



## The Keys to Keeping a Project on Track

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### Introduction

In 1985, after five years prosecuting criminals as an assistant US attorney, I became deputy general counsel of The American Institute of Architects. On my very first day, I was introduced to civil law. In his gravelly voice, the general counsel explained to me that the key to success in my new position was to "think liability". I understood, as the traditional casebooks teach in law school, that appellate decisions in commercial cases tend to focus on determining where something went wrong and deciding who should be blamed. Liability was the proverbial 'hot potato', something to be avoided at all cost. As a result, lawyers teach and are trained to concentrate on anticipating potential liability and finding ways to avoid or transfer it so their clients are not caught in its web. The general counsel wanted me to think the same.

There are big downsides to lawyers defining "success" as drafting a contract intent on anticipating potential failures and pushing responsibility to other parties with the least bargaining power. Project problems require a nimbleness that can be lost if contract structures are excessively rigid. The industry as a whole also incurs huge costs from procedural requirements that needlessly force parties to jump through time-consuming hoops before an issue can be resolved. This kind of "success" hurts and ultimately impairs the competitiveness of the U.S. construction market.

The better a contract party has allocated project risk away from itself, the more it may also have created disincentives for other parties to collaborate, prevent problems and, when they occur, find solutions. It can also hurt the party who has used market power to divest itself of risk. Self-serving narcissism has never built either the trust or the chemistry necessary for group effort to succeed or for firms to get hired. It can also hurt the legal profession: Too many in the business world already think the best way to lose a deal is to bring in a lawyer to draft a contract. And these problems are all easily avoidable and totally unnecessary.

Projects are most likely to succeed —that is, projects are finished on time, on budget, claims-free, profitably for all parties—when the parties' business dealings, communications, and dispute recognition and resolution mechanisms are aligned and geared to that result. Keeping these goals in mind provides a reality check on the entire process.

Getting real requires us to recognize that lots of today's clients still think "liability" first. I once had an opportunity to ask Stephen Joel Trachtenberg, then president of George Washington University, what he wanted most out of his in-house counsel. "To keep me out of trouble," he said, without missing a beat. One way to do this may be to shift risks onto other parties, but another, more constructive approach is to work with others to avoid and minimize potential liabilities for all concerned.

Traditionally in America, it is the risk-takers who enjoy the spoils, not the risk-avoiders. That's the lure of entrepreneurship. As a result, many of our clients are increasingly taking up a new banner. "Risk and reward? We want both." It's more complex than risk aversion, but it offers substantial benefits for the construction bar and its clients.



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To help understand where our clients are going, it's instructive to see where they have been. For many years, their lawyers, insurance carriers and risk managers have told them to run from risk. They doubt whether they have the experience or resources to manage risks on their own, and they jump at the opportunity to protect themselves by "word-smithing" and by purchasing insurance, or requiring someone else to purchase insurance. Enormous sums have been spent on buying overlapping bonds and insurance policies, while attorneys draft indemnity clauses by which clients are protected even against their own passive negligence. Through these various contractual vehicles, our clients have managed their risks by having us lawyers manage their words.

But knee-jerk risk transferring can come at a cost. Some clients have had to rethink that approach, when they find that the market for their services was shrinking due either to their refusal to take responsibility for their own actions or because their own customers were demanding their own one-sided risk transfers. Experienced clients began to realize that it could be more rewarding for them to actively manage the reasonable risks rather than running away from them. In embracing and managing risk, a profit could be made.

The bottom line was simple, although getting there might be difficult. More money could come to those who analyzed exposures with logic and without fear, determined who was the most capable of managing the exposure, and then made sure that that entity received all the resources it reasonably needed to manage the risk successfully – both authority and fee.

The transition from risk avoidance to risk management may entail some cost. But risk-managing clients also recognized offsetting savings from failures prevented, litigation avoided, transaction costs escaped, and opportunities gained through projects completed on time and on budget. To the question, "Wouldn't all parties to the design and construction process be better off in the long run if funds spent on avoiding liability or disputing it actually went into the project to help it succeed," many of them joined in a resounding "Yes."

