The Second Half Of Smart:

How To Temper Your Intelligence And Become A More Effective Deal Lawyer

Fred Tannenbaum

Improving the contract is just a part of the job.
What your client wants is for you to facilitate the deal.

WAY BACK in law school, we learned many necessary and useful pieces of information to mold our analytical way of thinking and ultimately pass the Bar examination. Little were we warned that our academic instruction would be only a starting point and not an ending point in our evolution as successful lawyers. We were also told from time immemorial that being the smartest person in the room and commanding the power of our substantive breadth of intellect would sway all but the most immoveable of mountains. In the real world, after 20 years of deal making across the United States in many of the most complex and nuanced transactions, in multimillion- and billion-dollar transactions, confronting some of the best and brightest ad-

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versaries, and helping clients buy and sell businesses in more than 60 industries, I have finally realized that just being a "smart" lawyer requires much more than merely having a good mind and grasp of the law. Many people in our profession have good minds and know the law. Clients expect you to be smart and know the law. Rather, the most successful deal lawyers understand that being "smart" actually requires mastery of two components. Obviously, one component requires you to have basic intelligence and know the law as well as the many ways the law can be applied, whether it is applied through compromise, use of leverage, or strategic retreat. Perhaps the more important aspect of being a smart deal lawyer, however, is to know how and when to temper your vast substantive breadth of knowledge with practical intelligence. The lawyer who combines both substantive and practical intelligence is the truly "smart" lawyer who will be considerably more effective for the client. Having raw intelligence without the second aspect of practical intelligence is analogous to a nation having a Defense Department without a State Department or a person having a brain but not a heart. They are both vital and inextricably linked and one cannot survive without the other.

SUGGESTIONS • Below are humbly offered, in no particular order, some ideas for combining your vast body of knowledge and gift for conveying that intelligence with practical restraints to make negotiations and client relations smoother and more effective. I believe that the blend of your native intelligence with knowledge and experience, together with the temperance described below in applying those skills, create an indomitable combination.

1. Perspective

Many of us sometimes lose sight of the big picture in transactions. We focus on our "comfort zone," the milieu and technical way-station in which we lawyers feel most comfortable. Too often, a discussion over an important, but nonetheless secondary, issue can overwhelm the entire transaction and divert attention, focus, and emotions from what is truly important. For example, I recall as a young associate fiercely contesting a particular employee benefits representation in one transaction involving the purchase of a curtain manufacturer. This discussion probably involved more subject matter experts and more discussion of arcane rules than any other topic or series of topics combined in that deal. Because my client was purchasing the assets of a business, and there were no successor liability issues, the scope of the representation had nothing to do with risk shifting, but merely with actual factual disclosure. The lawyer on the other side, a distinguished member of the New York Bar and eminence grice of his venerable law firm, in sheer exasperation, uttered "The deal is not about pension plans. It is about curtains." Needless to say, this quote had a profound impact on the parties to reach resolution of this less-than-earth-shattering item. This is the metaphor I use to remind myself to evaluate whether we have lost sight of the forest through the trees in negotiating any provision

too thoroughly and missing its true significance in the context of the overall transaction.

2. Proper Focus

Just as you need to put the substance of the deal in proper perspective, you need to remember that the deal is about the clients and the business, and not about you or the lawyer on the other side. What Professors Fischer and Ury said many years ago in a different context is still true today: Separate your and your adversary's personality from the issues. I have seen too many lawyers trying to get 30 or 40 meaningless concessions from the other side just because they could or just to flatter themselves about the profound value they may have added to the transaction. Just as transactions are not about pension representations, they are not about the lawyers, as charming and engaging as we and our personalities may be. Our role is to make our clients look good, protect them as best as we can, sometimes run interference when necessary, but, in the final analysis, be a tool to facilitate as smooth a result for the person who pays our bill. Our egos should be gratified by accomplishing those goals, not in getting 30 or 40 meaningless points in a document just to demonstrate your intellectual superiority or further evince the dominance of your negotiating leverage.

