
Column

A Sale of Land in Somerset County

Christopher Honeyman

Negotiation for Beginners

At the heart of negotiation teaching lies the implicit notion that the typical negotiation course offered in schools of law and business, as well as in such departments as international relations and planning, offers enough basic information about negotiation for students to at least begin their careers. Beyond this, our concept of a negotiation curriculum includes a myriad of topics and courses that add up to “advanced” negotiation. The implication — perhaps an insufficiently examined one — is that these advanced topics can safely be left to those students who are bent, someday, on negotiating, say, major corporate transactions, multiparty environmental disputes, or an international arms reduction deal.

But what if it is not so? Do “basic” negotiation courses actually teach students to understand even a “basic” negotiation?

In the last few years, we have moved some way toward defining the essentials of a “canon” of negotiation. The list of important topics now recognized as crossing disciplinary boundaries, as of the date of this writing, is far larger than it was as recently as three years ago. If we stuck to our existing concepts of how this field is taught, these would logically be added at the “advanced” levels. However, if the varieties of knowledge and skill being newly identified as important across many fields and types of setting do not operate only at an *advanced* level, but turn out to be implicated even in seemingly simple everyday transactions, then our

Christopher Honeyman is managing partner of Convenor Conflict Management, a consulting firm based in Madison, Wisconsin and Washington, DC. He has directed a fifteen-year series of major research-and-development projects in conflict management, has served as a neutral in more than 2,000 cases, and is coeditor of *The Negotiator's Fieldbook* (ABA 2006.) His e-mail address is honeyman@convenor.com.

expectations about the reasonable scope of everyday training may start to look more like complacency. It may even become easier to argue the centrality of negotiation in many forms of professional training, and thus claim a larger share of the curriculum. A recent experience of mine exemplifies, I believe, how knowledge of many supposedly advanced topics in negotiation might be necessary for someone trying to get a handle on even a simple little land sale.

Cash on the Barrelhead

My wife, Elaine, and I are gradually moving east. Madison, Wisconsin has been our home for many years, but we are not originally Midwesterners, a *pied-a-terre* in Washington, D.C. has been our second home for a few years now, and someday we plan to settle on the East Coast for good. However, like many East Coasters, no sooner had we nailed down a nice place in the city than we began to think about how we could get away from it on the weekends.

The Maryland and Virginia coastlines beckoned, but the attractive bits proved to be either too distant or too expensive, so we began to investigate in West Virginia. We found a region I will call Somerset County, two hours from Washington. (Other potentially identifying names in this story have also been changed.) Because it has been poor in both mining resources and farming soil, and therefore not much lived in over centuries, the region is unspoiled, and the scenery is spectacular.

The area also features Sam, clearly the smartest real estate agent either of us had ever met. One property he showed us stood out: a rural subdivision, which, contrary to the connotations of “subdivision,” consisted mostly of woods and is destined to remain so. With two hundred mostly three-acre lots spread over 1,200 acres, it offered wonderful views and no-hunting rules discreetly enforced by a mountain behind and a river in front. Each lot had access to the river, as well as to hundreds of acres of land held in common. So close to a major city, this seemed to us like a working definition of paradise.

In 2005 we tried to buy a lot, twice without success. Starting from Wisconsin, we just could not move fast enough. The community had been established for fifteen years, all the lots had first been sold long ago, and about half the lots had houses built on them already. But after a long spell of very slow resales, in the last year the backlog of listings had cleared and sales began to accelerate, with some closing in a matter of hours. Prices were starting to rise rapidly.

There was a reason for the sudden change in the market. Sam described it thus: “In West Virginia, buyers like you, who aren’t going to be here full time, don’t want freestanding property if they have any sense, because the owners of the equally unrestricted property who are your neighbors can do anything. And in our state, they usually *will* do just about

anything.” Unfortunately, said Sam, there were equal “gotchas” in buying into an association because careful rules had to be not only written, but also actually *applied*. In the subdivision we liked, he said, the developer had done a better than usual job of laying out both the subdivision itself and the rules to go with it. However, enforcement of the rules was up to the owners’ association, and the board had let things slide on just one rule. That was all it took. Some owners had gotten into the habit of leaving camping trailers on their property over the winter, flatly contravening a clear rule. Over years, some of those trailers became all but rusted into place. One owner of two adjacent lots invited his friends to leave their campers there too, and ended up with *six* trailers on his property. The results were a general unsightliness, flat property prices for a decade even while prices in neighboring areas were going through the roof, and, last but not least, one unhappy Sam. Sam considered it good business to own a lot in every subdivision where he liked to do business, and his property value was not going up either.

