Exploding myths

Partner Ori Wiener of Møller PSF Group Cambridge debunks some of the common myths surrounding fee negotiations

Negotiations can be very challenging at the best of times. For lawyers, fee negotiations can be the most challenging of all, given the emotional charge and risks associated with them.

A number of factors specific to lawyers exacerbate this challenge. These include lawyers' horror at the thought of losing a mandate or client for the sake of "a bit more money". This factor is particularly powerful in larger partnerships where there is little direct linkage between the fees or profits generated by any one partner and their annual drawings.

Other contributing factors are the desire to please clients (typical of many professional service providers) and a paucity of commercial training or experience. This mixture of fear, ignorance and lawyers' practice of deducting general principles from single precedents creates an environment in which myths about fee negotiation abound. This is especially true if they also reinforce many lawyers' innate prejudice and distastes for speaking about or haggling for money.

Most fee negotiation myths bear little relation to reality, especially when allowing for a realistic assessment of client relationships and lawyers' ability to differentiate their services on non-price factors.

Myth 1: Good fee negotiators are born, not made

Variations on the theme include: some just have the knack, it's not in my nature to negotiate with clients, I can't, or it's too embarrassing.

Many lawyers find negotiating with clients extremely stressful. This is because their desire to satisfy clients on legal issues is compounded by well-intentioned advice from consultants preaching the gospel of client satisfaction above all else. This unfortunately has led many lawyers to the erroneous conclusion that maximising client satisfaction requires minimising fees and avoiding – at all costs – potentially acrimonious fee discussions.

Although most lawyers consider themselves competent or even excellent negotiators when working on behalf of clients, the majority are uncomfortable with negotiating fees with clients. This demonstrates that it is not negotiation *per se* which is the issue, but the context within which these negotiations take place.

The fact is that fee negotiation is a skill that can be learnt and improved.

A typical partner will, compared to the thousands of hours invested in technical training over the course of his career, have invested less than a hundred hours' training on commercial or financial management issues.

Even the most talented of negotiators will generate poor results without the right support from their firms, if they don't prepare or if they don't apply effective negotiation techniques. Senior management should not underestimate the potential impact they can have in raising their partnership's fee generation competencies.

Myth 2: Clients only care about the money

Alternatives include: fee negotiations are best kept focused and simple, or we only need to worry about the headline rates.

Ineffective fee negotiators tend to focus on the most salient issues, such as hourly rates or the fixed price estimate, ignoring broader interests and issues. This reduces the chances of collaboration between the negotiating sides and inhibits effective integrative negotiation, i.e., win-win situations.

Most fee negotiations are about a package of issues, of which price is one of the most visible but rarely the most important. Matters on which several providers are able to deliver the required advice to a similar quality (commodity business) will inevitably be more price driven than more complex or strategic assignments. Effective negotiators find ways of differentiating their service offering, generating additional margins.

Poor negotiators enter a negotiation looking only to assert their demands and make as few concessions as necessary to the other side. They also tend to rush to their demands too quickly. Effective negotiators invest time, especially at the start of a negotiation, to understand and explore all parties' interests, motivations and constraints.

Independent surveys regularly identify price as an important but rarely the most important factor in determining the selection of external counsel. Experience however shows that price is most often cited as the reason for losing a mandate, typically because clients consider this to cause the least offense and because it avoids the need to discuss intangible issues such as relationships.

Myth 3: Clients always want to squeeze us down to the last penny

Variations include: they don't care about the relationship, they don't care about the quality, or they don't understand the complexities of the issues and process.

Many lawyers believe that clients inevitably only want to pay the least amount possible and that any opportunity clients have to discuss fees will inevitably result in fee reductions. This may well be the case during a competitive selection process or at the end of a mandate when the final bill is significantly higher than was first agreed (or estimated) and the client is demanding a write-off in relation to all or part of the overrun.

However, many clients don't care about the process: they only care about the outcome or deliverables. In fact, clients who are not themselves lawyers are often not able to assess the quality of the legal work done. They need help to understand how a lawyer and his team have added value to the business.

Unfortunately, many lawyers and law firms delude themselves about the quality of their relationships and are surprised and unprepared when asked to bid in a competitive process. Where there is no relationship to differentiate a firm, price will inevitably take on a much higher importance.

