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Realising negotiation as a manageable corporate asset

Negotiation is not just a discrete process but an intrinsic part of many aspects of practice. Realising this allows negotiation to become an assessable and transferable corporate asset.

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Ask someone to describe their theory on negotiation and they'll almost certainly tell you a war story. This may be entertaining, but in our experience of asking thousands of negotiators the same question, not especially useful.

The reason people respond in this somewhat Pavlovian manner may be because of a basic assumption most of us make about negotiation. Namely, that it's a particularly individual, even idiosyncratic endeavour, the practice of which is highly dependent on context. So, for example, ask me about a personal negotiation and I'll give you one bit of advice. Ask me about a not dissimilar professional scenario and my advice may be quite different, perhaps even diametrically opposed.

"Negotiation is the basic currency of legal practice."

This brief article comes to examine this basic operating assumption and its implications, and proposes what we regard as a more effective foundation for best practice in negotiation for law firms and legal professionals. Let's begin with a few basic propositions about negotiation[1] and lawyers.

The centrality of negotiation in legal practice

Negotiation is the basic currency of legal practice. Firms use negotiation to hire and evaluate their staff, determine remuneration and promotion policies, purchase and maintain information systems and manage client loyalty and satisfaction. Legal professionals use negotiation to gain and improve the conditions of their employment, build relationships within the firm, understand client needs and expectations, and of course, to persuade their counterparts to reach agreement.

Negotiation is the lifeblood of even the most bitterly contested litigation, although there the process is likely to be more adversarial than consensual in character.

When you come to think about it, it's difficult to envisage any important decision made by a firm or an individual practitioner that doesn't involve a process of negotiation.

Clients expect lawyers to be negotiation experts

Given the prominence of negotiation in legal practice, and the expanding impact of mediation, it's not surprising that most clients assume that their lawyers are expert negotiators. And, in many cases, clients themselves are highly skilled negotiators, able to critically evaluate the performance of their representatives.

Firms expect lawyers to be uniformly expert

From a firm's perspective, the need to distinguish its services in an increasingly competitive market place requires it to establish a culture of best practice. This means that the highest standards of professionalism are expected from all practitioners in every aspect of their work, including their negotiation and interpersonal skills.

What's happening in practice?

Naturally, it's difficult to generalise about the quality of negotiation practices across the entire population of legal professionals. Nevertheless, some consistent themes have emerged from our extensive interface with legal professionals during training and consulting assignments. For example:

- Practice managers and human resource personnel report difficulties in evaluating, and therefore managing, the negotiation performance of their professionals. The idiosyncratic nature of negotiation practice also impedes the transfer of negotiation expertise from experienced to more junior practitioners.
- Senior lawyers note that their approaches to negotiation tend to be more instinctive than systematic, making self-review and on-going

development problematic.

- Junior lawyers speak of a distinct lack of confidence entering into a negotiation, and a sense of confusion about whether the type of approach that they should adopt is dependent upon the subject matter of the negotiation, the character of their counterparts, or even the partner or client to whom they must report.
- Lawyers generally report that legal practice continues to be unnecessarily demanding at an interpersonal level. External negotiations are too often emotionally charged. Many practitioners, when confronted by an adversarial counterpart, typically reciprocate the competitive behaviour, which quickly plunges the negotiation into a positional contest.
- Within firms, effective feedback is rare, communication is often rushed and ambiguous, and important decisions are made in the absence of consultation with affected individuals.

To the extent that these symptoms present an accurate picture of current legal practice, they suggest implications for both firms and individual practitioners. At the organisational level firms may be under-managing, and therefore under-utilising, a significant resource, namely the negotiation capabilities of their legal practitioners. At the individual level, lawyers may be underperforming their innate capacity for skilful negotiation behaviour, bringing about sub-optimal outcomes, uncomfortable relationships and personal disillusionment with the practice of law.

A new approach to negotiation

Firms that have endeavoured to address these undesirable features of legal practice have found that the key to developing individual skills and the firm's wider negotiation capabilities is to alter a basic assumption about negotiation practice. Instead of viewing negotiation as highly idiosyncratic and situational, a more constructive approach sees negotiation as a learned competence capable of systematic application and transference. In simple terms, by adopting this new perspective the negotiation process becomes a manageable corporate asset, foreshadowing systems for training, standardisation, evaluation and continuing improvement.