Eventually, Sam had gotten mad enough to start a petition drive among the owners to force the board to act. The board acted, and the campers were driven out. With this esthetic improvement, sales picked up quickly, and prices began to follow. The last holdout was the fellow who had six trailers. When he finally had no choice but to remove them, he was one unhappy camper — because now he had no future use for this property. So he put it up for sale.

However, he did not hire Sam as seller’s agent. Sam was the cause of his disaffection, and although he respected Sam’s ability and determination, he certainly was not going to reward Sam with the listing. So he walked into the local real estate office one Saturday morning and listed the property with the first agent he saw — the one who was sitting at the desk.

As soon as the listing was circulated, Sam e-mailed us, along with his numerous other standing clients who were waiting for a crack at that subdivision. His brief announcement noted only that two adjacent lots had come on the market that were *not* his listing, and that it looked like the price was pretty low. This time we were prepared. By agreement after our last failed purchase attempt, Sam held a \$1,000 deposit check from us made out to the real estate brokerage he worked with.

By now, we trusted Sam. He had been pleasantly blunt with us about West Virginia real estate practice, which commonly involved the same agent representing both buyer and seller, and he had had us sign such “dual agency” agreements both previous times when we had put in bids on other property. We also respected Sam’s approach to the inherent conflict: it was up to the seller (his client) whether to accept Sam’s advice on a price, but he would tell not only the seller but the buyers (who were also his clients) if he thought the seller was being greedy.

Cellphones do not work too well in West Virginia because of all the hills. It took minutes for Elaine and me to decide we were going to buy, but it took all day to catch up with Sam. By the time I reached him it was 6:00 P.M. in West Virginia. I told Sam we were ready to buy the two lots sight unseen. We knew the price was thousands less per lot than the last time we had tried to buy — these had to be a bargain. But we did not know why. Sam told me quickly enough: the seller had signed, if you remember, with the first real estate agent he saw at the local brokerage.

It so happens there *is* only one local brokerage of any size, and Sam also works through it. However, Sam never comes in just to sit at the front desk and see what turns up; his time is too valuable. The agent who sits at the desk on a Saturday morning is the agent who has held a real estate license for exactly five days and does not know the local market at all. That is the agent whom the seller had hired. The person advising the seller on how to price the lots was also green enough to make the fundamental error of not going out to look at them first. Instead, he had relied on historical data as to what the lots *should* sell for — data which, thanks to Sam, were now thoroughly obsolete because of the recent enforcement of the trailer rule.

“But that doesn’t mean I can let you buy the lots,” continued Sam. “Since I’m not the seller’s agent, I haven’t even looked at them closely myself yet. By the time you can get here from Wisconsin, I’m sure either the one buyer who already made an appointment with me to see them tomorrow, or the other buyer I’ve heard from who’s made an appointment for the next day, will have bought them.”

I pointed out to Sam that we had made an unsuccessful offer for one lot that was ten lots to the left of these two, and another unsuccessful offer for a different lot that was ten lots to the right, and that Elaine and I had at least driven around all of them and were prepared to take the chance that the ones in the middle were pretty much the same. I also noted that Sam was holding our \$1,000 check and that I had a blank offer form from the last time around, which I was about to fill out and fax to him. I asked if that did not make us the first people to make an actual offer.

Sam allowed as how yes, it did. But, he said, he still could not let us make such a bid “blind,” at least not in good conscience. So, he decided, “I’m going to get into the car right now and drive out there and take a look. I’ll call you back in three hours [it was forty-five miles each way, over country roads] and if you still want to bid when I can describe the lots to you, fine.” This offer, naturally, only increased our confidence in Sam.

Three hours later Sam called back. “Both lots are gorgeous, and they are *way* underpriced.” We agreed that we would offer \$300 over the asking price for the pair — a cash deal, no contingencies, nothing that could possibly cause hesitation on the part of the seller. Sam took the offer to the real estate office first thing the following morning. By the time the seller’s

agent walked in, Sam had primed the entire staff, who all broke out in a rousing cheer for the new agent's first sale — for *more than* the asking price. Later the same day, the seller signed.

