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Coming to Terms When Negotiating with a Non-lawyer (United States)

Commercial and Contracts

Skills and Professional Development

30-second summary

Negotiating a contract is a hybrid legal and business function that is often performed by business

people with no formal legal education. During contract negotiations, different rules and obligations apply to a lawyer, depending on whether the party on the other side of the table is represented by counsel. If counsel does not represent the other party, you cannot state or imply that you're disinterested in the transaction. Also, you cannot give any legal advice to the other party — except to recommend obtaining advice of counsel. If counsel represents the other party, you are not permitted to communicate about the transaction with a non-lawyer representative of the other party, unless you have permission from the other party's counsel.

Over the past months, you've been diligently negotiating the terms of a master purchase agreement with corporate counsel of a longtime customer of your organization. As expected, the negotiations have been exceedingly amicable despite the high-stakes nature of the agreement. You sense that a deal is imminent. One afternoon, you receive a phone call from the CFO of your longtime customer, who asks to discuss financing terms in the agreement. Do you take the call? Certainly, if the call was regarding ongoing litigation, you would politely refer the caller to counsel and quickly end the conversation. But this is different, right? Wrong.

In-house lawyers often are faced with the prospect of negotiating agreements with non-lawyers from other organizations. In many instances, the other organization also has an in-house lawyer who may or may not be consulted regarding the matter. In order to comply with ethical obligations, a lawyer must determine whether the opposing organization is represented with respect to the particular contract being negotiated and, if so, obtain consent from opposing counsel before communicating, directly or indirectly, with a non-lawyer regarding the matter.

What rules control?

During contract negotiations, a lawyer's obligations regarding communication vary depending on whether the party on the other side of the table is represented by counsel. If counsel does not represent the other party, your obligations are described in your state's version of ABA Model Rule 4.3. If the other party is represented by counsel, your obligations arise under your state's version of ABA Model Rule 4.2. As the majority of jurisdictions have adopted these rules verbatim, and in the interest of simplicity, this article focuses on the application of these two rules as promulgated by the ABA.

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Rule 4.3 provides a lawyer's responsibilities when "dealing on behalf of a client with a person who is not represented by counsel." First, you cannot state or imply that you're disinterested in the transaction. Moreover, if there's reason to suspect that the person on the other side of the table misunderstands your interest in the transaction, you must try to correct the misunderstanding. Finally, you cannot give any legal advice to the other party — except to recommend obtaining advice of counsel.

The obligations and prohibitions of Rule 4.3 serve several goals, the most obvious being to prevent overzealous lawyers from using their legal skills to exploit lay people who may not understand the legal effect of an agreement or act. Additionally, the rule seeks to preserve the integrity of the

attorney–client relationship and prevent inadvertent disclosure of information. However, when a party is represented by counsel, the impetus of those goals is reduced, at least to some extent, by the obligations imposed by Rule 4.2.

Rule 4.2 defines a lawyer's responsibilities while "representing a client" in a transaction where the other party is represented by counsel. In such case, absent extenuating circumstances, (Such circumstances include instances where a law or court order makes otherwise prohibited communication permissible, which is unlikely to occur during contract negotiation) you are not permitted to communicate about the transaction with a non-lawyer representative of the other party, unless you have permission from the other party's counsel. By requiring you to speak only with the other party's counsel regarding the transaction, Rule 4.2 alleviates the concerns addressed by Rule 4.3, as the disparity of relative legal skill between you and the other party's counsel is (presumably) not an issue.

Do the rules apply to me?

When negotiating a contract with a non-lawyer, it's important to remain cognizant of your ethical obligations. Although negotiating a contract is a hybrid legal and business function that is often performed by business people with no formal legal education, a lawyer who participates in negotiating a contract is bound to abide by the rules of professional conduct. In fact, a lawyer is required by the rules of professional conduct even when acting in a purely business capacity.

Notably, the first sentence of each of these rules limits its application to a lawyer who is "representing" or "dealing on behalf of " a client. So the question arises: When negotiating a contract on behalf of your organization, are you providing legal representation to the organization? Certainly, a non-lawyer is permitted to negotiate a contract on behalf of an organization without committing the unauthorized practice of law. Non-lawyer business people are free to negotiate contracts on behalf of their organizations and, in doing so, are not practicing law.

