

## Developing a Negotiating Lawyer's Issues List for Contract Talks

By Prof. Seth Freeman, J.D.<sup>1</sup>

(~1550 words/ ~6 minutes)

*Executive Summary: Lawyers often use issues lists to hammer out conflicts in important contract talks. But a simple, innovative tool can help them create and claim more wealth for clients, act more collaboratively, create more trust, and satisfy both sides better. The tool is a Negotiating Lawyer's Issues List. It works by harnessing key, powerful negotiation principles that traditional issues lists obscure.*

What's missing from a typical corporate law firm's issues list? A lot.

An issues list is a basic tool transactional lawyers use to identify open issues in draft contracts. In theory, it also helps them plan how best to win on each issue, and manage discussions about long, complex drafts. Most issues lists essentially tell you for each issue, "what they want, what we want, and what we'll next offer or argue." Problem? A typical issues list obscures key information any negotiator needs to be effective.

Here's why. Any negotiator needs a simple, clear chart telling her (1) the agenda, (2) the range of acceptable outcomes, and (3) her priorities and options. That information can help her spot valuable trades between topics, suggest creative solutions to impasses, know what to strive for on each issue, and know what the worst acceptable results are. Studies show that with this information, she can create and claim far more effectively than a negotiator who merely goes in with a perfunctory list of demands. In fact, one study shows a simple negotiation chart may help her create more wealth for both sides, and especially her own.

But oddly, most issues lists omit this vital information altogether, encouraging the lawyer to fight naively, compromise naively, or give away the store. In effect, it actually fosters a strangely positional, argumentative approach that can hurt client and counterpart alike.

Here's what a typical issues list looks like:

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TOPIC	LENDER'S DRAFT	BORROWER'S MARK-UP	SUGGESTED RESPONSE [BORROWER'S COUNSEL]
<b>Covenants</b> See §____	Cross default provision for any default >\$500; minimum net worth of \$500,000.	No cross-default provision and no minimum net worth provision	NOT OKAY. Borrower needs latitude to handle trivial and passing cash shortfalls without creating a needless house of cards scenario. Borrower should not be required to sustain an unrealistic net worth given the projected ups and downs of the business plan. This should not be an issue for the lender. This point is of particular concern since the lender is permitted under §____ to raise the interest rate in the event of a technical breach un-remedied for three days.
<b>Remedies</b> See §____	Lorem ipsum dolor sit amet, consectetur	Lorem ipsum dolor sit amet, consectetur	Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum."

As a professor of negotiation who regularly teaches law students, I find it mystifying that lawyers rely on such lists, as do colleagues at top law schools. We're not alone. An investment banker once told me his attorneys were often reluctant to seek creative or favorable results in contract talks; they simply wanted to make their points and paper the deal. That, he said, is why he and his colleagues were generally dissatisfied with transactional lawyers.

The good news is that there are simple, powerful ways to help transactional attorneys do better for their clients- and the other side- with the help of a simple tool I call **A Negotiating Lawyer's Issues List**.

The Negotiating Lawyer's Issues List looks a lot like a standard issues list, so it's familiar and easy for attorneys to get comfortable with it. But it has three important differences: (1) it notes the best and worst acceptable result; (2) it ranks each topic by priority, and (3) it notes for each topic creative options that might resolve the issue. An example:

TOPIC	LENDER'S DRAFT	BORROWER'S MARK-UP	BORROWER'S BEST TARGET	WORST ACCEPTABLE	PRIORITY	The Firm's SUGGESTED RESPONSE
<b>Covenants</b> See §____	Cross default provision for any default >\$500; minimum net worth of \$500,000.	No cross-default provision and no minimum net worth provision	Cross-default for debts >\$1M; and minimum net worth of \$1,000	Cross default for debts >\$10,000; minimum net worth of \$25,000	1	Borrower needs latitude to handle trivial and passing cash shortfalls without creating a needless house of cards scenario. Borrower should not be required to sustain an unrealistic net worth given the projected ups and downs of the business plan. This should not be an issue for the lender. This point is of particular concern since the lender is permitted under §__ to raise the interest rate in the event of a technical breach un-remedied for three days.  OPTIONS: <ul style="list-style-type: none"> <li>• Right to inspect financials quarterly</li> <li>• Right to request further assurances</li> <li>• Immediate notice+Technical default begins 120 days after breach</li> </ul>
<b>Remedies</b> See §____	Lorem ipsum dolor sit amet, consectetur	Lorem ipsum dolor sit amet, consectetur	Excepteur sint occaecat cupidatat non proident,	Empor incididunt ut labore et dolore magna aliq	2	<i>We should initially counter by seeking dolore magna aliq magna aliq...</i>  OPTIONS: <ul style="list-style-type: none"> <li>• culpa qui</li> <li>• officia deserunt</li> <li>• mollit anim id est</li> </ul>

With these simple innovations, the Negotiating Lawyer's Issues List can make a dramatic difference for its user.

