102 Building Negotiation Skills for Cross Border Transactions

Shlomi Feiner
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Association of Corporate Counsel

Tuesday, May 1
8:30–10:30 am

701 Building Better Negotiation Skills
General Session

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LEGAL NEGOTIATION PROCESS AND TECHNIQUES

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PREFACE

Professor Craver has made presentations on **EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT** and **ALTERNATIVE DISPUTE RESOLUTION PROCEDURES** to over seventy-five thousand legal practitioners in over forty states, the District of Columbia, Canada, England, Mexico, Austria, Germany, Puerto Rico, and the People's Republic of China. He is the Freda H. Alverson Professor of Law at the George Washington University Law School, where he regularly teaches a course on Legal Negotiating. He was formerly associated with Morrison & Foerster in San Francisco, where he specialized in employment and litigation practice.

Professor Craver is author of ***Effective Legal Negotiation and Settlement*** (LEXIS: 5th ed. 2005), ***The Intelligent Negotiator*** (Prima/Crown 2002), and co-author of ***Alternative Dispute Resolution: The Advocate's Perspective*** (LEXIS: 3rd ed. 2006). He is also author of ***Can Unions Survive? The Rejuvenation of the American Labor Movement*** (N.Y.U. Press: 1993) and co-author of ***Employment Law Treatise*** (2 Vols.) (West: 3rd ed. 2004), ***Employment Law Hornbook*** (West: 3rd ed. 2005), ***Human Resources and the Law*** (B.N.A. 1994), ***Labor Relations Law*** (LEXIS: 11th ed. 2005), ***Employment Discrimination Law*** (LEXIS: 6th ed. 2006), ***Collective Bargaining and Labor Arbitration*** (Michie: 3rd ed. 1988), and ***Labor Relations Law in the Public Sector*** (Michie: 4th ed. 1991). Professor Craver has published numerous law review articles on dispute resolution and labor/employment law.

Professor Craver received his B.S. from Cornell University in 1967, his Master's Degree from the Cornell University School of Industrial and Labor Relations in 1968, and his J.D. from the University of Michigan in 1971. Before joining the George Washington University Law Faculty, he taught at the Universities of Illinois, California, Davis, Virginia, and Florida.

Professor Craver's book ***Effective Legal Negotiation and Settlement*** (5th ed. 2005) may be ordered directly from **LEXIS-NEXIS Publishing** [(800) 446-3410]. ***The Intelligent Negotiator*** may be obtained from online book sellers.

VIDEO and **AUDIO TAPES** of **EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT** and **ALTERNATIVE DISPUTE RESOLUTION PROCEDURES** may be obtained from ***International Communications Corp.*** [800)422-5134].

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THE LEGAL NEGOTIATION PROCESS AND TECHNIQUES

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INTRODUCTION

The art of legal negotiating concerns skills rarely taught in traditional law school curricula, even though practicing attorneys regularly encounter situations that require various forms of negotiation. While the negotiation process is clearly applicable to lawsuit settlements, contractual undertakings, business transactions, and so forth, it is easy to ignore its application to other equally important areas of law practice.

The negotiation process has little to do with traditional legal doctrines, except perhaps those of basic contract law. It is instead governed by the same psychological and sociological principles that influence other interpersonal transactions. As a result, lawyers who employ a conventional legal framework to guide their negotiations often ignore the most relevant factors.

It is imperative that negotiators recognize that they are involved with a process that takes time to develop. The various stages must evolve, and certain ritualistic behavior must normally occur. Patient bargainers who permit the process to unfold in a deliberate manner can usually obtain expeditious and efficient settlement agreements. On the other hand, impatient participants who endeavor to accelerate the process are likely to encounter needless problems and extend the time necessary to complete their transactions.

In this course, we will explore the negotiation process - the different stages and the objectives to be accomplished in each. We will also cover the negotiation techniques individuals are likely to encounter when they bargain with others. The more people appreciate how structured the negotiation process is, the more they can determine the optimal way to behave to achieve their desired goals.

COMMUNICATION EXERCISE: The object of the negotiation process is to satisfy the needs of the participants. Crucial forms of communication transcend the particular issue(s).

You and the person next to you will negotiate a personal injury problem, but you may not talk or gesticulate. All communication must occur on paper. Only monetary sums representing offers or demands may be exchanged. You will have three minutes to reach an agreement.

Assume that a 20-year-old, unmarried woman has been injured in an automobile accident with the defendant. Due to flying glass, she has lost the sight in her left eye and has suffered permanent facial scars. She still suffers from occasional bad headaches. Her unpaid medical bills to date amount to $20,000. It is clear that the defendant was negligent, but it is disputed whether the plaintiff was also negligent. Assume you are in a state where contributory negligence is still a total bar to recovery. A suit for $300,000 has been filed.

(A) The plaintiff is totally broke and desperately needs money. She wants to get $20,000 now to pay her medical expenses. Although her headaches have abated, her mental state has recently deteriorated due to the pending litigation. Her psychiatrist has informed you, with her permission, that if the case is not resolved quickly, she is likely to suffer an emotional relapse and commit suicide. She has instructed you to settle immediately for any amount over $20,000 (assume that you are representing the plaintiff on a pro bono, no-fee basis).

(B) The defendant insurance company lacks the personnel to try this case and believes the plaintiff will be an appealing witness. It fears a judgment well in excess of the modest $300,000 being sought if the case is tried, and will be obliged to pay the entire verdict if that fear is realized. You have thus been instructed to settle the case immediately for any amount up to $300,000. You will be fired if you do not achieve a settlement.

From this brief exercise, several highly relevant phenomena should be apparent:

1. People perceive the value of the same case differently, with high aspiration participants being more likely to obtain better results than low aspiration participants;

2. Some participants feel a greater need to settle than others, with risk-averse participants being less willing

to accept the possibility of non-settlements than risk-taking individuals; and

3. It is uncomfortable and difficult to conduct negotiations when you can only communicate about the specific items in issue, since ancillary discussions are needed to keep the process going between position changes.

I. UNDERSTANDING VERBAL COMMUNICATION/VERBAL LEAKS

A. Meaning apparent on face ("I cannot offer more").

B. Meaning equivocal ("My client is ***not inclined***/ does ***not want*** to offer any more"; "I cannot offer more ***at this time***"; "My client ***would like*** to get $50,000"; "That's ***about as far*** as I can go"/"I don't have ***much more room***").

C. Indicating item priorities: "I ***must have*** X, I ***really need*** Y, and I ***want*** Z").

D. Negotiators should listen for "verbal leaks" that are associated with equivocal statements.

II. NEGOTIATOR STYLES (G. Williams, 1983 & A. Schneider, 2002)

Most negotiators tend to exhibit a ***"cooperative"*** or a ***"competitive" style***, with "cooperative" advocates using a problem-solving approach and with "competitive" advocates employing a more adversarial methodology. Certain traits are used to distinguish between these two diverse styles.

COOPERATIVE/PROBLEM-SOLVING	COMPETITIVE/ADVERSARIAL
Move Psychologically *Toward* Opponents	Move Psychologically *Against* Opponents
Try to Maximize *Joint* Return	Try to Maximize *Own* Return
Seek Reasonable Results	Seek Extreme Results
Courteous & Sincere	Adversarial & Disingenuous
Realistic Opening Positions	Unrealistic Opening Positions
Rely on Objective Standards To Guide Discussions	Focus on Positions Rather Than Neutral Standards
Rarely Use Threats	Frequently Use Threats

Maximize Information Disclosure	Minimize Information Disclosure
Open & Trusting	Closed & Untrusting
Reason With Opponents	Manipulate Opponents

A. Williams study of attorneys in Denver and Phoenix found that ***65%*** of negotiators were considered ***"Cooperative/Problem-Solvers," 24% "competitive/ Adversarial,"*** and 11% unclassifiable.

B. ***"Competitive" negotiators*** tend to act competitively with both "cooperative" *and* "competitive" opponents, while ***"cooperative" negotiators*** tend to act cooperatively with "cooperative" opponents and competitively with "competitive" opponents.

C. Williams study found that a ***greater percentage*** of ***"cooperative"*** negotiators viewed as **effective** (59%) by other lawyers than "competitive" advocates (25%), while ***greater percentage*** of ***"competitive"*** persons considered ***ineffective*** (33%) than "cooperative" persons (3%).

D. Schneider study found two ***significant changes*** compared with prior Williams study.

1. "Competitive" negotiators viewed more negatively today than in 1980 – nastier and more abrasive.

2. While 54% of "cooperative" negotiators viewed as *effective*, only 9% of "competitive" advocates are and while only 3.5% of "cooperative" negotiators considered *ineffective*, 53% of "competitive" bargainers seen as *ineffective*.

E. Although ***"competitive" negotiators*** are more likely to obtain ***extreme results*** than "cooperative" participants, they generate far ***more non-settlements*** and tend to generate ***less efficient agreements***.

F. ***Effective "cooperative"*** *and* ***"competitive" negotiators*** are thoroughly prepared, behave in an ethical manner, are perceptive readers of opponent cues, are realistic and forceful advocates, observe common courtesies, and try to **maximize own client return**.

These findings suggest that the *most effective* negotiators are ***"competitive/problem-solving"*** lawyers who seek "competitive" results, but do so in a seemingly "cooperative" manner designed to maximize the joint

returns of the parties.

G. Lawyers increasingly ***view opponents*** as the ***"enemy"*** and are personally offended by opponent efforts to advance client interests-- Attorneys must realize that opponents are not the "enemy" but their ***best friends***, since they enable them to earn a living.

III. PREPARATION STAGE [*Establishing Limits & Goals*]

Knowing your own situation and as much as possible about your opponent's circumstances is very important if you wish to achieve optimal results.

A. ***Basic Areas***

1. Be fully prepared regarding relevant facts and law, Plus any relevant economic and/or political issues.

2. Prepare all relevant arguments supporting own positions-- Consider innovative formulations.

3. Anticipate opponent's arguments and prepare effective counter-arguments-- This will bolster own confidence and undermine that of opponent.

4. Try not to over-estimate own weaknesses or to ignore weaknesses influencing your opponent.

5. What is **your BATNA** [Best Alternative to Negotiated Agreement] - *i.e.*, your **Bottom Line**.

6. What is your **opponent's BATNA** - Try to appreciate Options and pressures affecting your opponent.

B. ***Assumptions***

1. Regarding own position.

2. Regarding adversary's situation-- Try not to use your own value system when evaluating opponent's likely position but endeavor to really place yourself in shoes of opponent.

C. Establishment of ***Aspiration Level***

This is a crucial factor, because negotiators who start with high aspirations usually obtain better results than those who do not begin with firm goals.

1. Attorneys who occasionally wish they had done better at end of negotiations have usually established beneficial aspiration levels and have achieved desirable results.

2. Attorneys who always achieve their negotiation goals should increase their aspiration levels, since they are probably establishing inadequate objectives.

3. Negotiators should initially:

a. Seek high, yet seemingly "reasonable" initial positions that will not cause opponents to lose all interest -- Try to begin as far from actual objectives as you can while still being able to rationally defend your proposals.

Due to ***"anchoring"***, people who begin with generous opening offers embolden opponents who think they'll do better than they thought while those who begin with less generous offers undermine opponents who think they'll not do as well as they hoped.

b. Lawyers should try to offer opponents terms that seem like ***gains*** rather than ***losses*** because of ***gain-loss framing*** - People offered sure ***gain*** and possibility of greater gain or no gain tend to be ***risk averse*** while persons offered sure ***loss*** and possibility of greater loss or no loss tend to be risk takers trying to avoid any loss.

c. Negotiators should also be aware of impact of the ***endowment effect*** - Persons who own something tend to ***over-value*** those items while people who are thinking of buying the same items tend to ***under-value*** those goods.

d. Successful negotiators are usually people who are able to prepare for negotiations by convincing themselves of the reasonableness of seemingly unreasonable positions.

1. This bolsters their confidence when they begin the negotiation process.

2. A confident manner often causes uncertain opponents to reconsider their preliminary assessments in favor of the confident party.

e. Establish "***principled opening positions***" that can be defended "objectively" when presented to adversaries-- Prepare logical rationales to explain each component of positions.

1. Bolsters own confidence and undermines that of uncertain opponents.

2. Explains reasons for choosing overall positions selected, rather than less beneficial starting points.

3. Frequently allows person to control agenda, by causing opponents to directly focus upon each segment of stated positions.

D. ***Planning Strategy and Tactics***

1. Carefully plan your desired methodology as if you were choreographing the movement from your opening offer to your desired objective.

2. Consider appropriate modifications to your plan that may be necessitated by changed circumstances that may arise during the negotiations (***e.g.***, overly generous first offer or unexpectedly large subsequent concession by opponent).

a. Imagine a road map with various routes from opening position to ultimate objective.

b. You must be prepared to change routes in response to opponent tactics.

E. Negotiators must develop bargaining strategies that will culminate in "final offers" that are sufficiently tempting to risk-averse opponents vis-a-vis consequences of non-settlements that opponents will be afraid to reject the proposed terms.

F. Negotiators must always remember their ***Best Alternatives to Negotiated Agreements***, so that they can comprehend the consequences of non-settlements-- If non-settlements would be preferable to opponent last offers, negotiators should not hesitate to reject the proposed terms.

IV. PRELIMINARY STAGE [*Establishing Identity & Tone*]

Establishment of Negotiator Identities and Overt Tone For the Negotiations.

A. ***Initial Exchange*** of ***Professional/Personal Information***

1. Status Factors:

a. Name of law firm or legal agency with which participants are associated.

b. Educational background.

c. Possible professional name-dropping.

2. Experience Factors:

a. General legal experience.

b. Familiarity with areas relevant to particular matter to be negotiated.

B. ***Establishing Overt Tone*** of Negotiations-- Openly Competitive/Cooperative, Congenial/Unfriendly, etc.

1. Negotiators should initially reestablish rapport with opponents they already know and work to establish rapport with opponents they don't know.

a. They should look for common interests that may make them more likeable since it is harder to reject requests from people we like than from persons we dislike.

b. They may have attended the same schools, they may like the same sports, music, or other activities, or they may share other interests.

2. Studies show that the ***negotiator moods*** significantly affect the way in which bargaining interactions are conducted.

a. Negotiators who begin interactions in a positive mood behave more cooperatively, reach more agreements, and achieve more efficient distributions of the terms agreed upon.

b. Negotiators who begin an interaction in a negative mood behave more competitively, reach more impasses, and achieve less efficient distributions of the terms agreed upon.

C. When negotiators approach interaction with vastly different views of tone to be set for the process,

"***Attitudinal Bargaining***" may be used to influence the manner in which bargaining will proceed.

1. Many attorneys are so enamored of the "adversarial" nature of the legal system that they view negotiations as "win-lose" endeavors.

   a. Be wary of opponents who normally address you by your first name but formally address you as Mr. and Ms. during negotiations, since this technique permits them to depersonalize bargaining interaction in way that allows them to act more competitively.

      When opponents depersonalize interactions, take the time to establish more personal relationships-- Use warm handshakes and other casual touching, and maintain non-threatening eye contact-- to make it more difficult for your opponents to employ inappropriate tactics against you.

   b. If you are negotiating in opponent offices and feel uncomfortable, try to ascertain if your opponents have intentionally created an intimidating atmosphere by placing you in a short and uncomfortable chair or with your back literally against the wall, or by placing themselves in raised position of dominance.

      1. Don't hesitate to rearrange the furniture or select another chair that will be more comfortable.

      2. When your opponents leave the office to get a file or some coffee, take their seats and indicate, when they return, that you prefer the view from those locations.

2. When opponents appear to begin interactions in negative moods, take the time to generate more positive moods by indicating the mutual benefits to be derived from the immediate interactions.

D. Since most negotiations can achieve "win-win" results where both sides are satisfied with the agreements achieved, it is beneficial to ***begin*** the process in a ***cooperative*** and trusting way.

   1. Encourages cooperative behavior and enhances probability of negotiation success.

   2. Generates mutually beneficial relationships that will enhance future dealings.

E. Remember that the ***negotiation process begins*** with ***first contact*** with opponents-- Parties who initially dictate the time, date, and location for interactions may gain an important psychological advantage even before the substantive discussions have begun.

V. INFORMATION STAGE ["*Value Creation*"]

Focus Upon ***Opponent's*** Initial ***Positions*** and ***Underlying Needs and Desires*** to Ascertain What May be Divided Up.

A. ***Seek*** as much ***information*** from opponent as possible, while being careful not to disclose inadvertently information you wish to remain confidential.

   Try to ascertain what ***options*** are available to ***opponent*** if ***no agreement*** is achieved with you, since this defines that party's bargaining power.

B. Initially ask ***Information Seeking Questions***.

   1. Narrowly-focused leading questions generally do not elicit new information, but tend to confirm information currently possessed.

   2. **Broad, open-ended questions** tend to elicit the most new information since they induce opponents to talk-- Only narrow your questions during final stages of the information retrieval process.

      a. Try to maintain good eye contact during the Information Phase-- Take as few notes as possible to permit you to focus upon opponent's verbal and nonverbal signals.

      b. Restate in your own words important information opponent has apparently disclosed, to verify/clarify information actually divulged.

C. Decide what ***information you need to disclose*** to opponent to facilitate negotiation process and determine ***how*** you plan to ***divulge*** this information.

   1. Information you volunteer tends to be devalued as self-serving ("***Reactive Devaluation***").

2. Information you provide in response to opponent's questions usually considered more credible than information you voluntarily disclose in an unsolicited manner.

3. Keep answers to opponent's questions short to avoid unintended verbal and nonverbal disclosures.

D. Employ ***Blocking Techniques*** to avoid answering opponent questions about highly sensitive areas.

1. Simply ignore apparent inquiry and move on to some other area you would prefer to discuss.

2. Answer only the beneficial part of a complex question, ignoring threatening portions of it.

3. Over- or under- answer the question propounded.

a. Respond generally to a specific inquiry.

b. Respond specifically to a general inquiry.

4. Answer a different question-- Respond to one previously asked or to a misconstrued form of the inquiry actually propounded.

5. Answer opponent's question with a question of your own-- ***E.g.***, In response to "Are you authorized to pay $100,000," simply ask opponent "Are you willing to accept $100,000."

You may alternatively treat such question as a new offer, placing opponent on defensive.

6. Rule the question out of bounds as an improper or inappropriate inquiry.

E. ***Plan*** intended ***Blocking Techniques*** in advance, since this will most effectively prevent unintended verbal and nonverbal leaks.

1. Plan to vary your Blocking Techniques to keep opponent off balance.

2. Use Blocking Techniques only when necessary to protect your critical information to avoid needless loss of credibility.

F. When both sides are aware of ***narrow settlement range*** one side may ***begin*** with ***reasonable offer*** just inside

range hoping to preempt negotiations and induce other side to accept offer without any haggling.

G. In most other bargaining situations, it is generally beneficial to ***induce opponent*** to ***make*** the ***first offer***-- Be certain you get the first ***real*** offer, since outrageous proposal really same as no offer.

1. Generous initial offer may provide unexpected information-- Opponent may know more about own weaknesses than you do, or has overestimated your strengths-- Either occurrence should induce you to contemplate an increased aspiration level.

2. After you receive opponent's initial offer, you can begin with position that places your goal in the middle, since parties tend to move toward center of their opening offers [***"Bracketing"***].

3. Party who makes the first offer likely to make the first ***concession***, and studies indicate that the party who makes initial ***concession*** tends to achieve less beneficial results than opponent.

