102 Taming the Sales Monster::Techniques & Tips for Working With Your Sales Force

Deirdre C. Brekke
Assistant General Counsel
Pactiv Corporation

Matthew Massarelli
General Counsel
TowerCo LLC

Christian S. Na
General Counsel & Corporate Secretary, U.S., Asia-Pacific & Latin America
Mitel Networks, Inc.

Faculty Biographies

Deirdre C. Brekke

Deirdre Brekke joined Pactiv Corporation as assistant general counsel. Pactiv is a leading manufacturer of food packaging and related products, including the Hefty brand line of consumer products. In her current position, she manages all of the company's contracts and transactions and acts as divisional counsel to the specialty products division of the company. Prior to her current role, she was the general counsel (and sole attorney) of Cardean Learning Group LLC, a leader in high-quality online education for the adult learner. Her role at Cardean included all forms of legal services, from intellectual property to acting as the corporate secretary.

Ms. Brekke's experience also includes serving as divisional general counsel for Moore North America, Inc. (now a division of R.R. Donnelly). She also held senior counsel positions at Sears Roebuck & Co., focusing on information technology, and The NutraSweet Company, a division of Monsanto Company, where she concentrated in the areas of transactions and international commercial law. Early in her career, Ms. Brekke was an associate with the firm of Mayer, Brown & Platt, now Mayer, Brown, Rowe & Maw.

Ms. Brekke is active with ACC and has previously spoken on e-commerce law and managing retention of outside counsel.

Ms. Brekke received her B.A. in International Studies from Emory University, where she was a member of Phi Beta Kappa, and graduated magna cum laude from the University of Georgia School of Law where she was initiated into the Order of the Coif.

Matthew Massarelli

Matthew S. Massarelli is corporate counsel for TowerCo, a communications tower owner and developer in Cary, North Carolina. Mr. Massarelli's responsibilities include providing legal assistance in the acquisition and lease-up of communications towers throughout the United States.

Mr. Massarelli's varied experiences have found him in roles ranging from corporate counsel for a Fortune 100 company, general counsel for a publicly traded company to president of a multi-state residential real estate company. While operating in the business role, Mr. Massarelli has had direct operational responsibility of sales teams selling both product and services. Mr. Massarelli's perspective, familiarity and understanding of the challenges salespeople face, coupled with his experiences serving as in-house counsel to sales groups, provides him with unique insight to the relationship between legal and sales departments.

Mr. Massarelli received his undergraduate degree from Miami University and his law degree cum laude from Case Western Reserve University.

Christian S. Na

Christian S. Na is general counsel and corporate secretary for Mitel Networks, Inc., the U.S. subsidiary of the Canadian-based company that manufactures IP communications hardware and software, located in Herndon, Virginia. Mr. Na manages all legal matters in connection with Mitel's operations in the U.S., Asia-Pacific, and the Caribbean/Latin America regions.

Before joining Mitel, Mr. Na was with the law firm of Swidler Berlin in Washington, DC. Prior to that he served as assistant corporation counsel for the City of Boston.

Mr. Na is currently an adjunct professor at the George Washington University, Elliott School of International Affairs. He also lectured at the Ewha University, Graduate School of International Studies in Seoul, South Korea. Mr. Na is a member of the ABA and is active with NAPABA and ACC's Washington Metropolitan Chapter.

Mr. Na received a dual B.A. degree from Boston University and his J.D. from Boston University School of Law.

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Corporate Counsel as GPS Navigator

by Christian S. Na

There is good reason why car buyers today pay thousands of dollars for a GPS navigation system - - those that have used GPS know the value of having a reliable navigation tool. These units are sophisticated. They pinpoint your location on detailed maps that automatically pan and zoom as you drive. They provide turn-by-turn directions, factoring the path of each segment of the trip to determine the best route based on your preference for the shorter distance or faster time. They also display current and average speed with updates on the time and distance to destination. Miss a turn and the unit will instantly re-route you back on course. The next time you rent from Hertz, try their "NeverLost" GPS option and you'll want one for your car.

In much the same way, an effective corporate counsel acts as an enhanced GPS system to navigate the various complex legal and regulatory landscapes and guide the company to its intended destination. Here are some basic things to remember in performing your role as legal navigator:

- For each corporate initiative, there can be a myriad of issues that are the trees. Keep a view of the forest that is the company's overall objective. Understand the goals of each project and develop a roadmap for resolving the issues with an appreciation of the business climate within which each department is operating.

- Business managers are the decision-makers. Let them tell you where they want to take the company and do your job in helping them stay onside with the laws and regulations that apply to their venture. Resist the temptation to second-guess their decisions - - no one likes a back-seat driver. Sit as their legal navigator, and they will in return be more apt to seek your opinion and value your advice.

