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EDITOR'S NOTE: DEALING WITH FAILURE
Victoria Prussen Spears

BANK FAILURE HIGHLIGHTS RELATED CLAIM ISSUES, STATE LAW CONSIDERATIONS, IN DIRECTORS AND OFFICERS INSURANCE CLAIMS
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OFFICE OF THE COMPTROLLER OF THE CURRENCY ISSUES GUIDANCE ON RISK MANAGEMENT OF "BUY NOW, PAY LATER" LENDING
Amber A. Hay, Michael A. Mancusi, Kevin M. Toomey, Christopher L. Allen, Anthony Raglani and Michael Treves

LUXEMBOURG MODERNISES ITS INSOLVENCY LEGISLATION
Jan Boeing, Geoffrey Delamarre and Tanner J. Wonnacott

THE RECENT USE OF BRAZILIAN EXTRAJUDICIAL REORGANIZATION PROCEEDINGS AS A SUCCESSFUL RESTRUCTURING TOOL
Francisco L. Cestero and João Guilherme Thiesi da Silva

INVESTMENT FUNDS IN BRAZIL: THE "NEW" INSOLVENCY REGIME AND THE LIMITATION OF LIABILITY OF INVESTORS
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Editor's Note: Dealing With Failure
Victoria Prussen Spears 53

Bank Failure Highlights Related Claim Issues, State Law Considerations, in Directors and Officers Insurance Claims
Geoffrey B. Fehling and Carleton Goss 55

Office of the Comptroller of the Currency Issues Guidance on Risk Management of "Buy Now, Pay Later" Lending
Amber A. Hay, Michael A. Mancusi, Kevin M. Toomey, Christopher L. Allen, Anthony Raglani and Michael Treves 59

Luxembourg Modernises Its Insolvency Legislation
Jan Boeing, Geoffrey Delamarre and Tanner J. Wonnacott 63

The Recent Use of Brazilian Extrajudicial Reorganization Proceedings as a Successful Restructuring Tool
Francisco L. Cestero and João Guilherme Thiesi da Silva 72

Investment Funds in Brazil: The "New" Insolvency Regime and the Limitation of Liability of Investors
André M. Mileski and Pedro Rocha 79

Negotiations and the Art of Communicating – Part II
Peter J. Winders 84

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Negotiations and the Art of Communicating – Part II

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. This second part explains negotiating tactics in detail and mediation. The conclusion of this column, to be published in the next issue of* Pratt's Journal of Bankruptcy Law, *will cover humor in negotiations, and more.*

FUNDAMENTAL NEGOTIATION GAMES/TECHNIQUES

Learn to recognize the following negotiation games and techniques.

Tactics to Bolster Power or Threat

Real or Feigned Anger

Real anger in negotiating is quite dangerous, as it is in most other situations. Loss of control may cause a party to let slip information he did not intend to divulge, display weakness, or highlight the importance of a particular point that the opponent can exploit. But controlled or feigned anger can sometimes convince your opponent of your seriousness and may frighten him/her sufficiently to induce a change in position.

Counter measures to an angry or apparently angry opponent: carefully watch him for clues about what he really wants, weak points he is worried about, and the like. Or you may want to appear personally offended in a way that may provoke an apology, create guilt and precipitate concession to smooth things over. In some situations, a negotiator will choose to appear equally angry (or expound on the anger of his or her client). Often, it is the best move to terminate the conversation, with a guilt-producing "I will talk to you again when you calm down," adding, "We can't accomplish anything today," if it is important to keep the door open.

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Aggression

Similar to anger as a negotiating ploy, the aggressive negotiator must carefully observe her opponent's verbal and non-verbal reactions to make sure not to trigger unintended reactions. Too much aggression can cause the opponent to walk away without resolution. In a transaction where the opponent has alternatives, he may not want a relationship with you. In the situation between lawyers representing clients in a dispute, there is extra expense dealing with a jerk, something you must put up with, document, and explain to your client.

Alleged or Pretended Expertise

The negotiator brags about his alleged expertise regarding small details to establish that a person is well prepared and in a superior position. This is similar to the stereotypical New York / District of Columbia lawyer discussed earlier.

Counter this by praising your opponent's knowledge and change the subject to more important items. Or if you think it an advantage, pretend to acknowledge his superiority and let your opponent continue to propose solutions to your objections, to your advantage.