3. View Of The Other Side

Give every lawyer the benefit of the doubt to earn your trust or disdain. Never underestimate anyone. Never overestimate anyone either. I have been deceived into thinking that just because the lawyer representing the other side is from a smaller or unrecognized firm, or from a small town, that he or she is not capable or able to match my grand talent. Unfortunately for both me, but more important, for my client, I learned that lesson at my peril. Although the "brand names" of firms may connote experience and competence, the absence of either should not lull anyone into a full sense of security. If that lawyer whom I vastly underestimated joined a well-known firm in a well-known city, my perception would likely have changed, but it should not have. He or she would still be the same lawyer, with the same client and the same negotiating position. Conversely, I have occasionally found myself smitten by the Siren Song of a senior lawyer at a powerful firm. I have too often conceded too many points or agreed to take too many actions just because I may have too willingly been persuaded by his firm's name and not any logic behind the request. The sophistry of false gods was most pronounced during the high-tech craze of the late 1990s/early 2000s, when lawyers from well-known Silicon Valley firms would justify whatever seemingly absurd position by "that's how things are done in the Valley." No more explanation or logic than that would be offered. Again, if that lawyer were at the small unknown firm, I doubt that I would have as readily submitted. Judge the adverse lawyer on the merits of what he or she says, not where he or she went to school or what brand name firm may pay his or her salary.

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4. Timing On Concessions

Both Kenny Rogers and Ecclesiastes expressed keen sensitivity to timing, in song ("You gotta know when to hold 'em and know when

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to fold 'em") and in verse, ("There is a time…"). Implementing this immutable principle, however, is easier said (or sung) than done. This short article cannot extend beyond generalities because each negotiation is different and proper timing will vary with the nuances of each deal. However, a few guiding principles transcend virtually all deals.

First, try not to concede points too early or too late. Some try to make early concessions to set the stage to make the opponent think that you are magnanimous and thus encourage corresponding concessions. I rarely see the laws of Newtonian thermodynamics, however, applied in this context. One early concession does not foster an equal and opposite one. The other side normally seizes on this as a sign of weakness. On the other hand, if the concession is offered too late, the parties may have become so entrenched and polarized by then that the concession is perceived as woefully inadequate to assuage any ill feelings. Or it may be viewed as insincere and gratuitous.

Second, many lawyers fail to realize that concessions may be postured as a sign of strength and not a sign of weakness. Making concessions in the right way in the right amount at the right time helps build trust and rapport with the other side and can hopefully eliminate minute stumbling blocks to consummating a deal.

Third, many highly educated lawyers actually take the view that every point is ultimately a business point and, therefore, defer to the client to make the concession. Although, technically speaking, this may be correct, most clients defer to lawyers on most of the arcane aspects of documentation when concessions are made and actually resent being swirled into a milieu in which it is self-evident that the lawyer is just passing the buck.

5. Practical Realities

Perhaps an analogue of the prior point is to remember Mick Jagger's guiding principle: "You can't always get what you want." Although all lawyers try their best to extract as many concessions as possible for their clients, a fine line exists between being a zealous advocate and a reckless obstacle. The key is to prioritize which points are truly significant business or legal issues and which are just nice to have but not essential. If the issues fall into the latter category, then a lawyer should recognize that the only times you will obtain all of the items you requested are when either you have not asked for any, the other side is totally desperate or incompetent or your client is overpaying so much that they can dictate virtually every term. These conditions rarely occur. Just make a judgment regarding which of your points are really necessary and then move on.

6. Face Saving

Although most of us quickly grasp that the other side does not have a monopoly of wisdom, seldom are we as reflective about our own positions. It is theoretically possible that we are not always correct on every issue or that there may be a patina of credibility in the other side's view. Even if that is not the case, and the other side is just plain wrong on many if not all of the

issues, let them win something. Everyone likes to think that he or she has added value and made a substantial contribution to their client's effort. If you can sprinkle a few concessions to your adversary, provided your munificence is relatively meaningless, everyone wins. The adversary has received satisfaction that he has performed his role. He or she also feels better about you. One of my most successful clients believes that he sees more than his fair share of deal flow and successful consummation of deals because he always lets his adversaries win as much as he possibly can without jeopardizing the integrity and value of the deal. The other side considers him a pleasure to deal with (or possibly even an easy mark) and he is more than happy to oblige in their sentiment. Conversely, as a younger lawyer, I had frustrated lawyers excoriate me with, "You always need to win, don't you?" I ultimately tried to learn that each issue does not rise or fall on its own merits and is part of a larger equation, and part of that equation is letting the other side win occasionally, as painful as it might be. You never know when you may meet again. It's a nine inning ballgame. It truly can be a win-win situation.

