

12 PRACTICAL TIPS ON

HOW TO NEGOTIATE CONTRACTS

EXCERPT FROM THE BEST-SELLING
BOOK "PRACTICAL TIPS ON HOW TO
CONTRACT"

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12 Practical Tips on How to Negotiate Contracts

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INTRODUCTION

This short book is a collection of 12 practical tips on negotiating that I had shared on LinkedIn and reprinted as a chapter from the book “Practical Tips on How to Contract.” Each page has a different negotiating tip.

This is not your typical legal advice book. It does not provide comprehensive coverage of negotiating. Instead, this book reflects 12 things that I know about negotiating based on what I’ve learned over my career. I was privileged to train under some of the top commercial and technology lawyers in the U.S. My understanding of how negotiations work also comes from my own experiences in law firms and businesses. I spent the last 25 years as a contract practitioner.

Take what I say in these tips with some healthy skepticism. Contract negotiation is not a science. There are no universal absolute rules. All contract advice reflects the writer’s opinions. Contracts are as diverse and complex as the world of people, businesses, and things in it. There is not one way to negotiate contracts.

*Laura Frederick
Austin, Texas
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1. Client's Priorities During Negotiations

This contract tip is about the client's priorities during negotiations.

Always ask yourself why your client is doing this deal.

I know this.

It isn't so you can engage in a battle of wits with the counterparty's lawyer.

It isn't so you can make the contract into a work of art.

It isn't so you can see how many concessions you can extract from the other side.

Your client's goal for the deal is to create a business relationship that allows the parties to pursue an opportunity that benefits them both.

We know this in our heads, but it is easy to get caught up in the negotiation as an end to itself. After all, that is our task and focus. Plus, we lawyers want to win. We are overachievers and trained to be zealous advocates for our clients.

That all leads us to focus on making each provision protect our client as much as possible. While important, we also must temper that with why the client engaged us.

The client hired us to help the business achieve the outcome. That outcome is why the client is negotiating the contract with the counterparty. The contract is only part of what determines the success or failure of that outcome. That outcome always needs to be the priority. In other words, don't win the battles only to lose the war.

2. Your Own Negotiation Style

This contract tip is about finding our approach to contract negotiations.

The evolution of my negotiation style reminds me of the fairy tale Goldilocks and the Three Bears. You remember - one chair was too soft, one was too hard, and one was just right.

As a new lawyer, I had a lot of fear about negotiations. I knew I'd screw it all up and embarrass myself in front of my client. I was so anxious and that made me less effective. This approach was too soft.

After I had some experience, I became more aggressive. I went into the sessions with my guard up. I might be smiling, but I was ready for battle. Eventually, I realized that didn't work great. I was too quick to argue and too slow to compromise. This approach was too hard.

At some point, I settled into a more conversational approach, which is what I use now.

I talk to my counterparty as I would someone at a social event. I don't yell, I don't insult, and I don't get angry. I try to make it a pleasant conversation, even when we disagree. This approach is just right for me.

My point is that we all evolve in how we approach negotiations.

Watch how others do it.

Explore different techniques.

Continue until you find the style just right for you.

3. How to Use Communication Channels During Negotiations

This contract tip is about how to use communication channels during negotiations.

My technology deals usually have three or four channels available - legal, technical, business, and, in some strategic negotiations, senior executive.

Typically, the business leads work out the commercial terms first. Then the entire group meets to discuss and agree upon the contract terms.

This approach is often all we need. But sometimes it is not. Sometimes we need to do something more to get to consensus. This need happens when the deal is especially complex or high value, when the parties are not that aligned, or when there is a difficult individual on one of the teams.

In those cases, I consider whether using other communication channels could help.

When the other lawyer seems reasonable, I may propose the two lawyers have a separate call to work out some of the legal wording on already-agreed concepts.

When we are struggling to agree on KPIs or technical details, I might suggest that we ask the technical leads to discuss offline.

And when we reach an impasse on the core commercial or risk terms, we'll have the business leads or senior executives meet separately to see if they can resolve the differences.

4. Dealing with What You Don't Know

This contract tip is about dealing with what you don't know during negotiations.

It happens to all of us. The other side makes a statement of fact. "Patent exhaustion means that no license is required here" or "The laws in my country do not allow venue in the U.S." Sometimes it is hooey and sometimes it is not.

But at that moment, you don't know which.

As a new lawyer, I'd bluff my way through. I'd do my best not to let on that I didn't know and quickly say, "Let me talk to my client about it offline." I'd then go into deep research mode to figure it out.

Now, rather than pretend that I know, I admit my ignorance and ask the other side to explain it to me. I ask about the big picture and the nuances, what is absolute and what is flexible, and what options there are for dealing with it.

There are lots of reasons why this approach often works better. I've now got them on my side helping me understand and solve for this issue. Chris Voss talked a lot about this approach in his book *Never Split the Difference*. I love this technique.

