Negotiation Success for the In-House Lawyer

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Introduction

- This panel will focus on negotiation skills for in-house counsel.

- A successful negotiation requires awareness of the negotiating process, attention to the shifting dynamics and subject matter expertise.

- Our panel will discuss how to prepare for and execute a successful negotiation of commercial contracts.
  - We will discuss in-house counsel’s and outside counsel’s roles in the negotiating process.
  - We will use as examples certain contract provisions that are common to many commercial contracts, regardless of your particular business sector.
  - Our goal is to identify the real-life implications of those provisions and strategies for reaching acceptable outcomes that work for both parties while balancing associated risks.
Objective

- Objective:
  - Your business team has reached an agreement in principal. As counsel, you will help negotiate an agreement while: (1) protecting the business terms; (2) balancing the benefit to the Company vs. the associated risks; and (3) protecting interests of the Company the business team may not be focused on.

- Legal Preparation and Business Preparation
Business Preparation – Essential to Success

• Business Preparation includes:
  – With the business team, evaluate the negotiating dynamic and leverage:
    • Who is the counterparty and why were they selected?
    • Are you in a position of strength or weakness?
    • Are there particular time constraints for either side?
  – Consider whether there are any essential “walk away” terms in the contract.
  – RFIs/RFPs.
  – Get on the same page as business team up front.
Legal Preparation – Essential to Success

• Legal Preparation includes:
  – Identify the key contract provisions related to the needs of the Company.
  – Identify contract terms subject to “default” legal treatment.
  – Keep up to date with legal trends.
  – Try to identify the needs of the other party, and what they may insist on.
  – Marshal arguments in favor of your positions.
  – Think strategically for the Company; could there be unintended consequences buried in the contract?
Role of Outside Counsel

- When and how to use outside counsel
- Help with preparation
- Market check
- Blame the lawyers
- Subject matter expertise
- International provisions/counterparties/deals
- Drafting of form contracts or guidelines
Negotiating Dynamics

• Every negotiation is different
  – Leverage, timing, personalities, counterparty’s experience/background/negotiation style, culture and underlying law play a role.

• Who makes the first move at negotiation sessions?

<table>
<thead>
<tr>
<th>Speaking First</th>
<th>Listening First</th>
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<tbody>
<tr>
<td><strong>Pros:</strong></td>
<td><strong>Pros:</strong></td>
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<tr>
<td>• Influence the agenda by presenting issues in</td>
<td>• Glean important information from the initial</td>
</tr>
<tr>
<td>favorable manner</td>
<td>presentation</td>
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<td>• Your positions become the starting point</td>
<td>• Ability to react</td>
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<td></td>
<td>• May give impression of leverage</td>
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<td><strong>Cons:</strong></td>
<td><strong>Cons:</strong></td>
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<tr>
<td>• Don’t know what other party expects, and</td>
<td>• Cede some control over the agenda</td>
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<tr>
<td>may open too low</td>
<td>• Additional information may not be helpful</td>
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Negotiating Dynamics Continued

• **Calibrating the “asks”**
  
  – Ask for what you need. Quickest way to “yes”, but risk:
    • Leaving no bargaining room.
    • Other party assuming you asked above what you need.
    • Miss out on upside if party would accept less.
  
  – Ask for more than you need.
    • Leaves room to make concessions.
    • Risk offending (or losing) the other party.
Negotiations are a Process

• **Expect to take several passes through the Agreement**
  – Walk through the agreement the first time to identify the issues and clean out underbrush – possibly skipping entire sections that require specialist input or are known to be contentious.
  • Balance (1) trying to make initial progress and resolving items you don’t want to take back to the business team vs. (2) keeping some negotiating chips that are not so important to you.

• **Progress in Turning Drafts**
  – Reducing the oral agreement of the parties to writing gives the drafter flexibility in presenting the agreement or addressing ambiguities.
  – There is a benefit in reducing the verbal agreement to writing; but weigh the benefit of negotiating off of your own draft. Are you better explaining why you made changes in a redlined copy, or defending what was already there?
Negotiations are a Process Continued

• Don’t accept or reject positions on spot
  – Hold your positions until you have the full list of issues.
  – Recognize a grand compromise may ultimately be required.