H. ***Observe carefully*** and ***probe opponent*** to ascertain his/her perception of situation, because it may be more favorable to own side than anticipated.

1. Categories of Information Regarding the Opponent:

a. Personal skill.

b. Negotiating experience.

c. Relevant personal beliefs and attitudes.

d. Opponent's perception of current situation.

e. Resources available to opposing party.

2. Sources of Information:

a. Choice of topics and sequence of presentation critical when multi-item negotiations involved.

1. Some negotiators begin with their most important topics in effort to get them resolved quickly and diminish the anxiety they are experiencing regarding the possibility of no settlement.

Increases likelihood of quick impasse over critical items and non-settlement.

2. Other negotiators begin with their least important items-- either intending to make concessions on them to induce opponent to make subsequent concessions on major items or to obtain psychological advantage by winning minor items while creating concession-oriented attitude in opponent.

Enhances probability of settlement by beginning process successfully and developing psychological commitment in participants to mutual accord.

b. Verbal leaks and nonverbal clues

3. Problems of Interpretation:

a. Credibility of information received.

b. Validity of your perceptions of opponent.

c. Attribution-- Meanings you attribute to opponent's ambiguous signals (verbal and nonverbal).

4. Verification Mechanisms:

a. Overall behavior patterns.

b. Consistency of verbal and nonverbal signals.

c. Use of questioning and probing.

I. Beneficial to ***ask relatively neutral questions*** for purpose of ascertaining underlying bases (assumptions, values, personal needs, goals, etc.) for opponent's stated positions.

1. Explore relevant factual circumstances in an objective, non-evaluative manner-- If both sides can agree upon underlying factors in a non-threatening way, probability of achieving successful result increases substantially.

2. Endeavor to ascertain external pressures operating on opponent ***and*** his/her client, since such factors directly influence their assessment of situation.

3. Specifically focus upon underlying needs and interests of both sides, rather than simply upon expressed positions.

a. Emphasis upon stated positions more likely to generate internecine conflict than exploration of underlying interests.

b. Remember that positions frequently reflect only some of underlying needs and interests- Use ***Brainstorming*** to generate innovative options. Discovery of undisclosed motivational factors will often enhance possibility of settlement by allowing parties to explore unarticulated alternatives that may be mutually beneficial-- For example, you may find that a plaintiff in a defamation action seeking a substantial monetary sum would prefer to obtain retraction and public apology or a corporate seller may accept some goods or services instead of cash.

VI. DISTRIBUTIVE/COMPETITIVE STAGE [*"Value Claiming"*]

Focus Upon ***Own Side's*** Objectives and Interests as Parties Divide Up Items They Discovered During Information Stage.

A. Direct ***competitive phase*** during which each advocate endeavors to obtain as much from opponent as possible. Negotiators should:

1. Carefully think out "concession pattern" in advance in manner that will not inadvertently disclose confidential information. You may use ***bracketing*** to keep own goal between current positions of the parties, making equal concessions until you end up in area you hoped to achieve.

2. Start from "***principled opening position***" to explain and support initial presentation.

a. To reinforce confidence in own position.

b. To induce opponent to reassess own position.

3. Try to make only "***principled concessions***", instead of unexplainable jumps, so they can convincingly explain why a particular concession is being made and why a larger concession cannot now be provided.

4. Avoid unreciprocated concessions in which they

bid against themselves without obtaining reciprocal position changes from other side.

5. Focus on ***aspiration level***, not bottom line, throughout the distributive stage. Less proficient bargainers tend to focus on bottom line and relax once it is achieved, while skilled negotiators focus on aspiration level and try not to relax until they achieve real goal.

B. ***Common Techniques*** (usually occur in combination):

1. Argument (legal and nonlegal).
2. Overt threats or more subtle warnings.
3. Rational or emotional appeals.
4. Challenges to opponent's various contentions.
5. Ridicule of opponent or of his/her position.
6. Control of agenda (its content and order of items).
7. Intransigence.
8. Straight-forwardness.
9. Flattery (including real or feigned respect).
10. Manipulation of contextual factors (time, location, etc., of negotiations).
11. Humor can be used by many people to ridicule unreasonable positions being taken by opponent or to reduce built-up bargaining tension.
12. Silence (people often talk to fill silent void, thus inadvertently disclosing information).
13. Patience (powerful weapon since many negotiators make concessions simply to end process)-- Time pressure can be effectively used against opponent who has an artificially curtailed time constraint.
14. Creation of guilt or embarrassment, since such feelings often precipitate concessions.

C. Characteristics of ***Persuasive Argument***:

1. Even-handed and seemingly objective.

2. Presented in logical, orderly, comprehensive, and articulate manner to enhance cumulative impact.
3. Beyond what is expected, forcing the opponent to reconsider his/her perception of matter in issue.

D. Characteristics of ***Effective Threats***:

1. Carefully communicated to and completely understood by opponent.
2. Proportionate to the present situation (***i.e.***, must constitute believable alternative to settlement).
3. Supported by corroborative information.
4. Never issue ultimatum you are not prepared to effectuate if necessary.

E. Distinguishing Between ***Threats*** and ***Warnings***:

1. ***Threats*** are actions communicator may take to punish recalcitrant opponent while ***warnings*** are consequences that will result from actions of others if requested behavior not carried out.
2. ***Threats*** more disruptive than ***warnings*** since more direct affront to person being threatened than predicted actions of others.
3. ***Warnings*** more credible than ***threats*** since appear to be beyond control of communicator.

F. ***Affirmative Promise*** ("If you do this, I'll do _____") more likely to induce position change and less disruptive than negative threat/warning, due to face-saving nature of promise, yet negative threat/warning more likely to be remembered than affirmative promise.

G. The ***purpose*** of ***power bargaining*** is to influence opponent's evaluation of:

1. His/her own situation.
2. Your position and your external options.
3. Your side's capabilities.

H. Counsel should ***consider*** the following ***consequences*** of ***settlement*** and ***non-settlement***:

1. Likely outcome if no settlement is achieved, including transactional and psychological costs-- to own side ***and*** to opposing side.

2. Total monetary and emotional costs of settlement.

3. Impact on future dealings between the parties.

VII. CLOSING STAGE [*"Value Solidifying"*]

Critical point near the end of successful competitive phase when parties begin to realize that an agreement within their respective settlement ranges is likely and they become psychologically committed to that result.

A. Parties who become ***overly anxious*** about achievement of accord frequently ***move too quickly*** toward closure.

1. They forget the patience, carefully planned concession pattern, and thought-out tactics that got them to this beneficial position, and they try to move directly to a final agreement.

2. Parties who make excessive and unreciprocated concessions in an effort to conclude transaction are likely to give up the gains they achieved during prior competitive phase.

65-75% of concessions made during last 20-30% of negotiation, although these position changes tend to be smaller than those made earlier.

B. Both parties need to ***close remaining gap together***-- Alternating concessions of a reciprocal nature should be employed, to ensure that one side does not concede more than its fair share.

1. During the Closing Stage, parties occasionally make concessions that are larger than those made just prior to entry into this stage of process-- This is not inappropriate, so long as opponent is being equally generous ***and*** such reciprocal concessions do not unfairly disadvantage one side due to its previous position changes.

2. Continue to use principled concessions and relevant negotiating techniques to keep process moving inexorably toward a satisfactory conclusion.

C. As the parties enter the Closing Stage, each is concerned about the possibility of conceding too much- ***Assist opponent*** by using ***face-saving techniques*** to resolve the remaining issues.

1. Use of ***threats/warnings*** during Closing Stage is generally counter-productive, since threats/ warnings are offensive rather than cooperative and are more likely to disrupt the process.

2. Use of ***promise technique*** is particularly effective, since it permits parties to move together-- ***e.g.***, agreeing to "split difference" between positions currently on negotiating table.

D. Important to remember that ***Closing Stage*** is ***highly competitive*** part of negotiation process.

1. If one party is more anxious to close than other party, he/she is susceptible to larger and more numerous concessions causing poor result.

2. Once you recognize that your opponent has become psychologically committed to settlement, evidenced by such closing behavior as more rapid and more generous concessions, do not move too quickly.

a. Be patient and encourage your opponent to close more of the remaining gap.

b. Indicate that you have minimal bargaining room left to induce opponent to believe he/she must close most of remaining gap.

c. Emphasize your prior concessions in effort to generate guilt that may induce your opponent to be more generous now.

d. Be supportive of opponent's position changes-- Praise that party's reasonableness and indicate that an agreement is certain if he/she can provide you with the few additional items you need to satisfy your client's minimal goals.

e. If opponent prematurely offers to split the difference between the parties, you may offer to split ***remaining difference*** inducing opponent to close 75 percent of gap.

VIII. COOPERATIVE/INTEGRATIVE STAGE [*"Value Maximizing"*]

This phase is applicable to nonzero sum negotiations in which one party can enhance his/her position with either minimal cost to opponent or perhaps even some benefit to other party-- Remember that what may initially appear to be a zero sum transaction may be converted to a nonzero sum negotiation, if parties explore alternative options that may prove to be mutually beneficial (***e.g.***, personal injury case where unacceptably large current lump sum payment is replaced by defendant's promise to pay all of plaintiff's future medical and rehabilitative costs).

A. When a tentative settlement is first achieved, it is often advantageous to ***explore alternative trade-offs*** that may enhance the interests of both sides - Look for items that may have ended on wrong side of table as parties over- and under-stated the value of items for strategic reasons during prior exchanges.

   1. Although parties may be mentally exhausted and want to memorialize their agreement, they should briefly explore alternative formulations that may be mutually advantageous but were previously ignored.

   2. While minimal candor is required during this part of interaction, even Cooperative Stage continues to have a competitive aspect, since each side is still trying to obtain as much as possible from opponent.

B. Be certain opponent recognizes that you are engaged in "cooperative bargaining" at end of "Closing Stage," since your proposed alternatives may be less beneficial to him/her than your tentative agreement, and if he/she does not realize that you are simply exploring possible alternatives, claims of bad faith or deceit may arise.

C. Once a final agreement is achieved, the parties should carefully ***review the final terms*** agreed upon to make sure there has been a complete meeting of the minds.

   1. If any misunderstandings are found, this is the best time to resolve them since the parties are psychologically committed to a final accord.

   2. If misunderstandings are not found until later, they are likely to be more difficult to resolve.

D. When the negotiation process concludes with a mutual accord, it is beneficial to ***draft the final agreement***--

While no attorney should contemplate the deletion or alteration of term agreed upon or the addition of new provisions, since such behavior would be unethical and probably fraudulent, he/she should seize the chance to draft provisions that best reflect his/her understanding of terms negotiated.

E. If your opponent drafts the final agreement, you should ***carefully review*** that ***draft*** to be sure it is accurate.

   1. Make sure the language selected reflects your understanding of the terms agreed upon.

   2. Be certain that nothing has been added that was never agreed upon.

   3. Make sure that nothing that was agreed upon has been omitted from the final agreement.

IX. NEGOTIATING GAMES/TECHNIQUES

A. ***Nature and Objectives:***

   1. Seemingly ingenuous remarks that disguise ulterior motives are common to most negotiations as people endeavor to move opponents in desired direction.

      a. Attorneys may use them to create an impression of greater actual or believed bargaining power than really exists to enhance that power.

      b. Such ploys may be used to diminish opponent's bargaining strength by creating the impression that the speaker is ignorant regarding that party's actual power, since bargaining power is defined more by perception rather than by objective standards.

   2. Psychological ploys may be used to induce opponents to respond in a beneficial way that is not based on wholly rational considerations. Examples include:

      a. False flattery to precipitate concessions.

      b. Feigned weakness to evoke sympathy.

      c. Feigned anger to generate guilt.

B. Fundamental ***Negotiation Games/Techniques***:

Although some negotiators use particular techniques one at a time, most employ several techniques simultaneously or resort to different tactics in a seriatim manner to keep their opponents off balance.

1. ***Numerically Superior Bargaining Team.***

   a. Single people who negotiate against two or three opponents are usually at a distinct disadvantage.

   b. Their opponents can more easily monitor their verbal and nonverbal signals and they can compare ideas during separate caucus sessions.

   c. Individuals who must negotiate against several opponents should have colleagues join them to counteract the numerical superiority possessed by the other side.

   d. People who have 15 or 20 persons on their side of table are at disadvantage against smaller teams, and they should conduct intra-organizational interaction during Preparation Stage to generate common goals and common strategy.

2. ***Asymmetrical Time Pressure.***

   a. If one side is under more time pressure than the other, a patient participant may take advantage of this imbalance.

   b. Negotiators must recognize that opponents also have deadlines that affect their behavior.

   c. Advocates can often hide their time constraints.

   d. Transaction negotiators may preempt the time element by announcing the deadline that must be met by both sides if a deal is to be consummated.

3. ***Extreme Initial Offer/Demand.***

   a. Creates high aspirations in self and may induce careless opponent to reconsider own evaluation.

   b. May cause opponent to conclude that matter cannot be reasonably resolved, or may place

offeror in position from which he/she may end up retreating in uncontrolled fashion.

   c. Counter-measures:

      1. Important to directly inform offeror of how unreasonable his/her opening position is, to disabuse him/her of any notion that position is even remotely realistic.

      2. You may refuse to state your own opening position until some meaningful offer is presented to you, but this forces opponents to bid against themselves.

      3. You may respond with equally outrageous position of your own, hoping to talk opponent into joint resort to realistic positions.

      4. May come out with own realistic position, but must realize that this will require opponent to make concessions on 10:1 or 20:1 basis.

4. ***Probing Questions.***

   a. Advocates confronted by truly extreme positions may generate a more flexible atmosphere through the use of probing questions designed to induce opponents to explain the positions being taken.

   b. Use of neutral, nonjudgmental inquiries is often more effective than direct challenge to positions being taken by intransigent persons.

   c. Ask opponents to value most finite items first, writing down figures that are remotely realistic.

   d. If unreasonable figure cited, calmly indicate lack of objective basis for position and ask how opponent determined that number.

   e. When done, total position usually three times opponent's offer or one-third of his/her demand.

5. ***Boulwareism/Best Offer First Bargaining.***

   a. Presenting best offer at outset, explaining

that you do not wish to waste time engaging in usual "auction" bargaining since this is all you are willing to offer-- Frequently employed by insurance company representatives.

b. Impossible to know true value of transaction from own side's perspective-- Must meet with opponent to determine how much he/she wants an agreement.

c. May only be employed effectively by person with bargaining power-- Party with such power can afford to be generous with process and let other party think he/she has influenced the outcome, since he/she may be willing to pay for privilege.

d. Entails substantial risk that opponent will react negatively to such paternalistic offer no matter how reasonable it is, due to feeling that he/she was denied opportunity to participate in process.

> Opponent may even accept less through auction process than you were willing to offer.

e. Recipients of Boulwareistic offers should assess them on merits and not merely reject them due to patronizing manner of presentation.

6. ***Range Offers.***

a. Some negotiators phase monetary offers/demands in terms of a range rather than as a single figure - *e.g.*,"We expect something in the $10,000, $15,000, or $20,000 area."

b. Such offers tend to indicate uncertainty in the mind of the offeror, since more prepared person would have determined precise number to be used.

c. Recipients of range offers should focus on most beneficial end of spectrum - *i.e.*, plaintiff attorney should discuss $20,000 figure while defendant lawyer should explore $10,000 demand.

7. ***Settlement Brochure.***

a. Preparation of written document, with pictures

if appropriate, to establish highly-principled initial position and induce opponent to argue from this document [creates aura of legitimacy].

> Some parties now prepare video reenactments of relevant circumstances to enhance their respective bargaining positions.

b. Do not make mistake of arguing from opponent's agenda, unless this will enhance your case.

c. Carefully evaluate validity of underlying assumptions set forth in opponent's brochure.

d. You may prepare counter-brochure to induce your opponent to approach problem from your viewpoint.

8. ***Limited Authority/Lack of Authority.***

a. Opponent claims any tentative agreement must be approved by absent client with final authority over situation allowing opponent to obtain psychological commitment from you he/she may later modify due to unexpected demands of client.

b. If opponent lacks authority to bind his/her side, it is often beneficial to place self in same position or to refuse to bargain until person with final authority can participate.

c. If opponent's claimed lack of authority is impediment to final agreement, provide him/her with face-saving escape by suggesting that he/she contact client to obtain further authorization.

> If you disingenuously claim lack of authority and wish to accept current opponent offer, ask to call client to obtain final authority.

d. Do ***not negotiate*** with opponent with ***no authority***, since he/she will try to induce you to bargain against yourself in a no-win manner-- Such an opponent hopes to extract concessions from you as a prerequisite to discussions with an individual who possesses real authority.

Ask such opponent to obtain authority or have someone with authority call so that you can discuss your respective positions.

9. ***"Nibble" Technique***.

   a. After "final" agreement is achieved, opponent demands one additional concession-- Party psychologically committed to agreement often concedes requested item to preserve accord.

   b. Don't merely ask how much ***own side*** wants pact-- Other side is unlikely to let the settlement fail over your side's unwillingness to accept their new demand.

   c. Best to counter other side's new demand with appropriate demand of your own.

      1. If other party is sincere, he/she will be willing to discuss reciprocal arrangement.

      2. If other party insincere, likely to demand honoring of original terms agreed upon.

10. ***Decreasing or Limited Time Offers***.

   a. During early stages of law suits, some attorneys make realistic offers that must be accepted by a set time or be withdrawn or reduced by a certain amount with the passage of time-- Tell opponent of time limit to avoid misunderstandings.

   b. This technique may offend opponents and increase likelihood of non-settlement, but may be employed successfully by negotiators with reputation for carrying out their stated intentions.

11. ***Real or Feigned Anger***.

   a. Real anger quite dangerous since loss of control may cause party to convey information he/she did not intend to divulge.

   b. Can be employed to convince opponent of the seriousness of your situation and to frighten that person sufficiently to precipitate a position reconsideration.

   c. Counter-measures:

      1. Carefully observe angry opponent for helpful clues that may be inadvertently disclosed.

      2. Appear personally offended in manner that may create guilt or embarrassment and precipitate concession to assuage your feelings.

      3. Respond in kind or terminate session.

12. ***Aggressive Behavior***.

   a. Similar to use of Anger.

   b. Opponent may frequently interrupt you in effort to undermine your momentum.

   c. Aggressive negotiators should carefully monitor nonverbal signals emanating from opponent (*e.g.*, clenched jaw, defensive posture) to avoid causing unintended frustration or termination of talks.

   d. Attitudinal Bargaining may be used to convince opponent that you are not willing to tolerate such "inappropriate" tactics.

13. ***Walking Out/Hanging Up Telephone***.

   a. Frequently employed to convince opponent that actor is unwilling to make further concessions.

   b. Negotiators should not let this type of bullying tactic intimidate them into unwise concessions- They should review their non-settlement options and determine whether further movement by them would be appropriate.

   c. Don't immediately telephone opponent or follow him/her out the door, since this would be viewed as clear sign of weakness.

14. ***Irrational Behavior***.

   a. A few negotiators try to obtain an advantage through seemingly irrational conduct-- Some attribute irrationality to absent clients, while others exhibit their own bizarre behavior.

b. Seemingly irrational negotiators hope to convince opponents they must either accept their one-sided demands or face consequences associated with ongoing dispute with unstable adversaries.

c. Few successful lawyers or corporate leaders are truly irrational-- If they were, they would be unlikely to consistently achieve good results.

d. In most cases, it is best to ignore seemingly irrational conduct by opponents, since they will generally evaluate any proposals in logical manner as soon as they caucus.

e. On rare occasion when truly irrational opponent is encountered, you must consider non-settlement options and decide whether opponent's demands are preferable to non-settlement alternatives.