- When you encounter situations where separate business units are steering the company in different directions, re-focus the group on the issues to bring them back on the same course. If an individual or unit continues down a path that places the company at risk of substantial injury, exercise your ability (and obligation) to pull the emergency brakes.

- Know the laws and regulations that apply to the particular business. Keep the managers informed of new issues that arise based on the decisions they make. Map those issues and guide the managers around any legal or regulatory hurdle. Recognize when you're in unfamiliar territory and get directions from specialists in that area.

- Communicate your recommendations clearly and get to the point. Unless the decision-makers are looking for a formal legal opinion, don't lace your advice with caveats or pepper them with conditional statements and reservations. Lay out their options in simple terms and suggest the best course of action. Tell them the hazards to avoid and what to anticipate around the bend.

- When the company encounters obstacles and dead-ends, don't just point out the apparent risks and limitations. This will only frustrate the manager. Instead, suggest alternative paths and detours that keep the company going in the same general direction. Be flexible and creative in finding off-beaten tracks and recommending the roads less traveled.

Remember these points when performing your role as legal navigator and the company will value your function as an indispensable tool in driving their business.

Christian S. Na
U.S. General Counsel & Corporate Secretary
Mitel Networks, Inc.

HandsOn

Roadblock to Revenue or Onramp to Opportunity?

Practical Tips and Tools for Negotiating Everyday Contracts

The Project

As you head out for lunch, a member of your company's business team appears and asks you to take a quick look at a contract he plans to sign at 1 PM that day. He tells you, "Their guys told me it's all standard and they never agree to any changes to their form, so just okay the paperwork and we can get this deal done."

Does the scenario sound familiar? You don't want to be the company's roadblock to revenue, but you do want to ensure that your company doesn't enter into a contract loaded with real risk. How can you win in this situation?

Tackling the Project

How to Avoid the Bypass

The scenario above—in which a member of the business team brings you a contract hoping for your signoff, rather than your comments—occurs more often when the legal department is viewed as an obstacle, rather than an asset. To demonstrate the value of your input, aim to serve your client better by implementing the following tips.

Get involved earlier

To provide effective advice to your business folks, you need to see the contract before they send proposed changes back to the other party. One tactic is to convince the business team that including you earlier will result in a better deal, and won't (as they might fear) bring the negotiations to a screeching halt. You might find these techniques helpful:

- Provide real world examples of problematic terms in actual contracts, perhaps contracts that you did not draft or negotiate. For example, you might show your business people a contract that defined "and" or "or" to mean "and/or"—allowing the other party to use whichever term they wanted in any situation. Once you explain to your business people why that might not be a good idea, they will be in a better position to understand the potential pitfalls associated with imprecise contract language.
- Point out the negotiating advantages of having all of the issues flushed out early by a careful legal review. Any negotiator can recall instances where requested changes were refused because the request was made too late.
- Stress that legal review can sometimes simplify negotiations. For example, you might be in a business where you prefer to resist waiving your mechanics' lien rights. But in some states that provision would not be enforceable in any case, making that point much less critical.
- Explain the risks of a contract from a practical point of view, in terms the business staff can follow. Avoid legalese—for example, instead of saying "lessor" and "lessee," you might find that it's simpler to refer to the parties as "us" and "them," or to use the parties' actual names.

If your organization lacks a contract review policy, you should seriously consider implementing one. If you have a policy, but it is obsolete or routinely ignored, updating it will give you an opportunity to educate the staff about the benefits of your early participation.

Don't be perceived as a bottleneck

Another reason that business folk sometimes avoid their legal counterparts is that they don't understand the time needed for adequate legal review. Respond to requests for contract review as quickly as you can, but explain that you cannot assess the company's risk instantly. Ask your clients to be honest and to specify the actual deadline for review and execution, rather than some arbitrary target. This will permit you to determine how much review is realistic given the amount of time involved and to maximize your opportunity for meaningful input. It can also help you rank the contracts waiting for your review in order of their urgency. If you must do a rapid review, look at these key provisions:

- limitations of liability,
- termination,
- indemnifications,
- warranties,
- confidentiality of your company's information, and
- payment holdback provisions.

In your written comments, be sure to specify, "For the record, I did not do an exhaustive review of this contract as I was given only 20 minutes to look at this document." Providing your colleagues with a timely, albeit limited, response will win you not only their appreciation, but also their return business.

You should also be sure that everyone—especially the business team—is kept informed on the progress of any approvals needed from other departments, such as insurance, safety, credit, and tax. Another advantage of a strong contracts review policy is that it can clarify who has the responsibility for obtaining and tracking these approvals.

