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Hermann: Better Settlements--Through Leverage

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BETTER SETTLEMENTS—THROUGH LEVERAGE. By *Philip J. Hermann*. Rochester, N.Y.: Aqueduct Books, a division of The Lawyers Cooperative Publishing Co. 1965. Pp. xxi, 269. \$9.50.

Who ever learned to negotiate from a book? Probably no one, and one who seeks the kernel of wisdom which will make him an expert negotiator, who seeks the password for admittance to the negotiator's sanctum sanctorum—that person will hunt in vain through the pages of Mr. Hermann's book. I do not mean to suggest either that Mr. Hermann has withheld something in his power to reveal or that he has explicitly promised such a revelation. Rather, I suggest a flaw either in our perception and analysis or in our verbal skills. One of them, probably our perception and analysis, is not sufficiently developed for us to comprehend and communicate the essence of an art as complex as that of negotiation. Perhaps another twenty or fifty years of research by psychologists and psychiatrists will give us the tools to dissect a man's personality and isolate those factors which make him a good manipulator of other people. Until that time these factors will have to pass under the nondiscriminate, unhelpful names of ability and judgment.

Although Mr. Hermann does not accomplish the impossible task of setting forth the secret of negotiation, one should not assume that he fails at other important tasks. In several respects the book is excellent. He gives an extensive and detailed explanation of the relationship which an insurance company adjuster is likely to have with his superior and with others in his company; he describes the likely tenure and job movement of an adjuster; and he describes the position of a field claimsman and of an independent adjuster. In each case he outlines some probable limits on the employee's authority and points to external factors which may influence the adjuster or claimsman. For example, he suggests that a claims manager in an office where many cases have recently gone to trial will feel pressure from the home office to settle more cases. This kind of knowledge should be helpful to the personal injury lawyer and particularly to the relatively inexperienced plaintiffs' lawyer.

Mr. Hermann's second chapter, entitled "The Leverage of Uncertainty," reveals greater insight than any other in the book. He describes the "leverage of uncertainty" phenomenon on page 8:

Uncertainty is one of man's great natural enemies. People often worry more about what may happen than they do when it does happen. The young child fears darkness because he doesn't know what is beyond his ability to see. It might be good; it might be bad. But the fact that he doesn't know instinctively creates fear.

Those familiar with the writings of psychologists will recognize much in chapter 2 which goes under the psychological label "intolerance of ambiguity."¹

The principal ambiguity or uncertainty in a personal injury suit arises from a lack of knowledge about what the judge and jury will do with the case. Most of the chapter on this topic is devoted to imaginative but practical ways in which one negotiator can heighten the uncertainty or ambiguity in his opponent's mind.

Although not stated in generalized terms, Mr. Hermann's thesis seems to be that the probability of a favorable settlement varies directly with the amount of anxiety (fear) inspired in one's opponent and that this anxiety in turn varies directly with the amount of uncertainty generated in that opponent; thus, uncertainty → anxiety → settlement. In the fight-or-flight terms of psychiatrists, he suggests that this kind of anxiety will always produce at least a tendency in one's opponent to "flee" by accepting the offered settlement.

Some preliminary studies at the University of Michigan Law

1. See generally Dibner, *Ambiguity and Anxiety*, 56 J. ABNORM. & SOC. PSYCHOL. 165-74 (1958); Smock, *The Influence of Psychological Stress on the "Intolerance of Ambiguity,"* 50 J. ABNORM. & SOC. PSYCHOL. 177-82 (1955).

School cause me to question the universality of Mr. Hermann's thesis. Indeed, they suggest that heightened anxiety may produce a tendency not to settle in some cases. Although our methods were crude and our results far from conclusive, the résumés and tape recordings of several experimental negotiations in connection with a seminar at the law school indicate that heightened anxiety sometimes resulted in, or at least contributed to, an angry refusal to reach any agreement. Our results suggest that some persons may find release from the anxiety aroused by an opposing negotiator's arguments by making a conclusive decision to cease negotiation and to accept the available alternative, whether it be trial, strike, or something else. Of course, such a decision in no way alters the probabilities or objective uncertainty about what a judge and jury will do; perhaps the decision somehow acts as a psychological barrier to the uncertainty which the opposing negotiator attempts to generate.²

