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705 – A Technology Primer for the Non-Tech Lawyer

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Faculty Biographies

Thomas Chow

Thomas C. Chow is deputy general counsel at Vindicia, Inc., a SaaS billing and marketing solutions start-up company. As the chief legal officer, his responsibilities include providing legal counsel to the executive team, overseeing IT and security compliance, managing Vindicia's patent portfolio and IP strategy, and partnering with sales to efficiently draft and negotiate commercial agreements. Vindicia has processed $4 billion in global revenues through its CashBox SaaS solution and clients include Blizzard, Bloomberg, Encyclopedia Britannica, Intuit, Mind Candy, Next Issue Media, NFL, Pearson and Vimeo.

Prior to joining Vindicia, Mr. Chow was director and associate general counsel for TechSoup Global, an international e-commerce 501(c)(3) enterprise operating in 39 countries. At TSG, he managed a team of attorneys as acting general counsel, supervised cross-border M&A deals, established a Polish foundation with public benefit tax status, and provided legal counsel to senior management on legal, HR, tax, and compliance matters. TSG has distributed over $3 billion in products to global NGOs from partners such as Adobe, Cisco, Intuit, Microsoft and Symantec.

Before practicing law, Mr. Chow was a systems administrator and IT specialist for companies such as EarthLink (pre-IPO), RCN Communications, Community Health Center Network, and the University of California, Berkeley. He retains an active interest and passion for innovative technology.

Mr. Chow received his JD from the University of California, Hastings College of the Law, and his BA with honors from the University of California, Berkeley.

Harold Federow

Harold Federow is currently contract vendor and IP manager at the Port of Seattle. He acts as division counsel to the information and communications technology department. His responsibilities include managing procurement and negotiating contracts for IT systems. He also oversees intellectual property, including managing patent filings, negotiating NDAs, etc.

Prior to joining the Port of Seattle, Mr. Federow was general counsel at Talyst Corporation, responsible for overseeing all legal issues. Prior to Talyst, he was legal counsel at Bsquare Corporation with responsibility for negotiating domestic and foreign contracts for software development.

Mr. Federow has been active in the Washington Lawyers for the Arts, providing pro bono legal advice to artists. He is also a supervising attorney for IP at the Entrepreneurial Law

Clinic of the University of Washington School of Law. He is on the board of the Jua Lekundu Foundation.

Mr. Federow received a BS in physics and BS in philosophy from MIT. He graduated from the University of Maryland School of Law. He also received an MS in physics from the University of Washington. He has one patent and has written one book.

James Nelson

James Nelson, partner and co-chair of Venable's technology transactions and outsourcing group, is a corporate attorney with a focus on intellectual property and significant experience in technology and sourcing transactions. He represents companies engaged in the development, production and commercialization of intellectual property assets, as well as a host of corporate matters, including financing, company formation, joint ventures and general M&A matters. Mr. Nelson has particular experience with sourcing transactions - working with both major corporate customers as well as technology and business process vendors. He has led sourcing transactions involving traditional call center operations, information technology, real estate management and business process outsourcing services.

A Technology Primer for the Non-Tech Lawyer

Harold Federow (Chair)

Thomas Chow

James Nelson

An introduction to the world of IT

INFORMATION TECHNOLOGY 101

Audience Assessment

- What comes to your mind when you hear the term "IT"?
  a) Desktop support services
  b) Hardware
  c) Software
  d) Licensing
  e) Cloud
  f) A computer geek
  g) Some of the above
  h) All of the above
  i) IT? What is it?

Audience Assessment

- How comfortable are you with talking about IT and other "geeky" topics?
  a) Feels like a language I don't understand at all
  b) Scares me a little
  c) Reluctant
  d) Neutral
  e) Pretty comfortable
  f) I love technology! Have you seen my latest, rooted Jelly Bean phone…?

Audience Assessment

- How often are you asked to review IT contracts?
  a) Never
  b) A few times a year
  c) A few times a month
  d) On a weekly basis
  e) Every day or pretty darn close to it

Audience Assessment

- How large is your legal department?
  a) An army of one
  b) 2-5
  c) 6-20
  d) 21-50
  e) 51-100
  f) Rivals the largest law firms
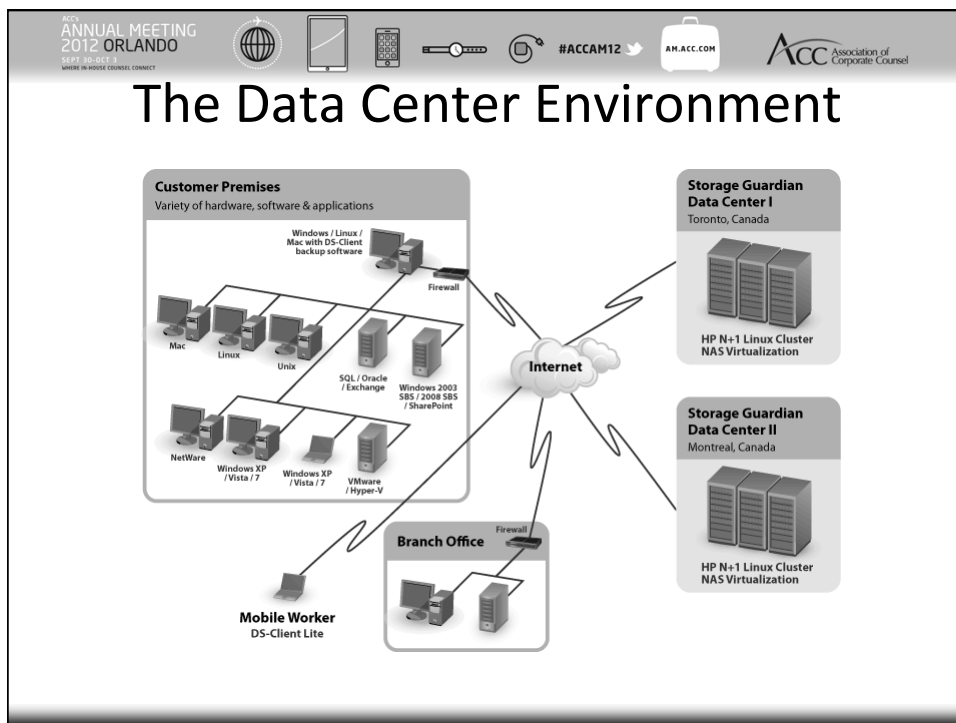
The breadth and complexity of IT