7. Proper Role

This is not a contest to see who can find the most issues. Get the deal done. Most lawyers are very smart people. Most smart people can analyze anything and find a myriad of issues. You can look at a painting in the museum and find a hundred aspects to it just as you can read a contract and find a hundred ways to improve it or get an edge for your client. The goal is to get the deal done; improving the contract is just part of the job. And although clients know you are smart, diminishing returns set in on your erudition. In most deals, the 80-20 rule applies: 80 percent of the value you bring to the client lies in 20 percent of your efforts. Consistent with this rule of thumb, the remaining 80 percent of the issues can be fertile ground for concessions, capitulation, or compromise. You are not paid by the number of issues you spot or the number of points you win. You are paid based on spotting the main issues and helping the client extract as much protection on those issues as possible. Use the other issues as bait for winning the main ones.

8. Risk Assessment

Risk aversion is a salient genetic predisposition of lawyers. However, no aspect of life or transactions can be devoid of risk. Some lawyers try to avoid making any decisions about any issue remotely related to risk and pass that off to the client as a "business decision." The more successful lawyers, however, recognize the pervasiveness of risk and the lawyer's role to analyze it, put it in context, try to minimize it, but ultimately deal with it. The most successful approach to dealing with risk that I have witnessed is to accept it, be responsible to make a recommendation to the client to address it (or handle it if the client is deferring to you), and not be rigid or dogmatic about it. The best synthesis of this statement is to weigh the magnitude of the risk times the probability of it being realized. For example, in a transaction involving a $100 million purchase of a chain of 100 retail stores in which both sides are equally represented, have equal bargaining power, and the price is fair, and one of the retail sites has not properly disposed of all of its hazardous waste, there are several practical ways to handle this issue short of escrowing the entire purchase price until the waste is removed or actually walking away from the deal. Unfortunately, I have been in situations in which the other side took these positions owing to their inability to assess the size of the risk in proportion to and in the context of the deal and against the many ways to fairly and conservatively quanti-

fy and deal with the risk without such a dramatic and draconian response.

9. You Are A Business Advisor Who Happens To Have A Law Degree

As a young associate, a billionaire client once thanked me for giving a fine legal answer to an issue. However, he stated, "I can get a fine legal answer from anyone. What I expect of my lawyers is an understanding of the financial, tax, accounting, sales, marketing, business at issue, manufacturing, human relations, government relations, and other non-legal aspects of the particular problem." In other words, the legal tail does not always wag the dog of the larger issue at hand. The more successful lawyers need to synthesize their knowledge of the law in the context of the issue at hand. Homogenization of the legal issues with the many other disciplines involved in any deal or business is consistent with the deal being about curtains, not about a materiality qualifier on a pension representation. Although the latter may be crucial, it is not always so. This is consistent with the one retail store with some possible contamination in a 100-store chain in contrast to just buying a single site that is contaminated. The business advisor is not afraid to make a recommendation on these and other issues. One of the best compliments I ever received was from a client who observed that the lawyers on the other side of a hotly contest venture capital transaction were just good lawyers, but that I was a businessman who happened to have a law degree. There is a reason why some wags say that 99 percent of lawyers give the rest a bad name.

10. Calculated Risks And Experimentation Lead To Better Judgment

Human nature strives for security and contentment, and many lawyers are no different. However, the businesses of successful clients require them to learn new markets, new products, new sources, new employees, new techniques and new approaches, just to stay even with the competition. So lawyers often hang firm with the tried and true, not because it is the best approach, but because it is the only approach with which they are familiar. Too often, lawyers do not take risks or do not concede points because they have not done so before. Teddy Roosevelt used to talk about the "cowboy in the arena." Although some may criticize the cowboy's riding technique and he may occasionally be thrown off the horse, the fact is that he is confronting the obstacle and persevering. A former general counsel of a large international brewery once told me that the lawyers he hired were those who would offer their recommendations on a wide variety of issues, even issues that are not purely legal or even purely business. This general counsel eschewed the outside counsel who simply shrug their shoulders and say "it's a business decision" and move on. Offering your opinion makes you part of the client's team and no one will be fairly faulted for offering a reasonable opinion about a matter. Oscar Wilde once observed that good judgment comes from experience, and experience comes from bad judgment. A lawyer will set himself apart from his colleagues by appearing in the arena, taking those calculated risks and getting that valuable experience, and from that experience, acquiring invaluable judgment and wisdom.

