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Negotiations and the Art of Communicating – Part I

By Peter J. Winders*

In this three-part series, the author discusses negotiating and communications, skills every bankruptcy lawyer needs. This first part introduces the topic through engaging anecdotes, lessons and thoughts on listening and the gamesmanship of negotiations. The second and third parts, which will appear in upcoming issues of Pratt's Journal of Bankruptcy Law, *will explain negotiating tactics in detail, mediation, humor in negotiations and more.*

I. INTRODUCTION

I have always found negotiations interesting, but I became a serious student after the following incident.

In the early 1970s we represented a mini-conglomerate that had operations in clothing manufacture, Florida land sales, subdivision development, a purebred cattle tax shelter, investment diamonds, and other things. The general counsel was a very smart lawyer named Lloyd, a New Yorker like the parent company, and a good friend of the firm.

Phosphate mining has been an important industry in Florida since the late 1800s. Florida was the world's leading producer through the 1960s. Then the bottom fell out for Florida phosphate because of new sources in North Carolina and Morocco and other economic factors. Doom predictions by the best minds in the industry were rampant and the expert consensus was that the Florida production would not recover for at least 20 years. During the 3 or 4 years of pessimism, the conventional wisdom of the giant companies holding the now worthless phosphate reserves was to lease the surface of the land for agricultural purposes so that the land would be valued for property tax purposes as farmland. In this window of depressed phosphate prices, our client's tax shelter purebred cattle subsidiary leased 20,000 acres of prime phosphate reserve land from Phosphate Company – for a very cheap price since the object was to save property taxes – for 15 years, well short of the possible 20-year recovery date.

But the experts were wrong. The demand for Florida phosphate recovered in 3 years, and the lease still had 12 years to run. The leased acreage was the next

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logical mining location for the Phosphate Company, and the $100,000 lease was standing in the way of millions per month in profits. There was no "out" in the lease for such circumstances, since the best minds in the business knew it would never arise. Phosphate Company made an overture to the cowboy in charge of the animals, to exchange like pastureland for a release – sounded reasonable to him – but New York squelched that. Phosphate Company prepared to mine anyway, and we filed suit for declaratory judgment that the lease granted exclusive possession for the term of the lease.[1]

Phosphate Company hired a very senior and prestigious nationally known Florida lawyer to personally defend and resolve our case.

We survived a motion to dismiss.

A few days later, that lawyer invited me to have lunch with him at the University Club, the most exclusive lunch setting in town. He was the perfect host until lunch was over. He then began his settlement discussion:

> He explained that his client wanted to fight this situation, and thought they would ultimately win, but he had persuaded the client to settle the case for top dollar and get on with business. He said we had done an outstanding job of lawyering on the matter, and that while we might ultimately lose, for right now we had his client where we wanted them. It was a shame really, because everyone knew that it was a mistake 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, but he had convinced the company to go all the way and pay a million dollars[2] for the lease, and allow us to stay until they actually began operations, 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. 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. He said he assumed I had authority to accept the proposal right then. I told him I would transmit the offer to our client.

I have to admit, this was very effective. I was in fact flattered, a 10-year lawyer on an even field with a nationally known lawyer of great prestige. I did think we had out-lawyered his side. I thought a million dollars for the lease was a fair price. I thought we had won.

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[1] Neither party to the suit exists any longer as each merged out of existence, and I am the only participant not dead yet.

[2] For reference, a million dollars in 1975 equates to $5.7 million in 2023.

Two things brought me to my senses. Before I had a chance to talk to the client, I went to our Thursday Happy Hour, where somebody commented he had seen me with the famous lawyer at lunch. I outlined the situation in general, which prompted a more senior lawyer from another firm who frequently joined our happy hours, to relate a story about my firm's founder, Governor Carlton, inviting him to the University Club for a settlement discussion, and one of my partners volunteering a similar lunch with another dean of the Tampa Bar.

The other thing that made me realize that I was being played was the client, who thought the million dollars a good start. "It might be a good price if I wanted to sell it, but I don't. It will be a great amount of trouble to find suitable pasture, and to move the cattle to it. I like the situation as it is. And I cannot just take the million dollars and close down. We have obligations to those who invested with us in a vehicle designed to give them a tax shelter. We would have to buy them out. Everything has a price, of course, but how bad do they want this?"