WELCOME TO THE ZOO

The Data Center Environment

The Data Center Environment

- Servers/Computer Hardware
  - Shared
  - Colocation
  - Blades
  - Virtual Machines

The Data Center Environment

- Storage
  - Server drives
  - Backup systems
  - Storage Area Network (SAN)

The Data Center Environment

- Software on those servers (On-premise)
  - Database
  - Enterprise Resource Planning (ERP)
  - Customer Relationship Management (CRM)
  - Everything else

The Data Center Environment

- The unseen stuff
  - Maintenance
  - Services

So why am I learning all of this?
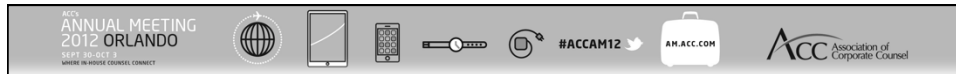
How to get along with the folks who live and breathe IT when you don't

THE WELL-RUN CONTRACTING PROCESS

- Broaden your horizons
- Establish guidelines for IT review

Broaden your horizons

- Take people out to lunch
  - CTO, CIO, and/or CSO
  - IT Operations/Systems Administrator
  - Do this regularly
  - Get a high level view of your network/IT architecture
- Review your company's policies and responses
  - HR, privacy, IT security, and audit policies
  - PCI-DSS, SSAE16, and ISAE reports
  - Incident responses (if applicable)
- Read technology publications
  - Magazines
  - Blogs
  - Websites

Establish guidelines

1. Meet with business folks to understand the risks/ benefits of the technology and what it's supposed to do
2. Work with IT on the details
   - First time, send to IT for review. Book 2 hours and go through their comments. Ask questions.
   - Second time, review yourself and then ask IT to look over. Book 1 hour and ask questions.
   - Third time and beyond: IT only needs to review.

      • Note: this works much better if you have already broadened your horizons (previous slide)

Establish guidelines

3. Create an IT review process.
   - Find out who are the appropriate reviewers in IT for contracts
   - Ask for a turnaround time, e.g., 48 hours. (sound familiar?)
4. Ask IT/Business to have brown bag lunches with your legal staff
5. Let your CTO/CIO/CSO that you want to be involved in any security related or compliance related projects

Things I do personally

- Lunch with IT Systems Manager frequently on top of regular meetings with CTO and EVP Engineering
- Chair the Risk Management Committee dealing with compliance
- Inserted myself as the point person for PCI compliance and IT security documentation
- Draft and own all security related policies

What agreements cover what IT items?

IT AGREEMENTS-TYPES OF AGREEMENTS

Types of IT Agreements
Hardware Agreements

- Purchase Agreement/Bill of Sale

- Hardware Leasing

- Data Pipe/Network/Connectivity

Types of IT Agreements
Services Agreements

- **Systems Integrator/Customization**

- **Maintenance**

- **Hosting**

Types of IT Agreements
Software Agreements

- **End User/Enterprise License Agreement**

- **Beta License Agreement**

- **Software Developer Kit (SDK) License Agreement**

Types of IT Agreements
Distribution Agreements

- **Original Equipment Manufacturer**

- **Value Added Reseller**

- **Independent Software Vendor**

- **Sales Representative**

Types of IT Agreements
Building Blocks of Terms

- **Transfer of Title**
- **Proprietary Rights**
- **Ordering Terms/ Cancellation of Orders**
- **Shipping/Delivery and Acceptance Terms**
- **Warranty Terms**
- **Indemnity Terms**
- **Price and Payment Terms**

- **Scope of Service**
- **Service Level Agreements/ Credits**
- **License Grant Scope**
- **Prohibitions**
- **Proprietary Rights**
- **Acceptance**
- **Term**
- **Termination**
- **Boiler Plate (e.g., confidentiality)**
  – Included in all of the agreements, as we know.

How should I approach a license agreement?

IT AGREEMENTS-KEY LICENSE AGREEMENT TERMS

License Agreement
Due Diligence

- **Where does this fit in the business operation/structure?**
- **Where does this fit in the IT operation/ structure?**
- **How key to the business/IT operation?**
- **Does this involve company Data?/Is it Personal Information/Financial Information or Health Information?**

License Agreement
Due Diligence (cont.)