*Overcome Impasses.* First, the list can help the user overcome impasses, in ways a typical issues list cannot, by highlighting creative options. For example, imagine your firm represents the borrower in a loan negotiation. Imagine the lender's counsel wants a very easily triggered cross-default covenant and a very high minimum net worth covenant. You and your client do not want these provisions. If each side considers this issue to be a high priority, these positions can lead to impasse. But why is each side taking the position it takes? Among other reasons, you might wish to avoid the covenants to (1) deal well with seasonal downturns, and (2) avoid trivial events from triggering a loan call. The lender's counsel may want the covenants to (1) give the lender a clear early warning of any financial issues your client faces, (2) protect the lender before other creditors draw off money from a struggling venture and so leaving the lender unprotected, and (3) having the chance to learn more when trouble seems to be looming without needlessly jeopardizing the venture. From experience, research, and brainstorming, you can develop many options that at least partially address some of these interests. For example, the parties might agree that the lender will have the right to inspect financials quarterly, or to request further assurances. Or they might agree to the covenants and further agree the borrower will give immediate notice of any technical breach, but agree that technical default begins 120 days after breach to give the borrower time to solve small matters. By picking the best idea(s) and adding them to the comment box, the attorney can

be powerfully, pleasantly persistent; he can be ready to offer a series of different ideas for solving impasses, improving the odds a satisfying deal will close. (For more on how to use creative options to satisfying clients' interests in legal negotiations, see *Beyond Winning Negotiating to Create Value in Deals and Disputes*, by Harvard Law Professor Robert Mnookin et al.)

*Spot Creative Trades.* Also, by ranking issues, the Negotiating Lawyer's Issues List invites the user to ask about the other side's priorities, mention his client's, and so explore the parties' different priorities. Doing that work can allow the parties to spot valuable tradeoffs. For example, imagine the lender cares deeply about the remedies but is less concerned about the specific covenants, while the borrower has the opposite ranking of issues. Discovering that difference suggests a simple, mutually satisfying trade: make the remedies section more to the lender's liking and the covenants section more to the borrower's liking. The more topics, the more possible tradeoffs.

*Claim Wealth.* Another innovation in The Negotiating Lawyer's Issue List is that it clearly identifies the range of acceptable outcomes for a given issue in the Best Target and Worst Acceptable columns. Shouldn't the Best Target be the same as your original proposal? Not necessarily. Skilled negotiators cushion the first offer for key priorities so they can make concessions and still wind up with their Best Targets. In most negotiations, the other side expects a concession, and if you refuse it, you increase the likelihood the other side will be put off and resentful. Studies find negotiators who cushion and concede produce results that are more satisfying to the other side than those who do not cushion, even if they reach the same outcome. (What if you strongly feel your opening offer is and should be your Best Target? Then you should try to hold to it; but you should expect more anger and resistance from the counterpart, and more demands for other concessions elsewhere, which will make the other topics that much more important.) Meanwhile, by capturing the range of acceptable outcomes, the Negotiating Lawyer's Issue List helps the user quickly spot when he has received a good offer, a weak offer, or an unacceptable one, and when he should advise his client to walk away.

*A Clearer Mandate.* Working out in advance with the client the range of acceptable outcomes, the ranking of priorities, and acceptable creative options is a vital task for any lawyer, since it is central to understanding the client's mandate and the lawyer's bargaining authority (if any). It may not be necessary to ask the client about every likely or present issue; general guidelines may work, as long as the lawyer can readily translate them into the likely specifics the Negotiating Lawyer's Issue List requires. If the lawyer cannot readily create the Negotiating Lawyer's Issue List because she doesn't understand her client's wishes or how they apply, the list has done a valuable service—it has signaled that the lawyer needs to check back with the client for further instructions.

One time-effective way to use the Negotiating Lawyer's Issue List might be to have a junior attorney review the two most recent drafts from the two sides, flag differences and fill in the columns headed "Topic" and "Counterpart's Draft". A more senior attorney can soon after fill in the Best Targets, Worst Acceptable, Priority, and Suggested Responses, consulting with the client as needed. She may wish to invite her team to work together on a Google Docs version of these parts until all are in agreement about it.

The Negotiating Lawyer's Issue List has additional advantages. It can

- act like a football coach's play card, allowing the lawyer to make wise proposals under pressure
- literally and figuratively get the negotiating team on the same page
- readily help the lawyer craft a wise revised draft proposal
- serve as a valuable template for future, similar talks.

A similar tool I've designed for business negotiators, the 'Topics, Targets & Tradeoffs grid,' is now regularly used by top dealmakers, including the deals team at MasterCard, a Fortune 300 firm, which handles about \$2 billion in mergers and acquisitions annually. Though highly experienced, the team finds the tool has substantially improved their performance in key talks for each of the reasons we've noted here, and its leader is so enthusiastic about the tool that he routinely serves as a guest lecture to tout its value to future MBAs and law students alike.

Most importantly, the Negotiating Lawyer's Issue List can help a lawyer create and claim value for the client, and do it in ways that are more likely to be satisfying to the other side as well. This ability allows the lawyer and client to build more trust with their counterparts, even as the lawyer more zealously and effectively serves the client's needs. For all these reasons, it may be that one of the best ways for a transactional lawyer to serve a client is to harness the power of key negotiation principles with the help of this simple, ready-to-use tool.