Agenda

- Goals of a licensing negotiation
- Why licensing negotiations are different
- Three dimensions of performance
- Tools and skills
- Preparing for the negotiation
- Running a negotiation
- Tactics (good and bad)
What is the goal of a negotiation?

Discovery of needs and issues
• The parties don’t always know what they need

Problem solving
• Both sides have problems that need solving
• If only one party’s problems are solved, the deal will be weak

Documenting the deal
• Once the solution is found, it has to be properly articulated in a contract

“Winning” is not a goal
• Getting a deal that works is the goal
Q: Why Are Licensing Negotiations Different?
A: Because Licenses Are Different.

Licenses are long-term relationships
- Negotiator must protect the business relationship
- That may mean the lawyer takes the heat for an unpopular position

IP Licenses create enormous leverage
- Business run and are built on licensed IP
- Licensor gives up rights and business opportunities
- IP is difficult to extricate in an unplanned termination

Technical understanding and cooperation is required
- Negotiators often don’t understand the technology
- Technical people often don’t understand negotiation

Trust (integrity/credibility) is critical to the relationship and therefor to the negotiation as well
Negotiate Different...

Understand the context of the deal

- Know the IP/Technology
- Prior dealings between the parties
- Do they parties want to work together or are they forced to?

Know your audience

- Your client has needs
- The other party has needs
- Negotiators have needs too

Remember that the relationship will end
Three Dimensions of Performance*

• **Claiming Value:**
  
  Serving your own/your client’s interests

*Keith G. Allred
Three Dimensions of Performance*

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• **Creating Value:**
  Satisfying both parties’ interests to the extent possible
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- **Enhancing the Relationship:**
  Developing trust & cooperation

*Keith G. Allred
Core Negotiation Skills

Listening
- What is said?
- How it is said?
- What is left unsaid?
- What is meant?
- Watch the body language
- Practice “active” listening

In each case:
- Take your time
- Don’t jump to conclusions
- Finish listening, then respond

Questioning
- Open
- Closed
- Leading
- Exploratory
- Protective
Negotiation is Part Art, Part Science

Be prepared, but not scripted or mechanical

Manage the tensions among dimensions
• Competition vs. Cooperation
• Value-claiming vs. Value-creating and Relationship-enhancing

Every deal has its own dynamic and pace
• Monitor and, if possible, control dynamics and pace
• Set the tone
• Shape the discussion
• Be flexible
# The Many Faces of Negotiation

## Intimidator

**Characteristics**
- Aggressive, intimidating style
- Lots of bluster

**Approach**
- Stay focused on the issue, not the presentation
- Take frequent breaks
- Don’t fight fire with fire - remain calm

## Terminator

**Characteristics**
- Focuses on problems over solutions
- Very risk averse – no risk is too small

**Approach**
- Patience – progress will be slow
- Emphasize that parties want to make a deal, not kill it
- Focus on realistic examples – avoid extreme and low probability examples

## Bureaucrat

**Characteristics**
- Rigid adherence to form – “this is how we do it”
- Sometimes not a lawyer – “procurement manager” or “contract manager” *(Caution: possible ethics issues)*
- Limited power to address creative solutions

**Approach**
- Learn to love form over substance
- Don’t sweat the small stuff – focus on issues critical to your client
- Sometimes just a tactic to gain advantage
- Appeal to the business team and escalate (carefully)

## White Shoe Negotiator

**Characteristics**
- Collegial and smooth in negotiation
- Keeps the pace of the deal up
- Focuses on “market” and resists going beyond it

**Approach**
- Fight fire with fire – be a consummate professional
- Beware of “trivialities” that hide substantive issues
- Don’t take her word that a term is “market” – check it out if you can
- Watch the contract language for subtleties
What’s Your Negotiating Style?

These are stereotypes/frameworks/thought exercises

• Each persona may be useful at times
• The wrong style at the wrong time can be disastrous
• Work within and/or complement your team’s style

Be yourself - don’t force it

• Stay within your own personality
• It’s easy to spot a fake
  • If you’re uncomfortable with a style you’ve assumed, it will show
  • You’ll lose credibility and trust
• Within those constraints, adapt your style to the situation
Additional Thoughts on Style

Companies and teams can have a style

Styles may change during the negotiation

Individual team members have different styles

• Understand each member’s roles and authorities
• You may have to handle them individually
Phases of Negotiation

Every negotiation is (at least) three negotiations
• Negotiation with the counter-party
• Negotiation with the counter-party’s attorneys
• Negotiation with (or within) your own client team
  • Bonus ethics credit: Remember who your client is!