Alleged or Pretended Superior Preparation

Very similar, this negotiator attempts to impress his or her opponent by overwhelming the opponent with detailed facts and figures during arguments.

This may be countered by asking the person to summarize his or her position without needless reference to superfluous data.

Take It or Leave It

A few negotiators will present their final offer at the outset, tell you that that is their evaluation and that they do not waste time in the usual back and forth auction game. It may be effective against a weak opponent, but do not count on it. There is a great risk that your opponent may not believe you. It is a first offer, after all. And most negotiators will want to believe that they have received a benefit from their own negotiating skills. It is a "small town" technique where the offeror has a well-known reputation of never backing down. In the labor union negotiating arena, it has a name – that of a former General Motors president – and has been declared an unfair labor practice, I guess because it must have worked.

Best or Final Offer

Similar to the above, if you make such a characterization, you must mean it and be prepared to walk away if the opponent rejects the offer. I recall both a Yosemite Sam cartoon and some famous political blunders, "I dare you to step over this line!" followed by, "Well, what about this line?" when the challenge is accepted. The offeror not only lost credibility, but also looks comical.

Consider retaining an out, such as, "Unless the client has a complete change of heart," "Unless the judge denies our motion to strike" or something similar. And reinforce with a restatement or reference to your principled position.

Tactics Using Powerlessness

Lack of Authority

This is a basic move, and often useful. You or your opponent claims not to be authorized to make or accept an offer, or an offer in the amount under discussion. It may be a truthful statement. It may be contrived, as when a lawyer tells his client, "Don't give me authority exceeding $10,000 for today's meeting." The advantage to a negotiator with limited authority is that it allows her to get what the opponent says is a best offer, while reading the clues (intentional or otherwise) as to how firm the "best offer" is. Because she has to get the reaction of her absent principal (the client, the boss, the sales manager) she may even choose to ingratiate herself personally by indicating she believes the offer to be "fair," while setting up one of the other negotiating gambits such as good cop/bad cop, described below.

Countermoves include disclaiming further authority yourself. "I understand, this is as far as I can go without my client's okay, too. He has been pretty stubborn about this. He thinks your client deliberately took advantage of him and wants to tell his story in court. But he has a practical side. I don't know what he will do." All of that can be made up within the conventions of negotiating. Or, suggest that the opponent call his principal to get more authority to take the offer that is on the table. Often, pressure to get the deal done today may help in getting a negotiator's best result.

Good Cop / Bad Cop

In this gambit there is more than one negotiator on one side, one of which is "reasonable" but the other is "adamant." The "reasonable" opponent sympathizes with your "generous" concessions but contends that you will need to do more to satisfy the unreasonable partner or client.

This technique sets a trap. You take the bait by trying to convince the "unreasonable" party, or worse, to satisfy him. Instead, try pretending to take the "reasonable" partner at his word, pretend you do not know what else to do beyond a reasonable resolution. This may put the "reasonable" player in a role where he might be forced to help you if he does not want to blow his cover. Even if that does not work, do not fall into the trap of in effect bidding against yourself.

One spontaneous example of this, shortly after I started practice, when still poor, we needed a new car. The car we had in Tennessee, where there is downhill for water to run, was unsuitable in the flat sections of Florida, where there are puddles. Every puddle cost at least one cylinder because the distributor (you may have to Google it) was designed to catch the splash from the right front wheel.

We were driving past a car dealership one evening and stopped in to look at the small Mercury one of my partners liked. These were the days when car buying involved a lot of negotiation, and it was customary to order the features you wanted rather than to buy off the lot. The stereotypical car salesman pointed to the largest Mercury, with all the options, told us he could make us a deal because the lady who ordered it had decided to buy a Lincoln, and asked if we would look at it. It was well above our means. He began to shave the price and cut it substantially, as he told me how it had some expensive option, and I told him I did not want that option and did not want to pay extra for something I did not want, or he could remove it. He was about at his limit and I at mine when my wife, who had been uncharacteristically quiet, said, "Peter, I don't like the color." "Well, that's it," I said. "Is there no price at which you think your wife will put up with the color?" (Still ignoring or underestimating the woman, as was the custom of car salesmen then even more than now).[1] "Well, maybe if I could get it at the price of the medium-sized car we came in to look at, but I don't know." The salesman left to talk to his manager (note the "I have reached the limit of my authority" ploy), and we could hear the discussion a few doors down as voices raised. "Take my word for it. He isn't going to buy it if she doesn't like the color. We will have to meet his price!" In the meantime, I asked Neta, "You really don't like it?" In an emphatic whisper, she said "Peter, I love that car!" She had fooled me as well as the salesman. As a negotiation tactic it was a brilliant good cop/bad cop move even though I was clueless about it.