Learn the business risks and issues

Not every contract risk should be a deal breaker. If the staff administering the contract are aware of a risk, they may be able to manage it satisfactorily. Of course, the first step is to be sure that you yourself thoroughly understand the business. Don't hesitate to discuss particular provisions with the appropriate nonlawyers in your organization so they can tell you if they see any possible risk or not.

To make your business people more aware of risk, a ranking system can be helpful. For example, you could highlight the relevant provisions in different colors: yellow for deal killers, green for less critical issues that still need to be addressed, and pink for still-less important issues that might provide you with some bargaining chips for the green or yellow issues.

Another way to identify legal risks is to use a toolkit approach. (See "Blueprint: Negotiating Toolkit," on p. 86.) If an issue is in the toolkit, then any member of the legal team will know the issue is important, what the acceptable alternatives are, and what kind of approvals are necessary.

Where a contract presents unacceptable risks, on the other hand, you must explain why the contract negotiators should try very hard to obtain changes. For example, if a contract had relatively low revenue potential, the company might be well advised to refuse a customer's demand to delete the limitation on liability.

Identify the deal killers up front

Most in-house attorneys do not have sole authority to kill a deal. Even if you have the authority, you should exercise it sparingly—or you'll be seen as a roadblock. In many organizations, the list of deal killers emanates from a discussion between legal and senior management. In these cases, the company may want to consider a directive from management that certain terms (or lack thereof) are never acceptable, or require appropriate levels of approval. What would be considered unacceptable would typically vary from business to business, but these deal killers could include, for example, most-favored-nations clauses, the absence of a limitation on liability, debiting the account, avoiding payment, or premium liability provisions creating an undue burden. Make sure your negotiators know which provisions are deal killers, which are important, but negotiable, and which are not particularly important.

Get Real: General Tips for Negotiating

Once you have business staff buy-in, you have the opportunity to provide meaningful advice. On the other hand, you want to keep the paper moving and not waste time on terms that are either unimportant or not negotiable. Here is a reality check.

Appreciate your bargaining power (or lack thereof)

Bargaining power drives the negotiations. It determines:

- whose form contract gets used, or who gets to prepare the first draft;
- whether the terms in the first draft are even open to discussion;
- what terms end up in the final agreement;
- the pace of negotiations; and
- the mechanics of execution.

Talk to your business staff to find out what bargaining power you really have. Ask these questions to get a handle on the market realities:

Supply List

In this HandsOn, we will provide:

- ways to encourage the business team to see your contract review as a valued part of the dealmaking process;
- tips for negotiating contracts and overcoming common obstacles;
- a discussion of when forms are acceptable to use and whose forms get used and why;
- a sample policy on contract review, approval, and signing authority;
- a toolkit approach to establishing standardized negotiating positions (with excerpts from a sample policy).

ACC Resources on...

Contract Negotiation

Docket Articles:

- Robert A. Feldman, "Contracts Illustrated," *ACC Docket* 23, no. 8 (Sept. 2005): 30–46. *www.acca.com/protected/pubs/docket/Sept05/contract.pdf*
- Michael L. Whitener, "Negotiating the Thicket of IP Clauses: Nine Key Issues for Negotiating Intellectual Property Clauses in Consultancy Contracts," *ACC Docket* 23, no. 5 (May 2005): 46–61. *www.acca.com/protected/pubs/docket/May05/negotiate.pdf*

InfoPAKs:

- *Drafting and Interpreting Contracts* (2005), an ACC InfoPak℠. *www.acca.com/infopaks/draftingint.htm*

Annual Meeting Course Materials:

- Maureen R. Dry, David T. Glynn, and Matthew A. Karlyn, "Handling Common (& Difficult) Contract Negotiation Issues," program material from course 502 at ACC's 2004 Annual Meeting and On-Line CLE Program. *www.acca.com/am/04/cm/502.pdf*
- "Take It or Leave It: Contract Negotiation from a Small Company Perspective," program material from course 202 at ACC's 2002 Annual Meeting. *www.acca.com/education2k2/am/cm/202.pdf.*

HandsOn

- Are there plenty of other companies lined up to grab the deal if you overnegotiate?
- How badly do you need this deal?
- How badly do they need you?
- Can you call their bluff?
- Do your folks have other options if you can't strike a deal?
- Do the parties have an existing relationship?
- Has the other side been fair and even-handed in the past?
- Is the deal so small that it is not worth negotiating over?

With a clear understanding of the relative bargaining power, you can work with your client to develop realistic negotiating objectives and strategy.