Representing those enlightened clients, ever growing in number, presents a challenge to the construction bar today. How can lawyers trained in risk-avoidance shift to a focus on risk management so that clients can remain competitive? The first step is getting our clients to understand that enlarging their exposure to risk should ultimately reduce the chances of their being found liable, *if* they manage the risks they assume reasonably and well. They may even increase their profits in the process. After all, if increased responsibilities are handled effectively, the probabilities of something going wrong should decrease. And the problems that do arise should be resolved more promptly and more equitably.

Novartis, its architects, engineers, contractors, and subcontractors took just that approach when converting its old 550,000 square foot NECCO candy factory into an award-winning, state-of-the art, research laboratory. Novartis brought that multi-million dollar conversion project in on time and below budget, without one injured worker, and using Integrated Project Delivery (IPD) and Building Information Modeling (BIM). The contractual tools included a focus on sharing the incentives and rewards for success, accompanied by strong project governance that recognized the need for party flexibility, and even stronger party communication skills. Let's consider these points one by one.

The first step is negotiating contracts with both eyes firmly focused on building success into our clients' endeavors, not just on helping them avoid responsibility and the consequences of their own failures. That means that when a client spots a risk, we ask, "Are you competent to manage the risk alone or with



others? If yes, what do you need from the owner and from others to manage the risk?" In other words, we ask not what must be done to avoid the risk, but what must be done to manage the risk effectively. And then we help the client develop and implement the negotiation strategy that will lead to the delivery of all the support it needs to succeed.

This commitment to "front-end alignment" of the parties to common goals is the most important step you can take pre-contract to increasing the chance of keeping a project on track. It should not be that difficult. No one who enters into contracts for design or construction wants the project to fail. The long-term costs are simply too high for anyone to believe that a wing and a prayer plus good word-smithing are all that is needed for short-term success. Once common goals are identified, the parties are ready for the tough and necessary conversations about how to achieve them during contract negotiation process.

The second step is a commitment by all parties to promote "no-surprise design" once a contract is signed.

## **The Value of "No-Surprise Design"**

No matter how carefully the parties align themselves to common project goals, a corollary of Murphy's Law is unavoidable. Something is going to go wrong sometime. Perhaps no one can predict precisely what that something is, but as night follows day, there are many ways to throw a project off-track and something will come.

The principle of "no-surprise design" and construction is that the parties mutually commit that, even if outside forces might cause difficulties, the contract parties among themselves will never blind-side each other. As soon as one of them has an inkling that something untoward is in the offing, that party will raise a flag for all to see, so that they *collectively* can put their minds and varying expertises together and strategize an effective way to handle it. Why is this important? Because studies show that all too often in project failures, the party that first knew about a problem chose to keep silent. "No-surprise design" rewards those who speak up by expediting solutions and thereby facilitating project success.

Is this a pipe dream? On a lot of projects, it may well be. Contracts drafted too tightly can deny parties the flexibility they need to handle change, and contracts drafted too defensively put everyone on notice that when push comes to shove, everybody will be thinking "shove." On that kind of project, parties have traditionally been trained to keep their heads down and buy an umbrella.

But this doesn't have to be the case, and increasingly, owners know it. Owners who seriously want a complex project to come in on time and on budget know the wisdom of building success-driven processes into their contracts. They also learn the importance of attracting professionals to their project who think more about gain than blame. In the long run, they can save money and time by allowing flexibility in process and encouraging commitments to professionalism. These owners often devote ample resources to project pre-planning, anticipating that it will yield dividends in the end. In fact, owners who have taken this approach report that pre-planning alone saves \$4 to \$8 for every \$1 spent on it<sup>1</sup>.

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<sup>1</sup> Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner and O'Connor on Construction Law* §§7:24 (West Group 2002), citing "Productivity Improvement in Construction" (1989).



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What does it mean for construction lawyers? For some of us, it will require a major change in thinking. Brought up to “not admit responsibility,” we will have to work extra hard to see the wisdom of tackling problems head-on. Others will find the change as refreshing as it is rewarding. After all, if everybody’s fingerprints are on the solution and the solution works, everybody is better off. And if it fails, with everybody’s prints on the failure, the only option available is fix it. Moreover, this is where we can earn the big bucks, helping our clients negotiate the problems that can neither be anticipated nor avoided, developing effective strategies to mitigate and bring the project back on track.