11. Know Your Limitations And Use Others As Resources

Many of us are trained to distrust the other side and not work constructively to the end of a mutually beneficial transaction for both sides. We should recognize our own natural limitations, as well as those of our firm and our clients. Those who are able to learn and rely on information from the other side accomplish several things:

- First, you gain the trust of the other side, because they feel you trust them and that they have made a contribution;
- Second, you have developed a resource;
- Third, the other side may reciprocate and take at face value a piece of information which you offer;
- Finally, the information which the other side provides may speed up and facilitate your fact gathering process.

Obviously, unswerving fealty to the other side's information may be dangerous. In the words of Ronald Reagan, describing his relations with the Russians, you need to "trust but verify." Groucho Marx offered a more irreverent but equally perspicacious insight: "Whom do you believe, me or your own eyes?"

12. Speak Concisely And In English

We lawyers pride ourselves in our eloquence and believe that everyone and everything hinges on each and every word of our carefully uttered full paragraphs. The reality in most deals is that the only words people wait for or actually hear are "yes," "no" or "here's how we can resolve this." Rarely are people swayed by orations of Cicerian proportion. In fact, most people, myself frequently included, often tune out such bombastic outbursts. Furthermore, lawyers are often tempted to display to their supposed acolytes the depths and breadths of their substantive knowledge on the most arcane topics. I am most impressed by lawyers who are confident enough in themselves that they simply tell the client that the matter can get done and here is how to do so instead of explaining how a certain tax code section creates a certain exception that fosters the result. The client knows you know how to make the watch. They just want to know the time. Clients also want to conserve their own time. In other words, if you cannot communicate clearly and effectively, just shut up.

13. Accommodation

Accommodating an adversary on items that may be needed by him to save face or give his client a decent deal is not a sign of weakness but rather of strength. It will build trust and build long-term relationships. Many lawyers' first impulse, especially when they have superior bargaining power, is to just say "no." Instead, I recommend the lawyer find out why the other side needs something and see if it can be accommodated without disrupting your client's needs. This view is consistent with the importance of face saving discussed earlier. It is also a logical outgrowth of creating win-win situations. Furthermore, accommodation should win reciprocal good turns and facilitate the transaction.

14. Proportionality Of Response

Lawyers often receive extensive markups of their drafts and often find large sections just simply crossed out. In addition to the typical ego deflation of seeing your precious work product summarily dismissed and believing that you have irretrievably lost the client's fundamental bargain as a result of the deletions, lawyers should resist the temptation to retaliate in kind or insist that every precious word be reinserted verbatim. Understand the other side's reasons for the deletions. Find out whether there exists a fundamental misunderstanding of each side's needs or whether a rationale for the deletion makes sense. More fundamentally, do not take it personally. Do not retaliate in kind and start either deleting their language because they deleted yours or escalating by adding more language to show them who is boss. Remember the other lessons earlier, particularly that this is about the deal, not your bruised ego. Conversely, when you need to remove their language from a section, consider how you would feel. Try to be as judicious and narrow in your excising as you can. Assess whether some language and concepts may be retained and modified. Try to be as

precise and sensitive as you can. Use a surgeon's scalpel in working with all but the most anathema provisions suggested by the other side, not a butcher's meat cleaver. Surgeons get paid far more than butchers. And surgeons get more respect, too.

15. Nothing Is Impossible; Yes Is Always An Answer

Although a client request may seem impossible or not well thought out, you can tell them how to accomplish their goal and they can then realize the answer is no. "No" is always an easy answer because it does not require any risk taking and if the advice is followed, you can never be proven wrong. Dissecting the multitude of problems with any request is also something at which we lawyers excel. Offering the client a discourse on "here are the problems" with the client's goal may evoke his admiration of your problem-spotting skills but concomitant aversion to your problem-solving ones. Any lawyer can say "no." The good lawyers can point out ways for a client to accomplish his or her goal.

