

Contract Negotiations

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NEGOTIATIONS

- › Common Mistakes to Avoid in Negotiations
- › Dealing with a Difficult Person
- › Responding to Negotiation Lines

COMMON MISTAKES TO AVOID IN NEGOTIATIONS

Relying on the Other Party's Factual Statements as to the Terms of the Business Deal

- Do not rely on the other party's factual statements as to the terms of the business deal even if you trust the other party
- Always check with your client as to the terms of the business deal
- Do not rely on your client reading the agreement as your way of ensuring the business terms are correct

Failing to Ensure Your Opening Position Gives You Sufficient Room to Negotiate

Start with your “best case scenario” position, but be prepared to compromise

- › Reasonableness without flexibility is rarely sufficient
- › Everyone in a negotiation wants to believe he or she has made a difference and added value for his or her clients – the other party may not believe it has added value if you do not give yourself the flexibility to compromise
- › Giving yourself this leeway also provides you with the flexibility to make compromises on one provision to obtain a better result with respect to another provision
- › By not starting with your bottom line position on a number of issues, you also will likely get a better result on some of those issues

Starting the Negotiations with Unreasonable Positions

- One of the most important attributes of a negotiator is credibility, as it greatly enhances your ability to convince the other party to accept your analysis and compromises
- You should never undermine your credibility by taking positions that cannot be reasonably supported
- If your form agreement includes certain completely unreasonable positions, it is critical that you move off them during the first phone call whenever necessary

Failing to Know in Advance Compromises Your Client is Willing to Accept and Using that Knowledge to Your Advantage

- If you know in advance compromises your client is willing to accept, you can often bridge the gap with respect to a difficult provision by using, in real-time, what the other side tells you during the negotiation to persuade them to agree to the compromise
- You can often steer the other side to say something that will make them more amenable to a compromise you are about to suggest if you know in advance what compromises will work for your client
- Raising a compromise too early is just as harmful as raising it too late—the timing of when you propose possible compromises, and how you raise them, is critical to your success

Failing to Determine if there are Truly Substantive Disagreements Between the Parties as to a Provision

- Frequently, parties believe there is a substantive disagreement where the issue is merely one of wording – it is critical to understand the other party's objectives with respect to a provision to determine whether there is actually a substantive disagreement
- In some instances, the other party will draft a broad provision to address a concern relating to a narrow edge case – once again, it is important that you nail down exactly why the other party needs such provision to determine if there is really a substantive disagreement as to the issue

Failing to Keep the Big Picture in Mind

- Real world negotiations are completely different than what we see in the movies where one party wins and one party loses. In reality, if both sides are well-represented, the final result will generally be a win-win
- It is not important for you to “win” and “fight” every issue to the maximum extent possible in a negotiation, and if you go all out to do this, you will likely have a “loss”, i.e., no agreement
- What is important is getting a strong deal done in a reasonable period of time, and for that to occur, you must always consider the big picture and not get lost in the weeds of minor issues that can bog down a negotiation

Admitting Your Client's Eagerness to Complete the Deal Very Quickly

➤ Examples:

- Telling the other side that, no matter what, the deal must be completed by the end of the week, the end of the month, or some other fixed period of time in the very near future
- Telling the other side that while there are many outstanding issues right now, you are certain that the parties will reach an agreement
- Telling the other party that your client has no other viable option but to use the other party's services

Admitting Your Client's Eagerness to Complete the Deal Very Quickly (cont'd)

- You can make brilliant arguments as to why certain provisions should be added, modified, or deleted, but if the other side knows that if, no matter how it responds to your requests, your client will execute the agreement anyway, the other party generally has no incentive to compromise on anything of significance
- Your admission that the deal must get done very quickly may lead to a fast deal, but not a fair deal

DEALING WITH A DIFFICULT PERSON

Dealing with a Difficult Person

Negotiating approaches the other side may use that can cause a person to concede issues that he or she does not wish to concede include those relating to the other side's

- Personality
- Misrepresentations

Personality

- The Other Party is Abrupt, Rude, or Sarcastic Throughout Each Call.

Personality

- The other party is friendly whenever you agree with him or her, but acts rudely or sarcastically whenever you do not agree with his or her position.

Personality

- ▶ The Other Party is Extremely Emotional During Calls.

Personality

- The Other Party is Ultra-Competitive:
 - This includes a party who wants to “win” every issue (a “Win Everything Party”).
 - This also includes a party who wants a concession from you for each concession he or she offers (a “Concession for Concession Party”).
 - This also includes a party who seeks additional concessions from you once the agreement is finalized but before execution (a “Nibbler”).

Misrepresentations

- Unless you are careful, you may effectively concede issues without even knowing you have done so.
- Such concessions can occur in many instances, including where the other party engages in misrepresentations.
- In other instances, the other party's misrepresentations place you in an awkward situation that you must address appropriately.

Misrepresentations

- The other party inaccurately represents that the only changes he or she made to the prior draft of the agreement are non-substantive.

Misrepresentations

- The other party misstates in a subsequent call what the parties agreed to in a prior call.

Misrepresentations

- The other party sends you a redline that does not reflect all of its changes.

RESPONDING TO NEGOTIATING LINES

In Many Instances, Responding to Negotiating Lines May Require Using the QELEC Method to Resolve Issues

➤ The QELEC method involves the following:

- Questions
- Experience
- Logic
- Examples
- Compromise if necessary

Negotiating Lines

- There are countless negotiating lines that a party may use to try to convince you to immediately concede an issue.
- A few of our favorites are listed in the upcoming pages.

Negotiating Lines

- › The concern you are raising is already addressed by the language in our agreement.
- › If we added anything more, it would be redundant.
- › There is no need to do anything here.

Negotiating Lines

- This provision is standard in the industry. Therefore, there is no reason to change it.

Negotiating Lines

- Your requested change is a non-starter.

Negotiating Lines

- These are our standard terms and conditions. Our T's and C's. We simply can't change them.

Negotiating Lines

- The issue you raise involves a scenario that will never happen.
- You don't need to worry about that at all, and therefore we don't need to address it in the agreement. It simply won't happen.

Negotiating Lines

- Your request is a deal-breaker. If that is your position, then I think we are done here.

Negotiating Lines

- You have too many redlines.

Negotiating Lines

- Our policies require us to include this provision.

Negotiating Lines

- ▶ You are the first person to ever raise that issue.