- **If it fails or the provider stops performing, how fast can you get to another provider (including RFP process and Contracting Process)?**
  - **What would the business impact be?**
  - **How many other providers are out there?**
  - **What would you need to transfer to the new provider?**

License Agreement
Key Terms

- License Grant Terms
  - Does the company have the full rights to use it as intended?
    - Where does the company intend to use it?
    - Do contractors/third parties need use as well?

License Agreement
Key Terms

- **Proprietary Rights**
  - **Does the company want or expect to own anything related to the software or its implementation?**

License Agreement
Key Terms (cont.)

- **Acceptance**
  - How complicated is the transition or installation?
  - Tie to Payment
    - Upfront
    - Milestones
    - Upon completion
- **Pricing**
  - Is it user-based (concurrent or named), company-based or other?
  - Is it paid in a lump-sum up front or over time?
  - Any other charges? Transition? Maintenance?

License Agreement
Key Terms (cont.)

- **Term**
  - Usually works in conjunction with pricing terms.
  - Are there auto renewals?
- **Termination**
  - Do you have a way to migrate away from the product?
  - Can you get your data back? Anything else you need?
  - Do you need any help from the provider?

License Agreement
Key Terms (cont.)

- **Representations and Warranties**
  - **For the product, how long does this last and what does it cover?**
    - **Does it tie in correctly with support and maintenance or other on-going use?**
  - **Standard representations and warranty on the provider (duly formed, no claims, no violations)?**
  - **Any other due diligence items (e.g., I would not have bought this but for. . . ?)?**
  - **Any other items?**
- **Indemnity**
  - **Are you protected from claims from third parties that would arise from your use?**

License Agreement
Key Terms (cont.)

- **Limitation of Liability**
  - **What is the amount (total fees under the agreement, fixed amount, other)?**
  - **What are the exceptions?**
    - **Indemnities**
    - **Confidentiality**
    - **Negligent damage to real or tangible personal property**
    - **Gross negligence**
    - **Fraud**

License Agreement
Key Terms (cont.)

- **Audit and Litigation**
  - **For use in the company, does it comply or allow company to comply with its existing policies?**
  - **If cloud, in the event of litigation involving the company, how would you execute a litigation hold?**
- **Insurance**
  - **Does the provider have the financial wherewithal to perform and back up the Agreement?**
  - **Does the provider have adequate insurance?**
- **Miscellaneous**
  - **In most agreements that involve services or other relationship items, consider a governance and/or dispute resolution provisions.**
  - **Consider arbitration if non-US provider and confirm ability to enforce.**

What to do to keep your software up to date and working.

MAINTENANCE AND SUPPORT

- REMINDER: Consult with your IT people on all of this (earlier slides)

Maintenance

- Like for your car
- Keeps the software up to date

SUPPORT

- "Who you gonna call…"
- What do you do when you have problems?

Costs

- Typically 15-20% of cost of software per year.
- Hardware separate
  - Most of presentation focused on software
- Increases
  - Schedule
  - Inflation
    - Some variant of CPI
    - Some other percentage

When does it start?

- Hardware
- Software
- How related to warranty?
- Vendor
  - On delivery or shipment
- Customer
  - On acceptance
  - On expiration of warranty

What are you paying for?

- Hours of support
  - Hours expended in providing support
  - Usually can buy additional chunks
- Events
  - In essence so many calls to their support
  - Usually can buy additional events
- Time
  - One year, in essence unlimited
  - Hours or events can be per year

Availability

- When are they available?
- Which time zone
    - 9 AM to 5 PM in Germany isn't much help in Seattle
- When do you need them available?
- Can you purchase greater availability?
    - 9 to 5 is nice---unless you need 24 x 7
- What holidays?
    - Sometimes, someone needs to answer on Christmas
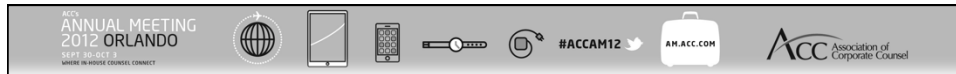
Describing the Problem

- Severity Levels
    - 1: It doesn't work
    - 2: Some portion doesn't work, but some does
    - 3: A feature doesn't work
    - 4: Cosmetic problems

    Definitions vary; be sure you understand them

    May only be 3 levels, not 4.

Now what?

- What is a response?
  - Return telephone call
  - Respond to email
  - Fix the problem
  - What is promised
    - Response to call/email in X minutes
    - Target time to fix problems
    - Depends on problem severity

- If only commitment relates to how quickly they respond to your phone call
- What commitment do they make about fixing?

There is a big difference between:

85% of all problems will be fixed in their targeted response time and

All severity one calls/emails will be responded to within 30 minutes

Problem Resolution

- Who decides when a problem is resolved?
- What if they can't resolve a problem?
- What if they can't resolve a problem quickly?
- "Commercially reasonable" and "Best efforts"

Getting Support

- Support Tiers
  - First level
    - Who a user calls
  - Second Level
    - Who first level calls
  - Third level
    - Usually the manufacturer

Getting Support (cont.)

- Need to understand who supplies the tiers
- May not be a second tier.
- Who can call about problems?
  - Depends on what support provided
  - May be limited to a person/list
  - Vendor has an interest in keeping small numbers

Software Maintenance

- What is an upgrade, what is an update?
- How often do they come out?
- How are you notified?
- How are they distributed?
- What about major version changes?
- What do you pay for?
- What happens if you don't install?

