Nine Bold Rules To Get The Most Out Of Your Contracting Process

(Part 1 Of 2)

Bryan Handlos, Kutak Rock LLP

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Thomas Carlyle, Sartor Restartus, II, 4[1]

Contracts are overrated. In nine cases out of ten you will be able to resolve problems with your business partners based on your business relationship and practical leverage with them. If the problem is serious, litigators will be involved anyway and the court system will provide an efficient way to sort the problem out. A good litigator will often be able to find creative ways around poor contracts. In any event, most contracts will never be looked at again once they are signed. Given these truths, what is the best approach to your contracting process? Most importantly, how can you save money and improve your bottom line? The "Rules" that follow reflect a bold non-legal approach to that subject.

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Rule 1. Focus only on price and business issues

Price and business terms are the reason for your contract and why it has value to you. The other side should be made to understand how important those central issues are to you. Focusing on legal terms and conditions distracts from what is most important. Asking for legal niceties slows things down and needlessly wastes your limited bargaining chips. If you must negotiate things only the lawyers care about, hold off on them until after you have resolved everything you really care about so they don't distract from what is most important.

Editor's note: Price and business terms commitments are undeniably critical elements of any contract. "Legal niceties" can, however, be used to significantly water down a party's

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rights to enforce those commitments. Provisions that limit warranties, limit remedies, and limit liability can push commitments closer to the handshake side of the spectrum. This may be fine with a counterparty that can unquestionably be trusted to do what is right even when it costs them significant money. If not, legal niceties are necessary, unfortunately. When a party's lawyers create a standard form contract their duty is to protect their own client. One should not be surprised if the bulk of the contract is devoted to minimizing their client's responsibilities. Some of that will be done in a way that is reasonable, and some will not. Wherever there is leeway to decide what is reasonable, the lawyers who drafted the contract will have decided to favor their own client. To disregard legal niceties, one must trust not only the counterparty, but those decisions made by the counterparty's lawyers. As trustworthy as they may be, contract lawyers have a very specific job to do and it has very little to do with trust. Also, as to the timing of presenting legal issues, key contract points can be pushed forward in RFPs. This can be a point of time when maximum leverage exists with a bidder who wants to win the business and when they may be most reluctant to push back. Getting a counterparty to agree to key terms in their response to an RFP can reduce the pushbacks that will occur after the sales team perceives it has won the business and withdraws from the process to let the mere formality of the paperwork be finished.

Rule 2. Do it yourself

Is extensive legal involvement really necessary? Contracts in the United States are typically written in English. Some terms may be complex, but you can certainly understand them if you take the time to read them carefully. You have likely read and negotiated a lot of contracts. You can decide what you are willing to agree to on your own and can doubtless do so by yourself much more quickly than involving someone else and spending time and money to communicate and collaborate with that person.

Editor's note: Reading contracts *carefully* is of course the catch. Contracts are written carefully and often fine-tuned over the years. Prudent review takes time (even when counsel does it)—the quicker the review, the more likely something will be missed. Subtlety and ambiguity exist, are often more to one party's favor than the other, and may well be intentional. What is not in the contract can be as important as what is. Those who write a lot of contracts are looking for these problems more than the average reader. In addition, for all the contracts an executive may have read and negotiated over the years, it is still likely fewer than the many hundreds of contracts competent counsel will have handled. Counsel can also bring the experience of having worked with many perspectives in the marketplace, including perspectives on both sides of the contractual fence (vendor-side and customer-side, for example) and the perspectives of the client's peers and competitors whom counsel has also helped. Counsel's assistance and experience may not be absolutely necessary, but has real value to offer.

Rule 3. Eliminate or minimize conversations with counsel, especially at the beginning of the project

Outside counsel is likely charging you on an hourly basis (in-house counsel may not be sending you an invoice, but they

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obviously have a cost also). Regardless of cost considerations (and whether you are working with inside or outside counsel), you probably do not have a lot of spare time to waste in unnecessary conversations. Counsel's job is to figure out what is important, particularly if you have worked with them long enough for them to understand what is usually important to you. As with any relationship, counsel should be expected to know or figure out what you want. Without going so far as to say conversations with counsel are overrated, they definitely cost time and money. "More doing, less talking" is a better approach.