Buyers of legal services also face a major challenge: to find advisers they can trust to deliver the advice in a manner that is suitable to their needs. Clients have incentives to invest in relationships and to allow for more even-handed fee discussions. Their greatest fear is a procurement process that will result in a service provider either not delivering the quality of service needed or that will engage in tactics designed to claw back margins in ways that the procurement team will not be able to manage.

Myth 4: They have all the power

Variations on the theme include: they can impose their prices on us, or if we don't agree to their terms and demands we will lose the instruction.

Many lawyers believe that the only way to compete against other firms is by cutting their fees. This feeling is naturally encouraged by clients (such as through the use of competitive selection processes).

The vast majority of negotiators, irrespective of whether they represent buyers or sellers, believe that the other side has a stronger negotiating position. This is due to the availability bias, a well-documented psychological phenomenon in which information which is readily available is given greater weighting than information that is less readily available.

In most negotiation situations, a negotiator will be more aware of any shortcomings in his

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own negotiation position than of those in the other side. This is why preparing has such an impact on the outcome of a negotiation, as it enables a negotiator to identify potential weaknesses in the other side's position.

The balance of power may well be skewed in favour of clients at the start of a matter, especially when they use procurement techniques or competitive auctions. However, once a matter is underway, there are usually opportunities for effective negotiators to recoup some or all of any initial discounts.

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Myth 5: You have to be a tough negotiator to be successful

A common belief is that negotiating a good fee deal will risk long-term relationships or potential opportunities for follow-on business.

Many lawyers find it difficult to separate the issues from the people. Because they have not received much fee negotiation training they can only imagine asserting their demands in head-to-head confrontations.

Effective negotiators know how to be tough on the issues but warm on the people. There are several negotiation styles, of which 'tough' is only one. No one style is better than the others and each is associated with strengths and weaknesses. For example, tough negotiators risk missing out on the bigger gains that collaborative negotiation can deliver.

In actual fact, well run fee negotiations help lawyers to improve their client relationships rather than weaken them. This is because there is better management of expectations and the development of more robust relationships marked by mutual respect and trust.

FEE NEGOTIATION TACTICS

DO

- ✓ **Prepare –** it will always generate positive returns.
- ✓ **Spend time thinking about the other side –** this will help to shift the balance of power in your favour, allow you to anticipate potential demands and identify concessions to ask the other side.
- ✓ **Be ambitious (and realistic) –** having an ambitious and realistic target will probably have the single greatest impact on the eventual outcome of a negotiation.
- ✓ **Be committed to your position/demands –** avoid weak or floppy language that undermines the credibility of your demands.
- ✓ **Rehearse –** you never get a second chance to make a good first impression.
- ✓ **Listen –** you'd be amazed at what you can learn from the other side.

DON'T

- ✗ **Assume it will just happen –** good fee agreements don't emerge on their own.
- ✗ **Confuse issues, positions and interests –** most people do and end up in deadlock.
- ✗ **Ignore feedback or signals from the other side –** this happens all too often, especially when we see the fee negotiation as a win/lose competition.
- ✗ **Be afraid to ask –** remember: if you don't ask, you don't get.
- ✗ **Make a concession without getting one in return –** negotiation sharks will be on the lookout for such signs of goodwill and mercilessly exploit them.
- ✗ **Give up at the first setback or challenge –** after all, if it were that easy, it wouldn't be called a negotiation.

Myth 6: Fee negotiations should always be formal, set pieces

Also common are: we only negotiate at the start or end of a matter, or we always have advance notice of a fee negotiation.

Being process oriented, lawyers typically think of fee negotiation in the context of formal discussions at the start or end of a matter. They are thus unprepared for client demands during a matter or to take advantage of opportunities to reopen a fee agreement when it is to their advantage.

Fee discussions can happen in many different situations and settings. Research has shown that surprise or flash negotiations tend to result in outcomes that are more biased in favour of one side (usually the one initiating the discussion).

Lawyers who have an overall understanding of their fee strategy are likely to be in a better position to spot favourable opportunities for reopening parts of a fee agreement or to defend their position from client attempts to chip away at prices. mp

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Endnote

1. See *Buying Professional Services,* Fiona Czerniawska and Peter Smith, Economist Books, 2010