## Will “No-Surprise Design” Be Enough?

Where does the predicate for project success lie? It is not only in “front-end alignment” and in “no-surprise design.” In addition to revisiting our drafting goals and subscribing to “no-surprise design,” we need to focus first on project governance and then on project communication.

Starting with project governance, we should look for creative success examples in other complex business arrangements outside of the construction world. In the world of strategic business alliances, for example, corporate executives are moving away from running their alliances through contracts alone and are moving toward creating governance structures based on shared goals.

The seeds for that change began in the 1990’s with the publication of Michael Hammer’s *Reengineering the Corporation* (Harper Business, New York, 1993). Hammer argued that each organization should reengineer all of its internal processes to maximize efficiencies and ultimately effectiveness. The rewards included new savings and greater profits. Corporation after corporation followed this model, upending its internal personnel and procedures, designing new efficiencies into its business practices. In many cases, profits rose, but only for a short while. Why? Because it was in the relationships *between* corporations that most problems brewed, most money was lost, and most opportunities existed for creating new value. It was in the intersection of businesses where waste and inefficiencies were rife and the biggest opportunities for new value created.

Armed with this insight, corporate America ventured into partnering<sup>2</sup>. In the process, corporate America discovered new ways by which companies could work with other entities or with individuals to produce greater value than what either could produce alone. From this evolved the new movement of “co-creating value,” a process by which multiple parties work collaboratively before and during a project to develop and implement systems, procedures, mechanisms, metrics, incentives—whatever the alliance needs to achieve shared success and value for all participants. Such alliances can push the envelope of front-end alignment and multi-party partnering as the preferred way of doing business.

The construction world played with some of same ideas when partnering became popular in the 1990’s. I say “played” because the industry never quite followed through on the idea. We held partnering sessions *after* the contracts were signed. We signed a partnering agreement *outside* of those contracts, a document with feel-good provisions but no metrics or teeth. We held partnering sessions at the beginning of a project’s construction phase, but then we sat back and watched events play out, expecting the parties to change their behavior with nothing more than a partnering agreement to support them.

<sup>2</sup> There are many books on strategic alliances and partnering in the business sector. One of the best is *Getting Partnering Right: How Market Leaders Are Creating Long-Term Competitive Advantage* by Neil Rackham, Lawrence Friedman, and Richard Ruff (The McGraw-Hill Companies, New York, 1996).



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Had we gone whole-hog, we would have done it differently. At least on the larger and more complex jobs, the owner would have brought in the contractor while construction documents were still being created, holding partnering sessions then. We would have focused those sessions on building the structural underpinnings that would allow all project players to succeed individually and as a group. Lawyers would have helped design procedures to uncover and resolve problems before their impacts multiplied. Lawyers would have helped parties to define their respective needs and metrics of progress, as well as metrics of ultimate alliance success, keeping everyone on the same page with the necessary resources and support to succeed. We then would have incorporated the results of these partnering sessions into each party's contract and measured the parties by their success in implementation. And, we would have convened partnering sessions continually over the course of a project so that the governance structures could be used effectively. Finally, we would have encouraged project owners, the key beneficiaries of partnering, to pay other parties for the time and effort that this enhanced partnering required of them so they would attend partnering sessions willingly, prepared, and ready to work for project success.

Traditional contracts can easily impede this "co-creation" of value. Lawyers often draft contracts using "silo-thinking"—each party sits in its own silo, largely oblivious to costs and benefits in agreements to which it is not a direct party. We then assign roles, responsibilities, authorities, and fees to various parties, expecting each of them to manage their respective risks on their own<sup>3</sup>. But an architect cannot design alone. He needs an owner to make key decisions on performance criteria, schedule and aesthetics. The architect needs someone with construction knowledge to review constructability of the proposed design. And the architect needs engineers to consider the feasibility of building structures required to support the contemplated result. The costs of coordinating input from these various sources are lowest during the early stage in a project's life when the design is not yet fixed.

