lawyer needs. The first part of this column, published in the January 2024 issue of Pratt's Journal of Bankruptcy Law, *introduced the topic through engaging anecdotes, lessons and thoughts on listening and the gamesmanship of negotiations. The second part, published in the February-March 2024 issue of* Pratt's Journal of Bankruptcy Law, *explained negotiating tactics in detail and mediation. The conclusion of this column covers humor in negotiations, and more.*

HUMOR IN NEGOTIATIONS

Humor in negotiations is a tricky thing, and could probably be an article in itself. Like any aspect of life and business, an effective technique should match one's personality and talents. Some people have the discernment to use humor only when it is likely to be effective, and it can work. In court, lawyers with high opinions of their sense of humor must control themselves and remember that the only comedian permitted in the situation is the judge. In negotiations, there are times when it helps, and other times best restrained. Here are some examples when it worked. In any case it requires one to decide who the audience is, and accurately assess the likely reaction of that audience. Do not use humor just for the sake of a laugh. Just being funny is most often useless.

Governor Carlton's Million Dollar Joke

Doyle Carlton, one of the founders of my firm, definitely had the talents of a humorist. After his term as governor of Florida ended in 1933, still during the Great Depression, he was asked by the Lake Istapoga Drainage District, a quasi-governmental entity with the power to levy taxes and float tax exempt bonds, to seek a loan from the Reconstruction Finance Corporation (RFC), a federal agency designed to help with certain Depression-era crises. The drainage district was about to default on its bonds because nobody could pay their taxes during that terrible economic time. The governor negotiated a $2 million loan (about $45 million today). The entire Istapoga board took the train to Washington for the closing.

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At the closing table, with the chairman of the agency presiding, RFC staff on one side, the Istapoga board on the other, the chairman announced that a $1 million loan had been approved, but only after the district had raised the other million locally. This was not what the district needed, or what Governor Carlton had negotiated. There was a stunned silence. Then the governor said:

> Mr. Chairman. This reminds me of the farmer who wrote to Sears & Roebuck to order a gross of toilet paper. After a week, he received a letter: "When ordering from Sears & Roebuck, please give catalog page and item number." To which the farmer replied: "Dear Mr. Sears and Mr. Roebuck, if I had your catalog, I wouldn't need your damn toilet paper."
>
> Jones laughed, his minions joined in, and the result was the $2 million loan was granted.

"That Chicken Outfit You Represent"

Earlier I described the negotiation with Phosphate Company. As opposing counsel and I were signing the informal agreement to settle, he said, "I want you to give a message to that chicken outfit you represent. This may be a big deal to them but my client makes that money in about 10 minutes."

I have tried to find some negotiation game in this statement, but have concluded that there is no advantage in being a sore loser. This was just an ego thing, a mistake in my view because it diminished his stature with me, if we were ever again in a settlement discussion. On the other hand, Stephen Potter's classic 1950 book "The Theory and Practice of Gamesmanship, or How to Win at Games Without Actually Cheating" describes a gambit where the losing party attempts to make the winner believe the loser is the superior player.[1]

But then I made my own mistake of telling the client about the statement. "Chicken outfit? What? Is he trying to insult us? Screw the settlement! We will try the case!" (Crap, I thought to myself. I shouldn't have mentioned the "chicken outfit" comment – I don't want to blow the settlement, which is great from the client's prospective.)

"Yes, Lloyd," I said to the client's inside counsel, "I have been holding back on you but I'm afraid there is one condition to the closing. They insisted, and

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[1] For example, in a game of chess, in the middle of the game, the inferior player studies the board for a long time, then concedes: "You have got me! Well done! No matter what I do, within 7 more moves you will beat me. Well played!" The object is to make the winner think the loser has the ability to calculate the 3 billion possibilities 7 chess moves entails, and assumes that the winner has the talent to pick the right one.

I didn't want to lose the deal, so I agreed to it. You have to attend the closing personally, and you have to be wearing a chicken outfit. You'll have to rent a chicken suit."

Fortunately, they found that very funny, and Lloyd agreed that for $6.5 million, he would be happy to dress as a chicken. That became a running joke for the rest of the transaction. For example, he told me he had had his chicken suit cleaned and shipped to me directly from the dry cleaners, telling them to be extra careful with it, which explained the bushel of feathers that arrived with the title documents.

"Opinion of Counsel"

That same inside counsel used humor to defuse a situation that arose during a closing of a sale of a Canadian subsidiary to a Philippines company. The closing had gone all night. As with many countries that want to control any export of existing businesses, the Canadian government had to approve the sale and it had done so. Attending the closing were the Philippines' lawyer (a former chief judge of the Philippines Supreme Court) and a New York lawyer from one of the big name firms. At 5:00 in the morning the New York lawyer, who had added nothing to the process other than arrogance and pomposity, said, "We will also need an opinion of counsel."