But the rules are different for lawyers. Generally, legal representation arises where a lawyer agrees to provide "legal services" to an entity. Although contract negotiation is not "legal services" per se, a lawyer who negotiates a contract on behalf of another is widely considered to be practicing law. In fact, sitting judges who are prohibited from practicing law have been removed from the bench for negotiating contracts on behalf of clients because such negotiations constitute the practice of law. As such, when negotiating a contract on behalf of your organization, you are representing the organization in your professional capacity. Thus, you are bound by the rules of professional conduct when communicating regarding the negotiations.

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Which rule applies?

In order to ascertain your obligations under Rules 4.2 and 4.3 during contact negotiation, you must determine whether the other party is represented by counsel. While smaller organizations may not have in-house counsel, larger organizations almost certainly have either dedicated or contracted lawyers advising them on various matters across the organization. However, the fact that an organization employs a lawyer does not mean that organization is represented with respect to the

transaction you are working on.

For example, a lawyer representing a corporation in a lawsuit cannot assert “blanket” representation of all the corporation’s employees in order to prevent opposing counsel from interviewing any of them. This is true for two reasons: First, a lawyer cannot unilaterally assert representation of a client with respect to a matter without the client’s agreement. Second, allowing such blanket representations is inherently fraught with irreconcilable conflicts of interest for the corporate lawyer. These concerns are not exclusive to in-house lawyers in the litigation context.

This rule is equally applicable to an in-house lawyer who attempts to assert a blanket privilege over all the organization’s contract negotiations. Certainly, the lawyer cannot unilaterally decide to represent the organization in all contract matters without the organization’s agreement. As noted above, there are several reasons an organization might be better served by negotiating contracts in its unrepresented capacity. An in-house lawyer who attempts to assert a blanket privilege over all contract negotiations may potentially assume representation prohibited by the rules against conflicts of interest. As such, while an organization’s lawyer may take part in one contract negotiation, the organization is not necessarily represented with respect to another deal that the lawyer is not involved in.

Within the context of ethical Rules 4.2 and 4.3, representation is specific to each individual matter the organization is involved in. At any given time, two organizations may simultaneously be working towards closing several independent transactions. In this scenario, it’s important to note that an organization’s lawyer who becomes involved in one negotiation does not represent the organization with respect to the other pending deals. This means that, depending on what transaction the lawyer becomes involved in, you may be required to treat the organization as represented with respect to one transaction, invoking the requirements of Rule 4.2, and as unrepresented with respect to another transaction, invoking the requirements of Rule 4.3.

Moreover, a lawyer’s obligations under Rule 4.2 do not arise until the lawyer has actual knowledge that a lawyer is involved in the particular negotiation. Nevertheless, a lawyer may not hide his head in the sand and ignore obvious indications that the organization on the other side of the table is represented by counsel. As such, unless you know that the party on the other side of the table is represented by a lawyer with respect to the particular contract at issue, your obligations arise under Rule 4.3 concerning dealing with unrepresented persons.

After you have actual knowledge that a lawyer is representing an opposing organization in a contract negotiation, your obligations arise under Rule 4.2 regarding communication with represented parties. It is conceivable, however, that at some point after becoming involved in a deal, the opposing organization’s counsel may turn the reins back over to a non-lawyer business person and have no more involvement in the matter. In such case, upon obtaining reasonable assurance that the lawyer’s involvement has in fact ended, the obligations imposed by Rule 4.2 cease to apply, and your conduct is once again subject to Rule 4.3 regarding dealing with unrepresented parties.

What if another lawyer is not involved?

As noted above, Rule 4.3 provides several prohibitions when a lawyer is negotiating with a non-lawyer. First, you cannot state or imply that you are disinterested (it is unlikely that this would be a concern in the contract negotiation context, as each party is presumably aware that the other is acting in the best interest of his respective organization). However, the rule also prohibits giving legal advice to an unrepresented party, other than to seek advice from counsel. This can be a concern to

lawyers negotiating with non-lawyers. In some instances, the non-lawyer may ask you for advice regarding a certain clause or term-of-art. Although it may be tempting to provide a quick answer in order to close the deal, it's impermissible to do so. The most you can do in this situation is to recommend that the non-lawyer seek advice of counsel.