Everyone ultimately suffers from silo thinking. Take, for example, requests for information. Some of them affect long-lead ordering of supplies or for other reasons may have urgent importance in keeping the job on schedule. Others may be not need answers until much later on the job. Some may be complex, requiring days or weeks of technical analysis. Others may be very easy to answer. Stacks of such questions can land on an architect's desk at the same time, often without any indication as to relative importance or urgency. The contractor may feel satisfied that the problems have been moved from his silo to the A/E's. But if the A/E doesn't correctly guess the correct priorities of each RFI, the project is poised to suffer further costs and delays that could easily have been avoided. The A/E's own contract with the owner is unlikely to provide guidance, often establishing only a single one-size-fits-all response period (if any). In these circumstances, the A/E may naturally tend to the easiest RFI's first, saving the hardest ones for when she has time to be thoughtful. Only two go back to the contractor on the same day as submission. The A/E goes home thinking she's done well, but what does an outside observer see? Soon, the owner, the A/E, and the contractor may very well have big problems on their hands.

For another example, consider how construction contracts often handle delay issues. Typically, they distinguish between delays outside the parties' control, such as weather, unforeseen conditions, acts of God, fire, labor unrest<sup>4</sup> and the like, and those arising from the acts or omissions of one or more parties.

<sup>3</sup> We do this because the standard of care for each party differs and liability concerns dictate that each party be judged differently accordingly. Joinder issues, we fear, would mess up the clarity of the differences making all parties liable for the failures of the project. In projects with silo-thinking this approach makes sense. In projects buttressed by shared goals, front-end alignment, no-surprise design and committed project governance, silo-thinking makes no sense.

<sup>4</sup> One could argue that this is within the control of the employer of the un-restful laborers, and often courts find that it is.



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The contract then apportions the risk of those causes among the parties, depending on foreseeability, assumption of the risk, and legal control. They often concentrate on *results* of delay by slapping liquidated damages on a contractor who fails to meet the schedule and allowing the owner and the contractor various acceleration, compensation, and termination rights—often a sloppy solution at best. None of these clauses builds success into the project. None of them even supports the project. None of them incentivize the parties to promote team solutions for the project as a whole. Indeed, traditional provisions tend to be reactive and are triggered only after a delay has occurred.

Worse yet, the traditional contract clauses relating to delay are based on a myth. They assume that delay-causing issues are the fault of a single party who can be hunted down and made to pay the consequences. Alternatively, when two parties contribute to a delay, many contracts assume that their relative fault can be scientifically assessed so that damages can be apportioned accordingly. But that's not how design and construction work, and we know it.

Consider an example that many readers of this article have probably experienced. The owner has to make a decision on Monday. Time is of the essence. The contractor and A/E each offer advice from different perspectives. The owner asks questions for which neither the A/E nor the contractor has ready answers. They promise to look into the situation and get back to the owner by the following Monday. As a result, one week of delay has occurred. On the next Monday, armed with new input, the owner finally understands the nature of the problem and has a growing sense that one decision will increase the project budget while an alternative decision may save money but add project time. Uncertain to assess the monetary consequences of extended time, the owner asks more questions, and the contractor and the A/E again ask for a week to research their answers. Now the project is up to two weeks of delay, and this process may continue through several iterations until the owner finally feels confident about deciding the issue.

Under traditional contracts, which party should be responsible for this kind of delay? The owner acted prudently in considering the available options, and perhaps it can fault the other parties for failing to anticipate the issue sooner. The contractor and A/E acted reasonably when they requested sufficient time to research a complex issue and render informed advice. And yet, the project is now weeks off schedule.

Is this kind of delay avoidable? Often it is, because a shared partnering approach may have accelerated dialogue that would have brought the issue to a head earlier on the job, when it wasn't yet on the critical path schedule. The parties might have developed an earlier shared understanding of the other parties' strategic goals, objectives and decision-making processes. And, the parties could have designed for themselves a shared governance structure with metrics that allowed them collectively to breathe life into those understandings. The trade-offs that perplexed the owner could have been identified, understood, and addressed by both the A/E and the contractor earlier on the job. An earlier decision could have been made by and for all.

## Where Do We Go From Here?

Can this new partnering approach be realized through drafting different contract clauses? With hard work and imagination, to some extent, the answer should be yes. Partnering should be a basic and compensated service required of all key parties. Creative lawyers should help the parties draft provisions



that enable communication, problem solving, and problem prevention<sup>5</sup>. But systems to handle inter-party dependencies such as requests for information and the like would still have to be designed and spelled out on a project-by-project basis. Other known issues, such as schedule, should be addressed collectively, as would success metrics and problem-identification metrics. Depending on the project, some of these would necessitate new innovative contract language; some not. Regardless of format, this refocused approach to design and construction should have a greater chance of achieving a profitable end for all.

