Negotiation:
Ten Tips for Lawyers

Solicitors' Rule 42.1.6.3 (Professional Skills)

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About the Author

Shirli Kirschner was admitted to practice in 1989, and worked as a lawyer first with Allen Allen & Hemsley and then Gilbert & Tobin, before establishing Resolve Advisors in 1996.

She now practises full-time in dispute resolution, with a focus on mediation, which she sees as "assisted" negotiation.

She sits on a number of mediation panels in Australia and one in Singapore. She also holds the offices of Dispute Resolution Adviser to the National Electricity and Gas Markets, a part-time special Registrar position with the Federal Circuits Court, where she mediates small claims, sessional lecturer in the Master of Laws programme at University of New South Wales. (UNSW), and Board Member at the Shalom Institute, UNSW.

Her special interests include multi-party conflicts, photography, perfecting a recipe for dark chocolate brownies, and successfully organising small children to play games collaboratively.

Negotiation –
Ten Tips for Lawyers

Shirli Kirschner

In business, you don't get what you deserve; you get what you negotiate.[1]

Introduction

Lawyers have been engaged to give legal advice and also more broadly to act as trusted advisers, or even the negotiators of deals, where the law is a component but not the whole.

Negotiation is practised in person and at distance. It occurs between two, three or more parties; it is practised in a domestic, regional, and global context. It occurs in relation to a variety of contexts, and in a variety of media: face-to-face, phone, email, and a combination. Further, negotiation is something that is not specific to lawyers; it is a skill that is part of our 'tools of trade'. For many of us, it is not a subject that we studied at Law School.

When one does a Google search on negotiation, it is easy to be overwhelmed by the plethora of information that is available. In order to determine how to use all the knowledge one can acquire, it is useful to consider:

- How best to measure success.
- The contributors to that success.
- Whether any skills or tools need to be added to the existing repertoire.

And to do this it is helpful to have a framework against which to measure one's progress.

There are a number of criteria with which we can judge success. These include:

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[1] Dr "Chester L. Karrass from "**In Business As in Life, You Don't Get What You Deserve, You Get What You Negotiate" 2006**

- Outcome quality (whether the solution reflects the clients' long- and short-term needs).
- Is *Pareto* optimal, maximising the joint return of the parties (and their advisers).

Lawyers, along with many other professionals, are agents in negotiation. Real estate brokers, bankers, insurance agents, and other intermediaries are also agents in the negotiations in which they participate. As lawyers, we share similarities as well as differences with other erstwhile negotiators. We have an obligation to ourselves, an obligation to our firm/associates, and an obligation to our clients – factors shared with other professional negotiators. But we also have an obligation to the Court and judicial system. This is a variable which is peculiar to the legal profession.

This paper seeks to provide a survey of 10 things to consider in being an effective lawyer negotiator. It will be useful in some places to have a working case study to illustrate some of the guidelines.

The Case Study

A negotiation is taking place between two law firms. Law firm A represents a Local Council which has purchased software for the running of its entire interface with ratepayers. Law firm B represents the software provider. The Council is seeking to rescind the Contract with the software provider on the basis that the software that has been installed does not substantially meet the contractual requirements stipulated, they have not fixed the deficits, and that the working relationship between the Council and software provider has significantly deteriorated. The lawyer for the Council opens with a 15-minute statement, extolling the ineptitude of the software provider and the huge damage that that has been done to the reputation of the Council, including raising the stress levels of Council employees. The Council is seeking to rescind the Contract as well as receive a damages payment for the misrepresentations that have been made.

1 Think about your *style* separately and independently of your *approach* to negotiation.

In negotiating, there are two closely related but distinguishable strategy choices operating for lawyers. One is the ***style*** of negotiation that a lawyer adopts: how they approach their negotiation counterparts, the atmosphere that is created, the relationship that is built, and the way the structure of the negotiation flows. The other is the ***approach*** that the lawyer takes to the subject matter of the negotiation, and the negotiation philosophies employed. Thinking of them separately increases your options as a negotiator.

(a) Approach

In academic circles, when teaching negotiation skills, the focus is almost exclusively on an "interest-based approach" also known as "integrative bargaining". This refers to a **mutual interest** based approach, or collaborative problem solving. It suggests that parties openly work together to find a **mutually satisfying** solution. However, it is important to know that there are still many opportunities in which to engage in "distributive bargaining". In this approach, parties compete for a slice of a small pie.[2] This is also known as a competitive/adversarial approach.

In reality, most people practicing negotiation realise that lawyers need to be both competitive (trying for as much of the pie as possible) as well as problem solving (attempting to expand the pie before dividing it).