Furthermore, some survey research done in connection with the seminar revealed that several of those identified as the best negotiators in a group of general practitioners and labor-management negotiators had a recognized ability to reduce tension and anxiety.³ Furthermore, in each case this ability to reduce tension by telling jokes and maintaining a nonaggressive attitude was identified as an important attribute both by the individuals having those traits and by others who had opposed them in negotiation. If heightened anxiety is productive of favorable settlements, why did several of the most able negotiators value the ability to *reduce* anxiety?⁴

2. In connection with our seminar we held a total of twenty-four separate negotiations. Despite the fact that any settlement, however unfavorable, produced a higher academic grade for the student than failure to settle, the students failed to reach a complete agreement in three of the twenty-four negotiations. In at least two of the unsuccessful negotiations, one team of students attempted to create anxiety in their opponents by adopting an unusually laconic and unresponsive attitude. Both the tape recordings of these negotiations and the students' descriptions of them suggest that the parties involved experienced considerable anxiety as a result of the inscrutable attitude of their opponents. However, this anxiety gave way to anger and thus appears to have contributed to the failure to agree. Since the situation was unreal and the students' motivations and responsibilities were different from those in actual practice, the students may have yielded more readily to their desire to injure their opponents, at whatever cost, than they would have done in actual practice.

3. Baumgart & Compagnone, Strategy and Techniques in Labor Negotiations, 1966 (unpublished paper in University of Michigan Law School Library); Egnor, Ewalt, Healy, Hutson, Kin & Young, A Survey of the Washtenaw County Bar, 1966 (unpublished paper in University of Michigan Law School Library).

4. It is possible that "anxiety" is too crude a term; there may be different varieties of anxiety. For example, the anxiety produced by tense personal relations with the opposing negotiator may lead to anger, whereas the anxiety produced by uncertainty about the outcome of a lawsuit may not cause anger. If that is so, Mr. Hermann's thesis may not be in need of qualification. However, psychiatrists' teachings about transference and similar phenomena suggest no such unerring power to discriminate between reactions to the person and reactions to the substance. They suggest quite the reverse: that feelings which we consciously attribute to an opponent's argument may in fact have been aroused by his tone of voice, mien, or other personal characteristics.

These two factors—the outcome of our experimental negotiations and the importance given to tension reduction by practicing negotiators—suggest that Mr. Hermann's thesis should be qualified slightly. I would suggest that *in certain circumstances* the heightening of anxiety above a certain level, by whatever means, will restrict rather than promote the probability of a favorable settlement. For the present I doubt that our analytic tools are sufficiently refined to carve out those "certain circumstances." Perhaps more sophisticated observation of good negotiators at work will provide the answers. Until then the negotiator will have to rely upon his judgment to ascertain when he has heightened the uncertainty and anxiety enough, and when his opponent is about to resolve his anxiety by making an immutable decision to go to trial.

Unlike the material dealing with the insurance company complex and that on the leverage of uncertainty, parts of the book offer few insights and little knowledge. For example, part of chapter 3 dealing with the "leverage of knowledge" is simply one more in a long line of pronouncements by Goldstein⁵ and others that those who are well prepared have a better chance of winning than those who are not well prepared. Likewise, Mr. Hermann's exhortation to seem eager to go to trial will come as no surprise to lawyers. The great majority of the general practitioners interviewed in connection with our seminar stated that ability as a trial lawyer was a vital attribute of a successful personal-injury negotiator.⁶

Despite these shortcomings, Mr. Hermann's book is worth the price for most lawyers who practice some personal injury litigation but who are not experts in the field. The book has much information which will be valuable to such lawyers. It explains the workings of the insurance company complex and it points out several clever and specific ways in which pressure to settle can be applied to the plaintiff's and defendant's attorneys and to the insurance company's adjuster. My one serious reservation about the book is the fear that Mr. Hermann's tactics will backfire in some circumstances and will produce no settlement, but rather a premature and undesirable rigidity on the part of one's opponent.

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5. GOLDSTEIN, *TRIAL TECHNIQUE* §§ 1-2 (1935).

6. See Egnor, *et al.*, *supra* note 3, at 28.