Distinguish real terms from defensive "gotchas"

Vendors and service providers frequently seek terms that will protect them if your client does not honor its obligations. For example, the other party may propose a very short notice provision if your client defaults. Although a short notice provision may not be important for the transaction to run smoothly, it does give the vendor a defense to claims you might make later. Rather than dig in your heels against a modification like this, make sure the staff managing the contract for your company are aware of the provision and understand its ramifications.

Consider who's doing the talking

You may not always be talking to a lawyer for the other side. If you made changes to a contract and sent it back to your business folks, who then forwarded the changes to the other party, you should be prepared to discuss your proposals with almost anyone from the other side. You may deal with the other party's lawyer, but often it will be a risk manager, sales or purchasing executive, CFO, or contracts administrator. Bear in mind that people in different positions will focus on different aspects of the contract. Often, for example,

- managers focus on the deliverables and the deadlines;
- CFOs focus on financial strength; and
- sales and purchasing people focus on getting the deal done.

Keep the discussion friendly and straightforward. If you get a reputation for scaring off customers, the business staff will either bypass you or ignore your advice.

Keep in mind the ethical concerns that may arise when the other side wants you to negotiate with a nonattorney. In some jurisdictions, a lawyer is prohibited from communicating about the subject of the representation with a person the lawyer knows is represented by another lawyer unless the lawyer has the consent of the other lawyer. We advise in-house counsel to review both the ABA Model Rules of Professional Conduct and the state's code of ethics to determine what is appropriate. Model Rules 4.2 (Communication with Person Represented by Counsel), 4.3 (Dealing with Unrepresented Person), and 5.5 (Unauthorized Practice of Law and Multijurisdictional Practice of Law) are relevant to any inhouse counsel negotiating a contract on their client's behalf. If you find yourself in this situation, could you deal with the nonattorney and argue you were wearing your business hat and not your legal hat? Probably not—err on the side of your lawyer's hat.

Should the legal department even be involved?

Assess whether it is cost-effective or even feasible for an attorney to review every single contract, given the number of small contracts your company executes or the limited number of lawyers your company has. If your company has a policy that every contract must be reviewed by the legal department, you will likely end up the much-resented bottleneck. Many contracts do not require legal review. Candidates for execution without legal involvement include:

- your company's standard form contracts,
- short-term contracts that are of low dollar value and are not significant to your client's business, and
- contracts in which the only negotiation points are addressed by a toolkit that has been approved in advance.

Your company should implement a policy outlining which contracts the legal department must review. (See "Contract Review and Signing Authority Policy," on p. 84.)

When You're Along for the Ride—Countering the Form Contract

Do not believe it when the other party tells you, "We never agree to any changes to our form contract." The company probably paid a lawyer a lot of money to draft its form contract, making the negotiators reluctant to make changes. Nonetheless, they still want to get the deal done. Similarly, while your business people are pressuring you to approve a standard agreement, they do not want to be responsible for signing a contract that is detrimental to the company. So while getting a negotiation going is not easy, if you ask for reasonable changes, explain your logic, and hear out the other side's concerns, you may obtain some meaningful modifications.

Put away the red pencil

People sometimes take offense when you scratch out large sections of their forms and send them back. The opposing party frequently reacts better when it receives a separate list of proposed changes. Make your suggested changes in an organized, easy-to-follow manner on a separate sheet—rather than scribbling in the margins of a hard-to-read fax. If an entire provision or clause is truly untenable, propose alternative language rather than deleting the text entirely. You might propose a qualification such as "provided however, that this shall not apply to. . . ." This is a good way to handle a provision drafted in absolute terms, such as a complete waiver.

If the other party responds by proposing alternative language that essentially addresses your concerns, do not reject it. Resist the temptation to nitpick language if it works.

Don't overreact

When reviewing a provision that goes way beyond what the other party actually needs, try not to overreact and go just as far in the other direction. Propose a reasonable toning down and consider adding an explanation.

Blueprint

Ready the Troops: Contracts Boot Camp

In many companies, attorneys do not negotiate small contracts. If this is the case in your company, consider training your negotiators—a sort of Contracts Boot Camp. Educate your people on the basic content of the contracts that they see regularly.

- Prepare bullet points for them to use when negotiating.
- Quantify the monetary risk of allowing certain clauses to remain unchanged so they will appreciate the financial impact of their agreements. (Good candidates for this treatment include offset provisions, debiting your account, and allowing for decreased value in a damage claim situation.)
- Outline what clauses your company always requires to protect its interests.
- Explain that even if they truly believe they cannot change one word of a vendor's standard contract, they must carefully review the document to fully understand it and evaluate the deal.
- Remember, you are not training them to be lawyers, but better-informed negotiators.

For your contract review and education program to succeed, you will need support from senior management. To persuade the management team that this training will reap benefits, provide an outline of your presentation, punctuating the materials with examples of problems that the company could have avoided by better contract drafting.