We discussed the fairness of the price and the proposition that it is easier to negotiate from a "principled position," a negotiating basic discussed below. After some discussion, we had our principled position: "I don't want to sell. You want it. Nothing compels me to sell at a 'fair' or 'market' price." You have to pay what I ask". Armed with that and fortified with the negotiating point that the client had extra expense of winding down the operation, we demanded a price of $6.5 million for all the assets of the business. More on this story later.

INTRODUCTION TO THE TOPIC OF LISTENING

I am fascinated by the myriad talents people have that I do not, and vice versa. Some musicians remember every tune they hear and find it bothersome that even elevator music sticks in their heads. I have heard it said that one cannot think without language (putting thought into words silently); if there are such people, I do not see how they survive. They can only think about ideas that others have thought up and named.

I think I have a talent for listening to people. In fact, it is one of my most irritating gifts. It took a while to learn that I should not intervene when my friends or partners were talking past each other to explain what each is actually talking about. Like many talents, there are good times to keep them quiet.

HOW TO LISTEN

Whether you are talented or not, there are rules that can make you skilled. Here are some. Whether they all apply to a given situation depends on the situation, but most are universal.

Don't Talk

Don't worry about what you are going to say next. If you are tempted to think about what to say next, resist. You may not look smooth when you do talk, but at least you are more likely to know your conversation partner's concerns. There are several aphorisms that go here, like "better to be silent and thought a fool, . . ." but they are not really on point. Concentrate on what is being said.

Listen to What Is Not Said

This is very important. Although listening to what is not being said may seem a contradiction, there are very many things that are communicated between the words. Body language, tone, volume, pitch, or speed of voice contain many clues. There are books that teach body language but they are mostly wrong. A nervous gesture may indicate that a person is uncomfortable in the setting, not that he is lying. One who will not look you in the eye may either not like your looks, like them too much, or not like being glared at. And, of course, once a person has studied body language theories, she can fake the telltale gestures – cross her arms to feign obstinacy, or uncross them to disguise it. But observing the clues together may show how important the subject is to the speaker. Is the speaker upset? Desperate? Indifferent? Passionate? Is she speaking to hear herself speak, or is he desirous of making you understand? Why is she talking about it at all? What does she want, or have to gain, if anything? Or lose? Does the problem concern her? Or is she reciting talking points?

Avoid the Trap of Words

People misuse words, are confused about their meanings, use words that are ambiguous. Listen to the thought or picture behind the words. Try to see what the speaker actually means by them. Try not to let words confuse you.

Consider the Context

Understand the context, and keep in mind everything you know about the situation. If you are a lawyer handling a matter involving an industry new to you, learn about the industry, at least the basics. Not only do words have different meanings in different contexts, but people misuse words and the context will help you know how they are being misused.

I once represented the lender in a suit on a guarantee against the husband/wife team who owned a mobile home business. The opposing lawyer

was an ethical and skilled professional, and a trustworthy advocate. The answer admitted the written guarantee but asserted that there was a 'collateral agreement' within the meaning of Florida cases, an oral agreement 'collateral to' the main agreement, though not actually changing its terms. Arguably, the definition was met by an informal grace period. "If you do X, I will allow you 30 days rather than 3 days to cure." The depositions of the husband and wife were set, and since they were both defendants, each was entitled to be present at the deposition of the other. It turned out that the wife was constitutionally unable to resist speaking while the husband was being asked questions, and since that was not easily controlled the deposition turned out to be of both of them. I didn't mind because I was likely to learn more from her outbursts than from the more careful husband. After the preliminary questions, I began to ask about the collateral agreement defense:

Q: Mr. Husband, your Answer says there was a collateral agreement . . .

Wife (interrupting) "That's a lie!"

A: Husband: "Never was a collateral agreement."

Q: So, despite what your Answer says, there was no collateral agreement?

A: Husband: No.

Wife: Anybody who says there was is a liar.

Q: You both agree on that?

A: Husband: Absolutely; Wife: Never happened.

I was watching the opposing lawyer during this and saw his obvious surprise. This lawyer did not make things up. The clients were in a business where 'collateral' would have a different meaning. It was apparent to me that the lawyer and his clients were thinking about different things. The defendants must be thinking that 'collateral agreement' in my questions meant that they had 'given collateral,' meaning provided a security interest to secure the debt. They must have told the opposing lawyer that there was a subsequent oral agreement, and he characterized it in terms of a 'collateral agreement' defense in the legal context.