Build trust / enhance the relationship with every interaction
• Build and maintain integrity and respect
  • Be consistent
  • Be reliable
  • Be human
• Look for value-creation opportunities for both sides
  • Even if you don’t succeed, the effort helps build the relationship
Pre-Negotiation Questions

What constitutes “success” in this negotiation?

• Is the goal to be “fair”?
  • Who defines what is “fair”?
  • Is “fair” based on what’s “market”?
    • “Market” may not exist for new or unique products

• Is speed a success factor?
  • Does either side have a deadline affecting its decision?
    • Corollary: Is the deadline real?
  • Are transaction costs or opportunity costs driving the schedule?
  • Which side is hurt more by a missed deadline?
Pre-Negotiation Questions

Where is the leverage in this negotiation?
- What is your BATNA?
  - What are the “must-haves”?
  - What are the “nice-to-haves”?
  - Is your client prepared to walk away?
- Can you determine the ZOPA?

What is each party’s risk tolerance?
- Which party is in the best position to manage each risk?
- What risks are unacceptable to each party?

How important are the “smaller points” of the deal?
Recap - before you enter the room…

Know the Issues
- Gather facts … and allow time for the other side to gather facts
- Know the documents and issues in as much detail as possible

Know your Client
- Understand business drivers, preferences and limitations
- Communicate to ensure goals and game plan are set

Anticipate the Other Side
- Understand the other party’s business and legal perspective
- Think through what their needs, objections and constraints may be
- Be prepared to be wrong

Consider Alternatives and Bridging Solutions
Setting the Agenda

Process is a negotiation too

- When, where and how to meet?
- What’s the goal of each session?
  - *Discuss open issues:* circulate an agenda/issues list so issues are framed the way you want them raised
  - *Page-turn:* circulate your draft and run through what they want changed
- Who’s “in the room where it happens”?
  - If high level decision makers will be present, gauge their tolerance for detail
  - *Bonus ethics credit:* Make sure their attorney is attending!
- Be realistic about what each session can achieve
- Allow time between sessions for parties to evaluate, adjust and seek solutions
# The Arena – pros and cons

## Face to Face

### Advantages
- Better communication
- Greater focus / fewer distractions
- Relationship building opportunities

### Disadvantages & Dangers
- Reduced access to specialists
- Angst and anger over travel
- Pressure to “make good use of the time”
- Opportunity for leaks of strategy and position
- You are always negotiating, even during breaks

*Note: Be a good host (space, time, refreshments, etc.)*

## Telephone Conference

### Advantages
- Convenience
- Lower cost

### Disadvantages & Dangers
- Harder to read signals, both from your team and the other side
- Greater opportunity for distraction
- Ethics and confidentiality concerns

### Handling the Telephonic Sessions
- Have a back-channel with your team and use it
- Make sure you are on mute for sidebars
- Consider web conferencing for document turns
Showtime – Starting the Negotiation

Negotiating with business teams
• Establishing understandings on business goals
• Appealing to “reason”
• Do not personalize issues

Negotiating with counter-party lawyers
• Usually a bad idea to make the other lawyer look bad
• Responding to posturing – ignore it or label it? It’s a judgment call
• Show respect (even if – especially if – you don’t feel it)

Negotiating with your client
• Avoid disagreeing with your client in front of the other side
• Make sure you (and they) understand where they are going

*Listen* – sometimes people just want to be heard
Showtime (cont’d)

- Focus on high value issues
- Watch the clock – keep things moving or don’t
- Arguing by example
  - Using the extreme example
  - Backing up to the reasonable example
- The fine art of concessions
  - Easy vs. hard concessions
  - Explaining your concession – why is this OK now?
  - Using emotion – or not
  - Escalating or tabling an issue – or not
- Controlling the next steps – drafting control
First Round / Early Rounds

Gather Information

- Reduce tension, build trust, create momentum
- Get some issues off the table
  - Narrow issues to a manageable list
  - Group related issues together
- Don’t get hung up on hard issues too early
  - Identify them, probe positions and interests, move on
  - Easier to address after relationship and momentum has been established
- Anchoring – making the first offer