It also provides useful clues and intelligence. Even if I don't understand the legal argument, I now understand my counterpart's view of it. And that is always valuable.

5. Deals on The Terms We Want

This contract tip is about our ability to reach a deal that has the terms we want.

One of the most important mindsets for negotiators is to remember: We are not in control. We can't make the other side agree with us.

We can try of course. That is the entire point of negotiations - to see if there is common ground on which both sides want to do this deal. We use our best drafting and negotiating techniques to influence and persuade. But in the end, we cannot force our counterparties to sign because we are not in control of them.

Now we all get frustrated when they won't agree to the edits we want. Some negotiators get downright angry. They rant about the other side not being "reasonable," which really means the other side does not agree to the ranters' proposals.

In my experience, those ranters do more harm than good. Their uncontrolled emotion ruins the trust and goodwill you need to find consensus and leaves the other side even more reluctant to see things the ranters' way.

I prefer the more serene approach to negotiations. Negotiate to include as many of your changes as possible. When you have the deal as far as you can, then you either sign or you don't. That decision is something of which you are in control.

6. Efforts Clauses as Negotiating Tools

This tip is about using efforts clauses - reasonable efforts, best efforts, and the like - as valuable tools for contract negotiations.

Many attorneys, myself included, learned that we can adjust an obligation by inserting one of the efforts clauses.

Some academics go into great detail explaining the conflicting case law and that we cannot be certain how a court will interpret the phrase.

I'm ok with that. The value I see is not in its certainty but as a tool for reaching consensus.

Let's say a buyer wants the seller to commit to some task. The seller is reluctant and wants to delete it.

In comes the efforts clause.

The buyer can acknowledge the seller's challenges and offer an efforts clause to soften the obligation.

And this approach often works because the seller perceives the obligation is reduced by that efforts clause.

I love this solution - the buyer is happy because it keeps the obligation, and the seller is happy because it reduced the obligation.

Now we can get the deal done.

And in the real world getting a deal done has a lot more value for companies than having certainty about an efforts qualifier.

7. Negotiating with Little Bargaining Power

This contract tip covers negotiating deals when you have little bargaining power.

We've all been there. You receive a one-sided contract from a big company. You may think trying to negotiate is hopeless, but it may not be.

Here are my four best strategies for this situation:

1. Don't make assumptions.

You may be surprised by your leverage. If the customer wants your product or a seller needs to hit a quarterly quota, you may see more concessions.

2. Ask nicely.

If you are friendly or have some bargaining power, there may be room to negotiate. Most big companies use playbooks with pre-approved changes. Remember the decision to give on these is at the discretion of the attorney. So be nice.

3. Make just a few changes.

If you ask for 100 changes, you may only get a few and ones you don't want. Focus on the most important issues and ask for a limited number and be reasonable. This approach makes it much more likely you'll get some.

4. Include something you can give up.

In most negotiations, it is unlikely you'll get everything. Ask for at least one point that you can concede. Don't go in needing every change.

And remember the wise words of Commander Taggart - "Never give up. Never surrender!"

8. Prepping the Document to Send to the Other Side

This contract tip is about prepping the document to send to the other side.

Did you know if you use an existing Word document as the starting point, it may have the source information still embedded and hidden in the document?

If that freaks you out (as it should), then run the “Check for Issues” feature within Word on every document before you send it to the other side. It identifies any metadata, hidden text, or other things you don't want the counterparty to see.

Follow these nine steps:

1. Select “File”
2. Select “Info”
3. Select “Check for Issues”
4. Select “Inspect Documents”
5. Check the boxes of what you want to clear. I usually uncheck “Comments, Revisions, and Versions” and “Headers, Footers, and Watermarks.”
6. Click “Inspect” in the dialog box.
7. After it runs, you'll see another box that says, “Review the inspection results.” You'll see any identifying properties detected.
8. Clear them by hitting “Remove All.”
9. You can reinspect by hitting the “Reinspect” button or just close.

That's it. Just a few steps that may save you from a whole lot of embarrassment.

9. Exchanging Redlines with a Counterparty

This contract tip is about exchanging redlines with a counterparty.

Redlines or redlined contracts are electronic versions of a contract that show the differences between two versions. All contract negotiations start with a template form. The other party then adds its changes to the form.

The typical practice is to then send a redlined version back to the other party that shows all the changes made to the received version.

Many lawyers will work off that redlined copy received from the other side.

Not me.

I learned early on to **ALWAYS** run my own redline. When I run my own redline, I often see changes that don't show up as changed in the redline that I received from the counterparty.

I believe in most cases this is unintentional. Running redlines is a very manual effort. Sometimes people choose the wrong base document without realizing it. I have had only a few occasions in my career when I thought the incorrect redline was purposefully deceptive.

Just remember that you cannot control the two documents that your counterparty used to create the redline. But you can control the choice when you do it yourself. Always run your own redlines.

10. Using Your Negotiating Currency

This contract tip is about using your negotiating currency.