15. ***"If it Weren't For You" (Or Your Client).***

a. Party complains about your negotiating behavior or claims to have been forced into his/her present situation by opponent's previous unfair actions to generate feelings of guilt.

b. Don't allow opponent to create unfair guilt in you by raising prior matters that are not directly relevant to present negotiation - Simply apologize and get on with discussions.

16. ***False Demands (Discerned During Information Stage).***

a. If made with respect to items opponent desires, can strengthen your position by enabling you to make "concessions" later for items you want.

b. Risk that opponent may call your bluff by conceding items to you or may discover that you are being untruthful with respect to these items and distrust your other claims.

17. ***Uproar.***

a. Where one side threatens havoc (e.g., mass layoffs) and then offers to prevent the dire consequences if other side accepts its draconian demands (e.g., salary reductions).

b. This technique is used to precipitate unilateral concessions from parties striving to avoid the threatened devastation.

c. Counter-measures:

1. Carefully evaluate the likelihood that the threatened disaster will actually occur.

2. Determine consequences for the threatening party if it does occur-- Situation might be worse for threatening party than for you, in which case you might indicate willingness to accept the dire consequences if opponent does not provide appropriate concessions.

18. ***"So What."***

a. Attempt to detract from party's concession by characterizing it as relatively unimportant.

b. If your concession is really worth little to your opponent, then he/she should not mind if you withdraw it due to its importance to your side.

19. ***"Mutt and Jeff" [Reasonable-Unreasonable Dichotomy].***

a. Situation where "reasonable" opponent sympathizes with your "generous" concessions but emphasizes need for greater concessions by you to satisfy his/her "unreasonable" partner or client.

A single negotiator can use "unreasonable" absent client to effectuate this technique.

b. Do not make mistake of directing all of your arguments and concessions to "unreasonable" party in effort to achieve his/her acceptance.

1. If you can satisfy "reasonable" opponent, you may be able to divide opponents and whipsaw "unreasonable" person to accept offer viewed as acceptable by "reasonable" partner.

2. If "reasonable" person indicates that he/she must defer to partner's opinion, it

is clear they are using Mutt and Jeff technique.

20. ***"Brer Rabbit" [Reverse Psychology]***

a. Negotiator tells opponent he/she must have items A, B, C, and D, which are actually person's secondary goals-- Negotiator then indicates need for "at least X, Y, and Z," which are really person's primary objectives, hoping that win-lose opponent will impose least desired terms.

This technique is often effective against win-lose bargainer who may wish to provide the result opponent seems to want least, in an effort to be punitive.

b. While an adroit negotiator may induce a win-lose opponent to provide what is actually desired, this technique should not be used against win-win opponent who may be induced to provide person with the result he/she does not really prefer.

21. ***Passive-Aggressive Behavior.***

a. Generally employed by seemingly passive person who is really very aggressive-- Person does not directly indicate his/her dissatisfaction with negotiation process but instead tries to disrupt the transaction indirectly (*e.g.*, shows up late for session; fails to bring needed papers).

b. Take control of the situation by obtaining the needed documents yourself and by preparing draft of agreement reached to preempt that person's ability to disrupt things-- Once person is faced with fait accompli, he/she tends to give up rather than directly challenge situation.

22. ***Belly-Up ("Yes, But").***

a. Party (often wolf in sheepskin) feigns lack of negotiating ability and knowledge in effort to evoke sympathy and weaken opponent's resolve-- Usually acknowledges reasonableness of opponent's concessions ***but*** proceeds to explain why the concessions are not sufficient.

b. Most dangerous of all negotiators, since they basically refuse to play "game" fairly--They make opponents work to satisfy their needs by inducing adversaries to prove that they can formulate a settlement that will be satisfactory to them.

c. Counter-measures:

1. Never allow Belly-Up opponent to evoke such sympathy that you alter your negotiation plans and concede everything in an effort to find a "solution" for this poor soul.

2. Force Belly-Up opponent to state own position that you can directly challenge-- Adroit Belly-Up negotiator will try to avoid stating own definitive position at all costs.

C. ***Recognition Crucial*** to Gamesmanship Defense.

1. Negotiators should be aware of the types of games frequently played during negotiations and know how to recognize which tactics are being employed.

2. Once an attempted technique is recognized, a negotiator can minimize its psychological effectiveness and perhaps even turn the circumstances to his/her own advantage.

X. ETHICAL CONSIDERATIONS

A. Attorneys are obligated to ***represent clients zealously***, within the bounds of ***professional propriety***.

1. They should remember that they must live with their own consciences and not those of their clients.

2. Lawyers with reputations as deceitful negotiators have a difficult time representing clients effectively, since their representations can no longer be accepted by their opponents.

B. Attorneys should strive to achieve excellence and to ***maintain*** their ***personal integrity***, since this will enable them in the long run to optimally serve the interests of both their clients and society.

("Always do right. This will gratify some people, and astonish the rest."--Mark Twain)

C. ***Ethical Dilemmas*** Frequently ***Encountered*** by Negotiators:

1. Should attorneys merely endeavor to obtain settlements that are "satisfactory" to clients or to maximize return to their clients?

2. Should attorneys seek more than "fair settlements" if they think that more can be ethically obtained?

3. If negotiators must avoid "unconscionable" results, who is to decide what is "unconscionable?"

4. Should we expect less candor from personal injury or criminal defense attorneys than from commercial litigators or estate planning lawyers?

5. Can "truth" really be separated from "justice" in the adversarial system?

6. When, if ever, may negotiators appropriately lie? Model Rule 4.1(a) states that "a lawyer shall not knowingly make a false statement of material fact or law to a third person," but a Reporter's Comment indicates that different mores apply during negotiation interactions:

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category.

a. Is it less opprobrious to withhold the truth than to affirmatively distort it?

b. What is the difference between acceptable "puffing" and inappropriate mendacity?

c. When are negotiators obliged to disclose factual information to opposing counsel?

d. When, if ever, are attorneys obliged to divulge information about own client value systems?

e. When may attorneys misrepresent client settlement intentions?

f. May attorneys lie about the authorized limits given them by their clients?

7. To what degree may a lawyer representing a person with a severely sprained ankle embellish the nature of the injury involved?

a. May he/she imply a greater amount of pain and/or injury duration than is actually present?

b. May he/she ever suggest the presence of a broken or cracked bone?

c. If defense counsel responds to representations by plaintiff's lawyer about the extent of soft tissue injury by noting that broken bones can involve enduring pain, is plaintiff counsel obliged to correct defense lawyer's erroneous assumption regarding broken bones?

> Is the sin of omission in such a situation less culpable than a sin of commission where you directly generate the misunderstanding?

8. If lawyers fail to find cases in their jurisdiction supporting their position, must opposing counsel to tell them about the cases they have not found?

> Model Rule 3.3(a)(3) requires litigators to disclose those cases to the tribunal.

9. Would defense counsel in contributory negligence state be obliged to divulge, prior to settlement, fact that State Supreme Court had just substituted comparative negligence doctrine for the contributory negligence doctrine in decision issued that morning?

10. If lawyer knows that opposing counsel is recovering from a recent heart attack or nervous breakdown, may he/she employ his/her usually aggressive/ abrasive negotiating tactics?

11. May negotiators employ tactics that are designed to intimidate or harass their opponents?

Model Rule 4.4 prohibits the use of tactics that "have no substantial purpose other than to embarrass, delay, or burden a third person ..."

12. May attorney representing plaintiff in civil case involving criminal overtones suggest possibility of criminal charges if civil case is not settled?

In Formal Opinion 92-363, ABA Standing Committee on Ethics said that such conduct not unethical so long as attorney does not indicate improper influence over criminal process ***and*** does not demand excessive compensation that may violate extortion laws. Accord, *Comm. on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. Sup. Ct. 1992). Compare *In re Charles*, 290 Or. 127, 618 P.2d 1281, (1980)(threat of criminal charges ***solely*** to obtain advantage in civil matter unethical).

APPENDIX A

Sexual Harassment Exercise

GENERAL INFORMATION

Last year, Jane Doe was a first year law student at the Yalebridge Law School, which is part of Yalebridge University, a private, non-sectarian institution. Ms. Doe was a student in Professor Alexander Palsgraf's Tort Law class.

During the first semester, Professor Palsgraf made sexually suggestive comments to Ms. Doe on several occasions. These comments were always made outside of the classroom and when no other individuals were present. Ms. Doe unequivocally indicated her personal revulsion toward Professor Palsgraf's remarks and informed him that they were entirely improper and unappreciated.

During the latter part of the second semester, Professor Palsgraf suggested to Ms. Doe in his private office that she have sexual relations with him. Ms. Doe immediately rejected his suggestion and told Professor Palsgraf that he was "a degenerate and disgusting old man who was a disgrace to the teaching profession."

Last June, Ms. Doe received her first year law school grades. She received one "A", two "A-", one "B+", and one "D", the latter grade pertaining to her Tort Law class. She immediately went to see Professor Palsgraf to ask him about her low grade. He said that he was sorry about her "D", but indicated that the result might well have been different had she only acquiesced in his previous request for sexual favors.

Ms. Doe then had Professor Irving Prosser, who also teaches Tort Law at Yalebridge, review her exam. He said that it was a "most respectable paper" which should certainly have earned her an "A-" or "B+", and possibly even an "A".

Ms. Doe has sued Professor Palsgraf in state court for $250,000 based upon three separate causes of action: (1) sexual harassment in violation of Title IX of the Education Amendments of 1972; (2) intentional infliction of emotional distress; and (3) fraud. Professor Palsgraf has a net worth of $450,000, including a $350,000 equity in his house and a $50,000 library of ancient Gilbert's outlines.

It is now early August, and Ms. Doe will begin her second year of law school in several weeks.

CONFIDENTIAL INFORMATION -- JANE DOE

Your client wants to obtain several forms of relief from Professor Palsgraf:

(1) A grade of "A" or "A-" in Tort Law;

(2) The resignation of Professor Palsgraf from the Yalebridge Law School; and

(3) A sufficiently large sum of money to deter such offensive conduct by other professors in the future.

(I) Score ***plus 35 points*** if Professor Palsgraf agrees to change Ms. Doe's Tort Law grade to "A-", and ***plus 50 points*** if he agrees to change her grade to "A".

(II) Score ***plus 200 points*** if Professor Palsgraf agrees to resign from the Yalebridge Law School faculty. If Professor Palsgraf does not resign, but agrees to take a one-year "leave of absence" ***or a*** one-year "sabbatical leave" from the Law School during the ***coming*** academic year (***i.e.***, Ms. Doe's second year), score ***plus 50 points***. If Professor Palsgraf agrees to take a leave of absence and/or sabbatical leave during the coming year ***and*** the following year (***i.e.***, Ms. Doe's final two years of law school), score ***plus 75 points***.

(III) If Professor Palsgraf does not resign, but does agree to seek psychiatric counseling ***and*** to personally apologize to Ms. Doe, score ***plus 50 points***.

(IV) Score ***plus 2 points*** for ***each $1,000***, or part thereof, Professor Palsgraf agrees to immediately pay Ms. Doe in settlement of her suit.

(V) Ms. Doe is concerned about the publicity surrounding this matter and the impact that publicity may have on her future employment opportunities. Score ***plus 50 points*** for a clause guaranteeing the confidentiality of any settlement reached with Professor Palsgraf.

Since Ms. Doe wishes to have this matter resolved now so that she may concentrate fully on her legal education, you will automatically be placed at the ***bottom*** of ***Plaintiff groups*** if no settlement is achieved.

CONFIDENTIAL INFORMATION -- PROFESSOR PALSGRAF

Your client realizes that his conduct was entirely inappropriate, and he is deeply sorry for the difficulty he has caused Ms. Doe. He would thus be willing to submit to psychiatric counseling and to personally apologize to Ms. Doe. Should you agree to either or both of these requirements, you lose ***no points***.

Professor Palsgraf fears that Ms. Doe may ask for his resignation from the Yalebridge Law School, and he would rather lose everything before he would forfeit his Yalebridge position. Should you agree to have Professor Palsgraf resign his Yalebridge professorship, you must ***deduct 500 points***.

Your client recognizes that he will have to provide Ms. Doe with the grade she should have received. He is readily willing to change her grade to an "A-", and you lose ***no points*** for agreeing to such a provision. Professor Palsgraf does not think that Ms. Doe's exam performance was really worthy of an "A". You thus ***lose 50 points*** if you agree to have Ms. Doe's Tort Law grade changed to an "A".

Professor Palsgraf is currently eligible for a one-year, paid "sabbatical leave." He has been saving this leave to enable him to go to Cambridge University in two years. If you agree to have Professor Palsgraf take that paid "sabbatical leave" during either of the next two academic years, you ***lose 25 points***. Should you agree to have him take a "leave of absence" during either of the next two years, which, unlike a "sabbatical leave," would not involve a continuation of his salary, you ***lose 100 points***. (If you agree to both a one-year sabbatical ***and*** a one-year leave of absence, you ***lose*** a ***total*** of ***125 points***.)

Professor Palsgraf will almost certainly have to provide Ms. Doe with monetary compensation for the wrong he committed. You ***lose 3 points*** for ***each $1,000***, or part thereof, you agree to pay Ms. Doe. Any agreement regarding the payment of money must be operative immediately-- no form of future compensation may be included.

Professor Palsgraf is concerned about the publicity surrounding this tragic affair. Score ***plus 50 points*** for a clause guaranteeing the confidentiality of any settlement reached. Since Professor Palsgraf believes that the continuation of this law suit may ruin his outstanding legal career, you will automatically be placed at the ***bottom*** of ***Defendant Groups*** if no settlement is achieved.

APPENDIX B

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Canadian briefings

ACC Association of Corporate Counsel

May 2007

a special supplement of *ACC Docket* graciously sponsored by **Blake, Cassels & Graydon, LLP**

International Trade Recap

By Cliff Sosnow (cliff.sosnow@blakes.com), Greg Kanargelidis (greg.kanargelidis@blakes.com), and Jack Quinn (jack.quinn@blakes.com)
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The softwood lumber dispute dominated Canada-US relations in 2006, as have the negotiations that have led to an agreement intended to create trade peace between the two countries. Whether it works remains to be seen, depending upon the implementation of the agreement. And, the reverberations of the dispute are creating new jurisprudence; not just in antidumping and countervailing duty law, but in terms of the scope and operation of the investor-state dispute settlement rules of the North American Free Trade Agreement (NAFTA), and the arbitration process set up to litigate disputes on whether a NAFTA Party has treated investors from other NAFTA Parties according to NAFTA investment disciplines.

The relationship with China has also come to the forefront of the Canadian trade law agenda. An investment treaty with China now looks like a very real possibility, as negotiations have picked up momentum and are progressing after years of being in the doldrums. Add to that a decision in 2006 by the Canadian government to not impose a special safeguard duty against imports of Chinese barbeques and bicycles, even though the Canadian manufacturers were found to have been injured by the imports, and the clear message is that trade law will be used to strengthen business between the two countries.

Trade law continues to occupy the front page of the business news sections of Canadian newspapers. A good example is a recent decision by the World Trade Organization that European failure to approve biotech crops from Canada and other countries violates the plant and human health rules in the WTO; although whether the decision will open the European market to Canadian biotech crops remains to be seen. Finally, 2006 saw the Canadian International Trade Tribunal render a signal decision clarifying when importers are exempt from paying duty on goods that would otherwise be subject to duty, provided the goods are "for use" in another product.

The Softwood Lumber Agreement: Seven Years of Peace or Temporary Ceasefire?

On September 12, 2006, Canada and the US signed a new *Softwood Lumber Agreement* (SLA) after receiving the support of all the major exporting Canadian provinces and a majority of companies comprising the softwood lumber industry. Broad support from the Canadian lumber industry was critical for the SLA and remains so for it to come into force, since the SLA requires that at least 95 percent of those entitled to refunds of duties agree to relinquish their claims. On September 18, 2006, the Canadian government tabled a notice of ways and means motion, which passed by a majority of votes on September 20, as part of the process to implement Canada's commitments under the SLA and prior to introducing more detailed legislation.

The SLA is an attempt to put an end to one of the longest-lasting and largest trade disputes in history and once again take softwood lumber into the territory of "managed trade," at least for the foreseeable future.

ACC Launches New Ontario Chapter

ACC is excited to announce that we have developed our first chapter in Canada. The Ontario Chapter represents the interests of more than 200 members of 144 corporations, such as Alcatel Canada, Advanced Micro Devices, Inc., Barrick Gold Corporation, Hyro One Networks Inc., and Royal Bank of Canada. The chapter will serve Toronto and its surrounding cities. For more information or to get involved, visit the chapter page at *www.acc.com/canada*.

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The SLA provides each of the "regions" in Canada (i.e., Alberta, the BC Coast, the BC Interior, Manitoba, Ontario, Saskatchewan and Quebec) the choice to adopt one of two regimes that would govern exports of softwood lumber by producers operating in those regions.

Under "Option A," an export charge would apply at rates varying from 0 percent to 15 percent when the price of softwood lumber declines from over US$355 per MBF to US$315 or less per MBF—there is no export charge when the "prevailing monthly price" is over US$355 per MBF; there is a charge of 5 percent when the price is between US$336 and US$355; a charge of 10 percent when the price is between US$316 and US$335; and a charge of 15 percent when the price is US$315 or below.

Under "Option B," a lower export charge would apply, but it would be combined with a volume restraint (quota) that declines as prices fall within the US$355 to US$315 range. There is no export charge or volume restraint when the prevailing monthly price is over US$355 per MBF; there is a charge of 2.5 percent and a quota of a maximum of that region's share of 34 percent of "expected US consumption" for the month when the price is between US$336 and US$355. There is a charge of 3 percent and a quota of a maximum of that region's share of 32 percent of expected US consumption for the month when the price is between US$316 and US$335; and a charge of 5 percent and a quota of a maximum of that region's share of 30 percent of expected US consumption for the month. The penalty for a region exceeding this limit is quite drastic—the US can immediately and unconditionally terminate the Agreement.

Regions that adopt Option B, therefore, have to very carefully manage and predict their monthly exports to the US. This may or may not always be

possible, given lumber supply and demand is generally fairly volatile from month to month because it is based on orders that may be placed on the spot market. This may result in a region (and, correspondingly, the companies operating in that region) significantly underutilizing the region's total quota when calculated on an annual basis.

The SLA's relatively complex mechanisms for restricting the amount of exports of softwood lumber from Canada to the US are likely to give rise to a number of disputes relating to the product scope of the Agreement and how various calculations are made, and quotas allocated, among Canadian lumber producers. The US domestic industry may quickly challenge any methods adopted in Canada that it perceives to be inconsistent with the SLA. The SLA has dispute settlement provisions that envisage arbitration in accordance with the rules of the London Court of International Arbitration. However, continued litigation on aspects of the SLA will hardly serve the purpose of arriving at a bilateral agreement that is meant to terminate litigation with all its attendant uncertainty and expense. Indeed, the dispute resolution mechanism under the SLA itself gives rise to some concerns: (a) only prospective remedies may be ordered, making expeditious resolution key; (b) arbitrators cannot be citizens or residents of either the US or Canada, thus making allegations of bias less likely but reducing the pool of experts on the subject; and (c) there is no provision for appeal, which, while making the process shorter, also eliminates avenues for correcting potential errors.

