

Bullying, Rigidity Are Surefire Neg

By Victoria Pynchon

Although steering the hulking monster of litigation toward a successful resolution is not rocket science, thwarting your opportunity to successfully negotiate its resolution is as common and easy as child's play.

The most certain way to scuttle your client's chances for a negotiated resolution is to arrive at a settlement conference without the individual authorized to seal the deal. Why can't he or she simply be available by telephone? For the same reason you don't want your jury to "call in." A settlement negotiation is part process, part presentation, part drama and part human interaction. Not only do your clients know at depth settlement-creating interests, desires and opportunities

better than counsel possibly could, they will never understand the principled reasons for any agreement achieved in their absence.

Leaving a settlement negotiation too soon is as good a way to scotch your chances for resolution, as is appearing without your client. The people who study these things tell us that "Americans" (and I use the term loosely for anyone, citizen or not, who buys retail) become uncomfortable after two or three bargaining "moves." Offer, counter-offer, counter-counter will predictably be followed by "I'm outta here." Because we litigators have ready at hand the legal "weapon" of mass destruction ("see you in court, buster") we're often even more impatient with the process of bargaining than our clients are. When you start to get impatient, remember

that your settlement officer knows a lot about your opponent's negotiation position that he can't tell you. If you think you've reached impasse but your neutral disagrees, take a deep breath, walk around the perimeter a few times and then follow your neutral's lead.

Rigidly adhering to any mediation format is another common deal-breaker. "Going with the flow" allows you to strategically use whispered confidences in the hallway; candid conversations between counsel; meetings with your neutral and a difficult client and private principal-to-principal negotiations to your own best advantage. There are dozens of permutations and combinations of these attorney-client-neutral dyads and triads. Our ability to be deferential, authoritative, subject to persuasion or persuasive often depends on our "audience." During the course of any settlement negotiation, the neutral learns party and counsel dynamics that can help you strategically deploy identified members of your negotiation "team" to their highest and best use. Don't miss the opportunity to call as many game "plays" during the negotiation day as possible.

Bullying is one of the best ways to ensure settlement conference failure. My good friend Jeff Kichaven is fond of saying that piling rationalization upon rationalization to convince a lawyer he's wrong is like raising your voice to communicate with a deaf man. If the possibility of settlement is important enough to spend your day negotiating, it's important enough to tell your neutral that you don't appreciate being pressured; you *do* understand the other side's position; you disagree with it; and, you don't need to be pressured about it any longer. Instead of simply resisting your opponent's assertions, suggest to the mediator that it is far more effective for you to explain your clients' preferences, interests and positions than it is to be bullied into accepting a deal he is not comfortable with.

Hiring "any mediator" is another



cycle." In a person means understand justers' levels of a office pressures. case, it often me only general coun divisional vice pre middle-manager the litigation in th times it's not so m the industry or cu law will be applic ought to know. 1 chances for se the judge or med likely to be "insid decision cycle," w understanding th at play or the ind dispute arose.

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just toward settlement issues. Just as you wouldn't hire a personal injury lawyer to try your complex insurance coverage action nor an Amlaw 50 attorney to fight a child custody battle, you shouldn't hire a probate neutral to mediate an antitrust action. As Colin Powell has said, the most important factor in the success of international diplomatic negotiations is the diplomat's ability to "be inside the other guy's decision

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