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Firm alliances

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of a global law firm alliance

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Mind control

Ori Wiener of Moller PSF Group reveals the key influencers in fee negotiations and how partners can take advantage of them

Few aspects of a lawyer's career, other than technical expertise, have as much of an impact on individual success as those relating to handling clients. Of those, fee negotiation, i.e. the ability to be comfortable negotiating with a client, is probably the most challenging.

This skill has become even more important over recent years as competition among law firms has become fiercer, clients have become more professional in their approach to sourcing legal advice through the increasing use of panels and procurement processes, and alternatives to the hourly rate approach have become more established.

The financial crisis has also contributed additional pressures on law firms as the declining volume of work has prompted many firms and lawyers to offer discounts on their 'rack' rates during the crisis. The trouble is that prices are now proving to be 'sticky' as clients are resisting a return to pre-crisis pricing.

Given the importance of this skill, it has always been striking that only a tiny fraction of the profession seems at ease negotiating with clients. The fact that some lawyers in private practice seem to have a natural talent further highlights the shortcomings of the majority. Given that almost all lawyers are comfortable with negotiating contracts on their clients' behalf, it suggests that the issues are of a personal or psychological rather than a technical nature.

Market shift

So what is it about fee negotiations that make it so difficult for most lawyers to engage in? A number of factors have conspired to make this a challenge.

The impact of globalisation has been a significant driver for change. It is less than 15 years since firms such as Linklaters decided to embark upon a global strategy in pursuit of cross-border opportunities. The resultant growth in the size of firms and their need for a broader client base required partners to be more active in the pursuit of new clients and business. This left the current generation of partners responsible for leading relationships and fee negotiations with little or no role models.

At the same time, clients have become more sophisticated in their demands on and use of external counsel. These demands included greater commercial understanding of clients' needs and better value for money, or at least more transparency and predictability of costs.

no surprise that lawyers are finding client service and fee negotiation a challenge.

In addition to these big picture issues, however, there are a number of specific psychological drivers that make fee negotiation particularly challenging and which easily explain why otherwise highly competent individuals avoid engaging in an activity that has significant potential benefits. Lawyers who appear to be 'born' fee negotiators seem to understand these drivers and have found ways to use them to their advantage.

To help understand these drivers, it is helpful to look at a typical negotiation (see Figure 1). Almost all negotiations involve a preparation phase, three phases (also referred to as acts) in which the gap between the two parties is established,

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The legal industry continues to struggle with these challenges. Many firms and training bodies are still pondering how to broaden their continuing professional development or qualification programmes to include commercial topics.

This, in turn, has meant that many private practice lawyers still see themselves first and foremost as practitioners of law rather than as professional service providers who happen to be legally trained and qualified. Given the dearth of appropriate training or role models, it should come as

narrowed and closed, and finally an implementation phase.

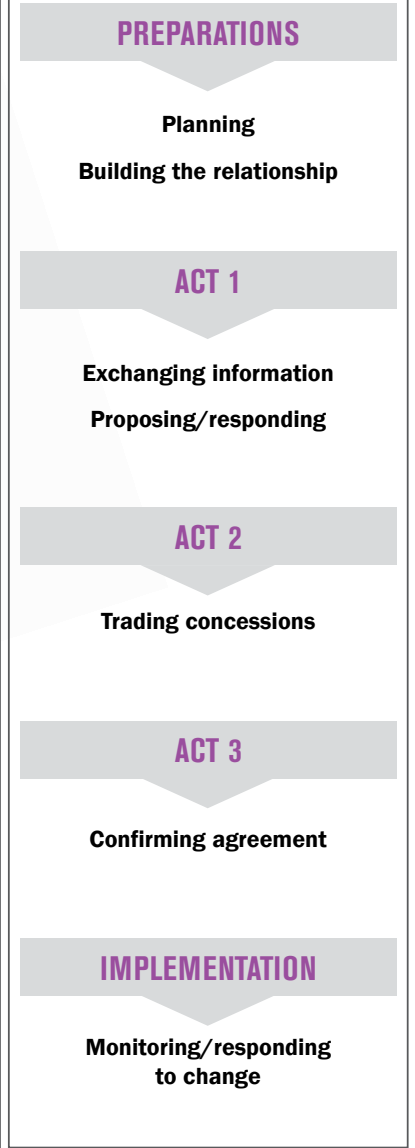
A multitude of psychological drivers operate in each of these phases. It is therefore essential to recognise the most important ones in each phase and to use them to one's advantage or to counter their influence.

Preparation phase

As described in earlier articles in this series, preparation and planning are crucial determinants for negotiation success.



**FIGURE 1:
TYPICAL NEGOTIATION PROCESS**



Drivers that affect how much and how well we prepare will therefore have a disproportionately large impact on negotiation performance.

The psychological phenomena most relevant during the preparation phase are culture and ambition. The impact of culture may be more obvious.

Depending on each partner's cultural origins, particularly during his formative years in terms of professional development, he will be more inclined to see negotiations as something normal or alien.

Some of the most common reasons for not negotiating include: "one does not talk about money"; "this is not what being a lawyer is about" and "I hate having to justify the value of our work".