I had all I needed so I stopped.

On cross-examination, the opposing lawyer asked:

Q: "Do you remember talking to me in my office about this case when you originally hired me?"

A: Husband & Wife (in chorus): Yes

Q: And didn't you tell me about a collateral agreement you had with Mr. Plaintiff?

A: Husband – Absolutely not. Wife: What kind of scam are you trying to pull?!

This is a pretty good example, I think, of listening – to what is said and not said; to avoiding the trap of words and listening to what is meant, to watching the expressions of the participants as clues to what they are thinking.

Listen to What Your Conversation Participants Are Thinking

Is he curious, trying to understand your viewpoint? Is there a hint of a smirk? Is he listening because he thinks he has to? Is he planning what to say next instead of following your thoughts? Be alert to such clues. You may be able to communicate better because of them.

If you know what he is thinking, try telling him. "I know you are probably smarter than the doctor, and that you are looking for holes and inconsistencies in his reasoning. And that to the extent he is giving advice, you can see that he is being manipulative. But it might be best if you ignore that part and actually try what he advises. He has a good reputation for getting results. Don't let the fact that you know what he is trying to get you to do keep you from trying it."

Listen for the Picture Your Conversation Partner Is Describing

What is missing? What could be the explanation for the problem he is concerned with? A simple example: As a brand-new lawyer, I naturally had to field random calls from strangers. One prospective client wanted to sue the mosquito control authority because its workers regularly overturned his birdbaths while he was at work. Providing food and water to our feathered friends was one of his passions. Yes, he changed the water daily. Yes, they were always clean and never stagnant-looking. Yes, he had called and protested but they still did it. "You made these birdbaths yourself." "Why, yes I did. How did you know?" "How did you make them?" "I took some old metal garbage can lids, and placed them on stumps in the yard. They look really natural and the birds love them. And the mosquito control people just turn them over for meanness." "They sound great. Is it possible that the mosquito control people might mistake them for old garbage can lids and dump them because they think that is what they are?" "Well, I never thought of that!"

Closely Related Are the Following Cautions:

Learn To Keep Your Mind Open to The Possible Interpretations Your Opposite Is Getting from You, And Do Not Come to Conclusions Too Soon.

Don't Learn Too Much from An Experience. You must and do learn from experience but be open to re-learning from other experiences and the experience of other people. Failure to be open to change is a common problem. It is a species of stereotyping. A bad experience with a client can lead one to think that "clients think this way" when only a fraction do. One former associate won his first case because the opponent made a mistake, and ever after he tried at every turn to lead his opponent into a mistake, becoming a 'gotcha' lawyer. Similarly, I overheard a five-year-old explain to his friend that "a dog pees through his toes," having learned too much from the answer to "Hey Dad. What is that dog doing to that bush?"

Keep In Mind That What You Learn, From Education or from an Experience, Is an Opinion or A Data Point Rather Than a Law of The Universe. The five-year old will likely outgrow his misimpression. The lawyer who stereotypes clients may not.

Remember That Having an Honest Discussion, Even in an Adversarial Situation, May Produce Better Results Than the Normal Adversarial One. If a deposition witness shows a pattern of not remembering enough to answer questions, it may be effective to have a dialog with him, within the limits of the setting, including some of the following approaches:

> "Q: You are telling me you cannot remember. You understand that if you say you can't remember, when in fact you DO remember, you are testifying falsely, right?
>
> Q: You are testifying that you cannot remember [what you and Mr. Jones talked about] [whether he told you that he did not want your services in selling his property] [whether the light was red or green]. Does that mean if Mr. Jones does remember and testifies to it, then you would not be able to testify otherwise?
>
> Q: In my experience, some people in a deposition are so nervous about making a mistake, they answer they don't remember because they are afraid they will not be exact. Is that why you are answering that you don't remember? Or do you have no memory of talking to Mr. Jones at all? Or do you not remember the conversation?
>
> Q: [If you can get by with it] The theory behind the rules is that each side needs to ask the other side's witnesses what they know about the dispute, and the witness is supposed to answer under oath. That lets the lawyers and the court evaluate what the real disputes are and what the judge or jury has to decide. If there is agreement on certain things, that may shorten the trial or allow the parties to make peace, or it may not. If you really don't remember, then I will need to know how you can

> prove what you said in your complaint, which I will ask you about in a minute. But at this stage of the proceedings, I am entitled to expect truthful answers to my questions.