Despite the prohibitions of Rule 4.3, a lawyer is nevertheless permitted to negotiate a contract on behalf of an organization with an unrepresented nonlawyer. In doing so, you are permitted to inform the unrepresented party of the terms on which your client will enter into the agreement. Additionally, you are permitted to draft documents for the unrepresented person to sign. Finally, you are allowed to explain your understanding of a document's meaning or the underlying legal obligations, as long as the unrepresented person understands you that you are representing your client when doing so.

Considering the obligations imposed by Rule 4.3, there are two important best practices to bear in mind when negotiating with a non-lawyer from an unrepresented organization. First, always identify your client and make it clear that your client's interests may not align with those of the unrepresented party. Second, don't give the unrepresented party legal advice. Although you may explain your understanding of a document or obligation imposed by a clause, there is a fine line over which you should not cross. As a general rule, if the unrepresented party asks your advice, refer the party to counsel.

What if another lawyer is involved?

Once the other party's lawyer participates in a contract negotiation, you are prohibited from communicating regarding the negotiation with certain representatives of the opposing party and should only communicate with counsel. However, when dealing with a large organization that has many levels of employees, the prohibition will not bar you from speaking with every employee from the company regarding the matter. In such circumstances, there are three groups of people with whom you cannot communicate.

First, you cannot communicate regarding the negotiation with someone who supervises, directs or regularly consults with counsel concerning the matter. While the breadth of this definition may be hard to divine from an outside perspective, it's best to err on the side of caution and use your best judgment in deciding whether a nonlawyer contact fits this definition.

Second, you cannot communicate regarding the negotiation with someone who has the authority to obligate the represented organization with respect to the matter. Whether a person has authority to obligate an organization is a question of agency law. Under agency law, one who has actual or apparent authority to act on behalf of an organization can obligate the organization. An agent has apparent authority when the organization he works for makes some manifestation of authority, which would lead an outsider to believe that such authority exists. Certainly, a non-lawyer whom an organization sends to the table for negotiation purposes satisfies this standard. As such, where the organization is represented by counsel, you should not communicate with such people.

Third, you cannot communicate regarding the negotiation with someone whose act or omission may be imputed to the organization for the purposes of criminal or civil liability. This definition is the most widely debated of the three, and authorities have developed three different standards for which employees fall into this category. The standard applied varies by jurisdiction, with most jurisdictions adopting the intermediate definition.

Third, you cannot communicate regarding the negotiation with someone whose act or

omission may be imputed to the organization for the purposes of criminal or civil liability.

Under the broadest definition, this portion of the rule prohibits you from communicating with any employee whose statement might be an admission under Evidence Rule 802(d)(2)(D). For those who do not regularly consult the Federal Rules of Evidence, Rule 801(d)(2)(D) is an exception from the definition of hearsay. The rule provides that an out-of-court statement made by a party's agent or employee on a matter within the scope of the agency or employment relationship is admissible against that party, even if it would otherwise be barred by the rule against hearsay. For our purposes, any statement of an employee of a represented organization regarding negotiation of a contract could fit within this rule. As such, this interpretation of the rule prohibits communication with virtually every employee of a represented organization because any employee can make admissions against her employer.

Under the intermediate definition, this portion of the rule prohibits a lawyer from communicating with those employees who have the authority to commit the organization to a position regarding the contract. This definition is essentially the same as the prohibition on communication with those who have authority to obligate the organization with respect to the matter. Under the narrowest definition, a lawyer is permitted to communicate with all employees of a represented organization who are not part of the "control group," which is described as the highest echelon of management. Although inherently difficult to define, the "control group" has been described as the "top management persons who [have] the responsibility of making final decisions" and "those employees who have … 'speaking authority' for the [organization]."

Not only are you prohibited from speaking with those employees, you're also prohibited from speaking "through" non-lawyer employees of your own organization. In practice, this means that when another lawyer is involved in a matter, you cannot pass your comments onto a business person so that person can then pass them onto a business person on the other side of the table. In fact, you shouldn't even "carbon copy" non-lawyers on an email or letter you send to opposing counsel. Certainly, Rule 4.2 places wide restrictions on an in-house lawyer when negotiating a contract with a represented organization. These restrictions, however well intentioned, may in reality do a disservice to the organizations involved. With that circumstance in mind, Rule 4.2 provides a convenient work-around for situations in which the parties would like to open lines of communication that are otherwise prohibited.