Editor's note: No one, even counsel charging by the hour, finds professional fulfillment wasting time on unproductive meetings or telephone calls. A brief initial communication of the client's perception of the deal will not be unproductive. Without the benefit of the client's direct input, some portion of counsel's perception of the deal may be formed by what the other side has put in the contract. If a client sends a contract to counsel with no comment, is counsel wrong to believe that silence means the client is okay with its various terms? This may not be the case where the counsel knows full well that a particular issue is a hot button for the client or where it is clear that the client is relying on counsel's own judgment with respect to certain 'legal issues' like indemnity and limitation of liability. But even then, much of the contract will remain open to question. This situation is made worse where the other side has left things out. Telling counsel what a client is most worried about will help counsel prioritize and focus on what is important. That initial brief communication will improve counsel's efficiency and result in counsel having a more accurate understanding of the client's needs than if counsel tries to figure it out for themselves. Lawyers may tout a lot of skills and value in their services, but even the most brazen will not try to sell their mind-reading abilities.

Rule 4. Minimize revisions

Counsel will be happy to totally rewrite your contracts. Many contracts have plenty to be critical of and much that should be fixed in a perfect world. This is not a perfect world. Most revisions to a contract will be wasted effort. And for the contract that is filed away never to see the light of day again, all of the revisions will be wasted effort. You do not need perfection. The more revisions you ask for, the longer and more expensive the process will be. Substantial rewrites cause problems and often reflect unrealistic expectations. Some contracts are not really negotiable anyway, so why not just bite the bullet, determine what you can live with, and move on?

Editor's note: Very few contracts are truly nonnegotiable. A party pushing back on requested revisions to its standard terms will sometimes say the deal was priced on the expectation that the parties would do business on those standard terms. If the one-sidedness of those standard terms is taken into consideration, the expectation of no changes is unrealistic. Perfectly reasonable objections to standard contracts will almost always exist, sometimes many of them. The other side invested considerable time and talent in engineering their standard contract. Even with a substantial markup, the party requesting revisions will spend only a fraction of the time the other side has already invested in their standard form. And even with extensive revisions, a party will likely still be at a substantial disadvantage to the other whose standard terms provided the starting point. Calibrating the level of response needed on a contract is best done by the client. Counsel's preferred approach will be to produce a high quality work product that protects its client as well as the standard contract protects the other side. If that is not warranted in the circumstances (e.g., if it will cost too much to obtain a reasonable degree of reciprocity), most counsel are perfectly capable of following the client's instruction to take a light touch or to focus just on specific issues.

[1] *A novel about philosophy from the 1830's which used the voice of an "Editor" as a literary device. The author and editor were, in fact, one and the same.*

(to be continued in the next issue of Nebraska Banker magazine)

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Rule 5. Force your contract team to complete their work in as constrained a time frame as possible

Projects expand to the time allowed for them. Manage this by setting a short time frame to complete the contract. Work can usually be done more quickly if it needs to be. A sense of urgency is needed and some reasonable deadline is necessary or the contracting process will drag on more than necessary.

If lawyers are engaged to help with the contract, leave the responsibility to them. Step back and let the experts work it out, lawyer-to-lawyer. This is particularly true when the other side's counsel is running the process on that side. There is no need to have multiple cooks in the kitchen. Your lawyers know what they are doing and should be fully capable of getting the contract completed, particularly if you have communicated your concerns and instructions to them. If this is not fully practical, turn the matter over to counsel, but invite them to bring you back in on specific issues as needed in the process.

Editor's note: Deadlines are necessary and sometimes driven by external factors. Deadlines also pose a temptation to the other side to play out the clock against the party that needs to negotiate a standard contract. This does not even need to be intentional. If time runs out, the other side will be happy to stick with as many of their own standard terms as still remain unresolved. They, after all, had all the time in the world to develop the standard form they are using and happy with. If truly necessary to manage the situation, impose a time limit internally and don't disclose it to the other side. Consider instead whether a deadline can be imposed that the other side needs to work against. Ideally, this deadline will be one that allows time to pursue a Plan B that involves a different party that is potentially more accommodating. Plan ahead; start early.

Rule 6. Don't get distracted by negative theoretical scenarios

It is not hard to dream up negative things that can happen in a new contractual relationship. Negativity, however, will not help get your contract done. Expect the best, which should be natural since you likely just selected your potential new business partner as the best competitive choice for your needs. Many businesses (yours included?) fall into the category of those who are unlikely to sue a business partner even if they default, so why bother to deal with negative scenarios which are also unlikely to begin with? Stay focused on what is most likely. Nothing is risk free – chasing down protection for every potential negative scenario is impractical and wasteful.

