

Transparency Will Eliminate Unnecessary Wariness Between Parties

FORUM COLUMN

By Victoria Pynchon

As a mediator, the question I hear most frequently from lawyers is "How do I convince my opponent to sit down and negotiate without losing my competitive advantage?"

Believe it or not, the answer is transparency.

If you can remember way back to last July, when firms like Microsoft and Yahoo were still engaging in business as usual, you might recall that a merger fell apart because Yahoo was acting "weird." At least that's what Microsoft's chief executive, Steve Ballmer, told the Wall Street Journal.

"We had an offer out that was a 100 percent premium on the operating business of the company and there wasn't a serious price negotiation ... until three months later. It was a little ... *weird*."

Lawyers know that three months rushes by in the blink of an eye. The board of directors meets. It seeks an analysis from the mergers and acquisitions people, who consult with outside counsel's antitrust department, which renders a decision but whose members first have to chat with the tax guys. Then there are the IP people, executives and lawyers, with whom to discuss license agreements and, of course, the managers in the human resources department, who may or may not have advice about executive parachutes - platinum, golden or brass.

And yet the Yahoo-Microsoft merger fell apart because Microsoft felt that Yahoo's delay was "weird."

Let's go back to what every trial lawyer knows. In the absence of information, people make stuff up. *Weird* stuff.

And the stories we tell ourselves about our uncommunicative commercial partners do not include one where the other guy is laboring day and night to fulfill our fondest desires. No. In the absence of information, we weave elaborate conspiracy theories in which our opponents are scheming to fleece us of our rights, obstruct our prospective economic advantage and turn our world upside down.

Your dentist can tell you what your opponent wants to hear. A fully illustrated pre-game outline of the upcoming procedure that goes something like this "First I'll put a little numbing cream on your gum. That way the shot of Novocain won't hurt too much. Then I'll drill," she'd say, holding the fearful appliance up and switching it on. "It may sound louder in your mouth than it does here in my hand, but I'll only have it on for about five minutes, after which ... etc., etc."

So how do you get your opponent to the bargaining table without sounding weak?

You say "Listen, Ted, I know both our clients believe their cases are as good as gold but after an initial round of discovery, it's my practice to call a timeout to discuss settlement."

Pause.

"How does that sound to you?"

Ted says it sounds all right. Which it does. Because Ted's got three incredibly acrimonious cases in his practice right now. Last year, one of his adversaries served an *ex parte* application with three bankers boxes of exhibits the day before Christmas. At 4:59 p.m. She scheduled for hearing on the day *after* Christmas. Sure, the judge would deny it, but Ted couldn't assume anything. He worked 15 hours on Christmas Day. So it sounds good to Ted.

More important to your own litigation plan, your opponent has just agreed to come to the bargaining table, even though the actual meeting won't be held for several months. When the appointed hour arrives, you will not have to ask for a settlement conference at a time when it might show weakness on your part because it's already part of the plan.

To avoid the Yahoo/Microsoft problem *weirdness* problem, give the other side a preview of coming attractions.

"We appreciate the offer, Ted. Let me warn you that our CEO finally decided to tackle the Mt. Everest climb in May, so we cannot guarantee a response until June. There's some chance we might be able to make some preliminary progress with the GC before then. Let me give him a call and get back to you in a week about how things are progressing on our side."

Whatever the details, let your negotiation partner understand what you're doing and why you're doing it. Don't let them hang around, waiting for a telephone call, imagining that you're planning strategic nuclear air strike on their primary manufacturing facility in Minsk.

And don't be surprised if that's *exactly* what they're thinking. These negative assumptions about our fellows are not weird after all. In fact, they flow quite predictably from what social psychologists tell us are our innate cognitive biases of selective perception, self-fulfilling prophesy and autistic hostility.

"Selective perception" - our tendency to select those points of view that confirm our existing attitudes and ignore or discount information that disconfirm them - is particularly prevalent in litigation. Because we're engaged in an adversarial process, we'll select the few facts we do learn about our opponent's actions (or inaction) that suggest he's plotting against us. Which of course he is. But maybe not precisely at this moment. Assuming the worst, we respond negatively, provoking the "expected" reply, and entering into a vicious cycle of action and reaction. We then quickly enter a state of "autistic hostility." We are not communicating and that lack of communication is interpreted as hostile.

The simplest way to cool down this overheated atmosphere - and to keep our adversary at the negotiation table - is to be relatively transparent about our overall game plan - first written discovery, followed by document production, the depositions of two percipient witnesses and one corporate designee, and then a settlement conference.

In this economic climate, with your clients already on panic's edge over unanticipated financial reverses, building settlement negotiations into the litigation game plan will keep their temperatures within the range of normal as well. Because when they don't know what *you're* thinking, they begin to wonder whether you're acting just a little bit *weird* as well.

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