

Learning not to seal the deal too quickly



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They warned us. And it's not so much that we didn't listen to them. It's more like they didn't listen to their own warning.

I'm speaking of the law school professors I've seen warning their students about "the zeal for the deal." You know the phenomenon. An affable, busy or even scared negotiator wants to get a deal done so intensely that s/he concedes too much, too quickly and leaves a lot of value on the table. This passion for getting a deal done can also cause a negotiator to keep scheduling rounds of negotiations with someone who doesn't have the authority or desire to do a deal. But the zealots often feel that with perseverance they can summon a magic phrase or be so engaging that a deal is inevitable.

Enter the law school teachers who provide cautionary tales about such zeal, but also construct exercises in classes that seem to reward students for doing a deal at almost any cost. I'm sometimes asked in to adjudicate and will relate a recent experience I had.

The facts of the case involved a very successful football coach in the southern U.S. Odd and extraneous information was provided, including his win/loss record, his performance bonus, fan support and so on. More relevant was that he had a morals clause in his contract and his school was of the religious variety. The item of interest seemed to be his having a woman in his hotel room during a road game. Students were assigned the tasks of representing the school and the coach.

In then walked these students, exhibiting the confidence and *bonhomie* of young lawyers-to-be. There was no actual back slapping and no one actually said "How ya doing guy?," but that was the general atmosphere as the big guys got in touch with their feminine sides and the young women used existing and sincere skills to find common ground.

They probed. They questioned. They tested to see how to make the pie bigger, as they say at Harvard and elsewhere. They walked on egg shells as they discussed the coach's great service. They expressed support for him as he might be pondering his move on to another team. Faces were saved, whether they needed saving or not. The coach loved his school, but if it were time to move on he could leave with his head high and face new challenges as life's horizons receded.

Chests puffed up in mutual victory, hands were grasped firmly and the pie indeed got bigger, right before my eyes.

But being a professional pain in the neck and elsewhere, as I gave feedback and marks at the end, I did ask the question, "Who was the woman in the hotel room and what happened in there?" No one knew. In fact, they were surprised I asked.

However, I started with the worse case scenario and moved to better possibilities:

"Is it illegal in this jurisdiction to have a prostitute in one's hotel room?" Not sure, but probably not.

"Could the woman have been a model and the coach's hobby drawing or photography?" Sure.

"Could this have been a registered massage therapist or other out-call health care professional such as a chiropractor, reflexologist, Reiki practitioner or acupuncturist?" Possibly.

"How about a Tarot card reader for the superstitious coach?" Yeah.

Obviously this woman could have been anyone, including the coach's daughter. I questioned why no one wanted to know this important fact. The answer is complex. These cases, or problems which are erroneously called "simulations," give the impression that something must be negotiated or done about the facts as presented. Moreover, if you're in a course called "Lawyer as Negotiator," the implication is that you better negotiate something.

But in reality you are sometimes better off not negotiating. If you work in mergers and acquisitions, as I occasionally do, the fact that 82 percent of all such deals destroy value should be in your mind. Why do that deal when statistics indicate you will fail? How often has a burning issue disappeared after a good night's sleep? Stirring up issues and emotions is often the cause of problems and leaving well enough alone should also be taught — "Lawyer as Procrastinator" could be the title of a course. By stirring the issues up in this simulation one can lose a great coach, or create huge liability if he's done nothing wrong. Perhaps he just wants to take away a huge settlement and collect a salary from the next school too.

Regardless, the prerequisite to the "Lawyer as Negotiator" course should be called "Lawyer as Fact Finder." □

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