



# MicroBusiness

## Pause!

■ Fred Schindler

**D**o you want to stop progress on an important task or project? Here's how—get a lawyer involved. It's happened to me several times. It's probably happened to you too. Luckily for most of us, our work doesn't often require us to work with an attorney.

### When Lawyers Are Unavoidable

Lawyers typically only get involved when two organizations need to agree about how to share information or work with one another. This can happen early on, when two organizations are just beginning technical discussions, with a nondisclosure agreement (NDA). Things can become much more complex and involved with business agreements, especially when significant amounts of money are involved and when there is considerable risk in the collaboration.

Most of us don't get involved in complex business agreements. But NDAs are very common. Sometimes, large purchases require a contract. It isn't always necessary to get lawyers involved, but, even in those cases,

someone needs to scrutinize the language carefully.

### Covering All the Bases

Take the humble NDA. It's basically a statement that says two organizations will share information in a certain area and that they won't disclose anything they learn to any other party without permission. That sounds simple enough. But such agreements typically require several pages of text—probably because a lawyer made sure that every eventuality is covered.

Most organizations have a standard NDA they offer to any outside organization before proprietary information can be shared. These NDAs are written from one organization's perspective, so even if they attempt to be fair, they rarely are. However, it's quickest to use the standard NDA, typically the one from the larger organization. I've been on both sides. If I'm in the bigger organization, I offer our NDA and explain how incredibly difficult it is to change even a word. Often, the smaller organization will just sign.



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Sometimes, however, the standard NDA doesn't fit. I've tried, for example, to use a standard NDA intended for two companies when the other party was a university. That required some language changes. And before I knew it, lots of terms were up for discussion. It took a week—and we didn't even involve any lawyers.

I don't know how many NDAs I've been involved in, but there have been many. They seemed rare when I started my career. Not anymore. I've been trying to think of any incidents or problems with any of the dozens of NDAs I've been involved in; I can't think of any. So all those terms we've negotiated and agreed to have been for naught. But a few cases of bad behavior elsewhere in the world have been enough for to justify the complexity of a modern NDA.

### Billable Hours

I've had occasion to be involved in a number of more complex agreements. These were cases where lawyers had to be involved. Some of the lawyers have

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been employees of my company; these are *inside counsels*. Sometimes we hire a lawyer from a firm that specializes in a specific area, an *outside counsel*. I've noticed that outside counsels are better than in-house lawyers at explaining all the worst possible things that can happen. Is this because they are specialists? Or is this because they bill by the hour?

Diligent attorneys have a talent for considering all the worst things that can happen and coming up with language that protects their client in every conceivable scenario. That sounds appealing. The problem is the other organization's lawyer has the same goal. The result is that many of the organizations' goals for the agreement are at odds, and this necessitates negotiation of conflicting language.

Typically, the attorneys for both sides avoid negotiating directly with each other. I suspect this is because they don't want to assume responsibility (which could mean liability). That leaves us, as engineers, to negotiate with one another. Our lawyers are in the background, explaining what matters to us and why. Even then, I have to look up unfamiliar words just so I have a clue as

to what we're discussing. I find typical contract language to be opaque and very dull. I'm sure a lawyer would disagree.

I remember a case where a colleague took the lead in a negotiation. It was painful as we went back and forth for weeks to get to language both companies could agree on. Finally, we were left with only one passage that remained at issue, but there seemed to be no resolution. My colleague, the engineer, finally suggested changing one comma, and the problem was solved.

Of course, lawyers can misinterpret things too. I was involved in a negotiation that had been going on for a couple weeks with no real progress. Finally I convinced all parties, including the lawyers, to get on a conference call to go through the remaining open issues. I was amused when the other company's outside counsel raised a fuss about a clause until my lawyer pointed out that it was in his client's favor. I was a little less amused when my lawyer made a similar misinterpretation. At the end of the meeting, we had agreement on all the terms, and I went back to my regular work.

Two weeks later the contract still wasn't ready for signature, so I set up

another conference call. I was not at all amused when the other company's lawyer complained about exactly the same clause he had misinterpreted before. But I'm sure he was able to bill for both meetings, so it worked out well for him.

### On a Personal Note

Working with lawyers can be a positive thing. I've had a few occasions to use them in my private life and found their advice to be useful and worth paying for. I've dealt with some patent attorneys and even had the opportunity to help one out with some litigation. I have a few patents, and I know my inventions. But the claims in my patent are painful to read and interpret. One patent lawyer walked me through a set of claims and showed me how they literally explained my invention. Except they literally put me to sleep. Luckily, patents also include drawings.

I don't have anything against lawyers, and I even count some as friends. I know a few good jokes about lawyers. I also know a few jokes about engineers. They both have a grain of truth.



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