Becoming a West Virginian

The closing was to be uncomplicated, by real estate standards. We were paying cash, \$51,800 on top of the \$1,000 deposit. We did not require a mortgage, and there was no house on the property that needed inspecting. We planned to write a separate check to the attorney to cover the title search and attorney's fees. In the world of real estate, things do not get much simpler than that.

The closing was scheduled for a few weeks later. I had my Wisconsin bank make out a cashier's check to the seller. Elaine and I came to Washington the night before and drove out to the attorney's office in a sunny mood that matched the weather.

We arrived early. Harry, the lawyer, was not busy that morning, so he led us back to his conference room, and we chatted for a while. He discovered I was a mediator. He allowed as how he worked as a mediator sometimes in county court, and we exchanged life-as-a-mediator stories.

Harry explained to us the business of law in Somerset County, from the perspective of the lead partner in the oldest firm in the county. I remarked on Sam's dual representation role, which Harry noted was pretty common for attorneys also. Sometimes, he explained, the representation arrangements were even more efficient because he also represented the Bank of Remus, which was frequently the issuer of the mortgage. Sometimes he signed the same agreement *three* times, for three different parties.

To illustrate how the politics of such arrangements are managed, Harry pointed to the wall clock and a thick hanging calendar; both read "Bank of Remus." He told us that not only did he represent the Bank of Remus as its attorney, but he was also on its board of directors. The threat of awkwardness if another local bank was writing the mortgage was diminished, he explained, by the fact that he also worked as an attorney for all the other banks in the county. He explained the wall calendar was so thick because it was actually *four* calendars, stacked. Just ahead of each real estate closing he would put the calendar issued by the bank writing the mortgage in front. Harry also remarked that if the Bank of Remus was not underwriting the mortgage at a particular closing, he would remove the Bank of Remus wall clock for the time being, and put it in a drawer.

We were still the only three people in the room, and it was now some minutes past the appointed hour. Eventually, Sam showed up. "Well, I guess we can get started," said Harry. This seemed to leave a conspicuous gap in personnel. "What about the seller, the seller's agent, and the seller's lawyer?" I asked.

“Oh, we don’t need the seller’s agent. And it’s one of those dual representation situations, I’m the seller’s attorney too, and I already have his signature on everything, because he’s gone to Florida,” Harry explained. “So we don’t need him either.” With that, he asked us to sign a form, in which Elaine and I acknowledged that he was the seller’s lawyer as well as our own.

Harry remarked on how quaint it was when some Washington buyers insisted on bringing their own lawyer, thus doubling everybody’s costs as well as ensuring that everybody got to watch two lawyers do more slowly what one lawyer could have done more quickly. However, he said, people in West Virginia were used to people from Washington, so they did not really mind, although it seemed strange. We agreed.

He next walked us through the usual blizzard of paperwork. Everything was fine until I handed him the cashier’s check. One look was enough to elicit a horrified “Oh, no!”

Perhaps this is true where you live too, but at least in West Virginia, apparently *nobody* makes out a check to the seller. That creates difficulties because the taxes, any unpaid association fees, and the seller’s fees to the attorney and the real estate agency all come out of that check. Sad experience suggested that if a check for the full amount is handed over to the seller, somebody may go unpaid, and there will be unhappiness. The check should *always* be made out to the attorney handling the closing. I had not known this, and we were 792 miles from my bank.

We “watched the gears spin” as Harry considered a solution. His multiplicity of roles now came in handy. “I am holding a check made out to the seller,” he said. “You have done all that could reasonably be asked of you; it’s our fault neither Sam nor I thought to tell you. And the seller is in Florida, so I can’t get him to endorse it.” Harry ruminated. “But if *I* endorse that check over to the bank, it’s fraud.” More rumination.

“I wonder what would happen,” Harry said, “if I just called the bank, and asked to put it in my escrow account, without a signature on the back.” He reached for the phone and asked for the bank manager.

After courteous greetings and a bit of circuitous discussion about this and that, Harry almost casually raised the actual problem. “I’m doing a closing, and the seller is in Florida, and I’m holding a check for \$51,800 made out to him. Would it be okay if I just deposit that into my escrow account? I’d hate to leave it lying around the office.”