Ask the Experts

Q: Is there any proactive way that I can help my company's front line bring me a better contract for legal review?

A: As in-house counsel, you should draft models of the top ten contract clauses that appear in your most common commercial contract. The clauses should reflect your preferred, most favorable language. For your negotiators, you can also provide several fallback positions for commonly negotiated or important clauses. (See "Blueprint: Negotiating Toolkit," on p. 86.)

Q: What if your company's decisionmakers insist on making last-minute changes to a version of the contract they had previously reviewed, accepted, and sent back to the other side? How do you avoid losing credibility with the other company?

A: Determine how important these last-minute changes are to your company's position. Be sure your management team is aware of the potential damage to the negotiations and the relationship if the changes are raised at this point. If your management team chooses to press ahead, then attempt to reopen the negotiations on these previously settled issues. Frankly explain to the other side that, upon further review, your management team is requesting some changes to terms that you acknowledge were previously settled. If the changes are reasonable and you have true bargaining power, you may succeed in getting the changes made.

Q: How do you respond when the other side asserts, "You can't be at the negotiation table because our lawyer won't be there?"

A: This is a tough call, and different lawyers might take different approaches. Arguably this comment puts you on notice that the other side is represented. Depending on the rules in your jurisdiction, at this point you may need the consent of the other side's lawyer before having any further communications with the other side's business team. Try to reschedule the negotiation and request that their lawyer attend. If that won't work, consider whether it may actually be in your company's best interest for you to skip the meeting. Having an attorney present may ratchet up the negotiation dynamic.

On the other hand, it could be argued that the other side's having an attorney in the company does not automatically mean they have representation in this matter. You might be able to attend the meeting but not participate or have any direct involvement—but first you should very carefully check your local rules and the ABA Model Rules of Professional Conduct, 4.2, 4.3, and 5.5.

HandsOn

Be ready to explain why you want the change

When seeking changes to a form contract, plan to articulate how the objectionable provision truly increases your company's risk beyond an acceptable limit. If you can cite past examples of real problems, it will help to dispel the notion that your concerns are unfounded. You should always propose an alternative that does not cause the other party to take on undue risk. Try to add modifications that clarify or limit the broad sweep of the other party's provision, such as "notwithstanding anything to the contrary, this provision shall not apply to. . . ."

Look both ways

The other party has invested considerable time and money to develop a form contract. They did so to protect their company; they are not likely to give up that protection easily. Nonetheless, if you understand the other side's underlying concerns, you can negotiate effectively. Even overkill provisions in a boilerplate agreement have some basis in a particular risk, whether that risk is real or perceived. A compromise may be possible if you can demonstrate that your proposal does not impact the other party's primary concern, but merely eliminates the overkill that puts your company in an unacceptable position. If you propose a modification that achieves both of these goals, you have a good chance of reaching a compromise.

Another possibility—at least for some types of businesses and negotiations—is a price adjustment that will make up for the risk that one side is being asked to take. For example, if one side insists on premium liability for a potential failure (no matter whose fault), the other side may be more willing to accept it if they are paid a higher rate and know it to be an unlikely possibility.

Finally, whenever you are confronting a difficult issue, remember: "Think and be creative." There is always room for finding common ground if both sides are open minded enough to look for an accurate reflection of the intent of the agreement.

When You're in the Driver's Seat—Using Your Own Form

To start, make sure your form contract is fair. One of the benefits of standardizing a contract is to curb negotiations. If you overreach, it's back to the negotiating table. Only if you consistently have greater bargaining power can your form contract be a bit more aggressive. For example, if you are the only game in town, you can demand more. Either way, there is usually more to it than issuing your standard contract to the other party and collecting signatures. When you review the other party's proposed changes to your form, keep in mind the following recommendations:

Don't take it personally

Just like you, the other person is just doing her job and trying to protect her client from risk. No matter what time or money you have invested in your contract, be open to modifications; the other party may suggest alternative language that actually improves the clarity or intent of your original form.

Be willing to compromise

In form agreements, you may be tempted to include a risk transfer provision so broad that anyone actually reading it would deem it unreasonable. If this happens, and the other party seeks a modification, ask for a detailed explanation. Once you understand the other party's difficulty, it is very possible that you can accommodate that concern without unacceptably sacrificing your protection. Be willing to tone it down. Remember, you wouldn't agree to an overkill provision, either.

Do not allow screaming or ranting as a negotiation tactic

If the other party's negotiator begins yelling, it is usually effective to end the discussion at that point. Calmly explain that you will resume negotiations when she can speak in a normal tone of voice.