A lawyer who identifies a problem should not complete the sentence until he solves the problem. If the lawyer cannot solve the problem, then a particularly skilled lawyer can point out to the client in an artful way the tortuous steps necessary to accomplish his goal. The client will thereby reach the same conclusion. I once observed this art when a senior partner at a behemoth firm, who went on to become the general counsel and then the chief executive officer of a Fortune 500 company, responded to our mutual client's query regarding launching possible litigation. The lawyer agreed that the lawsuit was easy to research and file, and costly to win but could be won, provided that they could prove a multitude of facts, which all but the most naïve would know were impossible to prove. The lawyer demonstrated to the client that he was a can-do partner of the client and could craft a strategy to achieve the desired goal. At the same time, the lawyer conveyed in no uncertain terms that the client's goal was virtually unattainable.

16. Separate Important From Meaningless Requests

As an outgrowth on the discussions regarding the proportionality of a response, prioritization, and face saving, I still try to temper my normal antipathy to lawyer revisions with the practical assessment of whether the changes are for the better, substantive, purely wordsmithing, or the result of a vague desire to on the part of the revising lawyer to feel as if he or she has added something. If you answer affirmatively to Shakespeare's question whether the proposed changes are merely "the sound and the fury of a tale told by an idiot, signifying nothing," then just agree to make the changes, move on, and get the deal done.

CONCLUSION • These lessons are much easier to espouse than to apply. We are all humans, have frailties, and have a desire to win. I frequently catch myself straying from these principles and descending back into the miasma of pettiness, insensitivity, and lack of perspective. Sometimes I catch myself in time. Other times it is too late. Just as my clients expect me to keep knowing the law, however, they also expect me to keep practicing these lessons. Although I will never know all of the law, I will never be able to apply all of these skills Both are journeys worth pursuing.

PRACTICE CHECKLIST FOR

The Second Half Of Smart: How To Temper Your Intelligence And Become A More Effective Deal Lawyer

• Keep the focus of the deal in perspective. Don't lose sight of the client's overall goal by focusing on legal technicalities. Remind yourself to evaluate whether you are losing sight of the forest through the trees by negotiating any provision too thoroughly and missing its true significance in the context of the overall transaction.

• Remember that the deal is about the clients and the business, and not about the lawyers. Separate your and your adversary's personalities from the issues. Your role is to facilitate the best result for the person that pays your bill.

• Give every lawyer the benefit of the doubt to earn your trust or disdain. Never underestimate anyone. Never overestimate anyone either. Judge the adverse lawyer only on the merits of what he or she says.

• Try not to concede points too early or too late. Making concessions too early is likely to make the other attorney think that he or she can get more concessions from you, not that you are willing to cooperate, and that he or she should make concessions to you. On the other hand, if the concession is offered too late, it may be perceived as woefully inadequate.

• Prioritize which points are truly significant business or legal issues and which are just nice to have but not essential.

• Even if the other side is just plain wrong on many if not all of the issues, let them win something. If you can sprinkle a few concessions to your adversary, provided your munificence is relatively meaningless, everyone wins.

• The goal is to get the deal done; improving the contract is just part of the job. You are not paid by the number of issues you spot or the number of points you win. You are paid based on spotting the main issues and helping the client extract as much protection on those issues as possible.

• When a question goes beyond a narrow legal issue, do not shrug your shoulders and say, "It's a business decision." Offering your opinion makes you part of the client's team and no one will be fairly faulted for offering a reasonable opinion about a matter.

• Find out why the other side needs something and see if it can be accommodated without disrupting your client's needs. This helps to create win-win situations. Furthermore, accommodation should win reciprocal good turns and facilitate the transaction.

• When you receive an extensive markup of a draft, understand the other side's reasons for the changes or deletions. Find out whether there exists a fundamental misunderstanding of each side's needs or whether a rationale for the deletion makes sense. If the changes do not fundamentally alter the deal or conflict with the goal that your client has in mind, consider conceding them as the most effective way to move the deal.