

## Effective Contract Negotiations

- I. Know what your goals are and prepare a strategy before beginning a negotiation.
  - a. What do you want?
  - b. What can you reasonably get?
  - c. What are you willing to give up?
  - d. Learn as much as you can about the other party. Try to identify their strengths and weaknesses. Know your adversary!!
  - e. Identify alternative party/means of obtaining your goals if negotiations with present party fail. Having the ability to walk away is very powerful.
  - f. Identify and understand your strongest points and particularly why the other side *'needs'* you.
  - g. Use your strong points and the reasons the other side needs you as leverage to get what you want/need.
  - h. Try to identify false confidences – ie. The other side makes you think they need you for 'A' when they really need you for 'B' or, similarly, that point 'A' is really important to them and 'B' is tangential, but in reality, point 'B' is their hot button. This is the opposite of the 'Red Herring' concept discussed below or rather, the other side pulling a 'Red Herring' on you.
- II. You will either be presented or will present an existing contract template or the parties will negotiate from scratch and then reduce the agreed "Term Sheet" business items into an official agreement.
  - a. Negotiating an existing contract template requires reviewing its existing terms and conditions.
  - b. Taking the time to consider 'what is not in the agreement but should be' is equally as (and oftentimes even more) important as reviewing the language that 'is' in the agreement. This is one of the most important reasons for consulting with an attorney who has reviewed, negotiated and enforced many variants of the agreements that you are negotiating.
  - c. Keep good notes of all communications when discussing Term Sheet items. Term Sheets are usually sent to the lawyers to reduce the agreed upon terms into an official agreement and oftentimes, one party provides information to the attorney's that may not be exactly what the other party thought was agreed.

- d. Other times, the lawyers will provide template agreements that while they incorporate the items from the term sheet, also include other language that may not fit within the spirit of the deal.
- e. Once the lawyers incorporate the Term Sheet into an agreement, additional negotiating on the “boilerplate” language begins. This includes warranty, indemnification, limitation of liability and the like.

### III. Negotiating Techniques

- a. “When you are the buyer, your first number is the least you'll pay and when you are the seller, your first number is the cap on what you could have gotten.” If possible, let the other side throw out the first number and remember... Never negotiate against yourself!
- b. Separate the issues into deal-breaker's, major points, minor points and “red herrings” or “give-ups.” This is also sometimes called ‘horse-trading.’” I'll reduce the time on this non-compete provision like you want if you agree to add this unrelated warranty provision that I want.
- c. Also separate the issues between business and legal issues. Let the lawyers hash out the legal items - especially when the other side has an attorney.
- d. “Splitting the Difference Chess” – Know the number you want to wind up with and try to throw out a starting number that will force the other side to return with a number that combined with your starting number, will average out to the number you want and suggest meeting halfway by splitting the difference or averaging them out.

### IV. Overcoming/Preventing Objections

- a. “We don't have to put it in the agreement because we are never going to do that” or, even better, “We're not going to hold you to that so just leave it in...”
  - i. Besides the obvious response, “Well, if you're never going to do it or hold us to it, why is it a problem to put it in or take it out of the agreement,” there is also the “Well, what happens if you move on to bigger and better things at a different company.” – In truth, you are more worried that they can be fired, demoted or more likely, they don't have the authority to make it happen if it's not agreed to in writing.
  - ii. **REMEMBER** – An oral agreement is worth the paper it is printed on!
  - iii. Virtually all contracts contain what is called a “merger clause” which states that anything that was said or written before the agreement was signed does not matter unless it is explicitly written in the agreement.

1. This is something that everyone deep down knows, understands, even reads before signing, but somehow, the human nature is to trust the other party and for some reason, people ALL THE TIME, sign agreements that have tangential oral promises that they eventually come to find out they can't enforce.
  2. There is no reason you should feel 'shy' or 'uncomfortable' asking to make sure it is included in writing. There are so many other things included in the agreement that are significantly less important, so there must be a reason why the other party does not want to include this.
- b. "I don't have the authority to make that change."
- i. Always make sure the person with whom you are negotiating is authorized to make the deal and bind the company before you begin. While you (or they) can stall a bit for time by requesting time to "think about it," you don't want the person with whom you are dealing to keep telling you he or she has to get permission from some phantom decision maker.
    1. Of course, if you want additional time to think about something, you should use this concept to stall for more time.
- c. "That's the way we have always done it and we can't change it."
- i. Try to point out why it is important to you, how your deal may be different from their previous deals and have them explain why it is so important to them so you can try to address their concerns elsewhere.
- d. "In order to get that changed, we have to send it to our lawyer and we will have to pay him to review the change."
- i. Most changes to an agreement should not require more than an hour of review and more likely, less than 30 minutes. Drafting an agreement from scratch should only be a few hours. That is a lot cheaper than months of litigation, not to mention any judgments you may need to pay.
- V. How do you know if you got a good deal?
- a. A good agreement eliminates most, if not all, disputes or ambiguities.
  - b. Even negotiating from a weak position does not mean you will not get a good deal considering your situation. If you make the most of what you have to bargain with, then it should be the best deal you could have made in that situation.
    - i. Again, focus on your strongest points. There has to be a reason why the other party is still sitting there. Identify those reasons and capitalize on them as much

as possible.

- c. If both parties are happy, it is likely you have a good deal. However, even when you are happy and the other party is not, it does not mean you have a good deal. Remember that in the future, the bargaining positions may be reversed and if you did not negotiate fairly or took advantage of the situation by being too greedy, it will come back to haunt you.
- d. Negotiating fairly, however, does not mean you have to agree to terms that are to your detriment or do not make good business sense for you nor does it mean you have to accept any take it or leave it deals.
- e. Remember that both parties are there to make a deal that benefits them both.

## VI. Reviewing the Agreements

- a. More or less time? When reviewing an agreement, pay close attention to all the time periods or triggers. Anything that requires you to perform, provide notice, pay, automatically renew, protect your interest, etc should be as long as possible while anything that requires someone else to do any of that in your favor should be as short as possible.
- b. Mutuality. There are many clauses in stock agreements that are one sided and to the extent it works out in your favor, a request to make all of them mutual is suggested. These include, but are not limited to: indemnification, limitation of liability, warranty, termination, non-solicitation/non-competes, confidentiality and IP rights.
  - i. Be careful that if you ask for mutuality on one thing, the other side may ask for it on another thing and that may be worse for you than if you had asked for the first thing.
- c. Save all versions of the agreement and any correspondence. Consider setting up a contract tracking system that allows you to keep track of the changes, when agreements are signed and need to be renewed as well as important terms such as price.
- d. Use MS Word's revision tracking to help with corresponding.

## VII. Types of Agreements likely to be encountered.

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|---------------|-----------------------|
| a. Employment | e. Lease              |
| b. Vendor     | f. License            |
| c. Client     | g. Settlement/Release |
| d. NDA        |                       |