Audience Question

- What do 14, 40, 8, 6, 24 and 0 all have in common?

    a) You can find them on a roulette wheel.

    b) They are the numbers I should have played in Powerball last week.

    c) They look like my golf scores

    d) They are all even

    e) Time

Useful numbers to remember

- In one day there are:
    - 24 hours
    - 1,440 minutes
    - 86,400 seconds

Uptime

- What it means:
  - How much of the time the system is working.
- How is it defined?
  - Per day?
  - Per your use time (business hours)?
- What is excluded?
  - Scheduled maintenance
  - Anything else?
  - Is there a force majeure type clause?

Uptime (cont.)

- What do you really need?
  - Uptime of 99.99% sounds good (system down 8.64 seconds per day)
  - Do you really need it?
    - Only open 8 AM to 6 PM
    - Web order processing 24 x 7
  - What can you live with?
  - What can you afford?
    - Each 9 adds cost
    - 90% is less cost than 99%, 99% much less than 99.9% etc.

Uptime (cont.)

- What if not achieved
  - Is there a penalty?
  - How does it relate to your costs?
  - Typically a sliding scale related to how often per month (or quarter) not meet.
  - Typically rebate on cost.

Warranty and Liability

- Warranty
  - Is there relating to support/maintenance?
  - Is it part of main agreement?

- Limitation of Liability
  - What is it?
  - How does it relate to main agreement
  - Fees paid for maintenance/support not very much

Making sure you've paid for all your licenses

AUDITS

Why Audit?

- Licensor confirms customer has correct number of licenses.
- Can even have when seat-type license.

Audit is Contractual

- No common law right to audit
- Limited to what contract provides

Audit Clause

- What gets audited (books, records, inventory, logs, etc.).
- How is audit performed.
- How often audited per year.
- What notice is required

Audit Clause (cont)

- "Reasonable cooperation" by auditee
- Limit interference with operations by auditor
- When done
  - Normal business hours
- Who does
  - Auditor
  - Third party
- Results review

Audit Confidentiality

- Whoever audits may be exposed to considerable amount of confidential information.
- If licensor uses a third party, then consider allowing the third party only to report results
- Watch out for network scans

Audit Costs

- Two sets of costs
- "True Up"- Matching what you should have to what you do have.
- Audit costs
  - If error exceeds a certain amount or percentage then auditee pays costs of audit
    - 0 to 5%. 5% typical
    - Error is likely, try to get as large a percentage as possible

What you need to know and how to protect yourself

IT AND DATA SECURITY

Privacy Policy

- HIPAA and HITECH
  - Encryption of health information when transmitted – 128 bit key minimum, SHA1 or higher hashes
  - Logging
  - Breach notification if information is not secured:
    - Affected individuals
    - Secretary of HHS
    - The media where more than 500 individuals affected
- EU Data Storage
  - Server/data center location
  - Data controller v. data processor
  - Consumers record deletion
  - U.S.-EU/Swiss Safe Harbor
- Generally

Document and Data Retention

- Sarbanes Oxley

DOCUMENT TYPE	RETENTION PERIOD
Accounts Payable Ledger	7 Years
Accounts Receivable Ledger	7 Years
Bank Statements	Permanent
Charts of Account	Permanent
Contracts & leases	Permanent
Correspondence (Legal)	Permanent
Employee Payroll Records	Permanent
Employment Applications	3 Years
Inventories of Products	7 Years
Invoices to Customers	5 Years
Invoices from Vendors	5 Years
Payroll Records & Tax Returns	7 Years
Purchase Orders	5 Years
Time Cards & Daily Reports	7 Years
Training Manuals	Permanent
Union Agreements	Permanent

Document and Data Retention

- Sarbanes Oxley
  - But actual practice?
- NDA requirements
- Data destruction

Unique Issues in the Cloud

- Questions:
  - Where does your data actually live?
  - How is your data stored? How is it protected and secured?
  - Does your data cross state lines? (likely yes)
- Loss of control
  - How many service providers does your service provider have?
  - Read all of your vendor's privacy policies

  Reality: A secure cloud system is probably more secure than your own systems

E-Discovery Concerns

- Questions:
  - Who is a custodian of your records?
  - Who can be subpoenaed?
    - What is your vendor's policy regarding such requests?
  - Protective orders
  - Can you produce documents when you have no idea where they reside?

Data & Security Breach

- Disaster response plan
  - Who is the point person(s)?
  - How are alerts triggered?
  - Has it been tested?
- Notification
- Remediation
  - PCI Forensic auditors
  - Independent consultants
- Incident Team
  - IT (CTO/CIO/CSO)
  - Legal/HR
  - Finance
  - Marketing

What you can take home from this Session

KEY TAKEAWAYS

Association of Corporate Counsel

Session 705 - A Technology Primer for the Non-Tech Lawyer

Outline Prepared – July 20, 2012

I.   INTRODUCTION OF PRESENTERS (HAROLD)

      a.   Harold Federow

      b.   Thomas Chow

      c.   James Nelson

II.   TECHNOLOGY INTRODUCTION (THOMAS)

      a.   Assessing the crowds technology level

      Poll: what comes to mind when you think of the term "IT?"

        i.   <u>Options</u>: hardware, software, licensing, cloud, desktop support services, some of the above, all of the above, a computer geek

      Poll: how comfortable are you discussing IT and "geeky" topics?

        ii.   <u>Options</u>: scares me, reluctant, neutral, comfortable, love technology

