

BOOT CAMP

IN THE THIRD OF A SERIES OF ARTICLES ON FEE MANAGEMENT, EXPERT ORI WIENER OF MØLLER PSF GROUP CAMBRIDGE EXPLORES HOW TO ENSURE PARTNERS ARE FULLY PREPARED FOR FEE NEGOTIATIONS

FOUR THINGS YOU WILL LEARN FROM THIS MASTERCLASS:

- 1 How to shift the balance of power in your favour
- 2 How not to weaken your negotiating position
- 3 When to discuss fees to ensure maximum results
- 4 How to win clients over to your side

Partners who are uncomfortable with negotiating fees with clients invariably attribute this to a fear of being at a disadvantage in terms of negotiating power and a concern that the negotiation will put their prospects for future work at risk. Hence, few if any partners actively prepare for fee discussions, even if they are imminent.

Richard Godden, the former head of client sectors at Linklaters, notes that “if partners don’t prepare, they won’t know if a particular proposal should be accepted or rejected”. Furthermore, he adds, “lack of preparation will make a lawyer appear secretive or evasive

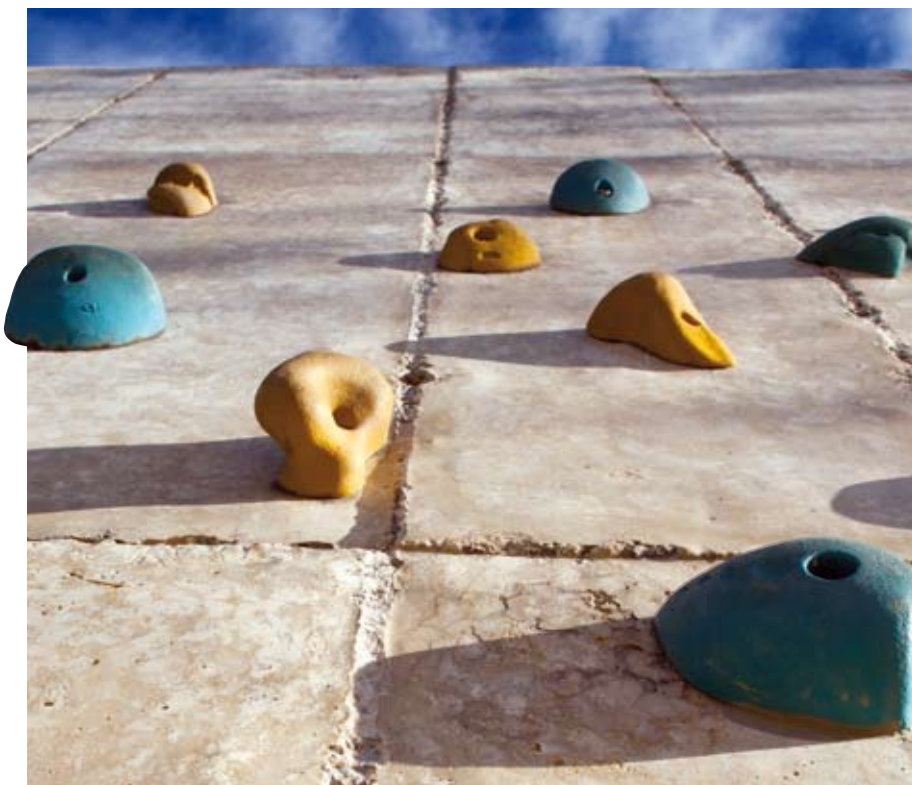
and is likely to make a fee discussion more adversarial”.

On the other hand, feedback from partners who are considered strong fee negotiators consistently points to preparation as a major contributor to positive outcomes. “The more a partner prepares, the better they are at handling a fee negotiation,” notes Ilan Hanohov, head of business development at CMS Legal Services. “We see a clear relationship between the effort invested in preparing and the results achieved, particularly in negotiations in connection with major matters or panel appointments,” he says.

I am often asked how much time should be invested in preparations for fee negotiations. There is no simple answer to this but, as an example, consider a typical £250,000 matter. If the negotiating partner could improve the economic result by just two per cent, this would imply additional revenues (and profits) of £5,000. Applying an hourly rate of £450 would suggest breakeven at 11 hours.

This crude analysis ignores additional benefits such as increased clarity of mandate, contribution to the relationship and the direct impact on profits. Given that few partners would spend that much time preparing for a matter of this size – and that much of the preparations could be carried out by support staff – the effective hourly rate generated through such preparations can be extremely high.

There are however three areas in which partners should prepare for fee negotiation:



1. the negotiating ground;
2. their negotiation position; and
3. the negotiation process.

Preparing the ground

Most negotiations are influenced or even decided before they get started. This is because effective negotiators look to find ways to shift the balance of power in their favour before they sit down at the negotiation table.

They do this by:

- managing clients' expectations;
- positioning the firm or team;
- recognising the special nature of the work; and
- highlighting the unique qualifications of the team for the work at hand.

Clients on the other hand use techniques such as auctions or beauty parades to maximise their negotiating power.

Effective negotiators also carefully select the timing of fee negotiations. Generally speaking, negotiating before or at the start of a matter is most common (especially given the need for engagement letters, for example). There may however be circumstances under which delaying a fee negotiation may be of advantage to external counsel. These may include instances in which the client may not yet be fully aware of the extent of the external legal advice needed, or where developments during the course of a matter could help strengthen the case for higher fees.

A number of experienced negotiators occasionally seek to discuss fees at the end of a matter to take advantage of the euphoria following successful completion. Note however that these negotiators also make special efforts to avoid big surprises and to minimise any potential loss of negotiation leverage for leaving it that late.