Among the main benefits the Canadian government is seeking from the SLA is a measure of certainty that would arise from having a specified mechanism for export control. This is in contrast to being in limbo as to the antidumping and countervailing duties that the US authorities may impose after each fresh round of litigation at the various fora where challenges against the US trade actions are currently pending. Another major benefit that the Canadian lumber industry may see in the SLA is that it guarantees the return of US$4 billion of the US$5 billion in duties that Canadian companies have paid thus far in terms of duties. While this is only 80 percent of the duties paid, money in the pocket may well be considered worth twice (or at least 20 percent more) in the bush.

Negotiation and resolution of the underlying issues is arguably the most enduring solution. The fundamental concerns of the US lumber industry relate to the Canadian stumpage and log export policy under which Canadian lumber producers pay a fixed stumpage fee to the provincial governments, and exports of logs are prohibited or restricted. The SLA recognizes that these issues need to be dealt with—it proposes the creation of a working group on regional exemptions to develop criteria and procedures for establishing when a region can be considered to have adopted "market-determined timber pricing and forest management systems." The working group is given 18 months to provide "recommendations," which the parties to the SLA will make "best efforts" to incorporate into an addendum to the Agreement.

The SLA does not guarantee a long-lasting solution, even though it contemplates a seven year term that can be extended an additional two years. This is because, at any time after the Agreement has been in force for 18 months, the SLA permits either party to terminate the Agreement for no cause upon providing six months' notice. Further, if Canada decides to take compensatory measures that the dispute resolution tribunal authorizes, the US may terminate the Agreement by providing only a month's notice.

Thus, the SLA is certainly not a clear win for the Canadian lumber industry, but neither is it a complete loss.

Softwood Lumber Falls onto NAFTA Investor-State Disputes

Having exposed important structural weaknesses in the countervailing and dumping duty dispute settlement provisions set out in Chapter 19 of NAFTA, the softwood lumber dispute now focuses its spotlight on the limits of investor-state dispute settlement and the relationship of NAFTA Chapter 11, which sets out a code of obligations that NAFTA Parties have toward investors from other NAFTA countries, to the countervailing and antidumping provisions of NAFTA.

A dispute involving Canfor Corp. and Terminal Forest Products Ltd. against the United States of America in a Chapter 11 arbitration has examined the reach of Article 1901(3), which provides in part that the investment rules in Chapter 11 do not impose "obligations on a Party with respect to the Party's antidumping law or countervailing duty law." Canadian petitioners argued that in rendering decisions respecting the softwood lumber dispute, officials at the Department of Commerce and the United States International Trade Commission misapplied their governing laws, abused their discretion and, more broadly, made decisions that were motivated by political bias. They alleged that in so doing, they violated the national treatment, most-favoured-nation treatment, minimum standard of treatment and expropriation provisions set out in NAFTA Chapter 11. The United States government argued that Chapter 11 investment tribunals lack jurisdiction in such matters because NAFTA Article 1901(3) excludes the use of Chapter 11 investor-state dispute settlement for disputes respecting countervailing or antidumping duties.

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In a June 6, 2006, decision, an arbitral panel agreed that Article 1901(3) precludes Chapter 11 investor-state arbitration from applying to the countervailing or antidumping law of a state party to NAFTA. The panel also rejected the position that alleging misconduct by government officials in relation to determinations of US countervailing and antidumping law is justiciable under NAFTA Chapter 11.

However, an additional dimension of the petitioners' case was that the Byrd Amendment— US legislation that specifies that countervailing or antidumping duties imposed on imports can be collected and redistributed to those US companies that complain of being affected by unfairly subsidized or dumped imports— is a proper subject of Chapter 11 jurisdiction because it results in the differential treatment of US and Canadian companies in violation of the Chapter 11 antidiscrimination provisions.

The panel ruled that it could examine alleged breaches of the amendment under the provisions of Chapter 11, even though the subject matter of the amendment relates to the countervailing duty and antidumping law that the panel said is not a fit subject of Chapter 11 review. It noted that the US government failed to notify the parties to NAFTA that it was amending its countervailing or antidumping duty law, as required by NAFTA. By not doing so, the US government could not claim that the Byrd Amendment is US countervailing or antidumping law.

While treaties like NAFTA and, in particular, the investment provisions of Chapter 11, have an inherently political dimension, NAFTA—including Chapter 11—is foremost a legal document, one whose terms will be interpreted according to the precisely worded formulations negotiated by the parties.

Duties Relief: CITT Clarifies Application of "End-Use" Provisions

In the March 20, 2006, *Jam Industries Ltd. v. President of the Canada Border Services Agency* decision, the Canadian International Trade Tribunal (CITT) clarified when the various so-called end-use provisions of Canada's Customs Tariff apply to imported goods. The CITT determined that the duty relief provisions do not apply when musical instruments are connected to a computer and thereby have enhanced functionality.

All goods imported into Canada are imposed with customs duties pursuant to the provisions of the Customs Tariff. To determine the tariff rate of duty applicable to any imported goods, the goods must be classified among some 8,000 tariff classifications that are set out in the List of Tariff Provisions, which is a schedule to the Customs Tariff. An importer is required to classify imported goods in a tariff classification found within Chapters 1–97 of the Customs Tariff.

Chapter 99 of the Customs Tariff sets out duty relief provisions that might apply to goods classified in Chapters 1–97 of the Customs Tariff. The particular tariff item at issue in *Jam Industries* is No. 9948.00.00, which provides for "duty-free" treatment when an imported good is an article "for use in" a computer.

Jam Industries concerned 29 models of keyboard synthesizers, digital pianos and digital organs, and four expansion boards for synthesizers that are connected to a computer enabling the instrument to acquire additional capability.

In earlier decisions, the CITT has held that the expression "for use in" requires that goods be both physically and functionally joined. The CITT considers that the concept of "functionally joined" means that the goods "for use in" the so-called host goods have a functional relationship (be it active or passive) with the host goods.

In *Jam Industries*, the CITT held that in prior "for use in" cases, the imported article exhibited a special relationship to the host goods. In each of those cases, the goods "for use in" complemented the function of the host good. In all these cases, it is clear which is the host and which is the complementary good.

The CITT said that the "special" relationship had not been established in the case of the musical instruments. The musical instruments could be and are used as musical instruments on their own. In other words, the goods in issue "do not contribute to the function" of a computer and are not "required by the computer for its operation or the performance of its functions."

The tribunal's decision in *Jam Industries* clarifies the circumstances in which duties on imported goods may be relieved by reliance on the various "end-use" provisions. The tribunal's decision signals a resistance by the tribunal to expand the application of the tariff relief provision to goods "for use in" "host" goods, such as a computer. The tribunal clarifies in *Jam Industries* that the "end-use" test is applied "one way," namely, the imported good or article must enhance or be necessary to the operation of the "host" good.

Canada Rejects Safeguard Remedy for Bicycles and Barbeques

On May 29, 2006, the Canadian government announced that Canada would not impose special safeguard duties on imports of bicycles and barbeques, despite the recommendations of the CITT. The decisions mark the third time in as many cases since the implementation of the *Safeguards Agreement* in 1995 that Canada has declined to adopt CITT's recommendations to impose safeguard duties. Together the decisions illuminate the breadth of interests considered by Canada in acting on safeguard recommendations and the implications for the litigation strategies of complainants and respondents alike.

As a result of safeguard investigations respecting global bicycle imports and barbeques imported from China, the CITT recommended to the Canadian government in September and October of 2005 that Canada impose on these products initial duties of 30 percent and 15 percent, respectively.

Canada decided against imposing the CITT's recommended remedy, just as it had with the recommendations from the CITT's 2001 investigation of steel products. In deciding against imposing duties, the government acknowledged the difficulties facing Canadian manufacturing from Chinese-sourced imports of bicycles and barbeques, but cited the importance of other considerations bearing on the determination of an appropriate remedy.

The decision did not question the CITT's finding that imports were injuring the domestic industries. Instead, the government considered whether these temporary measures improve the domestic industries' long-term viability and weighed that benefit against the interests of other affected stakeholders. Ultimately, Canada concluded that any short-term reprieve safeguard duties might provide these industries did not justify the increased costs to retailers and consumers. In particular, Canada noted that bicycles are already subject to high levels of duties and that imposing duties on imports of Chinese barbeques would not staunch the flow of low-cost imports, but simply change the source from China to a third country.

Canada's announcement framed the decision to not impose these special surtaxes within the government's broader policy of tax reduction.

Will WTO Decision on European Biotech Crop Regulatory Approval Open Up European Market?

Over the last decade, the accumulated global biotech crop area has grown in size to an amount that is 20 times the land area of the United Kingdom.

The leaders of biotech crop production in the world are the United States, Argentina, Brazil, Canada and China. While farmers in these countries have consistently increased their plantings of biotech crops by double-digit growth rates every year since 1996, they have looked at the European market as providing limited crop access.

In 2006, a WTO panel looked at the failure of the European Union (EU) to make final decisions on the approval of biotech products from October 1998 to the time of the establishment of the WTO panel in August 2003; and the WTO-consistency of prohibitions imposed by certain EU member states regarding specific biotech products even after these products had been approved by the EU for Europe-wide marketing. The panel found that EU officials operated as if there were no regulatory system for the approval of biotech products. The panel concluded that EU officials, in practice, ignored their own legal system of biotech product approvals between 1999 and 2003. The panel also concluded that the member states that prohibited the marketing of biotech products did not perform a science-based risk assessment to support the prohibition, although some of the member states did conduct scientific studies.

The long-term implications of the interim panel report are difficult to assess simply because much depends on how the EU, its member states and other countries, including developing countries that are considering increasing acreage planted with biotech crops, react to the decision. If vigorously pursued, the decision clears the path to significantly increased biotech crop development and commerce.

Yet even now there are complaints that EU officials are still operating an approval process at a snail's pace. And fresh barriers are going up, such as new EU labelling rules that require all foods derived from biotech products, whether or not the genetic alteration is detectable in the final product, to bear a label saying that they have been produced from biotech crops.

Canada-China Investment Protection Agreement: A Significant Stepping Stone to Deeper Economic Cooperation

In 2006, Canada and China quickened the pace of negotiations to develop a Canada-China bilateral investment treaty (also called a foreign investment protection and promotion agreement by Canadian officials). This is a signal achievement whose importance cannot be overstated or overvalued.

Bilateral investment treaties are agreements aimed at protecting and promoting foreign investment. They accomplish this by setting out the respective rights and obligations of the countries that sign the agreement. Typically, bilateral investment treaties seek to ensure that foreign investors will not be treated worse than similarly situated domestic investors or other foreign investors; that they will not have their investment expropriated without prompt and adequate compensation; and, in most circumstances, that investors will be free to invest capital and repatriate their investment and returns. In effect, bilateral investment treaties tell the investment community that its investment is welcomed and can operate in a safe, secure and predictable legal environment.

But the contents of the agreement remain a mystery to the investor. Will the agreement give investors access to international arbitration? Will international arbitration, if provided, be first subject to an expedited domestic review procedure? What will be the grounds for legitimate expropriation of investments and how will compensation be assessed? What industries and sectors will be "carved out" of the investment treaty and what government activity will both countries want to exclude from the operation of the treaty? The negotiation of a bilateral investment treaty between Canada and China, the second-largest destination of foreign direct investment, is a major development for Canadian companies looking at the Chinese market. But without greater investor involvement in the negotiations, answers to those questions will have to wait the completion of the negotiations.

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Canadian Business and Cross-border Relations: Insights from Dorothy Quann, Xerox Canada

By Diane Rusignola (*rusignola@acc.com*)
Association of Corporate Counsel

As the general counsel of Xerox Canada, Dorothy Quann works in a Canadian operating company that aligns with the business direction of its US parent. Xerox's structure and US compliance programs help its legal department to run efficiently in Canada.

Parallel Courses

Quann says legal issues that arise in the US may often migrate into Canada, especially in the securities area. When Sarbanes-Oxley went into effect in the US in July 2002, Canada felt the repercussions: Ontario legislative Bill 198, nicknamed CSOX, was passed a little more than a year later. Its provisions, like SOX, are designed to protect investors, and improve the reliability of corporate disclosures. "Certainly the impact of SOX in Canada has been progressive, and in terms of securities legislation, Bill 198 was built in response to Sarbanes." In addition, she notes: "The Ontario government recently created the Canadian Public Accountability Board, which may have been a reaction to SOX and some of the regulatory framework in the US."

Quann also notes that, as is true in the US, the privilege associated with the provision of legal advice is under fire. "Whether something is privileged or not is also being looked at closely in Canada right now." She elaborates further that proposed legislation will threaten solicitor/client privilege when information is given to auditors. For example, auditors are considered a third party in the US, therefore, information given to them by in-house attorneys is not considered privileged. However, in Ontario that privilege is still protected under partial waiver. Lawyers are concerned that changes that are now being proposed to the Canadian Public Accountability Board would result in the loss of this partial waiver.

Quann also cites a recent case in which a US office of a large global auditing firm received information from their auditor partners in Canada—something that would have been protected in Canada under partial waiver. But a US plaintiff argued entitlement to subpoena and receive those documents since they had been given to the US audit partner by the Canadian audit partner.

In addition to Canadian requirements that may be similar to those imposed in the US, Canadian companies that are subsidiaries of US companies also adhere to US requirements. For example, Quann's activities are subject to the lawyer conduct rules adopted by Xerox after the SEC imposed special "up-the ladder" reporting obligations on lawyers who work for US public companies. "Xerox Canada, as a subsidiary of a US public company follows a process that requires up-the-ladder representation letters, straight across the world; Xerox is just one example." In addition, a number of Canadian companies trade on the New York Stock Exchange, so they have already been in compliance as well. "In effect, some of these US best practices have already infiltrated Canada without legislation being passed," said Quann.

Being based and practicing law in Ontario, Quann is governed by the Law Society of Upper Canada, which has rules of professional conduct and already provides for what would be considered up-the-ladder responsibility. Quann explains that these rules are broad and considered to be an ethical standard, as opposed to just a regulatory one.

Exposure to Personal Liability

Within the current climate of corporate law, Canadian CLOs may feel that they are the only ones who can provide legal opinions. When something comes out, it has to come from them. If the CLO is not informed on the subject yet provides an opinion on it, this will clearly prevent risk to attorneys under him. The business corporations acts, which Canadian companies are incorporated under at the Federal and provincial levels, provides indemnification

Canadian Resources

ACC's CLO ThinkTanks bring together a select group of top CLOs in an intimate discussion about controversial topics facing today's law department leaders. In September 2006, David Allgood of Royal Bank of Canada led the ThinkTank, "CLO's Role in Governance and Compliance—Canada."

Dorothy Quann was a program participant, and she commends ACC on the session. "I thought it was very well done. There was a good cross-section of people who were invited, including representatives from three of the largest banks having as many as 120 lawyers, as well as the small departments of only two or three lawyers. Some of the companies represented were publicly traded, and some were wholly owned subsidiaries, so it was a good opportunity to have an open dialogue on various topics."

Access the executive summary from this ThinkTank at *www.acc.com/protected/clo/canadacompliancelh.pdf*.

for directors and officers. Quann says that the legislation includes fairly standard language, and historically, as long as they act in good faith, honestly, and with the best interest of the company, officers and directors would be indemnified. "Lawyers have started to take a different look at D&O coverage over the last few years, due to what's going on in the US with the liability of some general counsel. D&O coverage also may not extend to an in-house attorney who is a director and/or an officer, even a general counsel, if his role is acting as a lawyer. In other words, the lawyer *qua* director or *qua* officer may be covered, but not the lawyer *qua* lawyer."

Of course, with attorneys wearing so many different hats in Canada today, Quann notes that it can be unclear at times what specific roles CLOs are fulfilling and whether indemnification would cover them. "CLOs are serving as chief privacy officers, chief risk officers, and chief ethics officers. Some in-house counsel have the human resources department reporting to them. When juggling all of these different roles and potentially creating liability, it may not be completely clear whether a CLO is acting as an officer of the company, or as the CLO. Is there D&O coverage, and is there recourse to that coverage?"

Getting the Business Edge

At the end of the day, in-house counsel are there to support the business. "At Xerox, the lawyers attend client staff meetings, strategy sessions, and outlook meetings, and I also sit on the executive team as well. We launch new training programs every year; most recently in 2006, we focused on competition law, and previously we did privacy. We sit in on account reviews to ensure we are clear on the intent of the business environment when negotiating contracts," Quann said. She adds that perhaps the best part of her job is working closely with the client and within their environment, including being part of their staff conference calls and working closely with their new sales manager training programs. "When you are in-house, the closer you get to the business and the more you love business, the more you enjoy your job," she says.

Quann also encourages attorneys to participate in executive programs on marketing concepts, organizational development, and leadership. These programs help to broaden skills in areas such as marketing, advertising, corporate security, HR, finance, and diversity that are critical in companies today.

Social Responsibility

Xerox believes in corporate social responsibility, and although they cannot make pro bono legal work a primary focus because of insurance coverage, the company and Quann both encourage their attorneys to take volunteer positions and get engaged in the community. "Recently, one of my employees was actively involved in the conference programming for the Xerox Women's Alliance, and that kind of activism is encouraged. Becoming a 'volunteer within the company' gives you a different, important view of how the company operates. People will see you differently and you get to work cross-functionally in the organization," Quann adds.

Dorothy Quann is vice president, general counsel, and secretary at Xerox Canada, a 98 percent owned subsidiary of Xerox Corporation, with two percent of the company publicly traded. Xerox Canada markets and sells Xerox products and services in the Canadian marketplace, and is also responsible for a research center and toner plant. With four lawyers and one law clerk, Xerox Canada's small legal department provides legal support to the company across Canada. Quann is located in Toronto and can be reached at dorothy.quann@xerox.com.

Canadian briefings

CLO as Media Spokesperson: Insights from Don McCarty, Imperial Tobacco Canada

By Renee Dankner (*dankner@acc.com*)
Association of Corporate Counsel

"In-house lawyers have a natural tendency to shy away from the media during trial or on legal issues generally—to say 'no comment' or to comment minimally. While this adheres to the historical conservative paradigm, not being proactive can give rise to 'urban myths,' which then take more time and energy to debunk than addressing the issues in the first place," explains Don McCarty, vice president, law-general counsel and secretary for Imperial Tobacco Canada. As a better and preferred practice, McCarty advocates taking a more proactive approach: Put out the first story and get the company's message out early and accurately. Following are tips shared by McCarty for CLOs as spokespersons and for effectively implementing practices to be proactive with the media and get the company's message out.

