Your guide to: contract negotiation and relevant contract law

Securing the Future of General Practice in London
Other guides in this series:

- Your guide to: procurement and tendering for practices and services
- Your guide to: forming partnerships, limited liability partnerships, companies, and other business structures

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INTRODUCTION

Securing the future of general practice in London is crucially important to all of us at this time. The challenges and opportunities facing practices are, without exception, in today's highly competitive environment, considerable. Practices have to have a good working knowledge of contract negotiation, procurement and tendering and consider what type of business structure they will operate in.

It's not easy. That is why we have commissioned BMA Law to produce three introductory booklets on these subjects. They do not attempt to tell you everything you need to know, as each subject area is vast. But they do, however, introduce these vitally important areas for those practices coming new to the subjects. We hope you find them helpful.

For further information on Londonwide LMCs and all that is happening to general practice in these challenging times, please don't forget to log on to www.lmc.org.uk.

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TYPES OF NEGOTIATION

There are essentially four types of negotiation:

**Win-Lose** – this is the “hardball approach”, used frequently when you are unlikely to see the other person again. These are tactics employed for example, where you are purchasing a house. Negotiations can be quite aggressive in order to reduce price, as you are unlikely to ever set eyes on the Vendor again. Please note that this is an extreme type of negotiation and not normally employed in the usual course of business.

**Gamesmanship** – usually employed where there is a great deal at stake and there is a need to prepare the negotiation in substantial detail in order to gain advantage. These tactics are then deployed, for example, where there is competition with regard to the award of any contract or as part of a bidding and tendering process.

**Manipulative** – where underhand tactics falling just within the law are utilised to gain advantage. It could be regarded as possibly misleading the other person, or, playing on the other person’s genuine belief of a fact to gain an advantage.

**Example:** where you know the other person believes that there is to be a rise in the rate of gas supplies and you use this to influence them into signing a long term fixed agreement with your company. You are aware that gas prices are in fact falling, but the other party only discovered this after signing. In these circumstances you are unlikely to get away with this a second time, and are likely to be viewed as untrustworthy.

**Open Negotiation** – this is fair and honest and open principled negotiation, which works best when you have an on-going relationship with the other party and need to maintain that relationship long term. It involves each party being clear to the other(s) about their objectives. It involves attempting to reach
agreement by modifying proposals until they suit each other and/or by reaching ‘wise agreements’, where a stand off would clearly wreck the objectives of each party, to the point where everybody loses.

**DISPUTE HANDLING**

You need to identify exactly what the dispute is and focus on it. Small disputes do not warrant excessive preparation time or, letters of complaint worded in such a long winded format, that the main theme of the dispute is lost. This tends to make the person raising the dispute look unreasonable and unfocused, and does not necessarily strengthen their position.

**Points to consider:**

- Keep any correspondence simple and focus on the main issues that you wish to address and anything relevant to those issues.
- Always couple the issue with evidence to back up your claim or complaint – this can be written, verbal or email correspondence.
- If the complaint or issue is complex, then use bullet points and formatting to break it up, thereby rendering it simpler to follow.
- Avoid emotive and unnecessary language. Keep the issues at arms length and deal with them objectively.
- Do not make your disapproval known more than twice in any piece of correspondence and avoid repetition.
- If the dispute is major, then you obviously do need to prepare in detail, but the same rules apply – keep focused.

**Note:** Always remember that the dispute may be major to you, but genuinely assess whether it really is important in the general scheme of things.
Practical Steps:

- Identify the main issues and decide which you will discard and which you wish to follow through.
- Decide whether the issues are contractual, financial or clinical.
- If unsure then obtain specialist advice. Expert advice is always wise to take before you embark upon any letter or verbal discussion on any issue.
- If you think obtaining advice is going to take some time, then send a holding letter and state within the letter that you are taking further advice. Do this even if you are the one raising the complaint as it puts them on notice that you have not accepted a situation or decision.
- If the other party sets unrealistic deadlines, then argue for more time and make it reasonable. This cannot be done if there are contractual or statutory time limits.
- Keep telephone attendance notes – even better try and follow these up with an email setting out what you believe was agreed.
- If the issue is legal then obtain legal assistance in drafting and use the correct language.

Major Disputes

Major negotiations or disputes require a great deal of detailed preparation, but as mentioned above the same rules apply. It is always a good idea to get the balance right in terms of how much information is required – too lean and it looks insufficient, especially if questions posed by the other side cannot be answered. Too much and you will tend to lose the main points in the text and become confused, as well as confusing the other person.

There is always a natural tendency to use all of the material you have at hand to make your case – avoid this. You need as much as
you require to make the point and back it up with clear evidence. Once the point is won – leave it and move on.