When I was a new attorney, I was very methodical in how I revised contracts. For each provision, I'd make sure I knew what the academics said was the best drafting approach for that concept. Then I'd revise each provision to say that.

I don't do that anymore.

Don't get me wrong. I still consider the academic recommendations for contract drafting. They have spent years studying the case law and provide a ton of value and wisdom.

But now, as an experienced attorney, I focus mainly on how and where I want to spend my negotiating currency.

Negotiating currency is what I call the amount of stuff you can realistically change in a contract for that deal. Each negotiation is different in how much you can change without putting your client's priorities at risk.

The approach I use is to make sure I am fully aware of the real world risks we face if things go wrong. There are common risks (nonpayment and product quality) and less frequent but very dangerous risks (patent infringement).

I focus my energy and drafting on those risks. They are the priority. I leave the poorly drafted severability and the reasonable efforts clauses alone.

11. How Jerks Jeopardize Negotiations

This contract tip is about how jerks jeopardize negotiations.

Negotiations are a partnership in which each side is working together to find a mutually acceptable deal. Sometimes you do. Sometimes you don't. But being a jerk, getting angry, or grandstanding breaks down the trust and alliance needed to reach agreement.

Some time ago, I was negotiating a difficult deal. Despite starting very far apart, we had reached consensus on everything except a few issues.

The business lead and I had a quick meeting before what was supposed to be our final call. We discussed the risks and decided to concede all remaining points. When we got on the call, the lawyer and business lead for the other side started out the call with a tirade, hurling insults and threats, and angrily demanding that we accept their final edits without change.

My business lead immediately terminated the negotiations and we moved on to engage the next vendor for the needed supply. Why? Because the vendor revealed its true colors. Their behavior didn't reflect our company's values.

They were not people with whom we wanted to do business.

In my experience, you will consistently get better deals if you are considerate and keep an open mind.

Don't be the jerk.

12. How to Ask for Changes to Your Contract

This contract tip is about negotiating to change an existing contract.

Don't rush into your asks. Take time with your pacing and be thoughtful in your tone.

I was reminded of this approach by how the director of my bookkeeping firm recently asked to increase the fee. He's a negotiating genius.

His first email asked if I would be open to receiving a proposal for an increase. He explained in that email that his firm could afford to provide raises to the staff only if clients agreed to small increases.

Here's why his technique works so well.

He didn't just tell me they were increasing the fee, which would have put me on the defensive. Instead, he first asked if I would be open to a proposal. It gave me time to acclimate to the idea.

He gave me an emotional reason to say yes. He personalized what saying no would mean to Rajeev, the person who takes such good care of me.

He structured it so my first response would be an easy yes. I'd be rude not to receive a proposal. It created a mindset shift that I had agreed, making a yes to the higher price more likely.

He didn't tell me the specific amount in the first ask. He started a dialogue before introducing the exact number.

(And yes, I did approve the increase.)

ABOUT LAURA FREDERICK

Laura Frederick is a technology and commercial transactions attorney with 25 years of experience drafting and negotiating contracts. She is the Managing Attorney at Laura Frederick Law PLLC, a boutique law firm based in Austin, Texas that helps businesses with their vendor contracts. She also is the Founder and President of Contract Mentors Group LLC, a training and consulting company that helps lawyers and professionals learn how to draft and negotiate contracts.

Laura spent most of her career explaining and training on contracts. But prior to 2020, she limited her advice to her clients and coworkers. In August 2020, she started sharing her insightful contract tips through daily posts on LinkedIn. She quickly developed a following of enthusiastic fans who look forward to her LinkedIn posts every day. Her followers include experienced attorneys, who use the posts to refresh their knowledge, and others who rely on her tips to learn the basics.

Laura Frederick had an impressive legal career that took her across the U.S. and around the globe. She spent her first three years of legal practice working at law firms on franchise and distribution agreements. She then moved into technology transactions, working at a firm that merged into what is now Fulbright Rose Norton. She later joined the international law firm of Morrison & Foerster and spent five years working in its Technology Transactions group. She was based in its San Francisco office for two years and its Hong Kong and Singapore offices for three. She left that firm to join PPL Corporation, a diversified energy company, where she led legal support for all commercial and intellectual property matters. In 2010, Laura began her work as in-house counsel at several solar power companies, including Amonix, Hanwha Q CELLS, and SolarCity. In early 2017, she joined Tesla as commercial attorney working on vendor

contracts and global environmental commodity deals. She left Tesla in early 2019 to open her own firm, Laura Frederick Law.

Laura received her undergraduate degree from George Washington University in Washington, D.C., where she majored in International Economics. She then earned her law degree from Emory University School of Law in Atlanta, Georgia, which she attended on a full-tuition merit scholarship. Following law school, she was selected as a Fulbright Scholar and spent a year studying international commercial dispute resolution at the University of British Columbia School of Law in Vancouver, Canada.

Laura now lives in Austin, Texas with her husband, four teenage sons, and two rescue dogs.