An interesting result that has emerged from the studies[3] shows that lawyers who are perceived as effective negotiators can fit into any of these categories. What is more important is the way that the lawyer chooses to run the negotiation, *ie* their style.

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[2] Johnson, K. (2001) ' The Art of Haggling' *Harvard Business School Working Knowledge*, May 7

[3] Welsh, N.A. (2012), 'The Reputational Advantages of Demonstrating Trustworthiness: Using the reputation index with law students' *Negotiation Journal*, 28:117 to 145. Published on line DOI:10.1111/J.1571:9979.2011.00329.X. Page 18 referring to Williams GR., L England, L Farmer and M Blumenthal. 1977 Effectiveness in legal negotiation In the Laweyer as negotiator: Problems, readmngs and materials, edited by H.T. Edwards and J.J White. St Paul, MN West Publishing..

(b) Style

He who has learned to disagree without being disagreeable has learned the most valuable skill of a diplomat. Robert Estabrook [4]

Style follows a continuum from competitive to co-operative in relation to one's approach to a counterparty. People are more likely to work to accommodate an opponent they find personable and enjoy interacting with. This dynamic works because it generates a sense of positivity that promotes co-operative behaviour, and fosters more efficient gains.[5] Nancy Welsh describes the studies in more detail. In summary what characterises these types of negotiation are individuals who seek to advance clients' interests, but at the same time, do so in a courteous and professional manner this seems to generate a heuristic for trustworthiness. To achieve this type of atmosphere, one must get inside one's opponent's head, in order to develop a sense of the problem as seen by the other side. The question then arises as to how this is achievable. How do we as lawyer-negotiators go against our instincts to press forward as an advocate, and rather think about what the other side is thinking and feeling[6]?

It requires the ability to balance one's advocacy on behalf of a client with the ability to accommodate the position of one's negotiation counterpart. This becomes particularly challenging in a conflict situation. Guidelines 3-7 provide some practical steps for achieving this duality.

2 Preparation is Paramount. Do it mindfully. Prepare the Substance.

The studies described and canvassed by Ms Welsh also suggest that lawyers rated as competent negotiators by other lawyers are rated so based on their preparation and understanding of the subject matter. "*All the effective negotiators.. were perceived as observant and disciplined professionals skilled in the craft of lawyering and operating*

[4] http://www.goodreads.com/author/quotes/5751725.Robert_Estabrook

[5] Craver 2010What makes a Legal begituatir? Loyla Review 5692) :348 a cited in Welsh above.

[6] Klug M. (2012) It's Not Just about You. Clayton Utz Negotiation Insights

within professional ethical concerns"[7] The most important aspect of this is to be thoroughly conversant with the substance of the matter **before** the negotiation begins.

The key tip with subject matter is to ensure that you think about the *client's* goals more broadly than the legal goal, which is often just a part of the overall picture. Ensure you know how the law fits with commercial goals. It is also important to know what happens commercially if no deal is reached.

In the case study cited between Council and software company, this means understanding the legal rights and obligations under the contract. How does each side see their legal rights, and what damages flow as a consequence? It also means working with the client to determine what a commercial reality looks like. From the Council's perspective, would they prefer to continue with this provider? How easy, realistic, and costly is it to swap providers? An analysis of this question provides the costs and risks of a "no deal" option, and assists with assessing where the negotiations for a deal should focus.[8]

3 Prepare to override Instincts and respond (not react).

One of the key learnings from modern neuroscience is that to keep ourselves safe, we are primed to react automatically, and to exhibit a negative bias (rather than responding mindfully), particularly when under threat. Accordingly, unless our own emotions are kept in check, a reaction in the moment is likely to be defensive, and not necessarily useful for anything other than prompting another negative reaction in return. To move past a defensive response, it is necessary to:

- Reduce the adrenalin in the system through measures such as exercise, sleep, and reduction of caffeine input. Increasing one's heart rate variability through specific breathing exercise can also assist.[9]

[7] Welsh footnote 3 above discussing Williams et all 1977 at page 18 online version.

[8] This is also commonly described as understanding the best alternative to a negotiated agreement or BATNA.

[9] Gevirtz, R. (2000). Biofeedback, 27 (4), 7-9.

Humphreys, P. & Gevirtz, R. (2000) Pediatric Gastroenterology and Nutrition, 31(1), 47-51.

- Prepare yourself, and your client, for each foreseeable eventuality in order to eliminate surprise and thus any knee-jerk reactions.
- Explain to the client the benefits of a measured response, to ensure such a response is seen in the moment as a positive.