To implement a co-creation value approach to design and construction, it is best to start with the owner, for they ultimately have the greatest power to produce environments that will promote on time, on budget, claims-free projects. It is the owner who selects the team, sets the team's values, rewards the parties for collaboration, empowers them through fee, chastises them for unnecessary game-playing, and fosters an atmosphere where problems and creative ideas bubble readily to the surface to be explored and addressed by everyone. So for those who are owner-attorneys, the challenge is yours.

Does that mean all other lawyers are off the hook? Not a chance. A mutual commitment to "no surprise" design and construction means that every player at the table has to play. Success is unlikely if any major participant sits back or actively undermines the shared process. Good project governance requires that everyone has to come to the table, prepared to listen and prepared to talk. And therein lies the major problem: How does a party feel secure in speaking when every statement can be held against it in a court of law?

## The Importance of Communicating Effectively

A colleague once asked me to help implement partnering on a \$40 million project that was drowning in problems. I asked first to sit in on a job meeting to get a sense of the atmosphere. I was struck by the lack of communication. Apparently schooled by their insurers, attorneys, trade associations, and past failures, everyone seemed reticent to volunteer information. Indeed very little information was shared, and when it was shared, others reacted with either surprise or affront. The net effect impeded true conversations before they could begin. It was also apparent that some of the same words were heard differently and understood differently depending on the listener's expertise – or in the case of this owner, lack of expertise. As a result, the entire project was suffering miserably.

For an insight into such problems, we can examine a seminal study where trained observers actually sat in on group meetings and negotiations and measured what the participants were doing to reach settlements that would stand the tests of time<sup>6</sup>. These researchers, led by Neil Rackham, found that expert negotiators plan and communicate differently and in ways that are measurable and can be learned. These skills can be very important on a complex construction project, where the parties are often negotiating various deals throughout the job. The communication behaviors of expert negotiators are worthwhile for construction lawyers to learn and use.

<sup>5</sup> Lawyers focus on dispute avoidance and resolution. Clauses supporting them would remain, especially those in support of mediation, but the focus of this new contract would be on inter-party problem solving and value-creation, a far more assertive approach to the realities of design and construction.

<sup>6</sup> See Neil Rackham, *The Behaviour of Successful Negotiators* (England: Huthwaite Research Group, 1975) N.B. Rackham is my husband. His findings are terrific notwithstanding.



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Rackham defined "expert negotiators" as those who 1) routinely came to agreement, 2) shaped agreements that were routinely implemented successfully, and 3) who left the negotiation table with the other party willing to negotiate with them again. Average negotiators lacked one or more of the three characteristics. For example, some could come to agreement, but their agreements were not always successfully implemented. Others could come to agreement, but their Other<sup>7</sup> did not want to negotiate again.

One would expect that Rackham's success measures should be goals of every construction attorney today. After all, some negotiated agreements may take years to be fully implemented, and durability is therefore a key metric of success. Business considerations make it desirable for our Others to be willing to negotiate with us again, because an increasingly specialized industry often brings the same parties together again over time. Among lawyers, the professional market is so small and so talkative that our personal reputations are among the most significant assets we personally bring to the table. The more we are perceived as empathetic, creative, personable and prepared advocates<sup>8</sup>, as well as competent, candid, and concerned<sup>9</sup>, the easier it will be for the Others to say "yes" in a negotiation. The issue for us then is: What do we need to know to communicate effectively?

The first point is that expert *communicators* know how to transmit information in a way that will allow it to be received, heard and understood. When Rackham sat in on negotiations, he measured discrete communication behaviors that fell into three primary categories<sup>10</sup>:

- Initiating
  - Making A Proposal
  - Building On The Proposals Of Another
- Reacting
  - Supporting
  - Disagreeing
  - Defending/Attacking
- Clarifying
  - Testing understanding
  - Summarizing
  - Seeking Information
  - Giving Information

Also noted were two additional behaviors observed mostly in group interactions: Bringing In (soliciting input) and Shutting Out (interrupting, cutting off and the like).