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[1] Some of the professional women I asked to preview this have suggested I remove this parenthetical. On the other hand, all of my wife's caregivers have been taken advantage of by car salesmen. The stereotype of car salesmen still has a lot of validity.

Helplessness; Feigned Inability to Commit

Like the canine who rolls over to show helplessness before an alpha, some negotiators act helpless, as if they do not know what to do, thus asking you by implication or directly to help them. One lecturer I heard thought this was failure to play the game, so I concluded that he had been bested by such an approach, and was ignoring the proposition that one negotiator is not obligated to play the other negotiator's game. I have never deliberately tried it, but I have seen it work when someone was trying to sell me something I didn't want. The price got quite low, similar to the story about the chess set.

A variation is also an application of a "principled position" negotiation. Acknowledge that an offer is not unreasonable, but is not enough because of other factors. It works best when the opponent has a very high motivation to resolve the matter.

Responses can include: Do not allow yourself to be drawn into serial concessions to find your opponent's solution for him. Instead, try to force him to state his own position so that you have an established range. "I am not going to bid against myself. You are going to have to decide what you want to offer."

TACTICS TO CREATE GUILT

"You Were Unfair"

In this tactic, a party claims his opponent forced him into his present unreasonable posture by previous unfair actions. In one particularly clumsy attempt at this, a lawyer told the court that he had not filed his brief on time because I had consented to one extension and was a nice guy and would have agreed to another extension if he had asked, so he was misled. I responded that I probably would have. The court pointed out that it was the court order that there would be no further extensions that he ignored and I was off the hook.

Do not allow an opponent to create unfair guilt in you by raising prior matters that are not directly relevant to present negotiation.

"No Fair!" in Negotiating

In this variation, one party tries to create guilt in the opponent by complaining that he has made good faith offers and it is not fair that you have not given in or at least reciprocated. An accusation of unfairness can hit a sensitive nerve in a professional with a carefully maintained reputation. But see it for what it is. Just because he has made a concession does not mean he is

entitled to one you do not want to make. This one reminds me of the scene in the movie "Just Friends" where the character Dusty Dinkleman says, "But I wrote a song for you! What kind of girl doesn't put out for somebody who wrote her a song?!" It deserves the same response.

"Gotcha"

Another effort to create guilt: one party pretends to seize upon her opponent's transgression, however small, to create needless guilt and anxiety and thus weaken the opponent's resolve. Examples: "You are 10 minutes late. I guess you don't have much any more interest in settling than you do in respecting our time," or overdue on a court obligation or another relatively unimportant mistake. The player makes a big deal about it.

Counter by apologizing appropriately (not as if it is as big an issue as opponent pretends) and either ignore the matter or promise to address it in due course.

Tactics to Create Presumptions or Control Agenda

Settlement Brochure

A written document, with pictures if appropriate, can help a negotiator establish a principled position, and create the impression in the opponent that there is little room to argue. The psychological hope is that the opponent will take the bait to argue what is wrong with the document, rather than present his or her own case.

The countermoves will vary.

First, consider whether the opponent's document will actually enhance your case. If not, do not make the mistake of quarreling with the brochure. To do so means that you have let the opponent set the agenda. Instead, argue the strengths of your position from your own agenda. In some instances, your own written presentation might be a good move.

This is similar to the technique described below where the partner shows up with the solution to the division of profits. But when that situation is in the context a fiduciary or quasi-fiduciary relationship, it borders on actual cheating, when in other situations it is simply an effective technique.

Arriving With the Surprise Solution

In the right situation, a written proposal creates a presumption that it is correct. Suppose a group is to divide profits or set salary points or divide assets.