It is also useful to remember that we have heuristic bias. That is our brain will reach quick conclusions that are not always correct.[10] Systematic and reflective preparation is an important part of effectively examining such bias.

An Example

Consider a negotiation between an employer and an employee in relation to a claim for victimization which arises after a female manager does not receive a promotion. The claim from the applicant manager is that the promotion was denied as a result of her having filed a sexual harassment claim against a manager, (which was not substantiated on investigation). The employer has indicated that there was a better candidate for the position. The matter has resulted in a claim within the relevant State jurisdiction. It is being negotiated. Each side has legal representation.

The employer is a privately owned corporation. Assuming that you act for the employer corporation and you are of the view that they have a strong legal defence. The corporation is in a male-dominated industry with a large number of stakeholders and key clients where women control the commercial interests. The commercial interests of the corporation include avoiding negative publicity, attracting good female and minority staff, and creating a culture that values diversity.

At the time that the applicant's solicitor opens the negotiation, "seeking compensation due to direct and indirect discrimination and a 'negligent' lack of systems," the **reaction** (particularly from your client) to this, may be to attack the employee's performance and motives and defend its systems.

[10] Kahneman, D. (2011) *Thinking Fast and Slow*, Allen Lane, London, p. 79

A **considered response (rather than a reaction)**, may be to reframe the attack from the applicant into topics which are less-loaded but squarely name the issues. This could include topics such as "diversity management", and "systems". You could also add to the list the issue of "legal obligations", to ensure that there is an agenda item that enables your client's system/obligations to be articulated and explored. (See also 4, 5 and 6 below.)

4 Understanding before Movement

It is the human experience that when one feels that that the other person has heard one's view, and understood it, one is more open to listening to the reasons why they disagree. This holds true in professional negotiations. As lawyers, we often listen in order to prepare the reply, or the next argument, or to counter what is heard, or to check a solution. As a negotiator, this type of listening will not engender a real appreciation of the issues at the heart of the problem. It will not leave the other side feeling heard and ready to shift.

As a lawyer we often don't ask a question we don't know the answer to. As a negotiator curiosity (within boundaries) is key to problem-solving or deal-making.

We need to be strategic in our listening and questioning, in order to burrow below the surface of the problem and unpack its nuance before trying to solve it. This means asking questions in order to understand, and listening to what's being said before seeking any sort of movement towards a solution. The skill is in understanding the other party, with their perspectives and beliefs, rather than looking at the situation merely through your own lens. This is a particularly difficult task when **their** views include a negative perspective of actions or behaviours belonging to **you** or your client.

So, for example, if you were the lawyer representing the software company in its negotiations with Council, the following would be necessary:

- To understand every aspect from the Council's perspective, both legally and commercially.

- To reflect back on what has been heard, so that the Council can clearly see that you've fully understood the issues from their perspective.
- To glean underlying interests, and motivations vis- à -vis the commercial relationships.

The ability to understand your opponent's behaviour means you can then look at ways to contain it, rather than battle against it. An issue that is trivial to one party may very well be of substantial importance to the other one. In the case of the Council and the software company, it seems irrational that a Council would reject software that is at the core of its daily activities, given that rescinding the contract is unlikely to be the best way of fixing the problem. Better understanding of where this anger is coming from may in fact unleash the opportunity to solve it and save a valuable contract.

5 Think about the Opponent

The common view is that thinking about the other side falls only within the realm of co-operative negotiations within a co-operative style. Once negotiators obtain what they think is appropriate for their own client, it seems counterintuitive to accommodate the interests of the opponent.

There are very good non-altruistic reasons to do this, which may very well fit into a distributive negotiation and a competitive style.

- First, providing the opponent with options to induce them to accept an agreement is particularly smart if the opponent has good no deal options or BATNA (alternatives away from the table). For example, in the case study, there are two other potential providers of software for the Council.
- It is important to ensure that opponents will not develop post-negotiation remorse, and subsequently not implement the agreements that have been agreed.
- As a lawyer, you may find yourself negotiating with the opposing lawyer in the future, and a negative view of you may well impact in other encounters.

The Case Study

As lawyer for the software provider, you have managed to persuade the Council not to rescind the contract, but to continue with it, on the basis that substituting the software provider is likely to cause a lot more problems than it solves. At this point, you may wish to turn your client's mind to whether there are additional things that it can offer at very little cost to itself. These may include such things as:

- Extra support.
- The Council being the first to benefit from any software upgrades that become available.
- The Council being the "model client" for testing new software upgrades of the type that it has purchased.

These kind of value add options" will potentially provide your client (the software provider) as well as the Council with some additional benefits and, market research and may also smooth over the inevitable problems when the deal is put into effect with the schedule agreed.