Price, payment and timelines are always important and usually can be negotiated. Once agreed, make sure that the terms are backed up in an email or other written correspondence before the final contract. These can then be referred to in the event of a disagreement.

Most people will ensure they have a Plan B as well as a Plan A. However, if you lose Plan A in negotiation, then it may be an option to reach it with a staggered approach via Plan B.

Compromise is essential for any successful negotiation. If you are pre-prepared with a list of concessions that you can offer to the other side, these can be used when it appears that you may need to give something back in order to win on one of the main themes. Remember not to do this unless it actually helps you achieve your ultimate aim.

If you are dealing with people that you already know then consider any hidden issues that may influence the outcome. Is there anything in the personality of one of the other parties that may help or hinder the discussions? How will you handle this? Every argument has its weaknesses and you must learn to address these before going into a negotiation or dispute. You can be sure that if you don’t have the answer to a weakness in your position, the other side will most certainly bring it up and you will lose face if unprepared. Do not lie. If you have to accept the weakness, do so and move on to stronger arguments.
The underlying message is that you need to plan your strategy. Deal with all the issues before you walk into any negotiation and also know your team. There are times when you will need to walk away and re-group. Ensure your team is aware that this is an option and that “time-out” may be required. Do not accept something which is slightly different from your original plan unless you have conferred with your team first.

It has become common in some complex negotiations that time is a factor and parties may find that they are negotiating until late or early hours. Avoid this. It can be unproductive and creates a situation where the parties are no longer focussed and issues are not dealt with properly in an attempt to reach agreement quickly.

Listening to the other side is just as productive as talking. The more the other party talks the more likely they are to give away more of their position. Listen and take notes and question the motives and offers made. It is easy to put your own position forward, since it is the position closer to you. However, do not make the mistake that many negotiators make when making their points – know when to stop talking. Once you win the point – move on.

Definitely do not take anything personally. All negotiations should be as objective as possible. However, it is not a bad idea to discuss emotions if they are relevant, so it may play an important part in any negotiation when you say you feel “undermined” or “prejudiced” or even “threatened”. Choose the words carefully and use them appropriately. Losing one’s temper and shouting or banging fists upon tables creates an impact which lasts a second, but, thereafter, destroys all credibility and is likely to be taken as extreme weakness.

Note: Lawyers are generally assumed to be the best negotiators but never represent themselves – for good reason!
Ask for evidence from the other side and if newly presented then ask that you have time to consider before responding. Make sure you do your research and consider their evidence in the light of expert advice if you need to. Remember – a little knowledge can be dangerous. Avoid quoting the law if you are not a lawyer and only barely understand the concepts. Lawyers do not (contrary to popular opinion) use “legal-ease” or Latin in correspondence and you should avoid using the same if you are quoting from something or attempting to set out a principle in law. It is bad form and immediately demonstrates that you have not taken proper formal advice.

TRADE offs

Any termination of a successful negotiation will most inevitably result in trade offs. Initial positions almost always change and you need to be prepared for this. You must always re-consider and change your position if necessary and re-negotiate on new terms. The trick is not to allow the negotiations to become stalled.

More often than not the other party may play “hardball” with you. Try and recognise this quickly. Stick to your objectives and offer a small concession to see how they react. If they do not concede then you have no choice but to play “hardball” back and then the result could be deadlock. This is rare and should be avoided.
Note: Be aware, however, that there are occasions where a Primary Care Trust, for instance, completely stands their ground and does not budge on a point mainly because legislation or regulations sometimes provide that they are bound by a particular position. Know the other side’s limits and be realistic in your expectations. More often than not, however, legislation can be ambiguous and it is important to recognise this quickly and take advantage of it. If legislation is clear however, no amount of negotiation will change the PCT’s position.

Check your facts before attempting trade offs – there is nothing more embarrassing and detrimental to your position than to be corrected or proved completely wrong. If you think they may be wrong ask them to justify.

Try and get them to disclose facts in writing – if they are not sure of their position they will not do it. Sometimes calling their bluff has the desired effect.

DEADLOCK

If all efforts have been made and you have reached deadlock then it’s time to decide whether to walk away. If that is the case then you must always leave the door open for future negotiation.

Afterwards you may still have some remaining options. See if you can identify someone on the other side that you perceive to be more reasonable and privately address them in an email or correspondence, although in many cases a phone call off the record may be a way to open the door again.

It may be that you will have to decide whether to resort to legal recourse. In which case you need to consider merit and consult a lawyer.
It is also worth considering how far you, yourself, want to compromise.

