



Defensive Advising Strategies 3: Risk Bargaining Between Adviser and Client

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What is risk bargaining?

The concept of "*risk bargaining*" is not a term of art. However, I am sure that risk bargaining, as I describe it below, is something well-known to experienced professional advisers in their dealings with their clients.

In an ideal world, a client would ask for advice in clear terms and the adviser would give only the advice sought. The distribution of risk in the transaction would be clear: The client would bear the risks associated with the advice being non-negligently wrong and in relation to those matters upon which advice was not sought; and the adviser and their professional indemnity insurers would bear the risk that the advice was negligently wrong. In the real world, matters are often not so straight-forward. In particular, experience shows that each party to the transaction often tries to push the boundaries to explore how much risk can be transferred to the other, often without the latter noticing. This process is a trap for the unwary or inexperienced. I will give some examples of how this happens in practice, before going on to consider how an adviser or client can best deal with these situations. If the reader has any good anecdotes or tips on this theme, I would love to hear them (please reply in the comments below this article in Linked-In)!

The client who doesn't want advice

Early on in my practice, I was somewhat surprised to encounter clients who appeared to be already quite clear in their view of the answer to the question that was being

posed. Why did they want the advice if they already felt they knew the answer? In some situations, e.g. family disputes, this could be put down to the underlying issue provoking strong emotions. However, other situations were not so obvious, such as where the client was acting in a professional capacity. I came to conclude that there was a category of client who was only interested in taking advantage of your insurance policy. A strong indicator here might be advice being sought of very junior counsel for a modest fee in circumstances where the matter at hand was worth a lot of money. A client who was genuinely interested in obtaining advice might be expected to instruct an experienced counsel and to pay a substantial sum for it.

The adviser who doesn't want to advise

There are undoubtedly some legal advisers, both solicitors and counsel, who like to sit on the fence. Failing to express a view may feel like the safe option for an adviser, who can simply lay out the competing arguments, without running the risk of backing the wrong horse. Whether this approach is actually less likely to result in a claim against the adviser is doubtful, and it is certainly not what the client is paying for. I have, nonetheless, read opinions of counsel, which only effectively say "*on the one hand and on the other*", the punchline being missing. I was once told by a senior barrister that, during his pupillage, his pupil master (later a judge) had said to him after a con, twinkle in eye, "*Did you notice, I didn't actually give any advice?!*".

The client who wants to get extra advice without paying for it

There are situations where clients want to try to get their adviser "*on the hook*" in case some aspect goes wrong, without expressly asking for advice on the subject and certainly without wanting to pay for it or (in some cases) to run the risk that the *adviser* will tell them something they don't want to hear. Put simply, the client wants to try to get a bit more bang for their buck.

As a barrister, I have come across numerous examples. One is The Passive-Aggressive E-mail: For example, "*Enclosed copy report FYI*", where it is not anticipated that you will be expected to read the report. Another is a conversation which might go something like this:-

Barrister: "You are not actually asking me to advise on XXX, though?"

Solicitor: "No". Pregnant pause. "Not unless you think there is something wrong with it."

Yet another example is The Enhanced Fee Quote. For example, "Counsel is asked to consider the proposed tax planning, and if she thinks it will work, to provide an estimate for advising on the same and drafting the necessary document, so that those instructing can seek approval of the same from our client".

I was once advising the defendant in a professional negligence case. The client claimed the adviser should have given certain tax advice, given he was aware of a particular aspect, although tax advice had not been expressly sought. The heads of loss included the cost of the claimant obtaining tax advice for the purposes of formulating the claim: £500k. The advice on the same topic which it was contending had been implicitly within the adviser's duty of care. Advice for which the client had not in fact paid the adviser. Hardly credible, but very stressful for the adviser when having to defend the claim, nonetheless.

How to deal with advisers or clients who are risk bargaining

Dealing with advisers who are avoiding expressing a view is simple once detected. The client is the paying party and can address the problem directly – the challenge for the client (and this might include a solicitor instructing a barrister) is noticing when it is happening in the first place, especially if the adviser is charismatic and/or charming and/or good at waffle.

Dealing with clients who are risk bargaining is trickier and requires some tact. Where one is dealing with a client who is not actually looking for advice, the temptation is to say: "If you wish to take a policy of insurance with my insurers, kindly do so directly!". The reality is that the adviser will not say this, but when not expressing the desired view, the client will probably just make the adviser's life a misery for a bit before trying to get out of paying the fees and the adviser will regret ever having taken the matter on. The trick here is therefore to spot what is happening early on, before too much work has been done, and at a stage where it is easier to have a frank conversation with the client.

Finally, as concerns clients who are trying to get that extra bit of advice, there is good scope to deal with the situation politely but firmly. Asking the client whether they would like a fee quote for advice on the particular aspect will often do the job!

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