6 Think about how much information to share

It is intuitive for many legally trained negotiators, particularly in a context of conflict, to play their cards close to their chest. On the other end of the spectrum, some negotiation theories advise lawyers to co-operate whenever possible, revealing information to create maximum value. The question of when to reveal information, or what information to reveal, and how to reveal it, is far from clear cut. In an integrative bargaining ("expand the pie") context, it is useful to provide more information in order for that pie to be expanded. However, this could be deleterious if your negotiation counterparty is not playing by the same rules.

It can be very difficult, in the moment, to work out what information to share. For this reason, it is useful *prior* to the negotiation to identify the information you may need from

the other side, and (putting yourself in their shoes) the information you may be asked by them to reveal. You can then consider reasons you and your counterparty might choose to discuss, or withhold, particular information. In this way, you can work with your client before the negotiation to assess the advantages or risks of revealing any particular piece of information. This will allow you to respond in the moment in a considered way rather than reverting to a style that is harmful.[11]

The Case Study

If you are the lawyer for the software provider, it is important to identify that the Council may want to know whether other clients have suffered similar issues and what the success has been in resolving the issues in the long term. One can see both the relevance of the question and the risks and confidentiality challenges of sharing such information. It is important to ensure that the risks and benefits are discussed with the client and a strategy is formed even before the request is made. Consider that such sharing, if I is to occur, may require some time for internal negotiation and stakeholder management within your client's organisation.

7 Think about being culturally appropriate

It is useful to consider the culture in which the negotiation takes place. This means both the meta-context (the nationality, country, or type of business) and also the cultural expectations of the specific stakeholders at the negotiation, table including lawyers and clients for all the parties concerned.

Your choice of how to handle the negotiation, how to dress, the level of formality, and other similar issues need to be carefully crafted to be in step with the culture. For example, if the negotiation is taking place with an organisation based in Asia, it is important to remember that informality can be seen as a sign of disrespect, and that the building of relationships is paramount in that cultural milieu. Israeli businessmen consider informal attire as totally appropriate. Thinking about the cultural framework ensures avoiding easy

[11] (2001) 'How Much Should you Share?' Business Negotiations Daily, March 22.

mistakes that can significantly impact on the relationship and the way your team is perceived. This needs to be done beforehand and discussed transparently with your client.

A further Example

Consider negotiations conducted by a large multi-national mining company with the Traditional Owners of land which the company is mining and now wants to extend the mine underground. The company was aware that the Traditional Owners would be worried about the relative size and resources of the mining company. The mining company opened negotiations by asking the legal advisers for the Traditional Owners if they would be open to having their client provide guidance on the best way to approach the negotiation so that it would feel culturally appropriate, including designing a relevant ceremonies if appropriate. By beginning the negotiations in this way, the mining company sent a very strong signal to the Traditional Owners, that they were aware of the differences in power and resources, and that they intended to use their power to work with, rather than against the Traditional Owners. (See also 9 below)

8 Think about the choice of medium

Negotiation over the internet, referred to as "e-negotiation", is often avoided because a number of the cues associated with face-to-face negotiations are lost. The common lore is that this is deleterious to the negotiations.

In matters where negotiations are task specific, dealing with projects rather than relationships, interaction over the internet can be very efficient, particularly where people are used to working in that way. As a general rule, where the client/participant has engaged with the company in the first instance through an electronic portal, continuing negotiations in that modality is often a good idea. (An example of this or where the relationship has been established as distributor/distributee over the internet and there is an expansion of the business role) it may well be that it's to the advantage of everyone concerned for this to be done in writing rather than verbally, or in person. This would include levels of comfort as well as output through documentation. This can be extended t

work in simple dispute situations where the issue is about coordination, or problem solving.

E-negotiations are less likely to be effective where relationship issues are at the core of the problem, and need to be discussed. They would also be ineffective in cross-cultural contexts, where there is a strong emphasis on developing and maintaining relationships.

9 Opening moves can make or break any deal

In any negotiation between lawyers or directly between clients, first impressions count... It is essential that you plan the opening of the conversation with care. Opening statements not only communicate your position on the issues at stake, but also convey messages about you, your client, your opinion of the other side, and the strategy you intend to adopt - integrative or distributive negotiation. The person, who begins, tends to set the tone .However, remember If the tone is not set the way you would like, have a strategy to reopen, respectfully.