Actively look for the “ambush issue”
Look for Sources of Value Creation

Focus on **interests** over **positions**

- Ask “why” to reach interests behind positions
  - Sometimes parties don’t recognize the interest behind the position – probing can increase understanding
- Seek to align the parties’ interests, not defend a position
  - There are usually more ways to serve your interests than just the position you’ve staked out
- Multiple offers can help uncover relative priorities
- Logrolling
  - Concede issues of lesser importance (to you) to gain on issues of greater importance (to you)
  - *Do the math* – it may be easier than you think to give something up

Don’t make it personal, don’t take it personally
“Packaging” Issues

Eventually, someone may offer to resolve a group of issues as a package

- Packages often do not do hold up to scrutiny and get unpackaged or cherry-picked away
- Generally most effective late in the negotiation when few issues remain
- Most effective when the issues are related to one another
- Packages of unrelated issues may reveal how far a party is willing to go on an issue even outside of the package

Clarify the package – get ALL of the other side’s points and rationale before responding
Don’t Ask for Something You Know They Can’t Give

Some things the other party just can’t do
• Asking for them is a waste of time
• You risk creating anger and frustration
• You may lose trust and credibility
• Pick your fights and know what risks are acceptable

“Never try to teach a pig to sing; it wastes your time and it annoys the pig.”*

*Robert Heinlein, *Time Enough for Love*
Winning Points

You Never Know Unless You Ask

- Many lawyers are afraid to ask for something seemingly outrageous or unreasonable
- If you present a reasonable basis for the request (and ask nicely), you may be pleasantly surprised by what you can get – it may be easier for them to give than you think
- You may get one or two additional benefits for your client, especially if you’ve been reasonable elsewhere
- Use sparingly – they might ask for something outrageous in return

You Won’t (and Shouldn’t) Win Every Point

- The downfall of many negotiators: not focusing on what’s important
- Let the other side win some issues
- Don’t get stuck on language where it really isn’t necessary
Dangerous Tactics

“Deal Breaker”
• This term is powerful, helpful and dangerous
• Use it sparingly and use it wisely
• Too soon or too often and you’ll lose credibility and trust
• Don’t use it if you don’t mean it

Bluffing
• The most dangerous game in negotiation
• If you are caught, all credibility can be lost
• Only try it if you’re almost certain of your chances, and be sure you can live with the consequences if you’re wrong
Re-opening issues is difficult and dangerous

- Hurts credibility and trust
- Often bogs down the negotiation
- Re-opening points can backfire by giving the other side the opportunity to open other issues that were previously resolved

In general, avoid re-trading unless …

- Something has changed that makes the agreement obsolete
- A mistake or misunderstanding (hopefully an honest one) comes to light that makes the prior agreement unacceptable

Be honest – if you are re-opening an issue, acknowledge what you’re doing, why you’re doing it, and apologize
Final Thoughts

Avoid negotiating with yourself, but try to make the other side do it

- Silence is both a sword and a shield
- You may lose ground by talking too much
- Sometimes a vague, non-substantive response will cause the other side to move off a position before you have moved off yours

Cardinal sin – losing your cool

- Stay calm and in control
- If you do blow-up, do it strategically

Hardest thing is when your client undercuts you

- This is one of the greatest frustrations a negotiator can feel
- Accept it and move on – calling attention to it just makes it worse
Negotiation Dos and Don’ts

Do
- Be prepared.
- Coach clients not to contradict (but be sensitive).
- Be creative – clients want solutions not lists of problems.
- Be cognizant of business realities.
- Control the documents – draft on screen but allow take-away time.
- Maintain leverage throughout the negotiation.
- Focus on results rather than theory. Principled discussions are fun, but clients want results. Everything must pass a “and what’s the point” test.
- Be the one to brief your client’s executives prior to “escalation” meetings – they need your counsel, not the other side’s.

Don’t
- Be over rehearsed.
- Allow time to put pressure on your client.
- Contradict other team members openly.
- Score random points against the other side (and avoid bickering with the other lawyer) – Clients hate it.
- Create unnecessary problems – ground your positions in context (is it really important to get that point on IP/liability etc. in the context of this deal?).
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