So, I can't speak to anyone but counsel?

So far, this article has essentially been a long list of acts that you should not commit; however, that all changes from this point on. In many situations, both parties to a contract negotiation would prefer that you speak directly with the responsible business people when negotiating contract terms. For instance, some relatively large organizations only employ a small number of lawyers and wish to preserve those lawyers' time for other matters. Additionally, depending on the operational structure of an organization, its lawyers may not be the best informed as to the nature and details of the deal. For these and other reasons, there are times when all involved will be better served by allowing a lawyer responsible for contract negotiation to directly contact a non-lawyer of an otherwise represented organization.

In order to do so without compromising professional obligations, a lawyer must get "consent" to speak with a non-lawyer business person of the represented organization. Consent must come from the represented organization's lawyer; it is not enough that the non-lawyer business person consents

to the communication. Even if that person is the chief executive, once a lawyer is involved in a contact matter, you must seek consent from that lawyer before commencing direct communication with the non-lawyer. This rule holds true even in the event that the non-lawyer contacts you.

Once consent is obtained, you must remain vigilant as to the scope of the consent you received. Just as a lawyer's representation in one matter does not extend to all matters an organization is involved in, when a lawyer gives you consent to speak with a nonlawyer representative of her organizational client, that consent only applies to the discrete matter at issue. If you represent your organization in multiple deals with the same represented entity, and you obtain consent to speak with a non-lawyer business person regarding one of those deals, you must resist the urge to discuss the other transactions while you have the non-lawyer on the phone.

In some situations, consent of the opposing lawyer may be implied. In 2011, the California Standing Committee on Professional Responsibility and Conduct addressed implied consent in a formal opinion of the subject. In so doing, it identified several factors to consider when determining whether a lawyer implied consent to opposing counsel communicating with a client:

1. whether the lawyer is present during the communication;
2. if there is a prior course of conduct between the attorneys whereby one attorney repeatedly gives such consent;
3. whether the nature of the matter is collaborative or adversarial;
4. how the communication is initiated — if opposing counsel emails you and "carbon copies" a non-lawyer representative of the organizational client, this invites a "reply all" response and implies that the lawyer consents to communication;
5. whether the communication is formal or informal;
6. the extent to which the communication might interfere with the attorney–client relationship;
7. if there is a common interest between the parties;
8. if the opposing attorney will have a reasonable opportunity to counsel the non-lawyer regarding the communication soon after receipt; and
9. whether the opposing lawyer specifically denied consent.

Despite the broad prohibitions on communicating with the non-lawyer representative of a represented organization, there are situations in which consent is not required. For instance, you don't need to obtain consent to speak with a non-lawyer business person if the organization's lawyer is present for the conversation. This presumably applies during conference calls as well. In this situation, it is assumed that the lawyer will be able to "filter" your message to the organizational client and control the response. Thus, the concern that you will exploit the non-business person's lack of legal knowledge by overreaching is eliminated. Moreover, opposing counsel will be able to "filter" the non-lawyer business person's response, eliminating the risk of inadvertent disclosures.

> Despite the broad prohibitions on communicating with the non-lawyer representative of a represented organization, there are situations in which consent is not required.

Don't ignore the rules

It may be tempting to ignore the ethical rules regarding communication when negotiating a contract, especially when the other organization involved would prefer to send a non-lawyer to the bargaining table while nevertheless obtaining advice from counsel regarding the contract. However, the rules

apply with equal force to a lawyer negotiating a contract as to a lawyer representing an organization in the courtroom. As such, when negotiating a contract on behalf of your organization, you must carefully determine which rule applies to the matter and abide by the applicable obligations.

References

Fair Auto. Repair, Inc., v. Car-X Serv. Sys., Inc., 471 N.E. 2d 554, 560 (Ill. App. 2d Dist. 1984).

Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984).

Formal Op. No. 2011-181 (2011).

ACC Extras on… Contract negotiation

Quick Reference

Tips and Traps of Preliminary Agreements: What You Need to Know (May 2012).