All of these statements reflect a cultural perspective fairly standard for typical Western professionals. If not recognised, it becomes easy to succumb to these biases and avoid fee negotiations or defer planning for a fee negotiation.

One of the most significant determinants of negotiation success is the ability to set ambitious and realistic targets. Experience shows that most

untrained negotiators fail to set themselves sufficiently ambitious targets, thus needlessly leaving money on the table. Applying a methodology for setting ambitious and realistic targets and supporting these through preparation is a key hallmark of an effective negotiator.

The three Acts

The level of psychological pressure experienced by most people rises dramatically when the protagonists meet at the negotiation table. Experienced and trained negotiators understand this and use it to their advantage. They also switch their focus, depending upon the stage the negotiation has reached.

For example, outstanding negotiators will focus during Act 1 (when the parties first meet) on building trust, so as to be able to extract as much information as possible from their counterparts. Such efforts don't just aim to generate competitive advantage, but also often help to craft agreements that are of mutual benefit by increasing the total size of the pie to be divided.

Furthermore, building trust early on also encourages each side to make

greater efforts to find win-win solutions. Where there is an absence of trust, on the other hand, negotiations tend not to progress as well and the outcomes tend not to be as positive to either side.

Experienced negotiators make an effort to project their negotiating power at an early stage of a negotiation. This can be done in a number of ways, typically by applying the effects of a psychological phenomenon known as loss aversion.

The best example is to tell a counterpart early on that one has alternatives. Who has not been told that "one of your competitors

PSYCHOLOGY OF FEE NEGOTIATIONS

Do

- ✓ **Go into a negotiation with a positive mindset** – it will help you to focus on opportunities and encourage your counterpart to jointly come up with win-win solutions.
- ✓ **Be ambitious** – setting ambitious and realistic targets will help you to improve your negotiation success. Remember that it is difficult to end up with something better than originally asked for.
- ✓ **Look for ways to increase the overall size of the deal via trade-offs** – one of the commonest mistakes is to assume that there is only one issue to negotiate, as this can only lead to a win-lose situation.
- ✓ **Consider going first** – anchors are some of the most effective tools in a negotiator's armoury.

Don't

- ✗ **Let emotions get in the way** – being objective and keeping emotions out of the way will allow you to become flexible and spot opportunities.
- ✗ **Threaten** – this will only lead to escalation or counter threats.
- ✗ **Be overconfident about getting a positive outcome** – prepare for the worst. Negotiations don't happen on their own and, besides, what if the other side prepares – would you want to go into a negotiation at such a disadvantage?
- ✗ **Assume there is a fixed scope** – few negotiations are truly of a 'fixed pie' nature. Look for the multiple negotiation issues and find trade-offs using different interests and values.
- ✗ **Give away concessions** – always ask for a counter concession, even if only of symbolic value. It is surprising how much incremental value can be gained or lost if concessions are traded or given away.
- ✗ **Fear negotiations** – they have become a fact of modern day law and are here to stay. Good negotiations will improve economic success and contribute to client relationships.

is quoting X" or that by not agreeing, the other side will forgo a major benefit, i.e. "if you don't agree, you won't get X".

Another powerful influencing tactic used to great effect at this stage is anchoring. Most people evaluate a proposal or the outcome of a negotiation against a reference point set early in the negotiation. The side able to set its anchor first is typically in a stronger position.

It is therefore usually an advantage to be the first to put a number on the table. Although lawyers are typically invited by clients to go first, most lawyers are reluctant and defensive rather than relish the opportunity. Lawyers who are natural fee

negotiators have a preference to go first or seize the opportunity when invited to do so.

Experienced negotiators will also be on the lookout for any signs that indicate their counterparts are not committed to their demands or opening positions. The underlying psychology operating here is known as cognitive dissonance. Individuals demonstrate discomfort with a particular negotiation position either verbally or physically.

Typical signs include evasive body language, hesitation, throat clearing, changes in voice pitch and a series of key words or phrases such as "in the region of", "about" or "we were thinking of...."

With a bit of practice, these signs are easy to pick up or can be eliminated from one's own behaviours.

One of the most dangerous pitfalls during Act 2 (the stage at which mutual concessions are traded) is the reciprocity bias. This powerful bias operates at several levels. People's tendency to go for a 'split the difference' approach can be exploited by sharp negotiators who raise their demands, thus shifting the apparent mid-point in their favour.

More insidious, however, are techniques in which one party makes demands (that are not seriously meant) and then withdraws these, sometimes even

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unprompted. That party then goes on to demand a meaningful counter concession, thereby applying maximum pressure on the other side to give up something valuable.

Although the closing phase tends not to be as critical in a legal fee negotiation, there are a number of drivers that can be used effectively. These include a further application of loss aversion, as in “we are so close to an agreement, if you could just agree to....., otherwise you won't get....”.

Also effective at this stage are tactics such as 'salami slicing', which work because of the effects of framing. By positioning extra demands as minor compared to the overall size of the deal, effective negotiators can squeeze out surprising amounts of additional value for themselves without risking the overall agreement.

The key issue with all of these influencing and negotiation techniques is that, when recognised and understood, they can be used to great effect or, if one is on the receiving end, their effects can be neutralised with relatively little effort. ^{mp}

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