An escrow account is by definition fiduciary in purpose. Harry clearly had a fiduciary duty to protect that check. He was also a lead partner in the oldest law firm in the county, an attorney to the bank, and a director of the bank. It did not take the manager long to agree to Harry’s request.

Nobody perceived any conflict between Harry’s duty to his client, the seller, and his duty to his client, the buyer, nor his duty to the bank. Harry’s duty to his client, the seller, was evidently to ensure that the seller was paid

everything that he was owed. In West Virginia, it did *not* extend to volunteering an opportunity for the seller to send the entire matter into a tailspin. Harry's duty to the bank, however, required that he ask me a question. "There's one thing. What happens if the check gets all the way back to your bank in Madison, and your bank has a problem with it because there's no signature on the back?"

I looked at Harry, and Harry looked at me. "Well, if that happens, I guess I'll just go down to the bank and sort it out," I said.

Harry looked at me, and I looked at Harry. "Okay," said Harry. The deal was done. And thus, Elaine and I became West Virginians.

The Negotiation Principles behind the Narrative

What does my West Virginia real estate experience reveal about the way advanced negotiation principles come into play even in fairly ordinary transactions? Plenty. To explore this idea, I will draw on some of the topics that I and my coeditor Andrea Kupfer Schneider included in *The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator* (Schneider and Honeyman 2006).

In preparation for developing the book, Andrea and I analyzed some well-regarded textbooks then in use for teaching negotiation in schools of planning, law, international relations, and business. The list of topics that were taught across the board — that is, the existing "interdisciplinary canon" of negotiation — was surprisingly short. (See Schneider and Honeyman 2006: 726.) It included, although not always using the same terms,

- the idea of personal style, strategy, or personality (including the concepts of competitive or adversarial versus interest-based or principled or problem-solving);
- the use of communication skills, both listening and speaking;
- the concept of integrative versus distributive negotiations;
- the concept of a "bargaining zone" between the parties, including BATNA (best alternative to a negotiated agreement) and reservation prices;
- the use of brainstorming and option creation; and
- the importance of preparation.

And that is it — the entire list of topics in the cross-disciplinary negotiation canon. Of this short list, almost every item crops up in one way or another in our short story.

However, it would be unreasonable to expect anyone to understand what happened and why it happened based merely on studying these six

topics. Right off the bat, in order to understand the seller's relationship to Sam, you would have to understand something about trust and distrust, which Roy Lewicki examines in our book, because the seller showed a classic dichotomy, in Lewicki's terms, between "calculus-based" and "identification-based" trust. The distinction, broadly, has to do with trusting that someone will do what they say versus trusting that they see the world much the way you do. On a calculus-based level, the seller reportedly respected Sam for acting consistently with Sam's principles. On an identification-based level, he saw Sam as enduringly pursuing interests contrary to his own because Sam had been the proximate cause of the crackdown on camping trailers. So despite trusting that Sam's word was his bond, he would not hire Sam as seller's agent — to his substantial cost in the end, as this freed Sam to represent us, and only us.

Another chapter in the book examines reputation, which overlaps with trust. Reputation was clearly a critical consideration in this transaction — and not just in terms of Sam's reputation with the seller. Even more interesting was the role of reputation (and trust) in the bank's reaction to the attorney's request to deposit an unendorsed check in his escrow account, as well as the attorney's reaction to my necessarily vague offer to "go to the bank and sort it out." It seems indisputable that the attorney's reputation with the bank, not just his position, influenced the bank manager's response to an apparently off-the-wall question. I also suspect that my reputation with Harry was enhanced by his knowledge of the kind of reputation one must maintain to be an acceptable mediator over a long period of time.

Theories of "agency," which are also examined in the *Negotiator's Fieldbook* and draw on a rich recent literature, are clearly relevant to my West Virginia experience, in the form of the multiple roles played by both Sam and Harry. In particular, the consequences of principal and agent relationships matter here, along with issues of agency and informed consent; the role of informed consent in this transaction was exemplified by the dual agency agreement that Sam had asked Elaine and me to sign. Perceptions of fairness — another *Fieldbook* topic — were clearly also at work: any agent who proposes to serve two masters must be acutely sensitive to the need to balance different kinds of fairness in order to maintain a good reputation overall.