Steering Around Common Roadblocks

Earlier in this article, we addressed how to overcome your own business staff's reluctance to welcome your participation in contract negotiations. Not surprisingly, you must also develop strategies for overcoming the other party's well-placed obstacles to your participation. Here are some common ways negotiators put the brakes on a deal—and solutions to keep the talks progressing.

I don't have authority

Ensure that the person with whom you are negotiating has the authority to make changes and finalize the contract. If not, ask who else should be included in the discussion. If you meet with resistance, consider giving such a thorough and detailed description of your concerns that the other negotiator has to pass your comments on to the next level because he has no idea what you are talking about or what their contract actually says. Establish up front that you have authority to reach a resolution (if, in fact, you do).

Everybody else signs it

"This is our standard contract. Everybody else signs it." To keep the conversation going when you hear this, acknowledge that many other companies sign contracts without reading them, but explain that your company takes a more thorough approach. Clarify that your concerns do not necessarily conflict with the other party's; you are not asking the negotiator to abandon the contract's protections completely, just to address your concerns as well. Be ready to explain how the other party's interests are not mutually exclusive of yours. A more direct response is "Yes, I understand that, and these are our standard changes. So to get beyond this deadlock, let's talk about the underlying concerns, rather than just the language." If possible, ask to discuss your concerns with the other party's lawyer.

Don't make me send it to our legal department

The other party's negotiator may resist your proposed changes by claiming modifications will necessitate a time-consuming legal review. This is a sure sign that you are talking to someone who does not have the authority to make substantive changes, and may be nervous even talking about legal issues. When presented with this excuse, your business people can respond, "We care enough about having a well-thought-out deal to have our legal department look at it, and they gave us a read on it in 24 hours, so it really shouldn't slow anything down for you to do the same." This may get you a discussion with the other side's lawyer, which means a real negotiation of issues rather than just language.

Finishing Touches

In-house counsel can enhance the company's bottom line by effectively identifying and managing the risks inherent in everyday contracts. A well-written policy on contract review and execution, together with timely advice and value-added negotiation, will put your legal department on the road to success.

This HandsOn is drawn in part from Course #602 at the ACC 2005 Annual Meeting, presented by Jack O'Neil, general counsel, Western Construction Group, Inc.; Todd H. Silberman, vice president and general counsel, Express Carriers; and Susan Aldrich Zoch, associate general counsel, Vertis, Inc. The materials for Course #602 are available on ACC Online at www.acca.com/am/05/cm.602.pdf.

Have a comment on this article?
Email editorinchief@acca.com

"Roadblock to Revenue or Onramp to Opportunity? Practical Tips and Tools for Negotiating Everyday Contracts," *ACC Docket* 26, no. 1 (Jan. 2006): 76–88.

HandsOn

A Sample Contract Review Policy

Contract Review and Signing Authority Policy: Contracts Other Than Sales Contracts

[COMPANY LOGO HERE]	EFFECTIVE DATE:	
	LAST REVISED DATE:	
	APPROVED BY:	
	POLICY NUMBER:	

Purpose

The purpose of this policy is to describe the types of contracts that require review by the Legal Department and to specify the individuals in the company who are authorized to sign those contracts on behalf of the company.

Scope

This policy applies to all company employees, including but not limited to company officers, exempt and non-exempt personnel, and full and part-time employees, and temporary and independent contract personnel.

The legal review by the Legal Department under this policy is in addition to any other internal review that may be required under other policies.

This policy does not cover the signing or issuing of purchase orders, nor sales proposals or contracts with the company's customers, as such activities are covered by other policies.

Policy Procedures

Contract Review:

1. It is the responsibility of the person submitting a contract for signature, as well as the person who will be signing the contract, whether or not the contract requires review by the Legal Department under the guidelines set forth below, to make sure that all internal approvals required for that type of contract have been received prior to execution of the contract. The Legal Department is not responsible for inquiring as to whether necessary internal approvals have been obtained.
2. The Legal Department is responsible for reviewing the following contracts (unless the Legal Department has specifically delegated that responsibility in writing), and all such contracts must be submitted to the Legal Department for review before they are signed:
   A. [insert types of contracts here, e.g. NDAs, M&A deals, employment agreements] that
   i. [insert relevant criteria here, e.g., dollar value, length of term, volume of business, subject matter]
   B. [insert other types of contracts] that
   i. [insert relevant criteria here]
   C. [etc.]
3. Contracts not requiring review by the Legal Department under this policy should not be submitted to the Legal Department for review.

Contract Signing Authority:

1. All contracts may be signed only by an authorized person within the company as set forth in this policy.
2. The table below lists the individuals authorized to sign the types of contracts specified.