Preparing the ground can also include actively seeking alternative matters for the law firm (see below) and, of course, improving one's negotiation capabilities through training and practice.

Preparing the firm's position

This is the area where relatively little effort will generate the biggest returns.

FIVE DEADLY NEGOTIATION SINS

What are the worst mistakes that people make when negotiating?

- **Not thinking about your counterpart.** In particular, their vetoes, concessions, interests, strengths and weaknesses. This is the reason why so many negotiations get off on the wrong foot or yield suboptimal outcomes. Many proposals and negotiations would be far more productive if the other side's perspective were analysed.

Negotiators inevitably become more confident and credible when they are able to spot the other side's weaknesses and potential opportunities for creative win-win solutions. Thinking about the other side also helps to pick the right time to negotiate or reopen a negotiation.

- **Not being ambitious and realistic.** This is probably the single biggest reason why so much money is left on the table by lawyers (and they may not even realise it). As ambition inevitably carries risk it requires courage but, if the negotiator is well prepared, the risks can be mitigated, leaving significant upside.
- **Not distinguishing between the issues and the people.** This is why many people worry that their negotiations will adversely affect their relationship with clients. Good negotiators will know how to be tough on the issues but soft on the people. If the other side tries to be tough on both the issues and the people, one needs to question the value being placed on the relationship by the client.
- **Not listening.** This is very difficult for most of us who have been trained to develop our opinions and to articulate these. However, effective negotiators ask considerably more questions and spend significantly more time listening to what the other side tells them. This way, they maximise their chances of picking up clues regarding potential weaknesses in their counterpart's negotiation position and minimise giving away any of their own weaknesses.
- **Not following through.** It is sometimes necessary to accept tight terms at the beginning of a matter. Good negotiators will make sure they take full advantage of what was agreed. Furthermore, they will look for opportunities to reopen fee agreements if appropriate. Once a matter is underway, clients will often be more open to such discussions, especially if the cause is one that was out of the lawyers' control. This can add significantly to the profitability of a matter.

Good negotiators spend the majority of their time considering the following.

- **Their veto position** (the walk away). Having a clear and strong veto is critical to avoid agreeing to the wrong deal in the heat of a fee discussion. This is best done by considering realistic alternatives to the matter being negotiated. Active business development or maintaining strong relationships with other clients is a highly effective means to generate alternatives. This is why statements such as "we have an alternative to you if we can't agree terms" puts a chill down recipients' spines when credible.

- **Their targets.** The ability to set ambitious but realistic targets is probably one of the single most important contributors to negotiation success. Considerable research literature demonstrates the positive impact of aspirational targets on the outcome of negotiations. Most lawyers are too unambitious, setting their targets at the firm's standard rates or even a discount to them.
- **Their concessions.** Negotiations almost always involve the trading of concessions. Partners need to consider which concessions they

would be willing to make and which they want to ask for. They should also think carefully about the sequence and timing of such concessions, as getting this wrong will give the wrong signals and encourage the other side to hold out for more.

It is important to remember that most negotiations will be about several usually interrelated issues, such as the hourly rates for partners and associates, the timetable, the team, the scope and the use of alternative fee arrangements. Effective negotiators will know their vetoes and targets for each of these and the 'trade-offs' between them.

The director of marketing at a regional law firm observes that partners often fall down on project scoping because they have not fully prepared with respect to their approach to project managing a matter. "Partners need to be able to engage with clients in a comparison of their proposal with that of others. This may lead to a process of despecing or respecing their proposal, depending on the client's interests," he says.

Managing the process

Experienced negotiators carefully plan what questions they want to ask and what they want the other side to know. This could include issues such as alternatives, constraints, preferences or deadlines. Partners should also be clear about which information should not be disclosed, lest they weaken their negotiating position. This becomes especially important if the negotiating partner is part of a team and there is a risk that other team members may leak information they consider innocent but which could materially impact the negotiation.

The best negotiators spend over 40 per cent of their preparation time thinking about the other side. This would include anticipating likely reactions, counter proposals and potential concessions the other side could make. As a result, good negotiators are better able to judge the gap between the two sides and to make constructive suggestions for concessions that will lead to a favourable outcome.

A frequently undervalued feature of the most effective negotiators is the

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ability to seek out information from the other side. They do this by actively listening and by exploring the interests of their counterparts. This is a major contributor to the negotiators' ability to come up with creative solutions, often increasing the total value of a negotiation to both sides.

Following through

One of the most overlooked phases in the fee management process is the time following agreement. Often, mandates or projects take on a life of their own, invariably generating more work or additional challenges than was originally anticipated. The most successful fee negotiators look for such opportunities to generate additional margins.

This is also an area in which effective negotiations can strengthen a relationship, as a judiciously timed and well conducted discussion regarding the financial implications of changes in the matter will pre-empt the inevitable shocks (on either side) when the final bill vastly exceeds the original estimate (a situation that is still a feature of daily life for most lawyers). Such discussions will also help highlight the value delivered

by the team to the client in meeting the client's objectives.

Rosemarie Ghazaros, director of business development and marketing at Nabarro, notes that one of the common hallmarks of good negotiating partners is that they are confident in the quality of the service they and their team will provide, above and beyond the pure legal advice. They will think in terms of responsiveness and teamwork to ensure clients have the best possible service experience from across the firm. "Obtaining regular (and independent) feedback from clients helps with this, and ensures they know exactly what each client values most," she adds.

Setting priorities

Given the broad range of areas in which preparation is possible and productive, the question of course is where to start. There is no single answer to this but, as Godden notes, "there is no one particular preparation that matters the most; it is the very process of preparing that generates the greatest benefit". This approach probably best illustrates the mindset of an effective fee negotiating partner. mp

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