• Don’t lose sight of the pressures on each party.
  – Business teams have requirements that put pressure on finalizing negotiations.
  – Try to avoid the creation of artificial deadlines that harm your position – for example, internal commitments to announce at an industry conference.
  – Don’t give up the leverage of knowing the other party is under similar pressures.
Negotiating Techniques and Tools

• **Communications are Critical**
  – Know your strengths and weaknesses as a negotiator.
  – Silence can useful because it will help squeeze additional information from the other party, more than they maybe intended to say.
  – Asking lots of questions yields information.
  – Know your audience, if the business team is present, taking the lead in framing legal issues can make your position sound reasonable – and yield concessions.

• **Incorporating the Business Team**
  – “Blaming” the executives/signatories for why you have to take a certain position.
  – Avoid getting on calls with only business folks from the other side (professional responsibility obligations).

• **Don’t Let it become personal, no matter how aggressive the other side becomes**
Negotiating Techniques and Tools Continued

- **Avoid entrenchment, when possible**
  - Utilize “market” or objective reference points. If possible, try referring to “what’s market” or industry standards. Then the other party has to justify moving off of market terms, and may have to yield concessions to do so.
  - Avoid ultimatums – instead of “we could never accept that” try “why do you think we should accept that?”
  - If the other party digs in with ultimatums or only minor concessions, consider the alternatives. Do you hang in or walk away?

- **Get Something In Return for Concessions**
  - Use concessions strategically (e.g., to keep up momentum; give on one point to get something more important).

- **Be Sensitive to Personalities and Cultural Differences**
  - Aggressive negotiators may be trying to hide weaknesses; soft spoken negotiators may have unyielding resolve.
  - Some cultures rely on the personal connection much more than the contract, and can be insulted by protracted negotiation or inclusion of terms they feel impugn their integrity.

- **Continue to Focus on Motivation**
  - Understanding why a point is important to the other party may help you identify alternatives.
"Affiliate" of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. For purposes of this definition, the term "control" (including the terms "controlled by" and "under common control with") means the direct or indirect power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.
Standard Clause – “Affiliate” Definition, Response

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– to any of its Affiliates; or

– in connection with any merger, consolidation or reorganization involving [Party #1] (regardless of whether [Party #1] is a surviving or disappearing entity), or a sale of all or substantially all of [Party #1’s] business or assets relating to this Agreement to an unaffiliated third party [of good financial standing].

Any purported assignment or delegation in violation of this Section is null and void.
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Standard Clause – Return of Confidential Information, Compromise

Return of Confidential Information. The Disclosing Party may elect at any time by notice to the Receiving Party to terminate further access to and review of the Confidential Information. In any such case, upon request, each Receiving Party shall, and it shall instruct its Representatives to, will promptly either return or destroy all Confidential Information furnished by or on behalf of the Disclosing Party or otherwise obtained by the Receiving Party and its Representatives, in each case without retaining any copies, extracts or other reproductions thereof. [Upon written request,] destruction of Confidential Information in compliance with this Agreement shall be confirmed by the Receiving Party in writing. Notwithstanding the foregoing provisions of this paragraph to the contrary, the Receiving Party and its Representatives (but with respect to any Representatives, only if the Receiving Party delivers a notice to the Disclosing Party identifying the basis for such retention) may retain such copies of Confidential Information solely to the extent (a) necessary to meet legal or regulatory document-retention policies requirements[ (which shall be controlled by the Receiving Party’s legal counsel)] or (b) such copies as are created pursuant to automatic archiving and back up procedures [(which shall not be generally available to employees of the Receiving Party)], provided that such retained copies shall remain subject to the obligations of confidentiality under this Agreement.
16 Limitations of Liability.

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- A Party's indemnification obligations under Section 15 (Indemnification).
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- Losses arising out of or relating to a Party’s gross negligence, including any willful misconduct or intentionally wrongful acts.
Wrap Up; Questions

- Key Takeaways
- Questions?
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