

Mann Report, May 2011

The Negotiation Tapes: Part I

by Joshua Stein, Joshua Stein PLLC



If you negotiate commercial real estate transactions - loans, leases, acquisitions, sales, joint ventures, whatever - you probably hear certain arguments across the table again and again. You probably offer up many of the same arguments for your own positions.

I call these arguments the “negotiation tapes.” I’ve collected them here and numbered them for convenient reference. For your next negotiation, you can bring along copies of this article; hand them out; and save time by referring to these arguments by number. I’ve also commented on strengths and weaknesses of these arguments and how to respond to them.

1. *It’s market.* Here the tape player is effectively telling you that whatever you ask for isn’t normal; maybe you don’t even know what you are doing. But “market” really depends on which piece of the “market” you have encountered in your own experience. What’s “market” to one person isn’t always “market” to the next. So it boils down to figuring out some resolution that works, regardless of what other people do.
2. *Another bidder wants to take this deal away from you.* This can very effectively “cut to the chase.” But the fact that the tape player is still talking with you almost admits that the competing bidder isn’t all that far along or attractive yet. And who’s to say that the competing bidder will be more of a pushover than the bidder already at the table well along in negotiations? Threats to walk away often lead to equally counterproductive “lines in the sand.” It’s often better just to focus on the issues.
3. *No court would ever enforce this language, so don’t worry about it.* That might be true if courts were fully predictable, but they’re not. And why should we bear the risk of that kind of a surprise or the litigation costs of confirming the language really is unenforceable? But if the issue really doesn’t matter, it’s an easy yes or an easy trade for something else.
4. *I’m already going to be in trouble with my principals for all the concessions I’ve made.* The tape player is the “good cop,” and there’s a “bad cop” lurking in the back room. But if a deal makes sense, we all know both cops are going to approve it and go forward. And shame on you, perhaps, for not insisting on dealing with the real decision maker from the start.
5. *We don’t really need to put this in writing.* Yes we do.
6. *If we did it for you, we’d have to do it for everyone.* I call this the bureaucrat’s first argument against everything. You can respond by saying the present case is different, for whatever reason. Or the tape-player should do it for everyone, or at least in similar circumstances. Or perhaps you just don’t really care about what they might have to do for other people.
7. *It’s a great idea, but we’ll never remember.* Usually this comment comes in response to some creative idea to add new counterintuitive steps to a relationship or process that usually works a certain way. And the comment is usually right. The people in the real world who will actually administer any contract rarely will actually look at it, until it’s too late.
8. *It’s standard.* Maybe yes and maybe no. Tenants often hear this argument from landlords in defense of pages of “gotcha” clauses on assignment and subletting—not suggested in any way in the term sheet. But it’s a “standard” argument in other contexts too.
9. *I can’t assess the size of the risk you’re asking me to take.* This often arises in allocating environmental or other unknown risks. It can require more due diligence and potentially even third-party insurance. Many transactions can’t support the resulting time and expense. And any such process creates its own issues and risks.
10. *You don’t really need what you’re asking for; you already have it.* Sometimes that’s true. Other times, when you dig into it, the statement isn’t exactly right and there’s a difference. Raising the issue may fix an inconsistency and produce a better substantive result.
11. *Casualty and condemnation don’t really happen.* They do. In a substantial portfolio they happen with some frequency. They aren’t just lawyers’ fantasies. On the other hand, they shouldn’t become business issues. Just try to give each party “as close as possible” to what they would have had without casualty or condemnation.
12. *It’s such a small risk, why are you worrying about it?* This argument cuts both ways, of course. The size of the risk doesn’t dictate who should bear it. But the “small” risks that rarely hit can eclipse the larger genuine issues in a deal. It can make sense to ask how “the rest of the world” resolves an issue, so as to stop spending a lot of time on it. That assumes, of course, that the present transaction doesn’t have special characteristics that justify handling the issue differently.

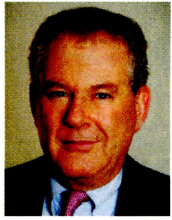
Next month’s column will continue with negotiation tape #13, “We need to get someone else’s approval, and we can’t reach them.”

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In last month's column, I introduced the concept of the "negotiation tapes" —arguments that you hear again and again in commercial real estate negotiations. Here I continue the list, with tapes 13 through tape 27.

13. *We need to get someone else's approval, and we can't reach them.* Many negotiation tapes rely on the "unreasonable third party" — someone else, absent, who prevents the negotiator from agreeing to something, reasonable or not. Maybe you should have demanded that the unreasonable third party actually show up from the start.
14. *The lawyers are getting in the way of the deal.* Here the theory is that clients don't control their lawyers, and instead the lawyers are off on their own breaking deals not making deals. In my experience, though, most clients know exactly what their lawyers are doing and call the shots or choose not to.
15. *This isn't fair.* Why would you expect anything to be "fair"? And what does "fair" mean, anyway?
16. *Let's get everyone in one room and hammer it out.* Sometimes this will close up the last few issues — it forces all the unreasonable third parties to actually attend and participate — but it can waste time if done prematurely.
17. *My model doesn't include that cost.* In other words, you made an assumption that turned out wrong. But it doesn't matter what assumptions went into pricing; either it works for both parties or it doesn't.
18. *I'd make this concession, except you might sell to someone else.* Do you really think a hypothetical "someone else" will behave differently — especially if a transaction gets into trouble?
19. *Our changes will actually benefit everyone.* Proceed with care.
20. *It's just boilerplate.* In other words, you're not supposed to actually read it. But surprises can lurk in boilerplate. Read it. And object where merited.
21. *We do a lot of deals like this one, and all our documents need to be the same.* One usually hears this argument only after all principled arguments have failed. Unfortunately, the party making this argument often means it and has the leverage to make it stick.
22. *I need flexibility; I don't know what the future holds.* But do you really need as much flexibility as you say? And once you've made this deal, aren't you committing to going down a certain road? You can't have it both ways.
23. *I need to worry about my exit strategy.* Anyone buying into a deal needs to leave the door open to get out later. A good real estate transaction needs both a buy and a sell (or a refinancing). Even if something works today, if it can impede a later exit (or refinancing), it often won't fly. Of course, everyone has different ideas about what "the next buyer" (or lender) will require.
24. *We'll be reasonable.* Absolutely, as long as the relationship is still good; you aren't too busy with other things; you aren't reorganized out of a job; your company doesn't file bankruptcy; the same people are involved; and they remember how reasonable they said they would be.
25. *We're offended that you would even think we might do that.* If it's so unlikely you would do bad things, then you should have no problem attaching draconian consequences to them. And the "trust me" argument is particularly weak when the parties haven't done business together before.
26. *When we negotiated this issue with someone else on another deal, they accepted our position.* Perhaps. But it doesn't mean much without understanding the pricing, other terms and context of that other transaction. Or maybe we just don't care.
27. *You're retrading.* Here the parties have tentatively agreed to something, but not everything — and nothing legally binding. As negotiations proceed and the parties think more, they may want to rethink tentative agreements. It's not great to do, but it's certainly done. It's one reason transaction participants and their counsel read and think about documents before signing them.

The "negotiation tapes" summarized here do sometimes help move things forward, but more often they're just the next layer of the onion. You have to peel off that layer to get to the layer that really matters and will help you conclude your deal.

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