Maybe a family business, a partnership, an estate. If Participant 1 comes to the meeting with a schedule already prepared, states that he has considered everyone's performance over the last year and done a lot of work (other participants have to insult him to criticize that) to create the schedule, the common reaction (the one hoped for by the preparer) is to see what adjustments to it should be made. If Participant 1 has given himself and three others a raise of 100% (he has to buy allies to avoid appearing only concerned with himself), chances are the discussion will start from there, and will either require objectors to "take" from one of those three or if they want to "give" to another party they will have to "take" it from someone. Participant 1 will end up with a 50% raise, but that is a lot better for him than the 20% he would have gotten without being the first to propose the agenda.

To counter this is difficult. One way would be to make copies of the list and have each participant come up with a similar list, average them and go from there, so as to eliminate the "presumption" effect that the original list has as a working hypothesis.

Oil on Troubled Waters

This technique is also most effective in multi-party negotiations, and has some of the effects of the Surprise Solution. A master of this tactic will sit back while others bicker, and at the appropriate time step in as peacemaker and offer a solution. Since the ire of the others has not been directed at the peacemaker, there is the impression that she is a neutral. One of my senior partners was a master at this and nobody but me seemed to remember that it was he who started the fight among the others in the first place.

Establish a Range

Somewhat similar to setting the agenda and creating the solution is the technique of proposing or establishing a range within which further negotiations will proceed. As a defendant, it is a great feeling when the range reaches the place where any settlement will be a success, given the cost, potential collateral damage to reputation and the like that a trial might bring. I assume the achievement of such a range for a plaintiff will feel similar.

Characterizing the Offer

"I have made you a fair offer." This is an attempt to make the opponent think that his declining or making a counteroffer is unfair. That should make you feel hesitant, particularly if your opponent seems to believe it.

There are several countermoves, each quite different depending on circumstances. First, ask to see evidence of fairness. In some situations, such as a labor

negotiation, when part of the negotiations is what the company can afford, ask to see the books or confront with the company's annual 10-k report to the SEC. "An additional 1% of your profits is not fair after all." Second, agree that it is fair, or feign or admit ignorance. "I take you at your word that $25,000 is a fair price. But I do not like it more than $10,000. I will keep looking for something I like as well." Note that this is not arguable. If you argue whether the price is fair, it is antagonistic and is more likely to lead to a stalemate. If you do not argue that issue, but say what you are willing to pay, he will either meet your price or walk away. You must be willing to walk away, though. Third, leave negotiations open but do not let the opponent be the judge of what is fair. "Well the definition of a fair price is what a willing buyer and willing seller will agree to. I am willing to [pay or accept] $X."

Of course, characterizing the opponent's argument as unfair can have an effect as well. Will he be challenged to dig in, or will he feel a need to modify it? Most likely the former. A principled reason that it is insufficient will probably be more productive than a label.

Pretending to Lose

This can be very effective. Psychologically, it flatters your opponent, makes him feel successful, avoids bad feelings. "I believe you have outlawyered me. I have some defenses, but I have told my client you will probably overcome them. My client will pay a million dollars for a release. Well played!"

Do not fall for it. The only thing relevant in that statement is "a million dollars." If that is what your client wants, great. It is a lot of money. But if the case is worth $3M, do not let the praise cloud your judgment. "Thanks. I do think we have good facts on our side. I will run it by my client and get back to you as soon as I can."

Tactics In Auction Style Negotiations

Large Initial Demand

This move not only creates a high aspiration in the offeror, but it also may induce a naïve or careless opponent to raise his evaluation of the strength of your position, or modify his expectations. "Gosh, if he thinks the case is worth $2 million, maybe my evaluation at $200,000 is too low." It can be an important step in setting the ultimate range of the negotiations as well.

But it also risks causing the opponent to believe there will be no reasonable resolution, which may force you to retreat and damage your credibility.

Counter measures include characterizing a truly unreasonable initial offer as not genuine. "That is so out of the ballpark that I am going to ignore it." Or, "I will tell you my counteroffer is $10. Now let's start again. Tell me what your real first offer is."