Editor's note: Judgment is necessary in deciding which battles to fight. Choosing not to focus on every potential negative scenario makes good sense. A party should, however, identify the key risks in a new relationship (counsel will be able to help if requested). Once key risks are identified, the affected party should consider how the resulting loss or situation will be dealt with if the identified risk materializes. A party may simply assume the risk of some losses. Other risks might be dealt with outside the contract (e.g., if poor performance is the risk, switching service providers may be a practical solution, assuming the client can easily exit the deficient relationship). If, however, the affected party wants to be able to hold the other responsible for a loss or situation caused by the other, that affected party should spend the time needed to deal with that possibility in the contract. While dreaming up and chasing down appropriate contract terms for every possible risk should not be the goal, important risks and client-desired remedies should be considered. Clients can manage what is invested to these ends by being actively involved in identifying important risks and communicating to their counsel what they care about and what they want to be able to do if they are wronged.

Rule 7. Once the lawyers are involved, stay entirely out of the process

If lawyers are engaged to help with the contract, leave the responsibility to them. Step back and let the experts work it out, lawyer-to-lawyer. This is particularly true when the other side's counsel is running the process on that side. There is no need to have multiple cooks in the kitchen. Your lawyers know what they are doing and should be fully capable of getting the contract completed, particularly if you have communicated your concerns and instructions to them. If this is not fully practical, turn the matter over to counsel, but invite them to bring you back in on specific issues as needed in the process.

Editor's note: There may be no single right way to staff a contract review and negotiation. If counsel is involved on one side it is typical for counsel to be involved on both sides. It may not even be ethical for one party's counsel to communicate with the other's party business representative if counsel knows that the other party is represented by counsel. More importantly, it can often be a mistake to put counsel in the position of going it alone with the other side (even if the business team is standing

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ready to weigh in on things as needed). Counsel defending his or her client's standard contract mostly has one job—to minimize changes. Counsel seeking changes may be smarter, more experienced and extraordinarily persuasive, but the counsel defending their own standard terms will have the high ground. They know their contract best, will have heard all the objections before, will have the easier job (resisting changes) and will not care about pleasing the other side's lawyer. It is more effective for the business lead on a contract (particularly on the customer side) to stay actively involved. Counsel defending a standard form may have no hesitancy in saying "no" to the customer's lawyer. That may be different if someone has to say "no" to the customer. A disengaged business lead also signals a lack of concern with the terms of the contract.

Rule 8. Keep the other side's sales team out of it

Sales leads or customer relationship managers on the other side of the transaction are unnecessary. By the time the contract is being negotiated, the sale has already been made and there is no role for a salesperson but to get in the way. They may well be compensated for getting your signature on the contract and may say or do anything (within bounds, of course) to make that happen.

Editor's note: On this point, the editor will have to disagree with the author (and knowing that the author's father was in sales, the editor would also say shame on the author for this suggestion). Good sales leads on the other side can be a godsend. Not because they will be disloyal to their employer but because they can do many things to help bring the contract to a satisfactory closure. Among other things, they can help: (i) maintain a positive non-adversarial dialogue; (ii) navigate the many policies, procedures, and stakeholders on their side of the fence; (iii) advocate for the customer's position internally; (iv) be a moderating influence on the naysayers (such as counsel) on their side; (v) obtain the ear of management decision makers to whom tough issues may be escalated; and (vi) search for compromises and alternative solutions.

Rule 9. Be nimble and flexible – take an ad hoc approach as much as possible

Every contract and every counterparty is different. Focus on what is happening in this particular situation here and now. Adjust accordingly. Policies and checklists stifle deeper critical thinking about the contract and inevitably create more work, particularly where exceptions need to apply. Allow your business leads, who are closest to the action and probably most interested in getting a good deal for you, to do their job.

Editor's note: Modern vendor management principles simply don't allow for this. What the author says is all true and should be taken into account. But contracting without having and following appropriate policies, procedures and checklists is dangerous and will result in regulatory criticism. Policies and procedures serve important QA and regulatory compliance functions, help assure contracting consistency within an organization, and can be useful in negotiating ("our policies require this..."). Policies can also serve as backbones for personnel who need them.

Contracting can be a costly and frustrating process where it is sometimes difficult to see the value achieved. Following "bold" rules to control the expense of the process are a natural reaction. As suggested by the editor's notes, however, remaining engaged in the process and actively communicating your concerns with counsel may be a better approach.

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Access the QR Code to read Part 1 of *Nine Bold Rules to Get the Most out of Your Contracting Process.*

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