LEGAL PROCEEDINGS

Do not threaten legal proceedings unless you are prepared to carry out the threat. Consider the options you may have:

- **Judicial Review** - reserved for challenging the decisions or authority of public bodies only, the decision is not legally binding on the parties.
- **Civil proceedings** - usually heard in the High Court or County Court and can be accessed by anyone who has a civil claim (i.e. anything other than a criminal action). As expected this covers a vast area including contract disputes, negligence and company/commercial disputes.
- **Dispute Resolution** - in this context it refers particularly to the NHS dispute resolution procedures set out in GMS/PMS contracts. If the practice is an “NHS body” for the purposes of the dispute, then matters are referred to the Litigation Authority for resolution. Please note, once accessed, the right to have a second bite of the cherry through the Law Courts is lost.
- **Ombudsman** - an official appointed to investigate people’s complaints about maladministration by public authorities. As a result of any investigation the Ombudsman has the power to make recommendations with regard to future actions and/or payments.
- **Trading Standards** - the Trading Standards service provides protection for the public in consumer matters by enforcing consumer law. It makes sure that traders do not obtain any unfair advantage in the way they do business. Trading Standards officers have the power to enter and inspect business premises and to prosecute.
You may not have all these options. They are always a last resort and cost plays an important part as well as merit.

You may think you have a good case on facts, but get a legal opinion. Time limits are also an issue. The time limit, for example, for entering a Judicial Review claim is three months from the date of the decision of the Public Body. If you miss this because of negotiation, there is no recourse for an extension. Contract law has a statutory time limit of six years from the date of the breach, Civil proceedings are costly and lengthy, and it is therefore worth considering the cost of court action opposed to the loss you may incur.

If you decide to proceed with legal action then consider the Small Claims Court. These are inexpensive, short and will hear simple claims to the limit of £5000. If your claim is more, then you have the option of voluntarily reducing it to meet the limit of the court.

RELEVANT CONTRACT ISSUES

**Without Prejudice Letters**

The underlying principle is that parties should be given the opportunity to settle disputes without resorting to litigation and should not be discouraged by knowing that anything said in the course of negotiations may be used against them in any litigation proceedings.

Any correspondence/documents exchanged in the course of negotiations which are primarily aimed at settling the dispute may be labelled ‘without prejudice’. This is in the knowledge, that should negotiations fail, these letters/documents may not be put into evidence and used against the party issuing them in any legal proceedings.
This is especially useful when making an offer to another party in settlement of an alleged claim. Using the words ‘without prejudice’ on the letter ensures that the offer is not taken to be an admission of liability that the amount is owed in law. Usually, the words ‘in full and final settlement with no admission as to liability’ are used in conjunction with this.

More complex offers or compromises should be drafted by a lawyer and in any event formal legal advice should be sought.

**Reasonable Endeavours vs Best Endeavours**

Many contracts have obligations placed on either party requiring them to use ‘reasonable endeavours’ or ‘best endeavours’ to fulfil that obligation.

**What does this mean in law?**

Basically the standard required for ‘best endeavours’ is much higher than ‘reasonable endeavours’.

**Example:** A practice is required to provide a PCT with information with regard to the number of elderly patients attending the surgery each week who suffer from diabetes. The obligation is that the practice will use all ‘reasonable endeavours’ to provide this information by the end of the month.

If the practice has staffing problems for the month in question and, delegated the task to the remaining staff, who managed to fulfil the obligation, but were late in delivery by a few days, then that may be sufficient to fulfil the obligation of the contract, as the contractor can argue that he/she has done all that is ‘reasonable’ in the circumstances.
Alternatively, if ‘best endeavours’ had been used, the practice may have had to go further in fulfilling its duty and engage locum staff to meet the deadline.

**Entire Agreement Clause**

Usually inserted towards the end of any agreement stating that the signed agreement constitutes the ‘entire agreement’ between the parties concerned. This short clause is extremely important in its effect as it prevents any subsidiary arrangements or agreements to the main agreement having any effect.

It is certainly worth insisting therefore, that any arrangements or agreements made outside of the main agreement which are intended to form part of the operation of that main agreement are either inserted into that agreement from the outset or clearly agreed as a variation to it, in accordance with any variation clauses set out in the main contract.

**Third Party Privity Clause**

Usually, only the parties to a contract can bring an action in respect of any of the terms within it. However, in the case of a contract in which one party provides goods or services to another party, it has long been settled that a clause providing for the first party to pay the proceeds of the contract to a third party is enforceable by that third party where the payment is intended to satisfy a present or future liability. That third party will be accorded full rights to sue under the original contract. A third party exclusion clause has the effect of removing that right. This ensures that only the parties to a particular agreement have the right to bring an action or claim under it.
Variation and Amendment

It is important that every contract has a variation and amendment clause. If the parties wish to change aspects of the contract, in the future, then they need to be able to provide a procedure within the agreement to enable them to do this. It is advisable, therefore, that any changes or amendments are effected in writing with full agreement between both parties and the procedure is set out clearly in the main contract.

Useful website

www.lmc.org.uk