False Demands and Giveaways

Hopefully, during the small talk around the start of the matter you will discover information about the opponents wants and concerns about the subject. Most good negotiators who discern that the opponent wants a particular concession, will pretend to value it highly whether they do or not, and give it up only for a large concession in return. It greatly strengthens your position if you have something of little value to you but much desired by the opponent. On the basic level, a retired trader in American Indian art told me in the late 1970s that when he started out he would fill the trunk of his car with items to trade and with $1000 in his pocket and return from the road trip with the trunk plus the interior of the car full and $10,000. "Trading is just people wanting what you have more than what they've already got."[2]

There is of course the risk that you misjudge the importance of your opponent's wants, and he will call your bluff. If so, counter by withdrawing your concession to try to regain your credibility. "Okay, I withdraw that offer," and make a different concession.

Tiny Incremental Concessions

Some negotiators will divide their concessions into small increments to give the impression that they are giving up more than the large concession they are actually willing to make. The aim is to give you the impression that you have drawn him into giving up more than he intended.

Do not be impressed with the number of concessions. Only the total amount is important. But be alert for the occasional negotiator that, like the unwary auction participant, loses his self control and seeks to get to yes as his goal, price notwithstanding.

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[2] That same trader stopped by my house, and seeing an old Navajo rug on the floor, said "I'll give you 3 times what you paid for that rug," without asking me what I had paid. Although we never engaged in negotiations, as I did not want to sell it, I thought that was an interesting gambit. A 200% profit is almost always welcome. I am sure that if I had overpaid and quoted an exorbitant price there would be an out for him, but the opening was designed to send the message that (a) he was not going to be cheap, trying to get the last nickel, and (b) he had a buyer that I had no access to.

"So What"

The negotiator tries to detract from an opponent's recent concession by representing it as either relatively unimportant or something which should have been granted at the beginning. "That was table stakes" or the like.

Again, he is characterizing your offer. One possibility is to withdraw that concession "since it is not significant" to him, and make a different concession. You will see if he is bluffing, and if he is, he is disadvantaged. His credibility is blown.

Boredom or Disinterest – Real or Feigned

In this one, a party appears totally disinterested or inattentive when opponent is making his/her best points in an effort to undercut both those points and her opponent's confidence.

The best counter may be to force such a party to answer your arguments. Ask her to identify any weakness in them. This is another application of the fundamental advantage of setting the agenda for the negotiations, this time as a countermove.

MEDIATION

Many or most U.S. courts now order the parties in civil cases to mediation. Mediation has its benefits and its drawbacks. Ninety percent of civil cases settle anyway. Mediation is a compressed, compelled, refereed settlement process. Without mediation the settlement dance can be a long process, with each party possibly reluctant to make the first suggestion of settlement for fear of communicating weakness. After that first step, the opponent may delay his response to feign disinterest. And so it can go. When the court orders mediation, those delays are off the table. The parties are forced to sit in a real or virtual room with each other and their lawyers, listen to each other for a while and then shuttle messages back and forth from separate rooms with the mediator as the messenger. There is typically a day devoted to this although it can be longer or shorter. If the matter settles, the mediator tells the judge it settled; if it does not and there is no sign it will, the mediator tells the judge the parties have reached an impasse. He does not tell the judge any details.

A day dedicated to settlement discussions is a good idea. The use of the mediator as a messenger complicates negotiations. The negotiator cannot read the expressions or weigh the words of the opponent. The mediator may interpret a position differently than you would in a face to face discussion. Not all of the negotiation tactics are off the table, but they have to be used

differently. The mediator can only give the message that the opponent tells him to convey. But you can ask the mediator his impressions. "Do you think he wants to settle? What does he really want? To tell his story to the world, or to get his medical needs met? Get the encroaching building removed or get damages for the encroachment? Or sell his land for a good price? Is he after revenge?" Don't hesitate to ask the mediator. Then read the mediator.

Mediators talk in code too. "I can't really tell you if this is his final offer, but I think it might be good if you tried a significant counteroffer." From that statement, you can trust that the mediator believes the plaintiff will take less or the defendant will offer more than the current one. It is up to you whether to believe that your next move must be large or small. Whatever you choose to do, send it with a message, preferably a principled position, but if not, one that provides a reason for the counteroffer. A reason might provoke an opponent to try to meet the reason, rather than simply respond to a dollar offer.

Some mediators pride themselves in reaching settlement in most of their cases. I do not trust that sentiment, because it suggests to me that the mediator will be tempted to use her own negotiation skills against the weaker party to force a settlement. That would be giving in to a conflict of interest. But it is a tough job. Should the mediator lean on the weaker party because he has a weak case and his stubbornness is making him his own enemy? Or should he be neutral on that, as a neutral is supposed to be? Should he be completely indifferent to a recalcitrant party stubbornly walking off a cliff? Those are some interesting ethical issues that help complicate mediated negotiations but do not have anything to do with you as the negotiator in the mediation scenario.

