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Ten Rules for Ethical and Effective Negotiating

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TEN RULES FOR ETHICAL AND EFFECTIVE NEGOTIATING

Most real estate deals are like water, and if managed correctly, they will generally find their own level. By this I mean that a deal's water level should be what the relevant legal and business market dictates, with adequate legal protections for each side, considering the specifics of the transaction, the parties involved and their relative bargaining power. The lawyer's job is to help ensure that the documents reflect a deal that is (acceptably) close to the water level. In most cases, to demand to be far above the water level (and thus potentially kill or hinder the deal) is doing a disservice to the client, who is paying the lawyer not to lawyer for lawyering sake, but to get the deal done in an effective and efficient manner. Likewise, in most cases, to accept without debate documents far below the water line is also a disservice to the client, because that means the client is accepting risks that are uncommon in similar transactions, and perhaps unnecessary. In sum, a good lawyer does two things: (a) he or she assists the client in keeping the deal within the acceptable range of water level, and (b) he or she assists the client in its attempt to gain every reasonable and necessary advantage within that range. The negotiating process consists of two parts. The front end, what you do before and after a negotiating session and what you do during the negotiation session. You must devote appropriate attention to both parts. This article will set forth and discuss ten steps you can use to accomplish this goal.

I. Rule One: **Be Prepared (Know the Law; the Parties; and the Documents).**

Just like the Boy Scouts, a good real estate lawyer must always be prepared for the task at hand. This means several things. First, you must always understand both the transaction and the law that applies thereto. Before diving headfirst into the drafting or negotiation of documents, it is crucial to take the time to find out everything you can about the deal. Often, there have been significant discussions between the clients or their representatives before the lawyer gets involved. Typically, the parties have discussed the economic terms, if not agreed upon them. You need to find out what happened before you got involved. If you do, you will begin to understand how your clients feels about the deal (i.e., whether he or she thinks it is a great deal, a good deal, or a questionable deal). What are your client's alternatives (i.e., whether there are other alternative deals to fall back on if things go south). The answer to these questions will help you to gauge the parties' relative bargaining power. Stated another way, these answers help you to locate the theoretical water level, and to begin to formulate negotiating positions and possible compromises.

You must also know the law that applies to the transaction. This involves not only keeping up with the law and the customs and practices of your jurisdiction, but also doing whatever is necessary to get a handle on those things in other jurisdictions where you practice from time to time. There is nothing more frustrating that to have to negotiate standard provisions with an out of state lawyer who refuses to believe that the provisions are common in your state. For example, in Texas commercial office leases typically contain lock out provisions, giving the landlord the right to lock out tenants who default in the payment of their rent. In

fact, the Texas Property Code contains a statute granting landlords this right, even if it is not specifically permitted in the lease. I once negotiated two large leases for a client with lawyers for out of state tenants. Both of my opposing counsels were from out of state and vigorously objected to the lock out provisions. When I explained to them that this language was standard, boilerplate language in Texas leases, one of them checked with her client's broker and confirmed that I was correct. The other opposing counsel did not and continued to argue against the provision. We spent so much time arguing about the lock out provision, that we had less time, and my client had less inclination to compromise on, issues where the tenant could have materially improved its position.

Another aspect of being prepared requires that you know the documents you are negotiating as well or better than anyone else. Not only does this show respect for your client and the other parties, but it also gives you an advantage when negotiating specific provisions of a document. For example, if you know there is a force majeure clause in the back of a document, you might be able to agree to compromise provisions elsewhere in the document and save your negotiating currency for something not covered elsewhere. In addition, there is no easier way to fall below the theoretical water level than to negotiate with someone who knows the deal and the documents better than you do.

Know what is important and what is not. Making these sorts of judgment calls on the fly takes preparation and practice; but when you do it, you are highly effective, and people will notice. It is also the number one reason our job is fun and exciting. Real estate deals move fast, and clients appreciate lawyers and brokers who can keep things moving. No one wants to pay a lawyer to negotiate just for the sake of negotiating. Lawyering is not a spectator sport. It is critical to know your client's genuine issues and to focus on those. The process of negotiation is one of compromise. Accordingly, very few documents end up just the way a particular party wants them. You must know going into a negotiating session what you must have and what you can trade away.

Practice Tip: Remember, documents are, by their nature, the product of compromise. Saying no to everything is just as ineffective as saying yes to everything.

The final aspect of being prepared is coordinating the negotiation process with all the members of your team. Typically, the team will involve you, one or two of your colleagues, representatives of your client and a broker. It is crucial that all members of the team (including the broker) have identical goals and negotiating plans. For example, all your excellent arguments and negotiating strategy will be for naught if the client or broker is telling the other side a different story.

Practice Tip: Make your client’s broker your ally. Reach out to him or her early in a transaction and get on the same page – e.g., with respect to Rule 1 above.

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