It is important that you discuss with the client to open or reopen and - whether you will do it as the advocate or whether they will do it or a combination. You will need to align the opening move with both the style and approach that you intend to take so as to properly set up the tone of the negotiation going forward. To do this, it is useful to prepare an elevator statement or pitch and an open question. The pitch is a short summary of the issues, the mood you want to convey and a signal of your approach as a negotiator. It is useful to pair a pitch with an open question seeking the others' views.

The Case Study

If you are the representative of the software provider, you may be tempted to begin the negotiation by saying: "We are aware that legally you don't have a leg to stand on. Our client is also a little sick of the over-reaction of your client's staff. However, we intend to see if we can make sense of this, and take some of the

emotion out of it, and get to a rational deal." While this may be an apt description of where your client is, it is likely to escalate the dispute considerably. It is likely to be heard as a message that your client takes no responsibility for the issue and doesn't accept the legitimacy of the Council's concerns. If it is useful to have a working relationship, a different start will be needed. This is also the case if you wish to turn this into an integrative negotiation (one in which you "widen the pie").

A pitch in that case might be: "The Council is an important client to us, and we are hopeful that we can understand what has gone wrong, and find a way forward to move to a better commercial relationship for both parties. We understand there are some serious concerns and some complex legal issues that will need to be canvassed as part of this discussion."

The question may then be: "Would you like to open by outlining the issues that have brought us here today?" (Allowing for the particulars.)

Or "How did you find working with my client before this problem occurred? (This is a litmus test question to check how deep the problem runs.)

By starting with a pitch and an open question , you can signal a wish to frame the negotiation in a different way from the adversarial set up that may have proceeded the meeting.

10 Consciously consider your reputation as a negotiator as part of your "brand"

You must never try to make all of the money from a deal. Let the other person make some money too, because if you have a reputation for always making all of the money, you won't have many deals. J Paul Getty[12]:

[12] Jiminez, 2012]

The question of the sort of reputation a lawyer should seek to establish and maintain in the largely non-transparent context of legal negotiations is an interesting and complex one. Professor Welsh suggests that it is self-evident that lawyers care about their reputations, not for their own sakes but also for the sakes of their client, the legal profession, and the larger Justice system in which they play a significant role[13]. Usefully there is now research available which examines the options available.

Intuitively litigators in particular may be attracted to maximising the gains for their client. This can lead to a desire to play "hardball", which can cause others to react and shut down, particularly in conflict negotiations. It can also result in a larger share of a smaller pie, or a sub-optimal deal. This may not be useful in establishing one's reputation.

This can suggest, simplistically, that is wiser to adopt a style that is accommodating and one that will facilitate a high degree of connection. This, together with high levels of skill, will tend to result in more creative deals. However, this more congenial approach can feel counter-intuitive to a client, and may appear as if their lawyer is looking after the wrong side and giving too much away. It would clearly not be helpful if the client perceived this to be the case.

As a lawyer it is important to be mindful of your reputation, and consciously consider this as part of your "brand": what kind of clients do you want to attract, and how do you want to be seen by colleagues and opponents? There is no one correct answer to the question. The world of social media has meant that personal brand has assumed an increasing role for professionals. This is now something that many of us have to turn our mind to as part of our career development, attracting jobs and clients.

Thinking about our reputation, external image, can also be a good way of reflecting on our own behaviour, and assessing it both within the context of an individual matter and also more broadly.

[13] Welsh ibid (at page 3 of the online version).

Closing Comments

Many of the strategies described in this paper are counter-intuitive. The intuitive approach, particularly in a conflict situation where the law is on your side, is to go in "guns blazing", and assert that right, and well you might. In order to do it differently, not only the lawyer, but the client also needs to be prepared and ready to take a different approach. The key message is to choose the approach not to let it emerge as a reaction. It is important to discuss all the various options with the client, and to have a strategy. There should be agreement on:

- The goal of the client and the lawyer.
- How success is to be measured.
- Preparation of self, client and other. (Focus on getting into the other sides, shoes, what information to ask for/disclose and preparing to respond not react.)

One of the most important parts of being a lawyer negotiator is to remember that the negotiation with one's client and the formulation of the goals and selection of the tone is the, most important and most necessary step in going to the table. Most lawyers have implicit checklists for these strategic conversations developed from practice. Being mindful, and having an explicit, physical checklist of the matters you previously consider in an intuitive way (as well as any additional perspectives from this paper) is an important step in being a consciously considered negotiator. In this way we can place a check on our unconscious bias, respond rather than react and also ensure a broad repertoire.

For many of the more expansive roles that lawyers hold such as negotiators for clients, there is increasing competition from other professional services organisations. A constructive and strategic approach to negotiation can ensure lawyers expand and or maintain the broader role of trusted adviser, should that be something that we choose.

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