Preventing Urban Myths—Being Proactive is Better than Digging Out

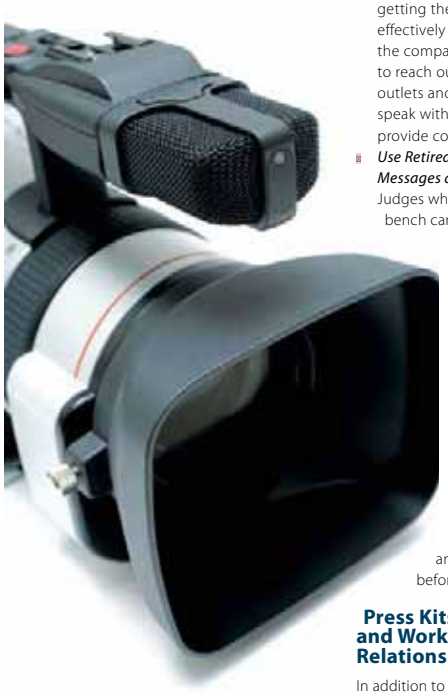
McCarty describes 'urban myths' as messages put out by detractors or opponents and repeated often enough in the media so that they acquire perceptions of truth in the public opinion even when the messages are not true. These 'urban myths,' if they get out in front of the public first and are allowed to fester, require more time and energy to address and correct in reactive mode than handling the issues head-on and up front would. McCarty has had past experience with de-bunking 'urban myths' which leads him to believe that being proactive is the preferred path. "We've worked hard to try to distinguish the Canadian Tobacco Industry because we have our own story. We're telling our story more and fighting these urban myths, and in-house lawyers have a real and valued role to play," says McCarty.

CLO as Spokesperson

While most companies have a public affairs team on point for media relations, McCarty shares that sometimes—particularly when reporting on a litigious issue or matter that's in trial—the media resists being given a spokesperson from public affairs and instead wants to speak directly with the CLO as the 'person in charge of the litigation.' Asked whether outside counsel might be a good choice as spokesperson on trial issues, McCarty said that he prefers for his lawyers in court "to concentrate on what is happening in court" and for him to take on the proactive role of working with the media as the company's CLO. There can of course be exceptions to this rule, particularly when an external counsel has, for historical reasons, been dealing with a case for longer than anybody and has a deep knowledge of the issues. In this case, the external counsel should be briefed on what the company's messages are.

CLOs can enhance their effectiveness in their role as company spokesperson by implementing the following practices:

- ***Media Training is a Must:*** Training may be through an outside company, in-house from public affairs or a combination of both. McCarty says that the training is difficult, but can be customized and tailored to the types of issues a company may face and might entail several half-day sessions. Training often involves filming and feedback.
- ***Be Accessible & Responsive:*** "When the media calls, you have to call back by their publishing deadline or you won't get your messages in and they'll go to print without you," says McCarty. Remember however that the media, particularly television media, needs material for its programming, whether video footage, quotes or the like and this can be used to your advantage.
- ***Be Proactive:*** Being accessible and responsive when the media calls first is important. Being proactive when a story is about to break or a large matter is going to trial is crucial. McCarty explains, "the 'day of' a case going to trial is not always the best time to speak with the media. In important cases, it's often best to send briefing materials and speak with the media beforehand so that you can provide information in a relaxed and unhurried fashion."
- ***Spend Time with the Media & Explain Issues:*** "Be in a position, from time-to-time, to spend time with the media and explain your company's issues. This can be helpful on both non-litigated issues and on issues that are in litigation," says McCarty. For litigated matters, McCarty will often meet with the media to present the company's point of view. On other matters, it is not uncommon for people from different sectors of the company, particularly public affairs and the CEO, to meet with an editorial panel, for example. Getting the message out can include written materials, holding a press conference, or holding a media 'scrum' where several media outlets are present and are asking questions. The 'scrum' has pros and cons: While it can be unnerving to have a large room of reporters present and all asking questions, it can save time in getting the message out and allow the CLO to communicate with the press in a single meeting rather than via separate phone interviews.
- ***Develop Professional Relationships:*** McCarty points out that it is



important to be professional and to cultivate rapport with the media. "I want to have a sense of comfort knowing that when I speak with the media, they will report it accurately. This is the exception rather than the rule. They want to know that if they call, I will get back to them in a timely manner," says McCarty.

- ***Reach out to Several Media Outlets:*** While getting the message out can be time consuming and CLOs are often crunched for time with their regular press of work and responsibilities, McCarty says that getting the company's message out effectively often entails working with the company's public relations team to reach out to a range of media outlets and then taking the time to speak with those solicited who will provide coverage.
- ***Use Retired Judges to Help Develop Messages and Inform Strategy:*** Judges who are retired from the bench can provide useful expertise in trying to develop case strategies for the underlying litigation and in identifying key messages to communicate to the media. While sitting judges are uninfluenced by what happens in the media, using retired judges to provide consultation on media relations planning can help with getting solid messages out and staving off urban myths before they get started.

Press Kits, Messages, and Working with Public Relations

In addition to sometimes being the company spokesperson on litigious or legal issues, the CLO and in-house lawyers can add value by working with the company's public relations group to educate them on the legal issues, develop 'press kits' and key messages, and to review public statements and press releases before they're issued.

- ***Press Kits:*** may include a statement of the issues for a matter, a Q & A document tailored to the most anticipated questions relating to the matter, and a statement of basic facts on the company. Providing information on the company and the matter to the media in advance helps to educate them and provide context in advance of providing personal interviews or quotes.
- ***Key Messages:*** often, companies develop certain key messages relating to public initiatives and high profile matters. These messages are then picked up by the media and communicated to the public. Preparing and delivering these key messages effectively is the best way of ensuring that the proper message gets out, and then has the best chance of influencing the reader.
- ***Public Statements:*** while specific communications and public relations policies may vary from company to company, in-house lawyers can play a key role in reviewing and drafting public statements to help ensure accuracy on legal issues, evaluate for potential risks or inconsistencies with legal strategies, and provide input on reporting requirements.

Move Toward the Media for Best Results

Taking a proactive approach with the media involves moving toward the media to get the company's messages out. While CLOs have not historically been viewed as public spokespersons, they can play a very valuable leadership role in speaking directly with the media—particularly when they have the best knowledge on the topic and when the media wants a direct line to the company's top lawyer. Effective media relations require training, preparation, skills, accessibility and expertise.

"I've seen a media training film of a guy running from the camera with the camera focused on his back watching him run away. That sends a real and very unfortunate message of fear and weakness. It's not the type of message and impression I'd ever want to send," says McCarty.

Canadian briefings

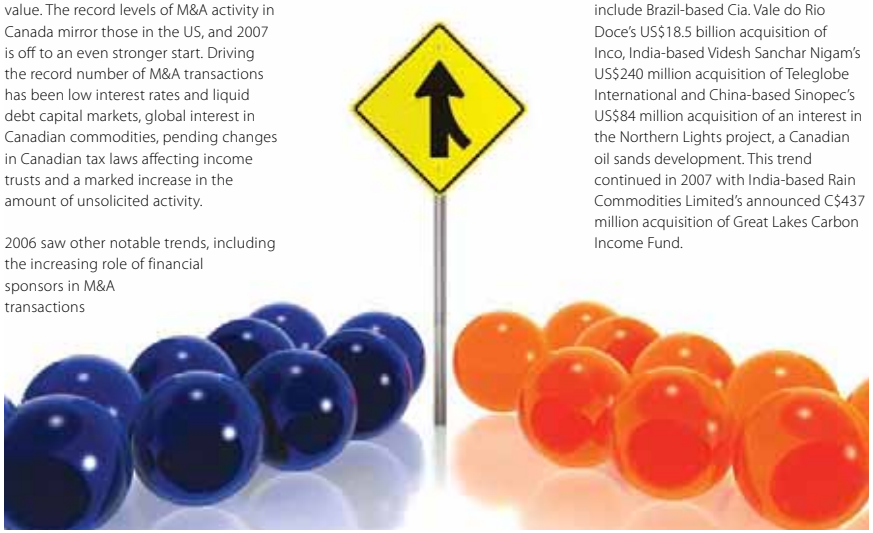
Canadian Mergers and Acquisitions: 2006 Year in Review

By Mark Adkins (*mark.adkins@blakes.com*), Michael Gans (*michael.gans@blakes.com*), Brock Gibson (*brock.gibson@blakes.com*), Ernest McNee (*ernest.mcnee@blakes.com*), and Craig Thorburn (*craig.thorburn@blakes.com*)
Blake, Cassels & Graydon LLP

2006 was a banner year for mergers and acquisitions activity in Canada. In the first nine months, there were 1,430 deals worth C$187 billion. Against the same period in 2005, these numbers exceed the value of deals by 64 percent and the volume of deals by 32 percent. The total value was just short of the record C$188 billion set during the first nine months of 2000. Buyers outside of Canada accounted for 35 percent of the deals during the first nine months of 2006 which represented 80 percent of the total value. The record levels of M&A activity in Canada mirror those in the US, and 2007 is off to an even stronger start. Driving the record number of M&A transactions has been low interest rates and liquid debt capital markets, global interest in Canadian commodities, pending changes in Canadian tax laws affecting income trusts and a marked increase in the amount of unsolicited activity.

2006 saw other notable trends, including the increasing role of financial sponsors in M&A transactions and their impact on deal timing, structure and business terms. Sponsor-backed 'go-privates' have become increasingly popular as management or controlling shareholders seek to take advantage of favourably priced credit and to avoid the increased costs of compliance in the post-Enron, post-Sarbanes-Oxley regulatory environment. The proposed acquisition of Four Seasons Hotels by a consortium of investors led by Four Seasons' controlling shareholder is a prime example.

In the oil and gas sector, M&A activity remained brisk throughout 2006, particularly with respect to income trust consolidations and strategic acquisitions in the midstream, downstream, service and oil sands sectors. Acquirers ranged from Canadian domestic energy trusts to US and international strategic and private equity investors, all looking for broader exposure to the Canadian energy juggernaut.



Canadian M&A Spotlight Survey

In September 2006, Blakes, in association with MergerMarket (an M&A data tracking firm), released the *Canadian M&A Spotlight Survey*. Among the highlights, the survey confirmed that private equity is playing a growing role in Canadian M&A. Canadian institutional investors are allocating more of their assets to private equity funds, both internally and externally managed. The recent closing of a new US$3.45 billion large-cap private equity fund by Onex is an example of the growing influence of Canadian funds in a sector otherwise dominated by US-managed funds.

Respondents to the survey are also seeing increasing involvement of companies from emerging economies such as Brazil, Russia, India and China (the so-called BRIC economies) in Canadian M&A transactions. Examples of these deals include Brazil-based Cia. Vale do Rio Doce's US$18.5 billion acquisition of Inco, India-based Videsh Sanchar Nigam's US$240 million acquisition of Teleglobe International and China-based Sinopec's US$84 million acquisition of an interest in the Northern Lights project, a Canadian oil sands development. This trend continued in 2007 with India-based Rain Commodities Limited's announced C$437 million acquisition of Great Lakes Carbon Income Fund.

Respondents to the survey were uniformly optimistic regarding the outlook for acquisition activity in the Canadian energy sector, with approximately half of each respondent group citing energy as the industry in which the most consolidation is expected in 2007. This mirrors the trend in 2005, in which energy led all other sectors in both number and dollar value of transactions, and the first eight months of 2006, in which energy again led all other sectors in number of transactions and was second only to the mining sector in dollar value of transactions.

Next to energy, respondents expected the mining sector to see the most consolidation in 2007. Over three-quarters of investment bankers surveyed expected the mining sector to have either the highest or second-highest level of M&A activity in 2007.

Respondents were universally of the view that the industrials/manufacturing sector will experience the least consolidation. This may be explained in part by a high Canadian dollar depressing opportunities in this sector.

The Toronto Stock Exchange (TSX) represents the second-largest technology market in the world, with 345 listed companies having a market capitalization in excess of C$58 billion. US investment bankers have the most optimistic outlook for the technology/telecom sector in the next 12 months, with over 20 percent expecting it to see the most consolidation. Canadian bankers are less optimistic, with 40 percent expecting the sector to see the least consolidation.

Respondents uniformly believe there will be limited consolidation in the Canadian financial services sector in 2007 and an even lower likelihood of cross-border acquisition of Canadian financial services targets. The survey results reflect a marketplace in which the financial services sector is already somewhat consolidated, particularly when compared to that of the United States, and where companies are limited by regulatory restrictions in the kinds of acquisitions they are able to make and the sectors in which they may be involved.

Income Trusts Lose Tax-Advantaged Status

A major factor affecting M&A activity in Canada in 2007 will be pending changes to tax laws affecting income trusts. With over 250 income trusts in Canada having an aggregate capitalization of over C$200 billion, income trusts, a type of publicly-held flow-through vehicle, are a significant part of the Canadian capital markets. On October 31, 2006, Canada's Minister of Finance announced significant changes to the taxation of publicly-traded income trusts and partnerships, which will effectively eliminate the tax advantages such structures have over traditional public companies. Existing income funds and LPs would start paying the equivalent of full corporate tax in 2011. Any new trusts would be immediately subject to the new tax in 2007.

Most directly impacted by these changes are tax-deferred and non-Canadian resident unitholders, including US investors. As a result of the loss of favourable tax treatment and corresponding decline in market value, existing income funds have become very attractive targets for acquisition by US private equity funds and strategic buyers. Already, 2007 has seen the acquisition of Halterm Income Fund by Macquarie Infrastructure Partners and Bell Nordiq Income Fund by Bell Aliant Income Fund, with a number of other announced deals in the marketplace. 15 separate funds have announced their intention to conduct strategic reviews during the course of 2007.

The expected phase-out of the income trust market will also eliminate a favoured private equity exit strategy in Canada, the income trust IPO.

Canadian briefings

Increasing Role of Private Equity and Hedge Funds in Canadian M&A

In 2005, private equity funds were the buyers in 5.4 percent of all Canadian deals by dollar value, while in the first eight months of 2006 this rate jumped to 14.1 percent and is generally expected to increase toward the US average of approximately 25 percent.

Although many funds active in Canada are Canadian, we see significant involvement from US funds looking for investment opportunities in what they perceive to be a slightly less saturated market. The result of increased private equity activity has been an expansion in the number of bidders in Canadian M&A transactions. It is now not unusual to see 10 or more bidders in Canadian auctions, whereas prior to the recent growth in private equity three or four bidders would have been common.

There are two principal structures used to acquire a public company in Canada: take-over bid or plan of arrangement. Non-exempt take-over bids involve an offer to all shareholders to acquire a certain percentage of a target's shares and typically require a second step transaction, such as a statutory amalgamation or merger, to acquire 100 percent of a target's shares. Take-over bids in Canada may be subject to conditions other than a financing condition.

A plan of arrangement is a one-step, shareholder-approved transaction under court supervision in which the purchaser acquires all of the shares of the target or merges with the target on a given date (closing). Accordingly, the plan of arrangement accommodates lender requirements that all of the shares or units of the target be acquired by the purchaser before funding. The plan of arrangement can also facilitate restructuring—because of strict Ontario and Québec related party transaction rules, it may be difficult for a private equity purchaser to restructure a target business until all of the shares or units have been acquired. As a result, it is the favoured negotiated structure (the consent and involvement of the target board are practical necessities) for private equity buyers. Under Canadian corporate law, arrangements typically require shareholder approval of two-thirds of votes cast at a shareholders meeting.

Irrespective of the choice of acquisition structure, we are increasingly seeing 'reverse' break-fee (or liquidated damage) provisions agreed to by private equity purchasers in the event of failure to finance.

Ontario and Québec related party transaction rules can also increase the regulatory complexity of involving management in leveraged buy outs (LBOs), with the result that management is often excluded from equity participation until after closing.

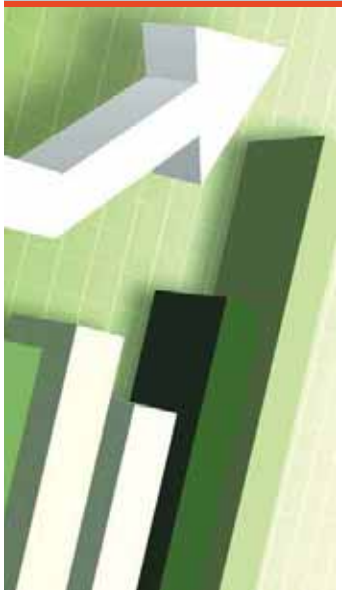
Hedge fund and investor activism in the Canadian capital markets is also increasing. In the Sears Holdings bid for the minority shares of Sears Canada, discussed below, Pershing Square Capital made a variety of claims before the Ontario Securities Commission (OSC) with a view to eliciting a higher offer price. Other recent examples include Greenlight Capital's oppression action against MI Developments following the going private transaction proposed by majority shareholder Magna International and Harbinger Capital Partner's bid for Calpine Power Income Fund.

Unsolicited Transactions

In an environment of investor demand for earnings growth, and given the absence of effective structural defence mechanisms available to Canadian

public companies, many bidders are choosing to forego negotiations and initiate unsolicited bids. Two high-profile transactions, the Sears Holdings bid for Sears Canada and the Xstrata and Inco bids for Falconbridge (and related Teck Cominco bid for Inco), gave rise to proceedings at the OSC and significant rulings on collateral benefits, the conduct of parties and the use of shareholder rights plans ("poison pills").

Recent amendments to securities laws introducing statutory civil liability for misrepresentations in continuous disclosure documents and for failure to make timely disclosure may also have encouraged unsolicited activity. Bidders should now have greater confidence in the completeness and accuracy of a target's public record. Although the cooperation and assistance of a target company and its management will



always be attractive to bidders, it may not be as critical as it once was for bidders to obtain access to a data room and conduct extensive due diligence. Consequently, unsolicited bids may be made easier and the incentive to seek a friendly supported transaction may be lessened. Xstrata's successful bid for Falconbridge and CVRD's bid for Inco, both discussed below, are recent examples of successful unsolicited bids.

Sears Holdings Bid for the Public Minority Shares of Sears Canada

With the significant increase in unsolicited M&A activity over the past 18 months, the OSC has had an opportunity to comment on how it believes bids should be conducted in Canada. In its review of one of the most widely covered and scrutinized unsolicited transactions of 2006, the OSC sent a strong message about acceptable conduct by offerors and its desire to strictly interpret and enforce the provisions of applicable securities laws.

Background

On December 5, 2005, Sears Holdings, the owner of 54 percent of the common shares of Sears Canada, announced its intention to offer to acquire the public minority shares of Sears Canada for C$16.86 per share. In response to the announcement, the Sears Canada board of directors formed a special committee, consisting of the six independent directors of Sears Canada, to oversee the formal valuation required by Ontario and Québec related party transaction rules and make a recommendation to the full board with respect to the proposed bid.

The December 5 announcement by Sears Holdings, which was made in advance of negotiations with the special committee or preparation of the formal valuation, marked a departure in practice from the typical related party, going-private transaction and set a hostile tone for the transaction that would follow. Several actions taken by Sears Holdings, including an application to waive the formal valuation requirement and a failure to disclose certain arrangements with significant shareholders, were seen as potentially oppressive by both shareholders and the OSC.

OSC Decision

Although Canadian courts have never adopted the "entire fairness" standard of review used by the Delaware courts in reviewing related party transactions, the OSC is of the view that the conduct of an offeror in a related party context should be scrupulous and comply not just with the plain language of related party transaction rules but also their "spirit and intent." The OSC was of the opinion that some of Sears Holdings' actions in pursuing its offer, considered in their totality, had the potential to be coercive and abusive toward the minority shareholders, the valuation firm, the target's special committee and the capital markets generally. The OSC's distaste for this conduct by Sears Holdings underscores its judgment.

The OSC found that a litigation release granted to a significant shareholder and the restructuring of the bid to provide favourable tax treatment for certain institutional shareholders, in each case in exchange for their agreement to tender to the bid, violated the Canadian securities laws against providing collateral benefits in a take-over bid to any shareholder that provides consideration of greater value than that offered to other shareholders.

