Negotiation I: A Dynamic Process

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Road Map

• What is negotiation?
• Who is a negotiator?
• How do you negotiate?
• What are you negotiating?
  ▪ Financial Obligations
  ▪ Non-financial obligations
• Summary
What is Negotiation?

• **Negotiation** is a dialogue/exchange between two or more people or parties, intended to reach an understanding, resolve point of difference, or gain advantage in outcome of dialogue; to produce an agreement upon courses of action; to bargain for individual or collective advantage; to craft outcomes to satisfy various interests of two person/ parties involved in negotiation process.
You May Be a Negotiator...

- If you have purchased a car
- If you have purchased lab equipment
- If you own a house
- If you have a husband/ wife/ boyfriend/ girlfriend/ children/mother/father /friends
- If you have asked your boss for a raise

- In short, we are all negotiators
How do you negotiate?

Dibble
Why can't I stay out till 11:30?
11:00
10:30
Sounds good!

11:00?

The Art of Negotiation
How do you negotiate? (Cont.)

THE SALARY IS NEGOTIABLE ... TAKE IT OR LEAVE IT

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How do you negotiate? (Cont.)

Attorneys Rarely Survive in the Wild

“But I came here to negotiate.”
How do you negotiate? (Cont.)
How do you negotiate? (Cont.)

• There are many styles of negotiation
  ▪ Accommodating – Win/Lose or Win/Win
  ▪ Avoiding
  ▪ Compromising – Win/Lose or Win/Win
  ▪ Competing – Win/Lose
  ▪ Collaborating – Win/Win
Case Study

• Class is divided in two groups
• You have 7 minutes to read the problem
• Do not share your fact pattern with anyone
• After reading the problem, start negotiating with your partner
• Once you and your partner reach agreement, let the instructors know
Case Study Discussion

• Average completion time
• Did you reach agreement?
• Did you not reach agreement?
• What was your agreement?
• Why did you not reach agreement?
• What type of negotiator are you?
• What kind of negotiator do you think your partner is?
An Eye Opening Exercise

• Your instructor will show you a picture
• Look at the picture carefully
• Try to pick as many yellow items as you can
• Do not write anything down
• Now answer the instructor’s questions
An Eye Opening Exercise

• Observations
• Lessons learned
• Has this ever happened to you?
Negotiation II: The Content

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What Do you Negotiate in a License?

- Financial Terms
  - Royalties – easiest part to negotiate...or is it?
- Non-Financial Terms
  - Statutory and Other Obligations to Licensor....unexpected issues
  - Research licenses
  - Auditing requirements
  - Royalty reports
  - Progress reports
  - Supply of materials
Royalties – Keep It Simple Until You Can’t

• Execution (upfront) Royalty
  ▪ All at once
  ▪ Installments
  ▪ Contingent upon specific event

• Minimum Annual Royalty
  ▪ May increase with development progress
  ▪ Creditable against earned royalties
    - Motivates licensee’s product development
Royalties (Cont.)

- Earned Royalties (% of Net Sales)
  - Stacking for third party licenses
  - Combination products
  - Variable based on amount of sales
  - Variable based on Licensed Products
  - Variable with patent status
    - Model agreements: “within scope”
    - Higher for issued claims
Royalties (Cont.)

• Benchmark Royalties – room for creativity
  ▪ Clinical trials, protocol production
  ▪ Submission/Approval of paperwork required by another government agency
  ▪ Proof of concept studies
  ▪ Patent issuance
  ▪ Partnering/Funding
  ▪ First commercial sale
  ▪ Cumulative net sales
Royalties (Cont.)

• Patent expense reimbursement
  ▪ Past expenses
  ▪ Future expenses and maintenance
  ▪ May be split between other licensees

• Sublicensing royalties

• Equity benchmark royalty
Non-financial Obligations

- Simple agreements, (CEL, BMLA) usually not too many changes
  - Definitions
  - Duration of agreement
  - Reporting requirements
Non-financial Obligations (Cont.)

• More complex agreements (PLA) more to change
  ▪ Fact and applicant specific
    – Changes to definitions (net sales, licensed territories, affiliates)
    – Provide Licensor with licensed products/materials made through licensed processes prior to first commercial sales
    – U.S. manufacturing requirement
      ♦ Written waiver
    – Record keeping and audit conditions
Non-financial Obligations (Cont.)

- PLA (cont.)
  - Some changes take longer than others
    - Development benchmarks
    - Commercial development plan
    - Research licenses
      - Academic and commercial
    - Sublicensing conditions
      - Licensor approval
    - Developing Country/“White Knight” obligations
Know What Is NON-Negotiable

• Reservation of government rights provisions
• Indemnification clauses
• Non-assignment language
• March-in rights
• Choice of law/forum
• Certain ADR mechanisms, e.g., binding arbitration provisions
Game

- Deal or No Deal?
- Thinking about everything that you have learned today, let’s tackle ten questions
- Discussion of answers
Summary

• Know your goals/needs: **Agency’s mission**
• Know what you’ve got and what it’s worth
• Know your applicant’s needs, motivation and **capabilities**
• Know what you can agree to and what you cannot
• Know when to walk away and when to come back another day
• Know that executing the agreement is not the end
  ▪ Monitoring and enforcement are key
Questions & Discussion
Contact Information

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