If after such a dialog your witness becomes more cooperative, you will have useful information. If he continues as he had been, you have great cross-examination material.

Getting Others to Listen to You – A Difficult Proposition. Why in the world would a person you are trying to persuade listen to you? His mind is made up.

Each of us is cursed with a personality. There are some personalities that are good at getting others to listen, and some techniques that the rest of us can use.

Empathy. I looked at several dictionaries and they don't agree about what empathy is, so let me explain what I mean by it. From observation and experience, there are people who are naturally empathetic and some who are not. On one end of the spectrum, there are those who have the gift (or curse) to actually feel what another person is feeling, and rejoice or suffer along with them, and such people are great at communicating on the same frequency with whomever they meet; on the other end of the spectrum, there is me. Not that I am not glad that you accomplished something or understand that you are emotionally overwhelmed by a tragedy or loss, but those are my feelings, not yours. I understand it, am willing to try to help solve the problems that come with it, but thank goodness, I don't experience your emotions. That's frightening! In contrast, my wife, Neta, did, and while it was often very hard on her, she embraced the gift. Once at her insistence we rushed over to visit a friend of hers whose husband had died in a small plane crash. I was barely surprised when she said, "Oh Ann! I have never lost a husband! But I wish I had so you would know it's true when I tell you I know exactly how you feel!" Empathy, if you have it, is a good basis for communicating.

Mirroring as a Substitute. One substitute that is often useful I have called, Mirroring. "Let me see if I have this right: . . ." and then repeat in YOUR words what you understood the other party to say.[3] Usually (not always) he or she will appreciate being listened to and that you made the effort to understand. That very often encourages communication. Once he or she appreciates that you are not just arguing, he or she is likely to confirm that you understand or correct where you missed it. If that happens, you are making progress. The person then becomes more likely to listen to you. This can be true both in counseling and in an adversarial situation.

Here is an Interesting Example. Plaintiff had been accused and tried for murdering his wife in a house fire. The fire marshal ruled arson, there was an

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[3] I know that the term is used to mean other things, but that is the trap of words.

insurance policy, he had financial difficulties, and the doors were locked from the outside. He was arrested and jailed until trial. The jury found him not guilty.

After he was acquitted, he sued his homeowner's insurance company for denying his claim, as well as for malicious prosecution, as the insurance company had reported its own investigation to the prosecutor. The court ordered mediation, but the plaintiff's lawyer saw no chance of settlement given his client's state of mind.

At mediation, the plaintiff was indeed so angry at the world and at the insurance company that he could barely put a sentence together when his lawyer allowed him to talk.

In the classic mediation process, there is a joint session at the outset where each side listens to the other's case. Modern mediators and parties often omit that step, which is often unwise, as that is the only chance the lawyers get to talk directly to the parties.

In this case, after the plaintiff gave his summary, I tried to mirror what made plaintiff so emotionally torn. "It is no wonder that you are so passionate about this. You were jailed for something you did not do.[4] You were accused of murder, and no one would listen to you. You had lost your wife, could not attend or arrange a memorial service, had lost your reputation and your livelihood, and were caught up in a system that you could not control. Of course, you feel angry, hurt, helpless, and abused in such a situation." That sort of thing. And apparently, I did a fair job of it as he responded that I had it exactly right.

I then told him the insurance company was willing to settle, but that I wanted to explain to him exactly why they were not worried about the huge punitive damages he was seeking. By this time, he was willing to listen. When I explained that the insurer would pay for the damage to the house, but for the rest, he would have to prove a great many issues, including that the insurance company had no reasonable basis to report the company's findings to law enforcement, that they did so only to intentionally hurt him, not because of the official arson determination and the conclusion of the investigators. I explained the mathematical odds of being able to win on ALL of the many issues on which he would have to prove. We proceeded to reach an acceptable settlement, after which he thanked me for explaining the situation to him. "Nobody else has explained it to me that way."

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[4] I do not know whether he did or not.