By that, he meant a formal legal opinion from the seller's lawyer that a buyer can rely on, covering such things as the legality of the sale, the compliance with all regulations, the authority of the officers to make the deal, and the like. Lloyd said, "You really don't need one. The sale was approved by the government of Canada, which covers the only challenges that could be made to the sale. My individual opinion is valueless. I am an employee, not a big law firm. I have no malpractice insurance. I have no attachable assets. So you gain no security whatever from my formal opinion. And you are bringing this up at the last minute to delay this process for no reason. You do not need an opinion of counsel." The Philippines lawyer said that perhaps that was unnecessary. The big firm lawyer inflated himself[2] and said, "My firm always require an opinion of counsel and I strongly recommend that my client demand an opinion of counsel." Lloyd: responded, "You want an opinion of counsel? Well, here is my opinion of counsel: PPFTTT!," directing a raspberry toward the lawyer, "But

[2] Inflating oneself is a common negotiating tactic throughout nature. Pufferfish, the pancake tortoise, the sand hill crane, the hognose snakes, various toads, do it to make them look bigger, wedge themselves tighter, look more menacing, harder to swallow. Furbearing mammals and things with feathers add raising their fur or feathers for additional effect.

you may want to get a second opinion." Lloyd's audience, of course, was not the lawyer but his client, the purchaser. The purchaser agreed to ignore its lawyer's silly advice.

WINDING UP

To review some of the tactical moves and countermoves discussed above in context, I return to the story about the phosphate lease that began this article, and consider how the expert used them.

> He invited me to have lunch with him at the University Club, the most exclusive lunch setting in town [Honor or flatter the adversary. If you are of much greater stature, treat as an equal – he will be more likely to want to agree with you.] The perfect host until lunch was over, he started by explaining that his client wanted to fight this situation, and thought they would ultimately win [threat], but he had persuaded the client to settle the case for top dollar [i. Good cop, on your side; ii. Characterize the offer as high] and get on with business. He said we had done an outstanding job of lawyering on the matter so far [Flatter, characterize the offer as a win], and that while we might ultimately lose [Threat], for right now we had his client where we wanted them [Praise, characterize the offer as a win]. It was a shame really, because everyone knew that it was a mistake [Guilt, suggest we were taking unfair advantage] to omit the termination clause from the lease, and it was a shame that the field manager (who we had met at the hearing and who was in fact a nice guy) was going to lose his job over it, [Guilt, although I was not going to be the jerk that fired him, if indeed anybody would] but he had convinced the company to go all the way [Characterize the offer as all that was available and generous, and equivalent to a win] and pay a million dollars [An admittedly big round number] for the lease, and allow us to stay until they actually began operations [Anticipate objection and remove it as a counter-negotiating basis], giving us plenty of time to find new land. He figured this was an offer we couldn't refuse because it basically paid the full value of the lease and guaranteed the profit of the enterprise [Characterize the offer, show it is based in logic, to try to put the opponent in the position of justifying a different position by the same logic, guide the negotiations into what's "a fair price"]. He convinced his client to pay top dollar to avoid delay and because that was more than a fair price for the release no matter how you calculated it [Same].

You will also remember that the successful counter to this masterful use of gamesmanship was the principled position, a position that it is hard to argue with because the basic premise is not subject to debate.

Please note that the phosphate lease story is not a story suggesting that our negotiating skills were greater than those of the opponent. The opponent's need to end the negotiations with possession of the land immediately was greater than our client's need to keep it. Instead, it illustrates the importance of understanding the gamesmanship that can affect or could have affected an opponent's analysis, and some of the specific tactics that can counter them, particularly a principled position.

But I do believe there were a few negotiating mistakes. Once we had come to an agreement of the $6.5 million, Phosphate Company's lawyer accused us of extorting his client. That would have been a good move if we had actually threatened anything, but it was clumsy and simply sore losing since we did not. Instead, it had the effect of reducing his stature as a negotiator. He let his ego get in his way. And before closing, he tried to change the deal from a purchase of all the subsidiary's assets to a purchase of the stock, for which his client would want the "usual representations and warranties." I told him that was not the deal. "We are settling a lawsuit, not negotiating the sale of a business." "Well, my client always does it that way, and that's the way the deal must go." ["My client always does it that way" or "this is how it is done" is a pretty good move by a more powerful party, as the opponent is likely to fall into the trap of accepting "normal procedure" as not important as long as the deal is done, ignoring the risks.] After all, a party can win in the negotiation and lose in the documentation. I promised to ask the client about it, recommending against it. Getting back to the lawyer for the phosphate company, we said we were willing to sell the stock, with warranties, only for a higher price. "What, your client is afraid to warrant that its title and business is good?" [The suggestion that an opponent is afraid of something might be a good move in a different context, as it can often induce the opponent to make concessions in response to the dare] but I responded, "Of course they are. As mad as you and your client are about this, they would find a way to conjure a breach of warranty suit just to punish us. If you want the reps and warranties the price is $8 million." The settlement closed without them.

PLEASE CONSIDER BEING A GRACIOUS WINNER

In a professional context, doing so will enhance your reputation as a trustworthy opponent, one who does his or her job as an advocate but without personal animosity. Your opponent today is likely to be a judge next month. A

modest, "We had the facts (or the law) on our side," will stand you better in the long run than a victory dance. Allowing the opponent to save face is most often the best investment.

DISCLAIMER

"Difference of opinion is what makes poor land sell and ugly people marry," has been a saying among property appraisers for generations. That is the basis of the property appraisal profession, which disregards individual opinion except as it manifests in actual sales of comparable property. Please do not get the impression that the various negotiating games and devices necessarily result in an unjustified advantage. They might. But they are part of the process in which a willing buyer, not required to buy, and a willing seller, not required to sell, achieve agreement. Everybody does not win an auction: In the view of the "losing" bidders, the article is not worth more than they were willing to pay; the winning bidder did not "overpay" because in the winning bidder's opinion the article was worth it (unless the winning bidder lost control, as warned against above). But the negotiation dance, the negotiation games, help those opinions form. Be aware of them, recognize them, and use and defend against them responsibly. I hope this helps.