      Poll: how often are you being asked to review IT related contracts?

        iii.   <u>Options</u>: never, few times a year, few times a month, weekly, daily

      Poll: how large is your legal department?

        iv.   <u>Options</u>: army of one, 2-5, 6-20, 20-50, 51-100, rivals large law firms

      b.   Hardware

        i.   Equipment – servers, shared/collocation, appliances

        ii.   Network – routers, switches, SAN, fiber/connectivity

          1.   List all stuff commonly found in a data center environment by type and associated brand names – lots of logos in the unofficial version that I end up using (not submitted to ACC)

          2.   Note changes in technology like backup tapes being phased out (but still prevalent in a lot of agreements I see)

      c.   Services

        i.   Systems Integration

        ii.   Customization/Configuration

        iii.   Maintenance

          1.   Particularly in enterprise level software such as databases (Oracle, SAP, Peoplesoft) and other software (IBM Cognos, etc.)

          2.   The need for customization – Salesforce.com integrations, etc.

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3.   Maintenance, even third parties like Rimini Street – issues with third party access can come up, though large maintenance savings

4.   Illustrate using Vindicia as a key example of SaaS service, but our integration process and professional services required to actually complete an integration—often requiring 100+ professional services hours and more in complex cases

d.   Software

i.   Onsite

ii.   SaaS / Cloud

1.   Understand the differences in scale that is possible with software. (MS Windows and Office vs. security utilities like Symantec that may have export restrictions on the consumer end, to true enterprise grade software, e.g., SAP BRM payment services)

e.   General

i.   Can be any combination of the above – e.g., "private cloud" services, Amazon Web Services, mixed hardware appliance with software embedded such as Proofpoint mail security system, etc.

1.   Proofpoint email security – hardware appliance + software licensing + lives in a data center/connectivity

2.   Embedded software into hardware

ii.   Why IT is more than just a retail software purchase

1.   Cloud

2.   On-site Systems

3.   Mission critical aspects of your business—but often contracts are not drafted to reflect the reality, and you need to know that there is a large gap. (e.g., Amazon Web Services up time)

III.   WELL RUN CONTRACTING PROCESS (THOMAS)

a.   How lawyer should work with the business

i.   Broaden your horizons!

1.   Take your CTO/CSO/CIO to lunch if you can

2.   Take your IT Systems Administrator to lunch—the more senior the better so they can explain your environment.

3.   Repeat a or b once a quarter.

4.   Get a high level network diagram of your critical IT architecture – either by talking over with your CTO/CSO/CIO

5.   Review all HR, Privacy, IT, Compliance/Audit and Security policies – even if those are not your areas of expertise; those are impacted in IT contracting depending on services

6.   Learn about your company's PCI/SSAE/ISAE compliance if those are applicable to you and whether you have standard asks from your suppliers.

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7.   Has your company ever had a security breach? Learn about the details and remediation if there was any.

8.   Keep open lines of communication with your IT staff as much as possible, particularly if you're in the in-bound/out-bound licensing groups for IT/procurement

9.   Read technology publications/blogs. Doesn't need to be all of them—just a few would be useful. CNet news.com is a good start. Then perhaps eWeek or even your favorite tech blog like androidcentral.com. Anything to keep up with the space.

ii.   Practically speaking what to do!

1.   When getting an important IT contract, sit down with the IT/business staff so that you understand the risks/benefits and the technology – this is often something that doesn't get done and leads to headaches. (e.g., some of my client negotiations)

2.   As you become familiar with technology, you will learn what you actually need to flag down from IT and what you can answer on your own. Particularly: first time you get a security schedule/addendum, sit down and go through it section by section with someone in IT who can explain access controls, logging, network segregation in your environment, etc.

3.   First time you deal with a particular type of contract, do it with IT. Second time, get IT to review what you've done. Third time, ask IT only when you think you need to.

b.   How business should work with the lawyer

i.   Get an IT business partner and ask them to commit to working with you on turnaround times. (48 hours) Often IT isn't included in the contract management flow, so you need to get them involved.

ii.   If you have a legal staff, have brown bags/lunch and learns with your IT staff or software engineers quarterly if possible. You need to understand your products and environments.

iii.   Let IT/CIO/CSO/CTO know that you (or your department) would like to be involved in security-related and compliance-related projects. (e.g., PCI compliance)

c.   Things I do personally – may not be applicable to everyone

i.   I have lunch with our IT Systems Manager frequently

ii.   I sit on the Risk Committee dealing with compliance

iii.   I inserted myself as the point person for PCI compliance for legal questions, HR issues (somewhat) and retaining the reports

iv.   I draft and own the IT security policies

IV.   <u>TYPES OF DOCUMENTS (JIM)</u>

a.   The Building Blocks of Terms (Scattered on Slide)

i.   Transfer of Title

ii.   Proprietary Rights

iii.   Ordering Terms/Cancellation of Orders

iv.   Shipping/Delivery and Acceptance Terms

v.   Warranty Terms

vi.   Indemnity Terms

vii.   Price and Payment Terms

viii.   Scope of Service

ix.   Service Level Agreements/Credits

x.   License Grant Scope

xi.   Prohibitions

xii.   Proprietary Rights

xiii.   Acceptance

xiv.   Term

xv.   Termination

xvi.   Boiler Plate (e.g., confidentiality) – Included in all of the agreements, as we know.