INTRODUCTION TO THE GAMESMANSHIP OF NEGOTIATIONS

There is no question that to some extent, negotiating is a game. Just as some trash talk in sports is designed to throw the opponent off by generating anger that clouds judgment, psychological ploys can nudge a negotiating opponent into unnecessary concessions. But also, the negotiating moves can give the negotiators real information that can lead to a satisfactory solution. All negotiations do not lead to one party's taking advantage of the other, but some of them do.

I had one tight-fisted partner to whom the game itself was the reward. Here is one example.

> "Hey Pete, do you play chess?"
>
> "Not much lately, but I used to play quite a bit."
>
> "I was in [some town in Mexico] last week and I went into a shop that had the most beautiful chess sets I have ever seen! The boards were inlaid with stone. And the pieces were carved stone, extremely intricate. I couldn't believe anyone could carve anything so intricate! They had some cheaper stone sets that were carved kind of in profiles, but this one set had amazing details. But they were very expensive. $400. [$400 in 1970 dollars would be over $3000 in 2023]."
>
> "Wow! Must have been beautiful."
>
> "Yes. And you know me! How I like to bargain?! I told the seller he might get that in Mexico City but not in this little town. I told him it was beautiful, but I could not afford it. When he gave me a bottom price I ignored it and looked around some more. I stayed in that shop for 4 hours, trying to talk him down. And you know what price I finally talked him into? FORTY DOLLARS!"
>
> "Good grief! That's amazing! I can't wait to see it!"
>
> "Oh, I didn't buy it. I don't play chess."

The Settlement Dance: Why It Is Necessary. In the 1970s, a young associate accompanied one of our name partners to a settlement conference. Asked how it went, she said "Well, once they wasted a few hours on some macho silliness, they reached agreement in about 15 minutes." Similarly, the old lawyer joke:

> Smith: "My client demands a million dollars and will not take a penny less!"
>
> Jones: "Outrageous! My client will not pay a nickel on your meritless claim!"

Smith: "Split the difference?"

Jones: "Done. I'll buy lunch."

It is a mistake to downplay the part of negotiations that allow negotiating parties to feel each other out, to make judgments on how strongly they believe in their position, how badly they need the settlement or want the object of the negotiations, where their breaking points may be, what they really want from the negotiation, whether there is something other than money that they especially value or need. That is in fact an essential part of the process. A negotiator cannot take her opponent at his word, but cannot insult him into an unmovable position in the process.

Two things come to mind to illustrate this.

First, at the beginning of a negotiations program I attended, but can no longer find the literature to credit, the host divided the attendees into pairs, As & Bs.

> The As received written instructions with a scenario that they, representing the very sympathetic personal injury plaintiff, were under no circumstances to go to trial. One of the tenets of her religion was a Biblical instruction to pay one's debts, and her main concern was her $14,000 in medical bills. Plus, her pre-existing anxiety disorder was so severe that fear of appearing in court would, according to her doctor, likely result in a suicide attempt. The doctor emphasized that the case must end quickly.
>
> The Bs, representing the insured trucker, received a note from the insurance company to settle at all costs within the $200k policy, that the analysis of the sympathetic plaintiff and some internal sloppiness in claim handling made a bad faith action a concern. The company considered the case extremely dangerous and if the lawyer failed to settle he would get no more work from the insurer.
>
> The negotiating pairs were instructed that they could negotiate only with written numbers, no talking, no messages, no sign language, no gestures, and given a short time limit.

The results, of course, were all over the place, from $14,000 to $200K. The point made was that the seemingly silly process of swagger, bluff, puffery, flattery, exaggeration and denigration of the strength of respective positions does in fact serve an important purpose of allowing negotiators to give and receive signals (both intended and unintended) without commitment.

Second, the Rules of Professional Conduct recognize that the Rules requiring Truthfulness don't exactly apply to negotiations. The Comments to Model Rule 4.1 "Truthfulness in Statements to Others" include:

> This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Thus, "I doubt my client will accept less than ___" is not a misrepresentation even if there is not much doubt. "I will not recommend less," "My client says he will not take less," and similar statements still leave room for movement, as the client may not follow the recommendation (sincere or puffed) and the client is always free to change its mind. Most good negotiators protective of their reputations for truthfulness may draw the line somewhere. Such a lawyer's statement, "Unless we settle today all offers are withdrawn" should mean it, and not back away absent changed circumstances, if she expects to maintain her reputation for fair dealing. The counter to such a line in the sand, of course, could be to ignore it recognizing that circumstances can change, or their importance can change within negotiation's conventions.