Violations of Policy

If any employee witnesses any mistakes or errors that result in a violation of this policy, the employee should report the violation immediately to a supervisor or a member of senior management so that the company can take immediate corrective steps. In contrast, if an employee willfully or intentionally violates this policy, the company may take disciplinary action, up to and including termination, as well as exercise any legal rights to seek redress against the violator.

TYPE OF CONTRACT	Persons Authorized to Sign [insert appropriate officers into the table, e.g., President]
NONDISCLOSURE AGREEMENTS	
AGREEMENTS WITH VENDORS	(1) _____ (unlimited as to amount and duration) (2) _____ (up to $_____ and no more than _____ in duration)
AGREEMENTS WITH EMPLOYEES	

Blueprint: Negotiating Toolkit

A toolkit approach to standardizing your negotiating position can:

- enable consistent use of the forms across the legal department,
- guide lawyers on acceptable alternative language,
- document management's pre-approved fallback positions,
- streamline negotiations through pre-approval of fallback positions,
- facilitate use of non-lawyers in contract drafting and negotiation,
- provide a training tool for lawyers new to the company.

What follows are excerpts from one company's toolkit, used by the legal department and select members of the contract management team. For the entire toolkit, see *www.acca.com/am/05/cm/602.pdf.*

NEGOTIATING TOOLKIT FOR KEY PROVISIONS FROM THE COMPANY SERVICES AGREEMENT (excerpts)

1. Introduction

The purpose of this Toolkit is to help Company personnel understand the key provisions of the Company Services Agreement (the "CSA") and to facilitate negotiation of these provisions, whether used as part of the CSA or as insertions to customer agreements. This Toolkit addresses the most commonly raised issues in the CSA. For each issue, the Toolkit provides:

- A statement regarding the purpose of the CSA provision.
- Supporting arguments in favor of the provision.
- Requests for changes to the provision that customers may commonly make.
- An argument opposing the customer request and/or a description of a "fallback" position that may be taken in response to a customer request.
- For provisions for which a fallback position is appropriate, fallback language to insert in the contract.

If you have any questions on how to use this Toolkit, or if the customer's concern is not addressed in the Toolkit, please contact an Associate General Counsel or the General Counsel.

2. Non-U.S. Customer Agreements

This Toolkit is designed for use with customers located in the United States. If a customer is located outside of the United States, you must notify and obtain approval to proceed with the agreement from the General Counsel.

3. Approval of Certain Business Terms

The business terms of customer agreements may expose Company to risks that require approval by specific Company executives. Approval from one or more individuals, as listed below, must be obtained prior to execution of agreements containing any of the following terms:

- If the value of an agreement exceeds _____, the _____must approve the agreement prior to its execution. If the value of an agreement exceeds _____, the _____ also must approve the agreement prior to its execution.
- If an agreement provides for renewal with price concessions, the _____must approve the agreement prior to its execution.
- If an agreement requires Company to make capital expenditures, the _____must approve the agreement prior to its execution.
- If any of the following provisions are in an agreement, the _____ must approve the agreement prior to its execution.
  - Unlimited direct damages liability
  - No disclaimer of consequential damages
  - Exclusivity
  - Most Favored Nations Pricing/Terms
  - Termination of Agreement for Change in Control

4. Use of Fallback Provisions

It is important that you advocate use of Company's original agreement provisions before you resort to using one of the fallback provisions, because the original agreement provisions are designed to best protect Company's legal and business interests. To assist you in this effort, this Toolkit includes supporting arguments in favor of Company's original agreement provisions. A fallback provision should be a last resort that is used only if a customer will not agree to an original agreement provision. Also, whenever possible the fallback provision should be "traded" for a concession by the customer that Company wants. Finally, examine the agreement as a whole when determining whether a fallback provision is acceptable, because a provision may function in connection with a related provision so that one change may necessitate another (for example, a provision that limits a party's liability is closely related to a provision that specifies a sole remedy—if the sole remedy is removed, then the limitation of liability should be closely examined).

Before modifying the CSA by using any of the fallback provisions in this Toolkit, you may be required to obtain approval in accordance with the Approval Process specified with each fallback position and described in the table to the right.

Key Provisions

I.- III. [omitted]

IV. Warranty

A Warranty is a promise about the quality of Company's work for a customer. Company's standard warranty is that it will per

APPROVAL TYPE	WHO APPROVES
1	An Associate General Counsel in conjunction with the Senior Business Executive (the business executive above the individual who obtained the account) involved in the transaction must approve use of the fallback provision. If such approval is not granted, you may escalate the decision to the General Counsel and the COO for a final determination.
2	An Associate General Counsel must approve use of the fallback provision, taking into consideration the facts of the particular deal.
3	The CFO must approve use of the fallback provision, taking into consideration the facts of the particular deal.
4	The General Counsel must approve use of the fallback provision and, as the General Counsel deems necessary, in consultation with the CFO and the COO. If such approval is not granted, you may escalate the decision to the CEO for a final determination.
5	The Business Unit Credit Executive must approve use of the fallback provision.
6	The Sr. VP Finance, COO, and CFO must approve use of the fallback provision.
7	The COO must approve use of the fallback provision.
8	The General Counsel must approve use of the fallback provision in consultation with the Sr. VP Finance, COO, and CFO. If such approval is not granted, you may escalate the decision to the CEO for a final determination.