The OSC affirmed that it was normal for bidders to take into account the tax planning objectives of shareholders in structuring bids. However, it also ruled that it constitutes a collateral benefit if a bidder seeks to accommodate the specific tax-planning objectives of certain target shareholders after the bid commenced.

The OSC also found that Sears Holdings failed to provide material information to shareholders. The OSC commented that disclosure that strictly follows the "line items requirements" in a form or a rule is not sufficient, and that in the case of a take-over bid, further disclosure must be provided if it might reasonably affect a holder's decision to accept or reject a bid in the particular circumstances.

As a result, the OSC ceased trading Sears Holdings' bid until the bid was amended to disclose all material information, including that certain shareholders' votes will not be counted toward the majority of the minority approval required for a second-step, going-private transaction, and the terms of the bid were amended to extend certain collateral benefits to all shareholders. An application to appeal the OSC's decision by Sears Holdings was dismissed by the Ontario Court of Appeal in September 2006.

Canadian briefings

Poison Pills in the Falconbridge and Inco Transactions

Canadian companies that are or may be the targets of unsolicited acquisition advances often respond by adopting shareholder rights plans. Plans may be adopted by the board of directors of the target, provided that shareholder approval is obtained within six months in accordance with the rules of the TSX. The recent decisions of the OSC relating to the Falconbridge and Inco shareholder rights plans provide interesting insight into the regulator's approach to shareholder rights plans in Canada.

In August 2005, Xstrata acquired an almost 20 percent interest in Falconbridge. After discussions between Xstrata and Falconbridge regarding combining the companies were concluded without agreement, the Falconbridge board of directors adopted a shareholder rights plan. On October 10, 2005, Inco made an offer to acquire Falconbridge. The Inco offer was made with the approval of the Falconbridge board of directors and was a "permitted bid" for purposes of the Falconbridge plan. On May 18, 2006, Xstrata responded with a competing offer to acquire all of the Falconbridge shares that it did not own. As the Xstrata offer was not a "permitted bid," Xstrata applied to the OSC to cease trade the rights issued pursuant to the Falconbridge plan.

In its decision, the OSC confirmed its view that, when considering whether a rights plan should be cease traded, the OSC will balance the public interest of shareholders' rights to tender their shares to the bidder of their choice against the duties of the target board to maximize shareholder value. However, despite restricting their decision to the unique circumstances, the OSC permitted the Falconbridge plan to stay in place longer than shareholder rights plans had previously been allowed. As a result of the Falconbridge decision, future bidders for public companies in Canada will have to consider carefully whether to acquire a significant position in a target prior to making an offer. Please see "Falconbridge: More Leeway for Defensive Actions in Canada?" in the January/February issue of *Canadian Briefings* for an extensive discussion of the OSC's decision.

Three weeks after the OSC's Falconbridge decision, Teck Cominco, which on May 8, 2006 had announced a take-over bid for Inco, applied to the OSC to have Inco's shareholder rights plan cease traded. The Inco plan had been in place for many years and had been approved by the shareholders of Inco.

Although Inco and Teck Cominco ultimately agreed to leave the Inco plan in place for a temporary period, the OSC required that the Inco plan be terminated against all shareholders (and not just Teck Cominco) on a specific date (August 16, 2006). The OSC reiterated its view that: "[u]nrestricted auctions produced the most desirable results in take-over contests. In the case law, the Commission makes it clear that rights plans are tolerated, not promoted, and then only to the extent that they allow a board of directors of the target company to fulfil its fiduciary duty—for example, to seek out a better bid to which shareholders may choose to tender their shares." As a result of the OSC's order, when CVRD Canada Inc. made its bid for Inco on August 14, 2006, it was not subject to the provisions of the Inco plan.

It is important that the Falconbridge and Inco decisions be considered together, given their proximity in time, the overlap in the composition of the OSC panels that considered both plans and the interconnected nature of the offers for Falconbridge and Inco. Target companies will argue that the Falconbridge decision is a precedent for allowing shareholder rights plans to stay in place; however, given the subsequent reasons provided by the OSC in the Inco decision, it is not clear whether such an argument will succeed.

HandsOn

Roadblock to Revenue or Onramp to Opportunity?

Practical Tips and Tools for Negotiating Everyday Contracts

The Project

As you head out for lunch, a member of your company's business team appears and asks you to take a quick look at a contract he plans to sign at 1 PM that day. He tells you, "Their guys told me it's all standard and they never agree to any changes to their form, so just okay the paperwork and we can get this deal done."

Does the scenario sound familiar? You don't want to be the company's roadblock to revenue, but you do want to ensure that your company doesn't enter into a contract loaded with real risk. How can you win in this situation?

Tackling the Project

How to Avoid the Bypass

The scenario above—in which a member of the business team brings you a contract hoping for your signoff, rather than your comments—occurs more often when the legal department is viewed as an obstacle, rather than an asset. To demonstrate the value of your input, aim to serve your client better by implementing the following tips.

Get involved earlier

To provide effective advice to your business folks, you need to see the contract before they send proposed changes back to the other party. One tactic is to convince the business team that including you earlier will result in a better deal, and won't (as they might fear) bring the negotiations to a screeching halt. You might find these techniques helpful:

- Provide real world examples of problematic terms in actual contracts, perhaps contracts that you did not draft or negotiate. For example, you might show your business people a contract that defined "and" or "or" to mean "and/or"—allowing the other party to use whichever term they wanted in any situation. Once you explain to your business people why that might not be a good idea, they will be in a better position to understand the potential pitfalls associated with imprecise contract language.
- Point out the negotiating advantages of having all of the issues flushed out early by a careful legal review. Any negotiator can recall instances where requested changes were refused because the request was made too late.
- Stress that legal review can sometimes simplify negotiations. For example, you might be in a business where you prefer to resist waiving your mechanics' lien rights. But in some states that provision would not be enforceable in any case, making that point much less critical.
- Explain the risks of a contract from a practical point of view, in terms the business staff can follow. Avoid legalese—for example, instead of saying "lessor" and "lessee," you might find that it's simpler to refer to the parties as "us" and "them," or to use the parties' actual names.

If your organization lacks a contract review policy, you should seriously consider implementing one. If you have a policy, but it is obsolete or routinely ignored, updating it will give you an opportunity to educate the staff about the benefits of your early participation.

Don't be perceived as a bottleneck

Another reason that business folk sometimes avoid their legal counterparts is that they don't understand the time needed for adequate legal review. Respond to requests for contract review as quickly as you can, but explain that you cannot assess the company's risk instantly. Ask your clients to be honest and to specify the actual deadline for review and execution, rather than some arbitrary target. This will permit you to determine how much review is realistic given the amount of time involved and to maximize your opportunity for meaningful input. It can also help you rank the contracts waiting for your review in order of their urgency. If you must do a rapid review, look at these key provisions:

- limitations of liability,
- termination,
- indemnifications,
- warranties,
- confidentiality of your company's information, and
- payment holdback provisions.

In your written comments, be sure to specify, "For the record, I did not do an exhaustive review of this contract as I was given only 20 minutes to look at this document." Providing your colleagues with a timely, albeit limited, response will win you not only their appreciation, but also their return business.

You should also be sure that everyone—especially the business team—is kept informed on the progress of any approvals needed from other departments, such as insurance, safety, credit, and tax. Another advantage of a strong contracts review policy is that it can clarify who has the responsibility for obtaining and tracking these approvals.

Learn the business risks and issues

Not every contract risk should be a deal breaker. If the staff administering the contract are aware of a risk, they may be able to manage it satisfactorily. Of course, the first step is to be sure that you yourself thoroughly understand the business. Don't hesitate to discuss particular provisions with the appropriate nonlawyers in your organization so they can tell you if they see any possible risk or not.

To make your business people more aware of risk, a ranking system can be helpful. For example, you could highlight the relevant provisions in different colors: yellow for deal killers, green for less critical issues that still need to be addressed, and pink for still-less important issues that might provide you with some bargaining chips for the green or yellow issues.

Another way to identify legal risks is to use a toolkit approach. (See "Blueprint: Negotiating Toolkit," on p. 86.) If an issue is in the toolkit, then any member of the legal team will know the issue is important, what the acceptable alternatives are, and what kind of approvals are necessary.

Where a contract presents unacceptable risks, on the other hand, you must explain why the contract negotiators should try very hard to obtain changes. For example, if a contract had relatively low revenue potential, the company might be well advised to refuse a customer's demand to delete the limitation on liability.

Identify the deal killers up front

Most in-house attorneys do not have sole authority to kill a deal. Even if you have the authority, you should exercise it sparingly—or you'll be seen as a roadblock. In many organizations, the list of deal killers emanates from a discussion between legal and senior management. In these cases, the company may want to consider a directive from management that certain terms (or lack thereof) are never acceptable, or require appropriate levels of approval. What would be considered unacceptable would typically vary from business to business, but these deal killers could include, for example, most-favored-nations clauses, the absence of a limitation on liability, debiting the account, avoiding payment, or premium liability provisions creating an undue burden. Make sure your negotiators know which provisions are deal killers, which are important, but negotiable, and which are not particularly important.

Supply List

In this HandsOn, we will provide:

- ways to encourage the business team to see your contract review as a valued part of the dealmaking process;
- tips for negotiating contracts and overcoming common obstacles;
- a discussion of when forms are acceptable to use and whose forms get used and why;
- a sample policy on contract review, approval, and signing authority;
- a toolkit approach to establishing standardized negotiating positions (with excerpts from a sample policy).

Get Real: General Tips for Negotiating

Once you have business staff buy-in, you have the opportunity to provide meaningful advice. On the other hand, you want to keep the paper moving and not waste time on terms that are either unimportant or not negotiable. Here is a reality check.

Appreciate your bargaining power (or lack thereof)

Bargaining power drives the negotiations. It determines:

- whose form contract gets used, or who gets to prepare the first draft;
- whether the terms in the first draft are even open to discussion;
- what terms end up in the final agreement;
- the pace of negotiations; and
- the mechanics of execution.

Talk to your business staff to find out what bargaining power you really have. Ask these questions to get a handle on the market realities:

ACC Resources on...

Contract Negotiation

Docket Articles:

- Robert A. Feldman, "Contracts Illustrated," *ACC Docket* 23, no. 8 (Sept. 2005): 30–46. *www.acca.com/protected/pubs/docket/Sept05/contract.pdf*
- Michael L. Whitener, "Negotiating the Thicket of IP Clauses: Nine Key Issues for Negotiating Intellectual Property Clauses in Consultancy Contracts," *ACC Docket* 23, no. 5 (May 2005): 46–61. *www.acca.com/protected/pubs/docket/May05/negotiate.pdf*

InfoPAKs:

- *Drafting and Interpreting Contracts* (2005), an ACC InfoPak℠. *www.acca.com/infopaks/draftingint.htm*

Annual Meeting Course Materials:

- Maureen R. Dry, David T. Glynn, and Matthew A. Karlyn, "Handling Common (& Difficult) Contract Negotiation Issues," program material from course 502 at ACC's 2004 Annual Meeting and On-Line CLE Program. *www.acca.com/am/04/cm/502.pdf*
- "Take It or Leave It: Contract Negotiation from a Small Company Perspective," program material from course 202 at ACC's 2002 Annual Meeting. *www.acca.com/education2k2/am/cm/202.pdf.*

HANDSON

- Are there plenty of other companies lined up to grab the deal if you overnegotiate?
- How badly do you need this deal?
- How badly do they need you?
- Can you call their bluff?
- Do your folks have other options if you can't strike a deal?
- Do the parties have an existing relationship?
- Has the other side been fair and even-handed in the past?
- Is the deal so small that it is not worth negotiating over?

With a clear understanding of the relative bargaining power, you can work with your client to develop realistic negotiating objectives and strategy.

Distinguish real terms from defensive "gotchas"

Vendors and service providers frequently seek terms that will protect them if your client does not honor its obligations. For example, the other party may propose a very short notice provision if your client defaults. Although a short notice provision may not be important for the transaction to run smoothly, it does give the vendor a defense to claims you might make later. Rather than dig in your heels against a modification like this, make sure the staff managing the contract for your company are aware of the provision and understand its ramifications.

Consider who's doing the talking

You may not always be talking to a lawyer for the other side. If you made changes to a contract and sent it back to your business folks, who then forwarded the changes to the other party, you should be prepared to discuss your proposals with almost anyone from the other side. You may deal with the other party's lawyer, but often it will be a risk manager, sales or purchasing executive, CFO, or contracts administrator. Bear in mind that people in different positions will focus on different aspects of the contract. Often, for example,

- managers focus on the deliverables and the deadlines;
- CFOs focus on financial strength; and
- sales and purchasing people focus on getting the deal done.

Keep the discussion friendly and straightforward. If you get a reputation for scaring off customers, the business staff will either bypass you or ignore your advice.

Keep in mind the ethical concerns that may arise when the other side wants you to negotiate with a nonattorney. In some jurisdictions, a lawyer is prohibited from communicating about the subject of the representation with a person the lawyer knows is represented by another lawyer unless the lawyer has the consent of the other lawyer. We advise in-house counsel to review both the ABA Model Rules of Professional Conduct and the state's code of ethics to determine what is appropriate. Model Rules 4.2 (Communication with Person Represented by Counsel), 4.3 (Dealing with Unrepresented Person), and 5.5 (Unauthorized Practice of Law and Multijurisdictional Practice of Law) are relevant to any inhouse counsel negotiating a contract on their client's behalf. If you find yourself in this situation, could you deal with the nonattorney and argue you were wearing your business hat and not your legal hat? Probably not—err on the side of your lawyer's hat.

Should the legal department even be involved?

Assess whether it is cost-effective or even feasible for an attorney to review every single contract, given the number of small contracts your company executes or the limited number of lawyers your company has. If your company has a policy that every contract must be reviewed by the legal department, you will likely end up the much-resented bottleneck. Many contracts do not require legal review. Candidates for execution without legal involvement include:

- your company's standard form contracts,
- short-term contracts that are of low dollar value and are not significant to your client's business, and
- contracts in which the only negotiation points are addressed by a toolkit that has been approved in advance.

Your company should implement a policy outlining which contracts the legal department must review. (See "Contract Review and Signing Authority Policy," on p. 84.)

When You're Along for the Ride—Countering the Form Contract

Do not believe it when the other party tells you, "We never agree to any changes to our form contract." The company probably paid a lawyer a lot of money to draft its form contract, making the negotiators reluctant to make changes. Nonetheless, they still want to get the deal done. Similarly, while your business people are pressuring you to approve a standard agreement, they do not want to be responsible for signing a contract that is detrimental to the company. So while getting a negotiation going is not easy, if you ask for reasonable changes, explain your logic, and hear out the other side's concerns, you may obtain some meaningful modifications.

Put away the red pencil

People sometimes take offense when you scratch out large sections of their forms and send them back. The opposing party frequently reacts better when it receives a separate list of proposed changes. Make your suggested changes in an organized, easy-to-follow manner on a separate sheet—rather than scribbling in the margins of a hard-to-read fax. If an entire provision or clause is truly untenable, propose alternative language rather than deleting the text entirely. You might propose a qualification such as "provided however, that this shall not apply to. . . ." This is a good way to handle a provision drafted in absolute terms, such as a complete waiver.

If the other party responds by proposing alternative language that essentially addresses your concerns, do not reject it. Resist the temptation to nitpick language if it works.

Don't overreact

When reviewing a provision that goes way beyond what the other party actually needs, try not to overreact and go just as far in the other direction. Propose a reasonable toning down and consider adding an explanation.

Blueprint

Ready the Troops: Contracts Boot Camp

In many companies, attorneys do not negotiate small contracts. If this is the case in your company, consider training your negotiators—a sort of Contracts Boot Camp. Educate your people on the basic content of the contracts that they see regularly.

- Prepare bullet points for them to use when negotiating.
- Quantify the monetary risk of allowing certain clauses to remain unchanged so they will appreciate the financial impact of their agreements. (Good candidates for this treatment include offset provisions, debiting your account, and allowing for decreased value in a damage claim situation.)
- Outline what clauses your company always requires to protect its interests.
- Explain that even if they truly believe they cannot change one word of a vendor's standard contract, they must carefully review the document to fully understand it and evaluate the deal.
- Remember, you are not training them to be lawyers, but better-informed negotiators.

For your contract review and education program to succeed, you will need support from senior management. To persuade the management team that this training will reap benefits, provide an outline of your presentation, punctuating the materials with examples of problems that the company could have avoided by better contract drafting.

Ask the Experts

Q: Is there any proactive way that I can help my company's front line bring me a better contract for legal review?

A: As in-house counsel, you should draft models of the top ten contract clauses that appear in your most common commercial contract. The clauses should reflect your preferred, most favorable language. For your negotiators, you can also provide several fallback positions for commonly negotiated or important clauses. (See "Blueprint: Negotiating Toolkit," on p. 86.)

Q: What if your company's decisionmakers insist on making last-minute changes to a version of the contract they had previously reviewed, accepted, and sent back to the other side? How do you avoid losing credibility with the other company?

A: Determine how important these last-minute changes are to your company's position. Be sure your management team is aware of the potential damage to the negotiations and the relationship if the changes are raised at this point. If your management team chooses to press ahead, then attempt to reopen the negotiations on these previously settled issues. Frankly explain to the other side that, upon further review, your management team is requesting some changes to terms that you acknowledge were previously settled. If the changes are reasonable and you have true bargaining power, you may succeed in getting the changes made.

Q: How do you respond when the other side asserts, "You can't be at the negotiation table because our lawyer won't be there?"

A: This is a tough call, and different lawyers might take different approaches. Arguably this comment puts you on notice that the other side is represented. Depending on the rules in your jurisdiction, at this point you may need the consent of the other side's lawyer before having any further communications with the other side's business team. Try to reschedule the negotiation and request that their lawyer attend. If that won't work, consider whether it may actually be in your company's best interest for you to skip the meeting. Having an attorney present may ratchet up the negotiation dynamic.

On the other hand, it could be argued that the other side's having an attorney in the company does not automatically mean they have representation in this matter. You might be able to attend the meeting but not participate or have any direct involvement—but first you should very carefully check your local rules and the ABA Model Rules of Professional Conduct, 4.2, 4.3, and 5.5.

Be ready to explain why you want the change

When seeking changes to a form contract, plan to articulate how the objectionable provision truly increases your company's risk beyond an acceptable limit. If you can cite past examples of real problems, it will help to dispel the notion that your concerns are unfounded. You should always propose an alternative that does not cause the other party to take on undue risk. Try to add modifications that clarify or limit the broad sweep of the other party's provision, such as "notwithstanding anything to the contrary, this provision shall not apply to. . . ."

Look both ways

The other party has invested considerable time and money to develop a form contract. They did so to protect their company; they are not likely to give up that protection easily. Nonetheless, if you understand the other side's underlying concerns, you can negotiate effectively. Even overkill provisions in a boilerplate agreement have some basis in a particular risk, whether that risk is real or perceived. A compromise may be possible if you can demonstrate that your proposal does not impact the other party's primary concern, but merely eliminates the overkill that puts your company in an unacceptable position. If you propose a modification that achieves both of these goals, you have a good chance of reaching a compromise.

Another possibility—at least for some types of businesses and negotiations—is a price adjustment that will make up for the risk that one side is being asked to take. For example, if one side insists on premium liability for a potential failure (no matter whose fault), the other side may be more willing to accept it if they are paid a higher rate and know it to be an unlikely possibility.