Presentations

Contracts I: Negotiating (May 2012).

High Impact Communication Skills (May 2012).

PPP Do's and Don'ts: New Best Practices (Oct. 2011).

Poll

What's Your Negotiation Style/Philosophy (April 2012).

ACC has more material on this subject on our website. Visit www.acc.com, where you can browse our resources by practice area or search by keyword.

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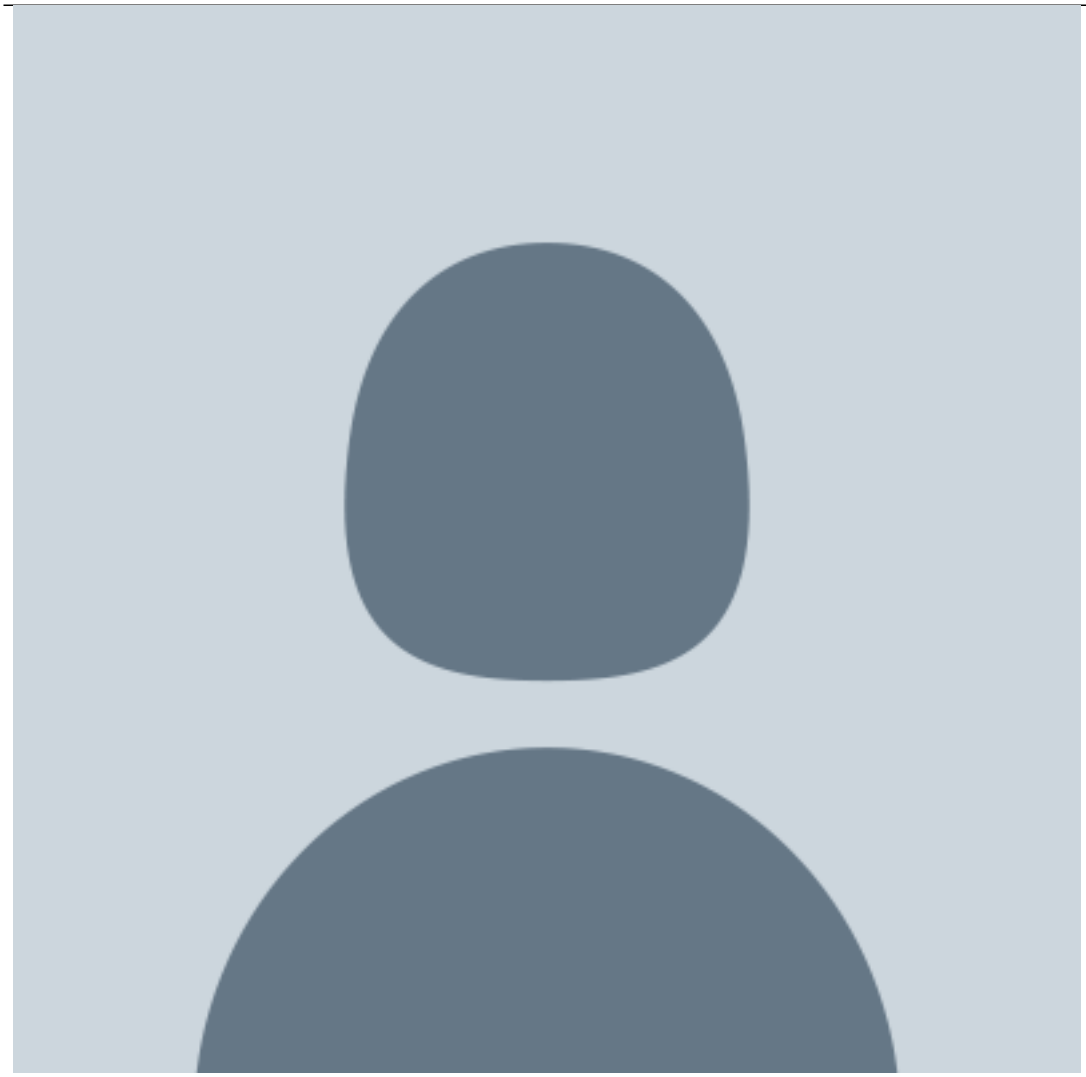

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