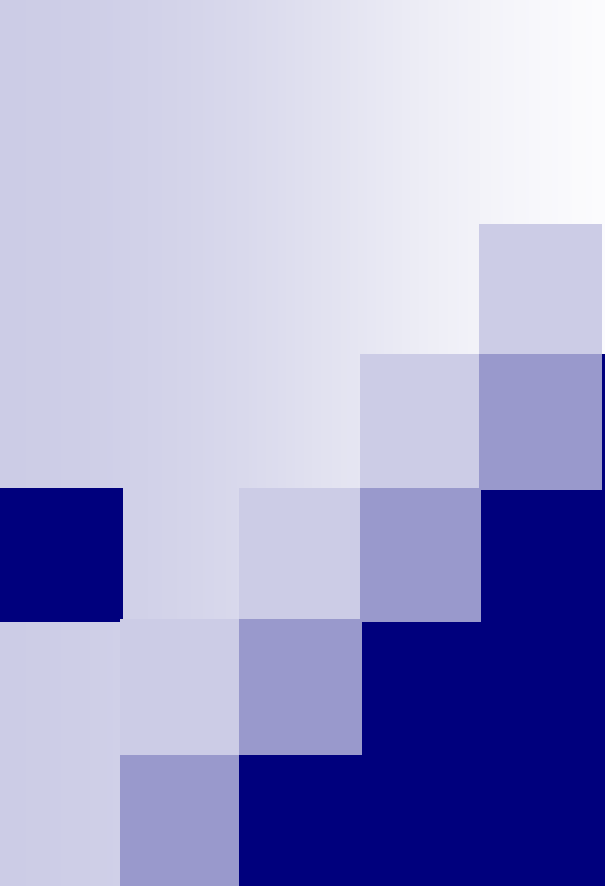




Negotiations

Negotiation and Transactional Attorneys

- Negotiation is a bargaining process between two or more parties seeking to discover common ground and reach an agreement or resolve a conflict
- For a transactional attorney negotiating, and in particular negotiating contract terms, is a primary focus of his or her practice
- Three criteria by which to judge a negotiation
 - Produce a wise agreement
 - Be efficient
 - Improve/Not Damage Parties' Relationship



The Ethics of Negotiating

- **What is unethical**

- ☐ Knowingly making false statements of material fact or law to a third person – 4.1 of ABA Model Rules of Professional Conduct

- **What is ethical**

- ☐ “Puffing” or “Embellishment” to advance your side’s interest

Negotiating Styles

- Cooperative/Problem-Solvers or “win-win”
 - Open, trusting and reasonable
- Competitive/Adversarial or “win-lose”
 - Closed, un-trusting and one-sided
- Competitive/Problem-Solvers or “**WIN**-win”
 - Appearance of being open and trusting but hold back and use subtle manipulation to maximize results
- In practice you see each of these styles and need to be prepared
- Positional Bargaining



Negotiating Techniques

- Persuasive Argument
- Threats, Warnings and Promises
- Control of Agenda
- Straight-forwardness
- Silence
- Time pressure
 - Understanding what is causing the pressure – year end, financial distress, promises made to investors/boards, etc.



Negotiating Techniques

- Numerical Superiority
- Best Offer First
- Limited Authority
- Nibbling
- Aggression
- Mutt and Jeff or Good Cop/Bad Cop



Keys to a Successful Negotiation

■ Preparation

- ☐ Understanding facts, law and economics/business issues and goals
- ☐ Importance of anticipation of opponent's positions
- ☐ Backgrounds and personalities of individuals involved

■ Establishment of Aspirations

- ☐ Too high vs. too low
- ☐ Must haves, nice to have, can live without



Keys to a Successful Negotiation

- Understanding and Use of Leverage
 - Hard to overestimate importance
 - Types of leverage include economic, expertise, power to walk away
- Establishing rapport with opponent
 - What is the tone?
 - Will the relationship continue after the deal?
- Listening to opponent
 - Maximize information retrieval
 - “Verbal leaks”
- Managing information you disclose

Keys to a Successful Negotiation

- Order issues are addressed
 - Addressing most important issues first may betray anxiousness and quickly lead to impasse
 - Beginning with less important issues can establish momentum for parties to reach ultimate agreement on all issues
 - Developing an Issues List
 - This does not mean waiting to address fundamental business issues until the end

Deal vs. No Deal

- BATNA – Best Alternative to Negotiated Agreement
- Understand consequences of not reaching a deal to your side and opponent
 - Transactional and psychological costs
 - Impact on future dealings
- Beware of “Deal Heat”
- Sometimes the best deals you do are the ones you don’t do

Closing the Deal

- Don't be anxious
- Closing the gaps together – reciprocal concessions
- Use of promises – splitting the difference
- Once agreement is reached, carefully review final terms to confirm meeting of the minds
 - Clarify ambiguities and misunderstandings before deal is finalized
 - Review final agreement draft closely – don't trust but verify



Contract Review and Comment

- Eyeball first and focus on key business provisions such as payment and term and termination (endgame)
- Importance of reviewing entire contract
- Avoid stylistic comments
- What's missing?



Contract Review and Comment

- Preparation of comments:
 - Mark-up plus memorandum
 - Memorandum discussing major points
 - Oral comments



Other Negotiating Tips and Practices

- Be a zealous advocate without being unpleasant
- Yours and your client's integrity are more important than any deal
- Negotiations often take place without conversations – exchanges of drafts
 - Don't be afraid to pick up the phone
- Always keep in mind the business goals and reality



Other Negotiating Tips and Practices

- Negotiating is not only something you do with a contractual counterparty
 - “Internal Negotiations”
- Understand the role you as the attorney are being expected to play in every negotiation

Other Negotiating Tips and Practices

- Traits of best negotiators in my experience:
 - ☐ Knowledgeable
 - ☐ Confident
 - ☐ Unafraid to have difficult conversations - candid but professional
 - ☐ Goal-oriented
 - ☐ Clear-eyed