b.   Hardware (Consider including the details of the following in materials since too much for slides. Idea is that they have the building blocks, unless that seems too basic)

    i.   Purchase Agreement/Bill of Sale

       1.   Transfer of Title

       2.   Ordering Terms/Cancellation of Orders

       3.   Shipping/Delivery and Acceptance Terms

       4.   Warranty Terms

       5.   Price and Payment Terms

    ii.   Hardware Leasing

       1.   No Transfer of Title

       2.   Ordering Terms/Cancellation of Orders

       3.   Shipping/Delivery and Acceptance Terms

       4.   Warranty Terms

       5.   Price and Payment Terms

    iii.   Data Pipe/Network/Connectivity (Looks more like a Services Agreement)

       1.   Scope of Service

       2.   Service Level Agreements/Credits

       3.   Ordering Terms/Cancellation of Orders

       4.   Shipping/Delivery and Acceptance Terms

          5.   Warranty Terms

          6.   Price and Payment Terms

c.   Services

    i.   Systems Integrator/Customization

          1.   Scope of Service

          2.   Cooperation with Parties/Governance

          3.   Warranty Terms

          4.   Indemnity Terms

          5.   Price and Payment Terms

    ii.   Maintenance

          1.   Scope of Service

          2.   Service Level Agreements/Credits

          3.   Cooperation with Parties/Governance

          4.   Warranty Terms

          5.   Indemnity Terms

          6.   Price and Payment Terms

    iii.   Hosting

          1.   Scope of Service

          2.   Service Level Agreements/Credits

          3.   Ordering Terms/Cancellation of Orders

          4.   Shipping/Delivery and Acceptance Terms

          5.   Warranty Terms

          6.   Indemnity Terms

          7.   Price and Payment Terms

d.   Software

    i.   End User/Enterprise License Agreement

          1.   License Grant Scope

          2.   Prohibitions

          3.   Proprietary Rights

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4.   Acceptance

5.   Pricing

   a.   End User License Agreement

           i.   Per user

           ii. Per use

   b.   Enterprise License Agreement

           i.   Site License

           ii. Seat License

           iii. Other

6.   Warranty Terms

7.   Indemnity Terms

8.   Limitation of Liability

9.   Term

10.   Termination

ii.   Beta License Agreement

   1.   License for pre-release software

   2.   Confidential Use

   3.   No Warranty

   4.   Feedback

iii. Software Developer Kit (SDK) License Agreement

   1.   License Grant for Object Code Software

   2.   License to use and distribute libraries and created runtime files

   3.   Proprietary Rights

   4.   Pricing

   5.   Warranty Terms

   6.   Indemnity Terms

   7.   Limitation of Liability

   8.   Term

   9.   Termination

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e.   Distribution

    i.   Original Equipment Manufacturer

        1.   Integration Requirements

        2.   Transfer of Title

        3.   Ordering Terms/Cancellation of Orders

        4.   Shipping/Delivery and Acceptance Terms

        5.   Warranty Terms

        6.   Indemnity Terms

        7.   Price and Payment Terms

    ii.   Value Added Reseller

        1.   Value-Add Requirement

        2.   Transfer of Title

        3.   Ordering Terms/Cancellation of Orders

        4.   Shipping/Delivery and Acceptance Terms

        5.   Warranty Terms

        6.   Indemnity Terms

        7.   Price and Payment Terms

    iii.   Independent Software Vendor

        1.   No Value-Add Requirement

        2.   Transfer of Title

        3.   Ordering Terms/Cancellation of Orders

        4.   Shipping/Delivery and Acceptance Terms

        5.   Warranty Terms

        6.   Indemnity Terms

        7.   Price and Payment Terms

    iv.   Sales Representative

        1.   No Value-Add Requirement

        2.   No Transfer of Title

        3.   Ordering Terms/Cancellation of Orders

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4. Shipping/Delivery and Acceptance Terms

5. Warranty Terms

6. Indemnity Terms

7. Price and Payment Terms

V. LICENSE AGREEMENT 101 (JIM)

a. Initial Internal Due Diligence

    i. Where does this fit in the business operation/structure?

    ii. Where does this fit in the IT operation/structure?

    iii. How key to the business/IT operation?

    iv. Does this involve company data/Is it Personal Information/Financial Information or Health Information?

        1. If yes, where will data be located and how will it be used and maintained?

    v. If it fails or the provider stops performing, how fast can you get to another provider (including RFP process and Contracting Process)? What would the business impact be? How many other providers are out there? What would you need to transfer to the new provider?

b. Key Terms to Focus on in Negotiation

    i. License Grant Terms-Does the company have the full rights to use it as intended, where intended? Do contractors need use as well?

c. Proprietary Rights

    i. Does the company want or expect to own anything related to the software or its implementation?

d. Acceptance

    i. How complicated is the transition or installation?

e. Pricing

    i. Is it user-based (concurrent or named), company-based or other?

    ii. Is it paid in a lump-sum up front or over time?

    iii. Any other charges? Transition? Maintenance?

f. Term

    i. Usually works in conjunction with pricing terms.

    ii. Are there auto renewals?

g. Termination

    i. Do you have a way to migrate away from the product?

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   ii.   Can you get your data back? Anything else you need?

   iii.   Do you need any help from the provider?

  h. Representations and Warranties

   i.   For the product, how long does this last and what does it cover?