Finally, whenever you are confronting a difficult issue, remember: "Think and be creative." There is always room for finding common ground if both sides are open minded enough to look for an accurate reflection of the intent of the agreement.

When You're in the Driver's Seat—Using Your Own Form

To start, make sure your form contract is fair. One of the benefits of standardizing a contract is to curb negotiations. If you overreach, it's back to the negotiating table. Only if you consistently have greater bargaining power can your form contract be a bit more aggressive. For example, if you are the only game in town, you can demand more. Either way, there is usually more to it than issuing your standard contract to the other party and collecting signatures. When you review the other party's proposed changes to your form, keep in mind the following recommendations:

Don't take it personally

Just like you, the other person is just doing her job and trying to protect her client from risk. No matter what time or money you have invested in your contract, be open to modifications; the other party may suggest alternative language that actually improves the clarity or intent of your original form.

Be willing to compromise

In form agreements, you may be tempted to include a risk transfer provision so broad that anyone actually reading it would deem it unreasonable. If this happens, and the other party seeks a modification, ask for a detailed explanation. Once you understand the other party's difficulty, it is very possible that you can accommodate that concern without unacceptably sacrificing your protection. Be willing to tone it down. Remember, you wouldn't agree to an overkill provision, either.

Do not allow screaming or ranting as a negotiation tactic

If the other party's negotiator begins yelling, it is usually effective to end the discussion at that point. Calmly explain that you will resume negotiations when she can speak in a normal tone of voice.

Steering Around Common Roadblocks

Earlier in this article, we addressed how to overcome your own business staff's reluctance to welcome your participation in contract negotiations. Not surprisingly, you must also develop strategies for overcoming the other party's well-placed obstacles to your participation. Here are some common ways negotiators put the brakes on a deal—and solutions to keep the talks progressing.

I don't have authority

Ensure that the person with whom you are negotiating has the authority to make changes and finalize the contract. If not, ask who else should be included in the discussion. If you meet with resistance, consider giving such a thorough and detailed description of your concerns that the other negotiator has to pass your comments on to the next level because he has no idea what you are talking about or what their contract actually says. Establish up front that you have authority to reach a resolution (if, in fact, you do).

Everybody else signs it

"This is our standard contract. Everybody else signs it." To keep the conversation going when you hear this, acknowledge that many other companies sign contracts without reading them, but explain that your company takes a more thorough approach. Clarify that your concerns do not necessarily conflict with the other party's; you are not asking the negotiator to abandon the contract's protections completely, just to address your concerns as well. Be ready to explain how the other party's interests are not mutually exclusive of yours. A more direct response is "Yes, I understand that, and these are our standard changes. So to get beyond this deadlock, let's talk about the underlying concerns, rather than just the language." If possible, ask to discuss your concerns with the other party's lawyer.

Don't make me send it to our legal department

The other party's negotiator may resist your proposed changes by claiming modifications will necessitate a time-consuming legal review. This is a sure sign that you are talking to someone who does not have the authority to make substantive changes, and may be nervous even talking about legal issues. When presented with this excuse, your business people can respond, "We care enough about having a well-thought-out deal to have our legal department look at it, and they gave us a read on it in 24 hours, so it really shouldn't slow anything down for you to do the same." This may get you a discussion with the other side's lawyer, which means a real negotiation of issues rather than just language.

Finishing Touches

In-house counsel can enhance the company's bottom line by effectively identifying and managing the risks inherent in everyday contracts. A well-written policy on contract review and execution, together with timely advice and value-added negotiation, will put your legal department on the road to success.

This HandsOn is drawn in part from Course #602 at the ACC 2005 Annual Meeting, presented by Jack O'Neil, general counsel, Western Construction Group, Inc.; Todd H. Silberman, vice president and general counsel, Express Carriers; and Susan Aldrich Zoch, associate general counsel, Vertis, Inc. The materials for Course #602 are available on ACC Online at www.acca.com/am/05/cm.602.pdf.

Have a comment on this article?
Email editorinchief@acca.com

"Roadblock to Revenue or Onramp to Opportunity? Practical Tips and Tools for Negotiating Everyday Contracts," *ACC Docket* 26, no. 1 (Jan. 2006): 76–88.

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A Sample Contract Review Policy

Contract Review and Signing Authority Policy: Contracts Other Than Sales Contracts

[COMPANY LOGO HERE]	EFFECTIVE DATE:	
	LAST REVISED DATE:	
	APPROVED BY:	
	POLICY NUMBER:	

Purpose

The purpose of this policy is to describe the types of contracts that require review by the Legal Department and to specify the individuals in the company who are authorized to sign those contracts on behalf of the company.

Scope

This policy applies to all company employees, including but not limited to company officers, exempt and non-exempt personnel, and full and part-time employees, and temporary and independent contract personnel.

The legal review by the Legal Department under this policy is in addition to any other internal review that may be required under other policies.

This policy does not cover the signing or issuing of purchase orders, nor sales proposals or contracts with the company's customers, as such activities are covered by other policies.

Policy Procedures

Contract Review:

1. It is the responsibility of the person submitting a contract for signature, as well as the person who will be signing the contract, whether or not the contract requires review by the Legal Department under the guidelines set forth below, to make sure that all internal approvals required for that type of contract have been received prior to execution of the contract. The Legal Department is not responsible for inquiring as to whether necessary internal approvals have been obtained.
2. The Legal Department is responsible for reviewing the following contracts (unless the Legal Department has specifically delegated that responsibility in writing), and all such contracts must be submitted to the Legal Department for review before they are signed:
   A. [insert types of contracts here, e.g. NDAs, M&A deals, employment agreements] that
   i. [insert relevant criteria here, e.g., dollar value, length of term, volume of business, subject matter]
   B. [insert other types of contracts] that
   i. [insert relevant criteria here]
   C. [etc.]
3. Contracts not requiring review by the Legal Department under this policy should not be submitted to the Legal Department for review.

Contract Signing Authority:

1. All contracts may be signed only by an authorized person within the company as set forth in this policy.
2. The table below lists the individuals authorized to sign the types of contracts specified.

Violations of Policy

If any employee witnesses any mistakes or errors that result in a violation of this policy, the employee should report the violation immediately to a supervisor or a member of senior management so that the company can take immediate corrective steps. In contrast, if an employee willfully or intentionally violates this policy, the company may take disciplinary action, up to and including termination, as well as exercise any legal rights to seek redress against the violator.

TYPE OF CONTRACT	Persons Authorized to Sign [insert appropriate officers into the table, e.g., President]
NONDISCLOSURE AGREEMENTS	
AGREEMENTS WITH VENDORS	(1) _____ (unlimited as to amount and duration) (2) ____ (up to $_____ and no more than _____ in duration)
AGREEMENTS WITH EMPLOYEES	

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Blueprint: Negotiating Toolkit

A toolkit approach to standardizing your negotiating position can:

- enable consistent use of the forms across the legal department,
- guide lawyers on acceptable alternative language,
- document management's pre-approved fallback positions,
- streamline negotiations through pre-approval of fallback positions,
- facilitate use of non-lawyers in contract drafting and negotiation,
- provide a training tool for lawyers new to the company.

What follows are excerpts from one company's toolkit, used by the legal department and select members of the contract management team. For the entire toolkit, see *www.acca.com/am/05/cm/602.pdf.*

NEGOTIATING TOOLKIT FOR KEY PROVISIONS FROM THE COMPANY SERVICES AGREEMENT (excerpts)

1. Introduction

The purpose of this Toolkit is to help Company personnel understand the key provisions of the Company Services Agreement (the "CSA") and to facilitate negotiation of these provisions, whether used as part of the CSA or as insertions to customer agreements. This Toolkit addresses the most commonly raised issues in the CSA. For each issue, the Toolkit provides:

- A statement regarding the purpose of the CSA provision.
- Supporting arguments in favor of the provision.
- Requests for changes to the provision that customers may commonly make.
- An argument opposing the customer request and/or a description of a "fallback" position that may be taken in response to a customer request.
- For provisions for which a fallback position is appropriate, fallback language to insert in the contract.

If you have any questions on how to use this Toolkit, or if the customer's concern is not addressed in the Toolkit, please contact an Associate General Counsel or the General Counsel.

2. Non-U.S. Customer Agreements

This Toolkit is designed for use with customers located in the United States. If a customer is located outside of the United States, you must notify and obtain approval to proceed with the agreement from the General Counsel.

3. Approval of Certain Business Terms

The business terms of customer agreements may expose Company to risks that require approval by specific Company executives. Approval from one or more individuals, as listed below, must be obtained prior to execution of agreements containing any of the following terms:

- If the value of an agreement exceeds _____, the _____must approve the agreement prior to its execution. If the value of an agreement exceeds _____, the _____ also must approve the agreement prior to its execution.
- If an agreement provides for renewal with price concessions, the _____must approve the agreement prior to its execution.
- If an agreement requires Company to make capital expenditures, the _____must approve the agreement prior to its execution.
- If any of the following provisions are in an agreement, the _____ must approve the agreement prior to its execution.
  - o Unlimited direct damages liability
  - o No disclaimer of consequential damages
  - o Exclusivity
  - o Most Favored Nations Pricing/Terms
  - o Termination of Agreement for Change in Control

4. Use of Fallback Provisions

It is important that you advocate use of Company's original agreement provisions before you resort to using one of the fallback provisions, because the original agreement provisions are designed to best protect Company's legal and business interests. To assist you in this effort, this Toolkit includes supporting arguments in favor of Company's original agreement provisions. A fallback provision should be a last resort that is used only if a customer will not agree to an original agreement provision. Also, whenever possible the fallback provision should be "traded" for a concession by the customer that Company wants. Finally, examine the agreement as a whole when determining whether a fallback provision is acceptable, because a provision may function in connection with a related provision so that one change may necessitate another (for example, a provision that limits a party's liability is closely related to a provision that specifies a sole remedy—if the sole remedy is removed, then the limitation of liability should be closely examined).

Before modifying the CSA by using any of the fallback provisions in this Toolkit, you may be required to obtain approval in accordance with the Approval Process specified with each fallback position and described in the table to the right.

Key Provisions

I.- III. [omitted]

IV. Warranty

A Warranty is a promise about the quality of Company's work for a customer. Company's standard warranty is that it will per

APPROVAL TYPE	WHO APPROVES
1	An Associate General Counsel in conjunction with the Senior Business Executive (the business executive above the individual who obtained the account) involved in the transaction must approve use of the fallback provision. If such approval is not granted, you may escalate the decision to the General Counsel and the COO for a final determination.
2	An Associate General Counsel must approve use of the fallback provision, taking into consideration the facts of the particular deal.
3	The CFO must approve use of the fallback provision, taking into consideration the facts of the particular deal.
4	The General Counsel must approve use of the fallback provision and, as the General Counsel deems necessary, in consultation with the CFO and the COO. If such approval is not granted, you may escalate the decision to the CEO for a final determination.
5	The Business Unit Credit Executive must approve use of the fallback provision.
6	The Sr. VP Finance, COO, and CFO must approve use of the fallback provision.
7	The COO must approve use of the fallback provision.
8	The General Counsel must approve use of the fallback provision in consultation with the Sr. VP Finance, COO, and CFO. If such approval is not granted, you may escalate the decision to the CEO for a final determination.

Note: In addition to obtaining the approvals noted above, you may need to obtain additional approval for agreements that include any of the business terms specified above in section 3.

form its work in a "workmanlike manner." This essentially means that Company will perform the work using a level of care and skill that companies doing the same work in the same situation would use. Customers on occasion ask for warranties that Company will use the highest standard of care possible, which would hold Company to an "expert" standard of care, which is much higher than the "reasonable person" standard of care suggested by the "workmanlike" warranty. Because the warranty imposes on Company an obligation to correct problems, the customer is required to give Company notice of such problems within a specific time period, so that these obligations are not open-ended. The warranty relates to the limitation of liability because the actions Company will take in response to a warranty claim are described in that section (correct the problem or refund the fees).

CSA Provision: Warranty and Remedy. Company warrants that it will perform the Services in a workmanlike manner, and that any Technology Services will conform materially to their written specifications contained in this Agreement. Customer's sole and exclusive remedy for any breach of Company's warranty is set forth in the exclusive remedy and limitation of liability section of this Agreement. **[1]** Customer must bring any warranty claims within 30 days of Company's provision of any non-conforming portion of the Services, and failure to do so will constitute irrevocable acceptance of such Services and waiver of any related claims. **[2]**

Sentence* [1] *Warranty and Remedy

Company warrants that it will perform the Services in a workmanlike manner, and that any Technology Services will conform materially to their written specifications contained in this Agreement. Customer's sole and exclusive remedy for any breach of Company's warranty is set forth in the exclusive remedy and limitation of liability section of this Agreement.

Purpose. If Company breaches the warranty contained in this section, then the customer can only seek the remedies of cure or refund outlined in the exclusive remedy provision.

Support. The customer's remedy for breach of warranty should be the same as for other breaches of the CSA. Also, as discussed above, if a customer is not satisfied with the work that Company has performed, then Company would like the opportunity to "make good" with the customer. The limited remedy permits Company this opportunity.

REQUEST: **Remove this Sentence.**	***Approval:***	**2**

Fallback. Company could agree to remove this sentence, in which event the customer could sue Company for damages.

Sentence* [2] *Warranty and Remedy

Customer must bring any warranty claims within 30 days of Company's provision of any non-conforming portion of the Services, and failure to do so will constitute irrevocable acceptance of such Services and waiver of any related claims.

Purpose. This sentence limits the time period in which a customer may bring a breach of warranty claim to 30 days.

Support. This sentence requires the customer to identify, and notify Company of, any problems with the services in a timely manner. By learning of a problem early, Company is in a better position to correct the problem.

REQUEST: **Increase (or remove) the 30 day warranty period.**	***Approval:***	**2**

Fallback. Company could agree to increase the warranty period to 60 or 90 days. Company should not, however, agree to remove the warranty period because Company then could be faced with a warranty claim many months from the time of performance of the services when (due to the lapse in time) it may be difficult for Company to determine the cause of the problem or correct it.

Fallback Language. Failure to make a written warranty claim within [60/90] days of completion of any non-conforming portion of the Services (or such other period as may be specified in an Appendix) will constitute irrevocable acceptance of such Services and waiver of any related claims.

CSA Provision: Third Party Products. If Company provides Customer with third party products under this Agreement, Company will use reasonable efforts to assign any warranty on such third party products to Customer, but will have no liability for such third party products. All third party products provided under this Agreement are provided "as is," with all faults, as between Company and Customer.

Purpose. If Company purchases products from a third party that it then passes on to the customer, Company provides the products to the customer without making any warranties regarding them. Company will, however, to the extent reasonably possible, pass through any warranties made by the seller of the third party products.

Support. It would be unreasonable for Company to have to provide a warranty for products over which it has no control.

REQUEST: **Provide warranty for third party products.**	***Approval:***	**4**

Fallback. Company should not provide a warranty for third party products, because Company has no control over the quality of the third party products. Further, it provides them as a customer convenience, not as a main component of the business model. Company could, however, agree to attach to the CSA a copy of any warranties that the third party agrees can be passed through to the customer (this will require review of the third party warranties and possibly discussion with the third party).

Fallback Language. All third party products provided under this Agreement, including without limitation software, hardware, or other equipment, are provided "as is," with all faults, as between Company and Customer. Company represents that Customer is entitled to make warranty claims regarding the third party products specified in Exhibit 1 against the third party specified in Exhibit 1, under the terms of the warranty provisions set forth in Exhibit 1. Such claims shall be Customer's sole and exclusive remedy with regard to such third party products.

CSA Provision: Disclaimer. COMPANY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, ACCURACY, OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. COMPANY DOES NOT WARRANT OR REPRESENT THAT ACCESS TO AND USE OF ANY TECHNOLOGY SERVICES PROVIDED BY COMPANY WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ENJOYMENT OF SUCH TECHNOLOGY SERVICES WILL BE WITHOUT INTERFERENCE.

Purpose. This provision clarifies that Company only makes the warranties that are included in the CSA, and that all other warranties (including the implied warranties of merchantability and fitness for a general or particular purpose that are implied by the Uniform Commercial Code) are disclaimed. This disclaimer protects Company from a claim that it has made other express warranties, such as in proposals or promotional materials, or that it intends for any implied warranties to apply.

See discussion of the disclaimer of a warranty of non-infringement.

Support. This provision protects both Company and the customer in that it clarifies that all warranties must be specified in the CSA. Thus, both parties know what to expect regarding Company's services.

REQUEST: **Make this provision mutual.**	***Approval:***	**2**

Fallback. Company could agree to make this provision mutual, so that both parties would be disclaiming all other warranties.

Fallback Language. EACH PARTY DISCLAIMS ALL WARRANTIES NOT EXPRESSLY SET FORTH IN THIS AGREEMENT, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE.

Note: The non-infringement warranty should not be disclaimed by the customer if it is providing materials, such as ad copy, unless the customer agrees to a non-infringement indemnity.

Approval Process #2 applies if the agreement disclaims Company's liability for consequential damages and limits Company's liability for direct damages to a hard cap. Approval Process #4 applies in all other circumstances.

AGREEMENT TO NEGOTIATE EXCLUSIVELY

THIS AGREEMENT TO NEGOTIATE EXCLUSIVELY (this "Agreement") is entered into this ____ day of_____ 2005, by and between the _____, a _____(the "Agency"), and _____, a _____ ("_____"), on the terms and provisions set forth below.

WITNESSETH THAT:

WHEREAS, _____ has expressed interest in property located in the area of the City _____ (the "Site")

WHEREAS, The Site is within the _____ Project Area and is depicted on the attached site plan identified as Exhibit A (the "Site Plan"); and

WHEREAS, The _____ has requested exclusive right to negotiate a _____ (the "_____") for redevelopment of property within the TOD zone, and will assist in the acquisition process of City, _____, quasi public and privately owned parcels within the zone; and

WHEREAS, The _____ has requested to partner with and to negotiate a disposition and development agreement (the "_____") pertaining to Agency and _____ within the _____ to implement the _____, and will assist _____ in the acquisition of adjacent lots owned by private parties within the _____; and

WHEREAS, Agency has not granted any person or entity any rights or commitments whatsoever with respect to the Site; and

WHEREAS, The parties acknowledge that in order for the _____ to be developed on the Site, the City of _____ (the "City") General Plan land use and zoning designations affecting the Site would have to be amended and such amendments require considerations and approvals independent from this Agreement that may not be granted.

NOW THEREFORE, in consideration of the mutual undertakings herein, the parties agree as follows:

§ 100 Exclusive Negotiation.

§ 101 Good Faith Negotiations

101.1 The Agency and _____ agree for the Negotiation Period (as that term is defined in Section 103 below) to negotiate diligently and in good faith to prepare a mutually acceptable _____ and /or other appropriate agreement(s) (collectively, the "Development Documents") to be considered for execution by and between the Agency and _____, in the manner set forth herein, with respect to developing the _____ on the Site.