<sup>7</sup> I use the word "Other" to signify simply that the person is a person with his or her own perspective of the problem and interests and needs, not an adversary out to get you, not a friend to cherish, just an Other, not you.

<sup>8</sup> These are four of the over-arching attributes of effective problem-solvers found by Andrea K. Schneider in her seminal treatise *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style* (7 Harvard Negotiation Law Review 143, 2002)

<sup>9</sup> The three key attributes of trust uncovered in yet another Rackham study.

<sup>10</sup> For a detailed description of these behaviors and how each plays a role in advancing a negotiation you may want to read Chapter Six, *The Communication Behaviors of Expert Negotiators* of my book, *The Architect's Essentials of Negotiation* (Second Edition) and Chapter Seven, *Collaboration and Team Building*.



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Some expert negotiators relied primarily on proposing, giving information, and shutting out to convey their ideas. Others used less of those three behaviors and relied mostly on building on the proposal of another, testing for understanding, and seeking information to persuade. The difference was so measurable that Rackham could classify the two respectively as "Pushers" and "Pullers." Both types of persuaders enjoyed successes, but the expert negotiators most often fell into the Puller category. These negotiators used communication behaviors to help the Others persuade themselves. In other words, if there were any persuading to be done of the Others, the Others were the ones who were helped to do it.

Most lawyers are trained to be "Pushers."<sup>11</sup> We are grounded in advocacy and evaluated by our eloquence. We learn to give information, and, when we seek information, we learn to ask questions so the answers can be used against the Other, not particularly to empathize with or even understand the Other. We get "A's" when we win, especially if the Other loses – at least a little.

Perhaps you remain unconvinced about the value of Pulling and are not quite ready to give up the power of Pushing. Returning to the data, research shows that twenty percent of expert negotiators' behavior revolves around using questions. They Seek Information from the Other nearly *three times more often* than the average negotiator. Ten percent of their behavior has them Testing Understanding—more than twice as often as the average negotiator. That means at least fully a third of their behaviors involve Pulling. When they do make statements, some eight percent of their behavior involves Summarizing what they heard the Other say. And they use this summarizing, a clarifying technique, nearly twice as often as the average negotiator. Putting those percentages all together, some forty percent of expert negotiators' behavior involves clarifying the Other's thinking – *twice as much as average negotiators' behavior*.

Why do expert negotiators rely so heavily on questions and other clarifying behaviors? Perhaps the most compelling reason is that *questions help you persuade the Other*.<sup>12</sup> This is consistent with our common domestic experience when one spouse tells another what to do without first soliciting (and at least appearing to consider) the Other's perspective. The odds of success are far higher for those who listen for understanding and explore the Other's issues. It may sound trite to look for common ground and mutually beneficial solutions, but it is remarkable how traditional risk avoidance on construction projects leads parties to overlook this positive approach. When questions are asked, not to confuse but genuinely to inquire about the Other's position, they can serve stunningly well to reveal *the Other's needs, values, and priorities* which, by the way, is precisely what you need to know to negotiate a solution.

Questions can serve other purposes, too. In addition to their utility in persuading the Other of weaknesses in its thinking, questions are also great for discovering the weaknesses in your own thinking. And because all you're doing is asking a question—and not trying to sell your idea—nobody needs to know how incomplete your own thinking is. Further, *questions help with elegant option development*. Even the

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<sup>11</sup> This finding results from the fact that, when you add in the data on giving information, also a form of clarifying behavior and something lawyers are trained to do, Pushers end up "clarifying" more than Pullers. They spend that *much more time than expert negotiators giving information* about the rightness of their negotiating stance.

<sup>12</sup> While Douglas Stone, Bruce Patton, and Sheila Heen in their wonderful book *Difficult Conversations: How to Discuss What Matters Most* (New York: VikingPenguin 1999) down play the power of questions to persuade, *SPIN®Selling*, again by Rackham, has persuaded me that if every negotiator used questions to uncover explicit needs and then helped the parties fill those needs, the problem of "reactive devaluation" would occur less often. In the construction world that could mean that a lot more projects could stay on track and a higher degree of customer satisfaction could result. *SPIN®Selling* is mandatory reading in my George Washington University Law School class on negotiation.



best of negotiators gets stuck from time to time, and a game of "What if. . .?" can prove just the strategy for bridging an impasse.

