

Lawyers and Software Negotiations

When and How to Use a Lawyer

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There are two kinds of lawyers, goes the old joke: those who know the law, and those who know the judge.

Contrary to what many senior executives believe, there are precious few lawyers who understand the first thing about a company's IT or software needs, much less the intricacies of software licensing contract negotiations. In fact, I've never met one yet. Please don't misunderstand me. This is not a knock against lawyers. A good corporate counsel certainly understands contracts, and I've met several who, deep down, are really very good people. That's why they bury lawyers 12 feet deep!

Lawyer jokes aside, there are far too many companies that ask too much of their legal counsel when it comes to software licensing contracts. We know this first hand, because as consultants who help clients during a variety of software vendor negotiations, we often sit side by side with internal, and sometimes external, legal counsel through the whole process. And we inevitably wind up explaining the finer points of software licensing and how different terms and conditions (T&Cs) can affect their company's (or client's) future costs, operations, and/or growth. Their involvement throughout the process is a waste of their time, and everyone else's.

So, when should legal counsel get involved in software vendor negotiations?

To review the final contract from a legal standpoint after the T&Cs have been negotiated. Period! No matter how much they may clamor to "know the contract," lawyers should do nothing else beyond review the final contract. Their job is to interpret the legal jargon, not try to optimize licenses to fit the organization's needs now and in the future. Why?

Because they are not IT or operations experts. They are not CIOs or IT asset managers who must look at their software assets and align them with business objectives. This is outside their expertise, and in most cases, their comfort zones.

What Lawyers Don't Know Can Hurt You ... A Lot! Consider initial software vendor negotiations. From experience, we know that lawyers only look at the legal aspects of the contract, including how many licenses are needed. Countless times, we have witnessed lawyers advising clients to over-license or purchase as many licenses as possible for each user or each laptop, scanner, etc. This not only misses what the company actually needs – now and in the future – it highlights what attorneys don't know about software licensing.

For instance, some licenses count the user while others may license the machine (such as with multi-core). And there are countless examples of non-pricing/non-discount concessions that can provide real value to the company.

For example, with few exceptions retailers know in advance that the winter holidays will probably be their busiest season. If they normally use 100 servers, their holiday needs might soar to 200 or more. Most vendors will start negotiations by demanding that the retailer buy the rights to 200 servers for the entire year (peak usage), but there is usually some flexibility. Sometimes they will grant a temporary uplift in your license grant for seasonal use. Alternatively, a negotiated allowance that allows expansion of development and testing of the software might be a better option. Either way, negotiation of a 'non-discount' concession will be far more valuable than a few percentage point reductions in the initial price, or over-licensing in the first place.

The same holds true of negotiating contract re-ups. Attorneys will vaguely understand that the existing terms and conditions negotiated previously were a sweet deal, especially if they are directed to keep those T&Cs. But attorneys will likely not understand the nuances in licensing changes, how they affect the T&Cs and how that affects the re-up.

A good example is multicore changes. While simple to understand, these can lead to extreme pricing changes in licensing. Certain older multicore values might be grandfathered in, but the question any company should ask is: "Should we?" An attorney can't answer that, or even know to ask the question. The multicore may be obsolete in a few months, or perhaps there is a plan to change the servers and the types of cores within the year. This would make the contract re-up and the T&Cs obsolete.

Another example: technological advances often outpace the speed at which software agreement amendments can be negotiated. Clients signing database software agreements as recently as 2006 may have had their agreements significantly reduced in value, given changes in 'core counting' processor rules governing database licensing deployments. In this case, the software contract did not change, the value coming from the software did not change, and the application using the software did not change – but a recent hardware upgrade may

have caused a six figure software liability. This actually happened on a large scale in the early half of 2009. Some database software vendors updated their processor core counting ratios, and the result was that companies upgrading to IBM Power6 processors saw a software cost increase of 25% for essentially the same quantity of CPUs.

Software licensing is a complex, arcane world unto itself, and enterprise software vendors change their software licensing rules often. It is very difficult to keep abreast of them all, even for people in the business. Throw in system migrations, M&A activities, buyouts, and dozens of other changes in a company's operations that can cause unintended non-compliance and it should be obvious that the only people at the negotiating table should be experts who understand these intricacies, and how they might affect the company.

Ask the lawyers for advice about what they know – the legal aspects of the T&Cs that have been negotiated by IT and software experts. Their presence at the negotiating table only slows things down. You may learn a few new lawyer jokes during the process, but lawyers don't think they're funny, and nobody else thinks they're jokes.

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Scott Rosenberg

Scott Rosenberg is responsible for creating and driving the vision of Miro Consulting, which he founded in August 2000. With more than 20 years of engineering and operations experience, Mr. Rosenberg's leadership has fostered significant company growth. Today, Miro Consulting has over 400+ clients across North America and has overseen more than \$1 billion in Oracle and Microsoft transactions. Rosenberg is an active member of IAITAM and is a Certified Software Asset Manager (CSAM). Mr. Rosenberg earned an Industrial Engineering degree from the University of Pittsburgh.

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