101.2 The Agency represents and warrants that the recitals contained in this Agreement are true and correct. The Agency further represents and warrants that during the Negotiation Period, the Agency will not negotiate with any other person or entity regarding the Site or enter into an agreement regarding the development of the Site without the prior written consent of _____, which consent may be withheld in _____'s sole discretion; provided that the foregoing shall not be deemed to prevent the Agency from furnishing to anyone public records pertaining to the Site. Notwithstanding the foregoing, _____ acknowledges that its rights hereunder are subject to the Agency's obligations under State law, including, but not limited to the conduct or disposition of any proceedings which require notice and a public hearing, the California Environmental Quality Act and the requirements for _____ and/or the Agency to obtain certain approvals from other public entities. The obligation to negotiate in good faith requires that _____ communicate with Agency with respect to those issues for which agreement has not been reached, and in such communication to follow good faith negotiation procedures including meetings, telephone conversations and correspondence, including e-mail. It is understood by the parties that final accord on those issues may not be reached.

§ 102 Required Actions

102.1 Not later than one hundred twenty (120) calendar days from the effective date of this Agreement, _____ shall submit to the Agency a package (the "Development Concept Package") which shall include the following:

(a) the proposed Master Plan, including a description of each development proposed for the Site, including site plan, conceptual building layouts and elevations (each, a "Development" and collectively, the "Developments");

(b) an estimate of development costs with supporting data;

(c) the proposed scheduling of each Development;

(d) the proposed source and method of land acquisition and construction financing; and

(e) the proposed Agency assistance, including the economic justification for it.

102.2 Promptly upon receipt of the Development Concept Package, the Agency shall review the development concept proposed by _____ and may, in the Agency's reasonable discretion, accept it as complete, request reasonable modifications or reject it. If any such items are rejected, the Agency shall provide a list of deficiencies to _____. If the Agency rejects any portion of the Development Concept Package, _____ may elect to either (a) terminate this Agreement upon notice to the Agency, or (b) modify shall modify and resubmit the Development Concept Package to the Agency within thirty (30) calendar days. If _____ elects to modify the Development Concept Package, this process shall be followed until the Agency shall have approved the Development Concept Package. Notwithstanding the foregoing, if the Agency and _____ have not agreed upon the Development Concept Package by January 15, 2006, either the Agency or _____ may terminate this Agreement upon written notice to the other party.

102.3 If the Agency accepts the Development Concept Package as complete, then, within ten (10) days from the date of such acceptance, the Agency and _____ shall continue to negotiate in good faith toward the finalization and execution within the Negotiation Period of ____ the remaining Development Documents. During this period, _____ shall prepare and submit to the Agency an architectural concept of each proposed Development. If the remaining Development Documents have not been entered into on or before the expiration of the Negotiation Period, either the Agency or _____ may terminate this Agreement upon written notice to the other party. If the Development Documents are signed, they shall supersede this Agreement.

102.4 All submittals made by _____ pursuant to this Agreement shall be the sole and exclusive property of _____. To the extent permitted by law, Agency agrees to maintain

all such submittals made by _____ confidential, and shall not disclose any submittal, or any of the information therein, to any third parties, except that Agency may disclose such submittals and information to its attorneys. In the event this Agreement terminates by reason other than the parties' execution of the Development Documents, Agency agrees to return to _____ all of the submittals provided by _____ hereunder. The obligations of the Agency pursuant to this Section 102.4 shall survive the expiration or earlier termination of this Agreement.

§ 103 Negotiation Period

The duration of this Agreement (the "Negotiation Period") shall be _____, through _____, unless sooner terminated pursuant to the provisions of this Agreement. The Negotiation Period shall be extended by periods of enforced delay, in accordance with Section 701 hereof, and by periods during which Agency is curing a default, in accordance with Section 104 hereof, but not by periods during which _____ is curing a default. Subject to the immediately preceding sentence, the Negotiation Period may only be extended pursuant to an amendment to this Agreement.

§ 104 Deposit

104.1 Concurrently with the execution of this Agreement by the Agency, _____ shall submit to the Agency a good faith deposit (the "Deposit") in the amount of $_____ in the form of either cash or an irrevocable letter of credit that is satisfactory to the Agency's legal counsel to ensure that _____ will proceed diligently and in good faith to negotiate and perform all of _____'s obligations under this Agreement. If the Deposit is in the form of an irrevocable letter of credit, _____ shall maintain such letter of credit in full force and effect for the entire Negotiation Period hereunder, and shall extend the letter of credit to the extent this Agreement or various time periods hereunder are extended. The Agency shall have no obligation to earn interest on the Deposit. Any interest earned on the Deposit shall be (i) the sole property of the Agency, if this Agreement is terminated by the Agency as the result of _____'s uncured default hereunder, or (ii) returned to _____, if (a) this Agreement is terminated by _____ as the result of Agency's uncured default, (b) this Agreement is terminated by either party at the expiration of the Negotiation Period, as it may be extended pursuant to the terms hereof, (c) either party terminates this Agreement pursuant to Section 102.2, or (d) Agency and _____ execute the Development Documents.

104.2 In the event _____ fails to negotiate diligently and in good faith, or has failed to timely discharge any other of its responsibilities under this Agreement, the Agency shall give written notice thereof to _____ (a "Default Notice") who shall then have _____ calendar days to commence negotiating diligently and in good faith or, with respect to any other failure, _____ calendar days to cure such failure irrespective of the good faith of _____. Any Default Notice given by the Agency shall specifically list the responsibility that _____ has failed to timely discharge. Following the receipt of such Default Notice and the failure of _____ to thereafter commence negotiating in good faith within such _____ calendar days or to cure any other failure to perform its responsibilities under this Agreement, this Agreement may be terminated by the Agency upon written notice to _____. In the event of such termination by the Agency, for a reason other than the failure of _____ to negotiate in good faith, the Deposit shall be returned to _____ and neither party shall have any further rights against or liability to the other under this Agreement.

THE PARTIES AGREE THAT IN THE EVENT _____ FAILS TO NEGOTIATE DILIGENTLY AND IN GOOD FAITH AND THIS AGREEMENT IS TERMINATED ON THAT BASIS, THE AGENCY WOULD SUSTAIN LOSSES, WHICH WOULD BE UNCERTAIN. SUCH LOSSES WOULD INCLUDE COSTS PAYABLE TO ADVISERS AND STAFF TIME ALLOCATED TO THE PREPARATION OF THIS AGREEMENT AND ITS IMPLEMENTATION, AND SUCH VARIABLE FACTORS AS THE LOSS OF OTHER POTENTIAL DEVELOPMENT OPPORTUNITIES WITH RESPECT TO THE SITE, PROVIDING EMPLOYMENT AND INCREASING PRIVATE INVESTMENT. IT IS IMPRACTICABLE AND EXTREMELY DIFFICULT TO FIX THE AMOUNT OF SUCH DAMAGES TO THE AGENCY, BUT THE PARTIES ARE OF THE OPINION, UPON THE BASIS OF ALL INFORMATION AVAILABLE TO THEM, THAT SUCH DAMAGES WOULD APPROXIMATELY EQUAL THE AMOUNT OF THE DEPOSIT (WITH ANY INTEREST EARNED THEREON), AND SUCH AMOUNT SHALL BE RETAINED BY THE AGENCY AS ITS SOLE AND EXCLUSIVE REMEDY IN THE EVENT THIS AGREEMENT IS TERMINATED BY THE AGENCY DUE TO _____'S FAILURE TO NEGOTIATE IN GOOD FAITH. IN THE EVENT OF ANY OTHER UNCURED DEFAULT BY EITHER PARTY TO THIS AGREEMENT, THE SOLE AND EXCLUSIVE REMEDY OF THE NON-DEFAULTING PARTY SHALL BE TO TERMINATE THIS AGREEMENT, IN WHICH EVENT THE DEPOSIT SHALL BE RETURNED TO _____ AND NEITHER PARTY SHALL HAVE ANY FURTHER RIGHTS AGAINST OR LIABILITY TO THE OTHER UNDER THIS AGREEMENT.

_____ AND THE AGENCY SPECIFICALLY ACKNOWLEDGE THIS LIQUIDATED DAMAGES PROVISION BY THEIR SIGNATURE BELOW:

_____ _____
_____ Agency

104.3 In the event the Agency fails to negotiate diligently and in good faith, or fails to promptly review and accept as complete, request reasonable modifications to, or reject, _____'s Development Concept Package, pursuant to Section 102 of this Agreement, _____ shall give a Default Notice thereof to the Agency, which shall then have _____ calendar days to commence negotiating in good faith or, with respect to a failure pursuant to Section 102 of this Agreement, _____calendar days to cure irrespective of the good faith of Agency. Following the receipt of such notice and the failure of the Agency to thereafter commence negotiating diligently and in good faith within such _____ calendar days or to cure a failure pursuant to Section 102 within _____ calendar days, this Agreement may be terminated by _____. In the event of such termination by _____, the Agency shall return the Deposit and all interest earned thereon to _____, and neither party shall have any further rights against or liability to the other under this Agreement.

104.4 Upon termination of this Agreement (i) by either party at the expiration of the Negotiation Period or such extension thereof as may be hereafter approved in writing by the parties, (ii) by either party pursuant to Section 102.2, (iii) by reason of an enforced delay pursuant to Section 701 hereof, or (iv) upon execution by the Agency and _____ of the Development Documents, then concurrently therewith, the Deposit and all interest earned thereon shall be returned to _____ and neither party shall have any further rights against or liability to the other under this Agreement.

§ 200 Development Concept

§ 201 Scope of Development

The negotiations hereunder shall be based on a development concept for the Site, enco_____ssing both a high-quality transit oriented development zone (the "TOD") and a traditional town center zone (the "TC") for residential and commercial mixed uses.

§ 202 _____'s Findings, Determinations, Studies and Reports

Upon reasonable notice, as from time-to-time requested by the Agency, _____ agrees to make oral and written progress reports advising the Agency on all matters and all studies being

made by _____. Further, at thirty (30) day intervals from the beginning of the Negotiation Period, _____ shall provide an oral and/or written report to the Agency, which may be submitted via e-mail, concerning its progress in preparing site plans, floor plans, elevations and time schedules for development of the Site. Said reports shall be submitted to the person listed in Section 705 hereof.

§ 300 Potential Agency Assistance

As of the date of this Agreement, the scope and extent of Agency assistance, if any, with respect to the development of the Site is undetermined. Said Agency assistance, if any is provided, will be determined based on the concept of feasibility during the Negotiation Period and specified within the Development Documents. Only the Agency Board may commit the Agency to any type or level of assistance.

§ 400 _____

§ 401 Nature of _____ _____ is a _____ that is duly qualified to do business in _____.

§ 402 Office of _____

_____
_____
_____
Attn: _____

§ 403 Assignment

_____, without prior written approval of the Agency, shall not assign this Agreement, which the Agency shall grant or refuse at its sole discretion.

§ 404 Changes in _____ Entity

Any significant change in the principals, associates, partners, joint ventures, negotiators, development manager, and directly involved managerial employees of _____ is subject to the approval of the Agency. However, for the purpose of entering into the Development Documents, _____ may include a partner and/or nominate a replacement entity as long as such entity's members are substantially the same as _____'s.

§ 500 _____'s Financial Capacity

§ 501 Development Concept

Prior to execution of the Development Documents, _____ shall submit to the Agency reasonably satisfactory evidence of its ability to meet its responsibilities relative to financing and completing the Development(s).

§ 502 Construction Financing

_____'s proposed method of obtaining construction financing for the development of the Site shall be submitted to the Agency pursuant to Section 102 of this Agreement.

§ 600 Agency Responsibilities

§ 601 Public Meeting

Any Development Document resulting from the negotiations hereunder shall become effective only after and if the Development Document has been considered and approved by the Agency Board and signed by the Chairman, or other designated Agency official, after a public meeting of the Agency Board called for such purpose.

§ 700 Special Provisions

§ 701 Enforced Delay; Extension of Times of Performance

In addition to specific provisions of this Agreement, performance by any party hereunder shall not be deemed to be in default, where delays or defaults are due to acts of God, inclement weather, the elements, accident, casualty, labor disturbances, unavailability or delays in delivery of any product, labor, fuel, service or materials, failure or breakdown of equipment, strikes, lockouts, or other labor disturbances, acts of the public enemy inclusive of terrorist attack, orders or inaction of any kind from the government of the United States, the State of California, or any other governmental, military or civil authority (other than Agency, to the extent that such orders or inaction affect Agency's obligations, performance or rights under this Agreement), war, insurrections, riots, epidemics, landslides, lightening, droughts, floods, fires, earthquakes, arrests, civil disturbances, explosions, freight embargoes, lack of transportation, breakage or accidents to vehicles, or any other inability of any party hereto, whether similar or dissimilar to those enumerated or otherwise, which are not within the control of the party claiming such inability or disability, which such party could not have avoided by exercising due diligence and care and with respect to which such party shall use all reasonable efforts that are practically available to it in order to correct such condition; provided, however, that no party hereto shall be entitled to any extension of time pursuant to this Section 701 due to any event or condition caused by a party's inherent financial condition or financial inability to pay its monetary obligations when due (as distinguished from a party's inability to make a payment by reason of a bank's failure or some other external cause not associated with such party's financial condition). An extension of time for any such cause shall only be for the period of the enforced delay, which period shall commence to run from the time of the commencement of the cause. Agency and _____ may also extend times of performance under this Agreement in writing. The parties to this Agreement agree to consider requests for extensions with the intent that all parties cooperate in good faith toward the fulfillment of the responsibilities enco_____ssed by this Agreement.

§ 702 Real Estate Commissions

The parties acknowledge that no real estate broker, agent or finder is involved in this transaction. If any claims for brokers' or finder's fees for the consummation of this Agreement arise, then _____ hereby agrees to indemnify, save harmless and defend Agency from and against such claims if they shall be based upon any statement or representation or agreement by _____, and Agency hereby agrees to indemnify, save harmless and defend _____ from and against such claims if they shall be based upon any statement, representation or agreement made by Agency.

§ 703 Press Releases

_____ agrees to discuss any press releases with a designated Agency representative prior to disclosure in order to assure accuracy and consistency of the information. The Agency shall not make any press release without the prior approval of _____.

§ 704 Nondiscrimination

With respect to _____'s obligations and performance hereunder, _____ shall not discriminate in any matter on the basis of race, creed, color, religion, gender, material status, national origin or ancestry.

§ 705 Notice

All notices given or required to be given hereunder shall be in writing and addressed to the parties set out below, or to such other address as may be noticed under and pursuant to this paragraph. Any such notice shall be considered served when actually received by the party intended, whether personally served or sent postage prepaid by registered or certified mail, return receipt requested.

Agency: _____

_____

_____

_____

_____

_____: _____

_____

_____

_____

_____

§ 706 Other Agreements

This Agreement supersedes any previous agreements entered into between _____ and the Agency or any discussions or understandings between _____ and the Agency with respect to the Site.

§ 707 Warranty of Signators

The signatories to this Agreement represent and warrant that they have the authority to execute this Agreement on behalf of the principles they purpose to represent.

§ 708 Modifications

No modifications or amendments to this Agreement shall be deemed effective unless and until executed by all parties hereto.

§ 800 Limitations of This Agreement

By its execution of this Agreement, the Agency is not committing itself to or agreeing to undertake: (a) disposition of land to _____; or (b) any other acts or activities requiring the subsequent independent exercise of discretion by the Agency, the City of _____ or any department thereof.

This Agreement is not a contract for the sale, lease, transfer, conveyance, excavation, improvement, development, subdivision or land use or zoning change of the Site and does not in any way constitute a disposition of property or transfer of control over property by the Agency. Execution of this Agreement by the Agency is merely an agreement to enter into a period of negotiations according to the terms hereof, reserving final discretion and approval by the Agency as to any Development Document and all proceedings and decisions in connection therewith.

Nothing in this Agreement is intended to or shall be construed to establish a currently existing limited liability co_____ny, partnership, joint venture, business association, or other entity between the parties, nor to constitute any party the agent of any other party.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first set forth in this Agreement.

_____:

_____

By: _____

By: _____
Name: _____
Its: _____

AGENCY:

_____

By: _____
_____

ATTEST:

By: _____
Agency Secretary

Agreement to Negotiate Exclusively (TRP v4)

EXHIBIT A

SITE PLAN

EXHIBIT B

LIST OF PARCELS

Pre-Negotiation Letter
[LETTERHEAD]

[Add Date Here]

_____
_____, Suite ____
_____

Re: Lease Agreement dated _____ (the "Lease") between _____, a _____ ("Landlord"), and _____, a _____ ("Tenant"), with respect to premises (the "Premises") consisting of approximately _____ rentable square feet in the Building commonly known as _____ (the "Building")

Gentlemen:

The term of your Lease is currently set to expire on _____ (the "Expiration Date"). On the Expiration Date, Tenant is required to surrender possession of the Premises to Landlord in accordance with the terms of the Lease.

Tenant has requested that Landlord enter into discussions and negotiations with Tenant concerning the possible renewal or extension of the current Lease term beyond the Expiration Date. Landlord is willing to enter into discussions with you regarding extension of the Lease term on the following terms and conditions:

(1) All prior and future discussions and negotiations between Landlord and Tenant with respect to the renewal of the Lease or any other matters in any way related to the Lease or Tenant's occupancy of the Premises shall be solely for the purpose of exploring possible mutually acceptable terms and conditions under which the Lease term may be extended, and for no other purpose. Landlord shall not be bound by any proposal or suggested course of action advanced in connection therewith, and Landlord shall have no liability for failing to negotiate, discuss or otherwise reach agreement.

(2) Although it is the present intention of Landlord to negotiate in good faith and to consider entering into a mutually acceptable agreement with respect to extending the Lease term and certain matters related thereto, Landlord, in its sole and absolute discretion, may terminate such negotiations and discussions at any time and for any reason (or no reason at all). Upon such termination, the respective rights and obligations of Tenant with respect to the Premises shall be only those set forth in the current Lease.

(3) Until such time as a written agreement extending the Lease term is executed and delivered, Landlord expressly reserves all rights and remedies that it may have with respect to the Lease, specifically including without limitation the right to commence at any time following the Expiration Date an action to terminate the Lease and remove Tenant from the Premises, without any notice or grace period other than as set forth in the Lease being afforded to Tenant, whether or not discussions or negotiations are then ongoing. If Landlord permits Tenant to remain in possession of the Premises beyond the Expiration Date, Tenant shall occupy the Premises as a tenant at will and shall, upon notice from Landlord at any time, vacate and surrender the Premises to Landlord in accordance with the terms of the Lease.

(4) No agreement as to any matter shall be implied or inferred as a result of any discussions or negotiations that may take place, or as a result of any request for information or documentation, or any acceptance, review or analysis thereof, unless and until a written agreement as to such matter has been fully executed and delivered by Landlord. Without limiting the generality of the foregoing, no preliminary agreement as to any issue reached in the course of any negotiations or discussions that may take place shall be binding against Landlord unless contained in a written agreement executed and delivered by Landlord.

(5) Tenant is hereby advised that in most instances the representatives negotiating on behalf of Landlord will not have final authority to bind Landlord and will need to seek and obtain formal approval from others prior to entering into a binding agreement on behalf of Landlord. Nothing set forth in this letter shall be deemed to require any such representative to submit any proposal for such approval.

(6) Tenant shall keep the existence and content of any and all negotiations and discussions that may take place with respect to a possible modification of the Lease term strictly confidential, and to not disclose any of the foregoing to any person or entity for any purpose whatsoever, without the prior written consent of the Landlord.

By initiating or continuing discussions with Landlord regarding the extension of your Lease term, you will be deemed to have accepted the preceding terms and conditions in their entirety.

Please do not hesitate to contact the undersigned if you have any questions.

Sincerely,

[_____]

By:_____
Name:_____
Its:_____