In any event, from a negotiation standpoint, the mediator is an additional factor that the negotiator has to take into account.

Note that mediation is one situation in which the danger of believing one has to reach agreement because "We have wasted so much time" is always present. There is no wasted mediation. Settled or not, you learn much about the personality of the opponent, his view of the case, what she thinks are her strong and weak points. You can continue to negotiate without the mediator if it impasses. Or ask the mediator to carry another message if that seems advantageous.

EXTORTION

This column discusses extortion because it comes up more frequently than it should. In the practice of law context, we see it often enough to educate against it, educate on how to handle and counter it.

The common law crime of extortion is obtaining money (or something else) by threat. "If you don't pay me $X, I will [vandalize your business][break your

legs][report to the police what I saw you do][publish the pictures],” etc. Note that it is the threat that is the crime. One may have a perfect right to report to the police what he saw. The crime is threatening to do so unless money (or something else) is paid. The fact that the money is actually owed does not make a difference. The crime is the threat as a way to collect it. Debts should be collected through the courts when necessary, not through self-help (so a threat to file suit is not a prohibited threat). But sometimes a person with a legitimate claim (or his lawyer) will try to capitalize on the possible extra embarrassment of the claim by threatening to call a press conference if an excessive demand is not met.

First, never do that.

Second, the best way to handle that, if the threat is transmitted by a lawyer (or if the claimant has a lawyer) is to send a written response, clearly identifying the letter as extortionate, taking the position that the recipient of the threat refuses to deal based on threats, but is willing to discuss any real claim on its merits. If the lawyer has a boss, copy him or her. At least somebody in the firm will recognize that the client or lawyer risks bar discipline, or damage to reputation, or both, by such improper threats. Obviously, do not actually say that in the writing – that borders on extortion! The cooler heads will also recognize that if the threat is carried out, there is no incentive to resolve the issue at a beneficial level.

Also, please realize that there is no need for an extortionate claim. The opponent’s own imagination will work in your favor far better than a threat. If all you do is tell him you are going to sue, he and his lawyer will fill out the consequences, real or imaginary. I once represented an employer who sued one of its traveling salesmen when it discovered he was carrying his own cheaper competing line of products in the company vehicle so he could undercut his employer for his own account if necessary. Being a good salesman, he both lied about it and explained his noble purpose of looking after his customers. His income tax returns showed he reported no income from the sales he made on the side. But I obtained his state sales tax returns which he faithfully filed. He gave up because he convinced himself I or my client would report him to the Internal Revenue Service. I had no intention of doing so, but his own imagination persuaded him.

The potential defendant threatened with a press conference will realize that the publicity of the potential lawsuit will be a disaster. The extortionate letter spelling that out actually gives the defendant a negotiating advantage if the defendant calls him on the use of threats as previously outlined.

FUNDAMENTAL RULES OF DEFENSE AGAINST NEGOTIATING GAMES

The following observations apply to all negotiations no matter what tactics your opponent uses. They are psychological traps inherent in any negotiation.

Avoid a "Need to Settle Today" Mindset

Like the auction bidder who gets so caught up in the process that he needs to win, some negotiators can fall into the "Dollar Auction" trap of giving more and more because of a need to resolve the matter.

Similarly, many extended negotiating sessions, as is often the case with court-ordered mediation, settle because 'we have wasted all this time' otherwise. Recognize that this psychological temptation exists, guard against it, use it on the opponent, and do not resolve the matter unless the result is truly satisfactory.

Always Have an Alternative

Except in truly unusual situations, there should always be an exit strategy. There is always an alternative to a negotiated solution: you should always be willing to walk away, to try the case, etc. Being prepared for that result strengthens any position. Failure to have such an alternative weakens a negotiator. In litigation, because 90% of filed cases settle, some lawyers count on that and are not fully prepared to go to trial. This puts them at a settlement disadvantage to an opponent who is ready to do so.

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Editor's note: The conclusion of this column, which will appear in the next issue of *Pratt's Journal of Bankruptcy Law*, will explain humor in negotiations, and more.