     1.   Does it tie in correctly with support and maintenance or other on-going use?

   ii.   Standard representations and warranty on the provider (duly formed, no claims, no violations)?

   iii.   Any other due diligence items (e.g., I would not have bought this but for. . . ?)?

   iv.   Any other items?

  i. Indemnity

   i.   Are you protected from claims from third parties that would arise from your use?

  j. Limitation of Liability

   i.   What is the amount (total fees under the agreement, fixed amount, other)?

   ii.   What are the exceptions?

     1.   Indemnities

     2.   Confidentiality

     3.   Negligent damage to real or tangible personal property

     4.   Gross negligence

     5.   Fraud

  k. Audit and Litigation

   i.   For use in the company, does it comply or allow company to comply with its existing policies?

   ii.   If cloud, in the event of litigation involving the company, how would you execute a litigation hold?

  l. Insurance

   i.   Does the provider have the financial wherewithal to perform and back up the Agreement?

   ii.   Does the provider have adequate insurance?

  m. Miscellaneous

   i.   In most agreements that involve services or other relationship items, consider a governance and/or dispute resolution provisions.

   ii.   Consider arbitration if non-US provider and confirm ability to enforce.

 VI. MAINTENANCE AND SUPPORT AGREEMENTS (HAROLD)

  A. Quick definitions

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1. What is maintenance?

2. What is support? (Do first)

3. Costs

    i. Software 15-20% of license

    ii. Plus hardware

    iii. Increases

Remember: Anytime there is a definition in this section, work with your IT department and the business users to be sure the definitions will work for them.

B.   When does it start?

C.

1.   Hardware

2.   Software

3.   How is start related to Warranty?

4.   Vendor

    i. Delivery or Shipment

5.   Customer

    i. Acceptance

    ii. Expiration of Warranty

D.   What are you paying for?

1.   Hours expended in providing support

2.   Available in extra chunks of X hours

3.   Events

    i. Check definition

    ii. Usually a call to support and its follow-on resolution

4.   Time

    i. Annual, not usually limited

    ii. Note: Hours or events can be on an annual basis

E.   Availability

        1.   When are they available?

        2.   Which time zone

           i.   If availability is stated in their time zone, be sure it works for you

        3.   When do you need them available?

        4.   Can you purchase greater (or lesser) availability

           i.   9 to 5 is nice---unless you need 24 x 7 (or vice versa)

        5.   What holidays are taken?

           i.   How does this work for you?

           ii.   Sometimes, someone does need to answer the phone on Christmas

    F.   Describing the problem

        1.   Severity Levels

           i.   Level 1: Some version of "It's not working"

           ii.   Level 2: Some part of it doesn't work, but some part does

           iii.   Level 3: A feature doesn't work, but the system mostly works

           iv.   Level 4: Cosmetic errors

        2.   Definitions

           i.   Vary somewhat

           ii.   Be sure you understand

           iii.   Sometimes only 3 levels, not 4

           iv.   Be careful how severity level is assigned.

    G.   What happens now?

        1.   What is a response?

           i.   Return telephone call/email message

           ii.   Fix the problem

           iii.   What is promised

               1.   Response to call/email in X minutes

               2.   Fix the problem in Y time period

               3.   Depends on the severity level

           iv.   Understand what the commitment to fixing problem is, especially if the only commitment is to responding to a phone call/email.

v.   There is a big difference between:

      1.   85% of all problems will be fixed in their targeted response time and

      2.   All severity one calles/emails will be responded to within 30 minutes.

H.   Problem Resolution

    1.   Who decides when a problem is resolved?

      i.   Vendor?

      ii.   Customer?

      iii.   Both?

      iv.   Want a quick solution if you disagree. If there is a problem you need it fixed and not to spend time arguing about it.

I.   Getting Support

    1.   Support Tiers

      i.   First level (who user calls)

      ii.   Second level (who first level calls)

      iii.   Third level (usually the vendor/manufactuer)

    2.   Who supplies the tiers? May be your IT, may be the vendor (in which case there may only be one tier).

J.   Keeping the system running

    1.   Useful numbers to use when assessing uptime:

      i.   24 hours in a day

      ii.   1,440 minutes in a day

      iii.   86,400 seconds in a day

These make it easy to calculate how much downtime you will be at risk for. For example, if your uptime is 99.9%, then you are at risk for 1 minute 26 seconds each day. You can impress your IT department if you can quickly calculate these numbers.

    2.   UP time

      i.   What is it

        1.   How much of the time the system is working

      ii.   How is it defined?

        1.   Per your use time (for example, business hours)

        2.   Per day

iii.   What is excluded

    1.   Scheduled maintenance

    2.   Other

    3.   Is there an applicable force majeure clause and how will it affect uptime?

iv.   What do you really need?

    1.   Uptime of 99.99% sounds really good (risk of downtime 8.64 seconds per day)

    2.   Do you really need it?

      (a)   If only open 8 AM to 6 PM may need a lot less

      (b)   On the other hand a web site or call center may need 24 x 7 uptime

    3.   Two questions are important

      (a)   What can you live with

      (b)   What can you afford?

        (i)   Each "9" adds extra cost: 90% costs less than 99%. 99% costs much less than 99.9%, etc.