In order to manage negotiation practice systematically, individuals and firms require some common threads through which they can understand and learn from the vast number and variety of negotiation experiences encountered in legal practice. In essence, what is needed is a conceptual framework that allows negotiators to see patterns and similarities between, for example, a confidential performance appraisal and a complex multi-party settlement conference. With this objective in mind, experts at Harvard Law School's negotiation program developed a powerful and versatile theoretical model that enables every negotiation to be broken down into (and therefore be analysed by reference to) seven, separately identifiable components. Not surprisingly, the model is called the Seven Elements of Negotiation[2] and is widely used as a foundation for contemporary best practice in negotiation and mediation.

Meaningful training for lawyers

The availability of a coherent and transferable negotiation theory has created the possibility for meaningful training in negotiation to help practitioners build upon their existing skills. By uncovering parts of the negotiation terrain that are often overlooked, the Seven Element framework offers practitioners genuine value in crucial areas such as preparation, goal setting, strategising and on-line communication. Also, because the Seven Elements are a negotiation language, the model contributes to more effective communication between practitioners and thus enhanced teamwork.

Where all of a firm's practitioners, or at least a discrete group within a firm, are operating according to a consistent negotiation theory, practice managers are better able to set standards for negotiation behaviour, evaluate performance and promote skills transference from senior to more junior practitioners.

Moreover, the consistency of approach that effective training can produce tends to simplify the process of communicating complex messages to clients and other outside profession- ▶

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als.[3] For example, one firm whose practice is exclusively geared to representing defendants in insurance claims found that its practitioners were adopting starkly different standards of negotiation behaviour depending on the nature of the relationship between the client and claimant. Where the relationship was expected to continue beyond the resolution of a particular claim, practitioners tended to be quite soft on the relationship and much more conciliatory in substance. On the other hand, where the relationship was perceived to be short-term, lawyers adopted a much more positional negotiation style with virtually no regard to the impact on the plaintiff. These highly individual practices were tending to confuse the firm's clients and anger plaintiff lawyers. As a result, the firm undertook a comprehensive training program in negotiation for all of its lawyers. The specific focus of the workshops was to help lawyers develop a consistent approach to negotiating substance confidently while at the same time maintaining productive working relationships with their counterparts.

Supporting infrastructure

Firms are able to support ongoing skills development for their practitioners by implementing a congruent negotiation infrastructure. Typical architecture includes the development of in-firm negotiation mentors, on-line consulting advice from outside experts, individual coaching inputs for senior practitioners, standardised electronic templates for preparation, goal-setting and review, as well as regular practice sessions and seminars dealing with emerging challenges in professional practice.

In summary, the key to improving an individual's and firm's RON[4] (Return On Negotiation) is to take a systematic approach to negotiation practice through the integration of individual experience with leading edge theory on effective negotiation behaviour. By adopting a managed approach to negotiation, firms are able to transform a vital individual competence into an invaluable organisational asset.

Conflict Management Australasia (CMA) has considerable experience assisting lawyers to develop and refine their negotiation capabilities by designing comprehensive training programs supported by practical negotiation infrastructure. Based on a careful analysis of current practices and perceived needs, CMA is able to hand build and manage a systematic process for achieving consistent and sustainable best practice in negotiation behaviour throughout a firm. For more information about CMA, please see our website www.cmalegal.com.au or e-mail us at cmaservices@cmacentre.com.au PL

Footnotes:

1 We tend to define negotiation widely. From our perspective, negotiation comprises any process of communication, active or passive, that facilitates change in the perception or behaviour of the negotiation principals. For an enlightened perspective on negotiation as a concept, see Volkema, R.J., (1999). *The Negotiation Tool Kit*, AMACOM, New York.

2 The Seven Elements of Negotiation are neutral labels which apply to commonly observed phenomena in every negotiation. They comprise: relationship, communication, interests, options, standards, alternatives and commitments. For more information, see Fisher, R. & Ertel, D., (1995). *Getting Ready to Negotiate: The Getting to Yes Workbook*, Penguin Books, New York.

3 This is particularly true where the training is premised on the notion that highly ethical behaviour is consistent with best practice. Where this occurs, (as it does in CMA's training workshops) practitioners are offered an approach to negotiation which is equally appropriate whether negotiating with colleagues, clients or other (legal) professionals.

4 The expression "Return On Negotiation" was coined by consultants working with the US based Vantage Partners LLC. For an excellent treatment of the subject discussed in this article, refer to Ertel, "Turning Negotiation into a Corporate Capability" published in *The Harvard Business Review*, May - June 1999, reprint number 99304.