*Questions are also a solid alternative to saying no.* There is one reality in all negotiations: Anyone can ask for anything at any time, and they often do. But there is a risk in pressing for something with knowledge that Other will not or cannot agree. An excessive one-sided request may cause goodwill to be lost. A well-thought-out question often can explore such issues and save the responding Other from having to say "no".

*Questions can also help you build trust.* The more competence, candor, and concern a party perceives, the more that party is likely to trust the Other. As you can't buy or borrow trust, what better way is there to build it than by asking questions that cause the Other to perceive the depth of the inquirer's understanding. And, if the Other entertains doubt as to your trustworthiness, a thoughtful use of information that the Other just gave you proves that you listened and understood the Other.

In these ways, clarifying behaviors – that is, seeking information, summarizing and testing understanding – will help a party bridge information gaps, emotional disruptions, and the dangers of projects jack-knifing before you. By building on the ideas of another and incorporating those ideas to the greatest extent feasible, players can find common ground sufficiently attractive that all should perceive value in living there together.

Some may object that all of this is too touchy-feely. Others may argue that new technologies like Building Information Modeling (BIM) have obviated the needs for enhanced personal communication behaviors. For those skeptics, it may be helpful to study the successes and failures at their next project meeting and consider whether the successes are achieved by use of initiating, clarifying and supporting reacting behaviors.

For construction lawyers, this analysis suggests a whole new set of tools to add value. Despite their sometimes negative image, lawyers can actually contribute to keeping a project on track by promoting improved communication behavior. During the negotiation phase, counsel can concentrate less on pinning everything down (at the expense of other parties) and concentrate more on building common goals and success metrics into the project. This doesn't mean that tough issues should be avoided; it means they can now more safely be addressed. With solid communication behaviors at each party's behest, lawyers can help parties consider how their range of collective experience can be aligned to minimize perceived risks. They can make sure that each party has an opportunity to explain its interests and needs. Lawyers can help further, summarizing what each has said so that all know they are being heard. Ambiguities can be addressed through intelligent questions, and creative attorneys may be able to put a proposal on the table if none is there. They may be able to find a nugget in the Other's idea on which a solution can be built. They can solicit opinions if a proposal isn't being engaged in the dialogue. In short, counsel can utilize the skills of an expert communicator to help the parties bridge differences and solve problems. After all, isn't that why lawyers entered the profession of problem solving in the first place?



## Appendix

If your reading time is limited, here are ten of the best books on negotiation. Enjoy.

1. *Getting to Yes: Negotiating Agreement Without Giving In.* Roger Fisher and William Ury (Boston: Houghton Mifflin, 1981)
  2. *Beyond Winning: Negotiating To Create Value In Deals and Disputes.* Robert H. Mnookin, Scott R. Peppet, and Andrew S. Tulumello (Cambridge: Harvard University Press, 2000)
  3. *Effective Legal Negotiation and Settlement.* Charles B. Craver (New York: Matthew Bender & Company, Inc. 2005)
  4. *The Fast Forward MBA in Negotiating and Deal Making.* Roy J. Lewicki and Alexander Hiam (New York: John Wiley & Sons, Inc. 1999)
  5. *SPIN® Selling.* Neil Rackham. (New York: McGraw Hill, Inc., 1988)
  6. *Difficult Conversations.* Douglas Stone, Bruce Patton and Sheila Heen (New York: Penguin Books, 1999)
  7. *Women Don't Ask: Negotiation and the Gender Divide.* Linda Babcock and Sara Laschever (New York: Princeton University Press, 2003)
  8. *Thinking Strategically: The Competitive Edge in Business, Politics, and Everyday Life.* Avinash K. Dixit and Barry J. Nalebuff. (New York: W.W. Norton & Company, 1991)
  9. *The Trusted Advisor.* David H. Maister, Charles H. Green and Robert M. Galford (New York: The Free Press, 2000)
- and, of course, mine
10. *The Architect's Essentials of Negotiation.* Ava J. Abramowitz, Esq., Hon. AIA, (New York: John Wiley & Sons, 2009)

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