SETTING THE STAGE – REPUTATION

Some of the basics followed by the best negotiators include:

Believability

Although the boundaries of permissive statements is flexible within the field of negotiation, reputation is important. For lawyers for instance, a reputation for honesty and integrity, for keeping her word, for not being afraid to go to trial if settlement fails is very important. For that reason, some of the negotiation games described below may be too risky to that reputation. One whose living depends on negotiating must maintain his reputation for the negotiations of the future and cannot sacrifice it for the present one. Negotiations in one-off contexts, where the parties will not likely negotiate again – buying a used car, for example – is different.

By contrast, a lawyer with a reputation for never going to trial is a huge disadvantage.

Principled Positions

This is both a substitute for an established reputation and a great bargaining tactic, maybe the most successful. Let the opponent know a rule you will not

break or a minimum requirement without which negotiations are futile. "The client will not negotiate on the basis of threats. We will negotiate on the merits, not because you threaten to publicize your claim." "My client not only has her pain and medical bills, but a need for therapy and nursing care for her lifetime. Without meeting those needs, there is no advantage to her settling rather than going to trial." Or even – "I don't really want to sell. We aren't bargaining about market value. If you want it, you are going to have to pay the price I put on it, which will account for my inconvenience in winding down my operations and the profits I anticipated." Having a principled position allows a negotiator to avoid, rather than confront, all or most of the negotiating games.

Here are some basic moves, and the objective the negotiator hopes to achieve. First, be aware that almost all negotiations involve small talk, ingenuous statements that have ulterior motives. A negotiator might be trying to suggest that he has greater power, prestige or bargaining power than he actually has, and convince you of it.

A humorous and rather clumsy example of this is this stereotype: At least when law firms had single offices, lawyers from New York or Washington, D.C., firms thought they were for that reason more powerful and respected than lawyers practicing in the more pleasant states.[5] Or elite schools. Most of us can identify with the farmer's reaction, "Harvard, huh? Well, I had a brother who went to Harvard but he got over it."

In the 1970s, a New York lawyer was handling an evidentiary hearing in an antitrust case in the Middle District of Florida before Judge Ben Krentzman. The lawyer may have known the law, but he was unable to ask a question that was not an impermissible leading question. After sustaining objections to a series of such questions, the judge took pity and suggested a way to rephrase. After a couple of these, the New York lawyer said, "Your Honor, I appreciate your assistance, but I think it is universally known that the antitrust bar of New York City is the leading one in the country, and I assure you I do not need your help."

Not only the New York lawyers but also other negotiators will frequently talk about people they know, places they have been, with the intent of impressing you of their importance. There are at least two counters to this.

First, consider whether it is to your advantage to be underestimated. If so, play to his prejudice: If he shows up to the deposition in a power suit, wear

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[5] This is the same stereotype depicted in the famous Saul Steinberg New Yorker cover from 1976 showing a New Yorker's view of the world. West of the Hudson River there are Chicago, Las Vegas, Los Angeles, and the Pacific Ocean.

shirtsleeves. Step in a cowpie if you can actually find one. In one extreme case the D.C. lawyers (some of whom I happened to like) consistently joked about the lack of sophistication of one of my clients, a vice president, high school quarterback who had married the daughter of the otherwise highly educated and very sophisticated family whose businesses we represented. I pretended to go along with the joke because he was the only one in the family who was rich in unprotected assets. He had unique business talents, undiminished by formal education. The D.C. lawyers ignored him.

Second, pretend to miss the point.

> D.C. lawyer: "I had to delay the deposition because of my 4-year old's birthday party. We did it up big. The sons of 2 senators and the AG were there. And the actual Muppets character from Sesame Street."
> "Wow! You know Big Bird? I'm a fan."

Failing to understand why you should be cowed can be disconcerting to the braggart. Power unrecognized is not useful.

Negotiation games involve psychological ploys to make an opponent respond in ways that are not wholly rational; that interfere with completely unbiased evaluations.

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Editor's note: The second and third parts of this column, which will appear in upcoming issues of *Pratt's Journal of Bankruptcy Law*, will explain negotiating tactics in detail, mediation, humor in negotiations and more.