Harry's response to our dilemma involving the check demonstrated creativity, an essential element of the negotiation canon. The nice distinctions of ethics and morality in negotiation and of the law of bargaining also both demonstrate an unexpected subtlety at the heart of West Virginia practice, in both real estate sales and lawyering. It seems clear that perceptions of what is legally appropriate and ethical in West Virginia draw on conceptions of community and the high likelihood of repeat-play, both of which favor establishing and maintaining a sense of trust rather than

cut-and-thrust. The economic efficiency that results, compared to typical urban practice only two hours away in Washington, D.C., is also appropriate to a state where everything grows on trees except money.

Culture is a huge topic in negotiation scholarship and teaching today, and several chapters of the *Fieldbook* are devoted to it. Furthermore, cultural difference clearly played an enormous role in my West Virginia experience. With a mere two-hour drive, I had entered a somewhat foreign negotiation culture, one in which a practice as common in Washington as bringing one's own attorney to a closing was considered "strange."

The list of pertinent topics goes on:

- the seller's frame (in which he apparently now saw the property as "a drug on the market," a commodity whose supply exceeds its demand, now that he personally had no use for it);
- problems of timing and ripeness (including Sam's awareness that the lots would sell fast, and Harry's perception that putting off the closing to allow a new check to be cut would be unwise);
- the seller's identity and emotions (including his sense of himself as a camper, not a second-house-owner, along with his visceral decision to use a different broker);
- the seller's potential internal conflict (in which we, at least, perceived a continuing risk that his desire to be shut of the matter might at any moment be counterbalanced by higher "aspirations," if he were to hear of the improved market for the lots);
- our aspirations (using "aspirations" in the technical sense, which refers to our desire for a low price point); and
- the efforts by the attorney and our real estate agent, as well as by the seller's agent to "court compliance" at different moments (i.e., to speak and act in such a way as to convince the other actor to see things our way).

All of these topics and more, in recent years, have been explored in depth in the negotiation literature and have become part of the advanced negotiation curriculum, in one subject field or another. More recently still, as previously noted, they have been analyzed further and found (in the *Fieldbook*) to apply across a truly wide range of negotiation domains. However, I doubt that they receive extensive treatment in the standard introductory negotiation courses in *any* field. In other words, an in-depth understanding of the negotiation phenomena that I experienced even in this little land sale is likely to be elusive without reference to these ideas. And in case this all seems more academic than practical to you, I will suggest that if the seller had read even a fraction of what you and I have

been reading over the years, he would probably have held out for a better price — and he would have gotten it, too.

Did I cherry-pick a particularly rich story? Perhaps. Certainly, it was the particular experience of encountering West Virginia culture that gave me the idea for this essay. However, I believe there are many simple negotiations that offer their own range of true negotiation complexity, once they are examined closely. Furthermore, without the tools now on offer only in supposedly advanced settings, how is the student or practitioner to know that what he or she first thought bizarre is, in fact, comprehensible, and therefore, perhaps, manageable to his or her advantage?

Thus, once unpacked, even a simple negotiation story can turn out to contain multiple elements that become nearly incomprehensible without exposure to an array of ideas simply not yet taught to most students of negotiation. This situation cannot serve our field or our students well.

We know by now, for instance, that the vast majority of what lawyers still frame as impending trials are really negotiations that have not happened yet. (The trial rate in federal district court is now just under 2 percent. Increased use of negotiation seems a large part of the reason why; see Galanter 2006; Honeyman 2006; Schneider 2006.) Similarly, businesspeople, planners, and members of many other professions (such as police officers) devote a huge chunk of their working hours to negotiation. One way to look at the recent research and practice experience compiled in the *Negotiator's Fieldbook*, then, is as a “shot across the bows” of the traditional curriculum in graduate education in all these kinds of schools and more. Perhaps it is time for teachers, researchers, students, and practitioners of negotiation to start bargaining harder for a larger share of the overall curriculum — one that really reflects the importance, centrality, and subtlety of our subject. Such training could benefit even those students who will not use it extensively in their professional lives, but who might find themselves involved in deals as “simple” as buying a little parcel of land on the river.

NOTE

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