        (ii)   Note: some cloud vendors offer 100% uptime as standard

v.   What if it contracted goals (up time, response time, etc.) are not achieved

    1.   Is there a penalty/rebate?

    2.   How does it relate to your costs?

    3.   Usually a sliding scale that relates to how often per time period the goal isn't met.

    4.   Typically a rebate on cost (for example, if the goal is not met three times in a calendar quarter, then for the next calendar quarter you get 1/3 off)

K.   Warranty and Liability

1.   Warranty

  i.   Is there a warranty specifically for support/maintenance?

    1.   What is covered?

  ii.   How does your main agreement warranty (if there is a main agreement) relate to the support/maintenance warranty?

2.   Limitation of Liability

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        i.   Is there one for the support/maintenance agreement?

        ii.   How does it interact with the main agreement limitations?

        iii.   Remember, fees paid for support/maintenance not likely to be very much especially relative to damages

L.   Maintenance (keeping the software current)

    1.   Again, be careful of definitions especially for upgrades, updates, version releases

    2.   How often do they come out?

    3.   How are they distributed?

    4.   What do you pay for and what is included?

    5.   What about major version changes?

    6.   What happens if you don't accept or install

    7.   What happens if you cease support/maintenance? If you restart?

VII.   <u>AUDIT ISSUES (HAROLD)</u>

a.   What is an audit?

Licensor checks to see if the number of licenses required matches the number you purchased. Can even have with seat type licenses

b.   Audit is a contractual right.

Limited to what the contract provides. There is no common law right to an audit.

c.   Audit Clause

Audit clause should spell out what gets audited (records, actual physical count, network logs, etc.). Also, how it is performed.

    i.   Frequency

       How many times per year can you be audited?

    ii.   Notice

       How much advance notice is required?

    iii.   Other terms

       Often some sort of "reasonable cooperation" term? Often good to restrict to normal business hours. Try to limit interference with operations by auditor. Who does the audit (vendor? Third party?) Is there an opportunity to review the results

d.   Confidentiality

They may be exposed to all sorts of information. Put an NDA in place with use restrictions. If they use a third party this is especially important. If vendor uses a third party, try to get the third party to only report results. Careful about network scans.

NOTE: Gartner claims that if you've been audited by one company, especially a bigger one, you are more likely to be audited by another one and wonders how good the NDA actually is.

    e.   Subsequent costs

Two kinds of costs:

True up—matching the number of licenses purchased to what you should have

Cost of audit- if error exceeds a certain amount or percentage (from 0 to 5% often) then you pay for the audit as well. Remember some errors are likely so you want as large a percentage as you can negotiate.

VIII.   <u>IT/DATA SECURITY (THOMAS)</u>

    a.   Privacy Policy

        i.   HIPAA and HITECH

            1.   Encryption of health information when transmitted—128 bit key minimum, SHA1 or higher hashes (HITECH)

            2.   Logging (HITECH)

            3.   Patient's right to access health record

            4.   Breach notification if information is <u>not</u> secured: individuals affected, secretary of HHS, and potentially the media if > 500 users (HITECH)

            5.   Designated privacy officer (HIPAA)

            6.   Workplace training (HIPAA)

            7.   Business Associate agreements (HIPAA)

        ii.   EU data storage

            1.   Server/data center location.

            2.   Data controller v. data processor

            3.   Mechanisms for consumers/end users to delete their private data

        iii.   Know what you can and cannot do with your data—know your privacy policy in and out. Hopefully its drafted broadly so that you can do whatever you need to provide your products/services.

        iv.   Know what your key providers can and cannot do with your data. (e.g., if you use Google Documents/Drive, be careful.) Review the privacy policies of key providers: web hosting, data center, payment processors, key consultants

    b.   Document/Data Retention

        i.   Sarbanes Oxley requirements (table)

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ii.   Actual practice of retention – often not enforced. Sometimes you need IT to do it for you, e.g., automatic email destruction/deletion.

iii.   How do you conduct data destruction? 3 pass wipe? 7 pass wipe? Degausing and physical destruction? Nothing? You need to know this.

iv.   What does your NDA say? What do you do in reality?

c.   Unique issues in the cloud

i.   Where does your data actually reside? How is stored? How is protected? Where is it physically? Is it crossing state/country lines? (particularly an EU concern)

ii.   Loss of control—service provider to service provider to service provider.

iii.   Reality: a secure, well built cloud system is probably more secure than your own. (the hard truth your IT staff doesn't want to admit)

1.   E.g., our incident with Trion Worlds

d.   E-discovery concerns when you give up control of your data

i.   Who is a custodian?

ii.   Who can be subpoenaed?

iii.   Protective orders

iv.   Will you be able to produce documents when you don't know where they are? Both practically and impact on your image before a judge. (ie, what's enough to satisfy a judge or magistrate?)

e.   Data/Security Breach

i.   What's your disaster plan? Who is your point person? How is that person(s) alerted? Our IT staff have logging and notifications 24x7, and then there is chain of command to notify. Has the plan been tested?

ii.   Who do you notify and when, particular when its your clients? When law enforcement allows you to do so. Payment card associations ASAP if you lose credit cards? FTC? Key clients? Insurance carriers?

iii.   What remediation do you need to deal with? Do you need a PCI forensic auditor?

iv.   Have an incident team that involves at least: IT (CIO/CTO/CSO), legal/HR, finance/risk (insurance carriers), marketing (PR)

IX.   KEY TAKEAWAYS

a.   Work closely with your IT department and learn from them.

b.   Read documents carefully.

c.   Be sure you understand contract definitions and review them with IT and the business users.

d.   IT is complex; so are the contracts.