Note: In addition to obtaining the approvals noted above, you may need to obtain additional approval for agreements that include any of the business terms specified above in section 3.

form its work in a "workmanlike manner." This essentially means that Company will perform the work using a level of care and skill that companies doing the same work in the same situation would use. Customers on occasion ask for warranties that Company will use the highest standard of care possible, which would hold Company to an "expert" standard of care, which is much higher than the "reasonable person" standard of care suggested by the "workmanlike" warranty. Because the warranty imposes on Company an obligation to correct problems, the customer is required to give Company notice of such problems within a specific time period, so that these obligations are not open-ended. The warranty relates to the limitation of liability because the actions Company will take in response to a warranty claim are described in that section (correct the problem or refund the fees).

CSA Provision: Warranty and Remedy. Company warrants that it will perform the Services in a workmanlike manner, and that any Technology Services will conform materially to their written specifications contained in this Agreement. Customer's sole and exclusive remedy for any breach of Company's warranty is set forth in the exclusive remedy and limitation of liability section of this Agreement. **[1]** Customer must bring any warranty claims within 30 days of Company's provision of any non-conforming portion of the Services, and failure to do so will constitute irrevocable acceptance of such Services and waiver of any related claims. **[2]**

Sentence [1] Warranty and Remedy

Company warrants that it will perform the Services in a workmanlike manner, and that any Technology Services will conform materially to their written specifications contained in this Agreement. Customer's sole and exclusive remedy for any breach of Company's warranty is set forth in the exclusive remedy and limitation of liability section of this Agreement.

Purpose. If Company breaches the warranty contained in this section, then the customer can only seek the remedies of cure or refund outlined in the exclusive remedy provision.

Support. The customer's remedy for breach of warranty should be the same as for other breaches of the CSA. Also, as discussed above, if a customer is not satisfied with the work that Company has performed, then Company would like the opportunity to "make good" with the customer. The limited remedy permits Company this opportunity.

REQUEST: **Remove this Sentence.**	***Approval:***	**2**

Fallback. Company could agree to remove this sentence, in which event the customer could sue Company for damages.

Sentence [2] Warranty and Remedy

Customer must bring any warranty claims within 30 days of Company's provision of any non-conforming portion of the Services, and failure to do so will constitute irrevocable acceptance of such Services and waiver of any related claims.

Purpose. This sentence limits the time period in which a customer may bring a breach of warranty claim to 30 days.

Support. This sentence requires the customer to identify, and notify Company of, any problems with the services in a timely manner. By learning of a problem early, Company is in a better position to correct the problem.

REQUEST: **Increase (or remove) the 30 day warranty period.**	***Approval:***	**2**

Fallback. Company could agree to increase the warranty period to 60 or 90 days. Company should not, however, agree to remove the warranty period because Company then could be faced with a warranty claim many months from the time of performance of the services when (due to the lapse in time) it may be difficult for Company to determine the cause of the problem or correct it.

Fallback Language. Failure to make a written warranty claim within [60/90] days of completion of any non-conforming portion of the Services (or such other period as may be specified in an Appendix) will constitute irrevocable acceptance of such Services and waiver of any related claims.

CSA Provision: Third Party Products. If Company provides Customer with third party products under this Agreement, Company will use reasonable efforts to assign any warranty on such third party products to Customer, but will have no liability for such third party products. All third party products provided under this Agreement are provided "as is," with all faults, as between Company and Customer.

Purpose. If Company purchases products from a third party that it then passes on to the customer, Company provides the products to the customer without making any warranties regarding them. Company will, however, to the extent reasonably possible, pass through any warranties made by the seller of the third party products.

Support. It would be unreasonable for Company to have to provide a warranty for products over which it has no control.

REQUEST: **Provide warranty for third party products.**	***Approval:***	**4**

Fallback. Company should not provide a warranty for third party products, because Company has no control over the quality of the third party products. Further, it provides them as a customer convenience, not as a main component of the business model. Company could, however, agree to attach to the CSA a copy of any warranties that the third party agrees can be passed through to the customer (this will require review of the third party warranties and possibly discussion with the third party).

Approval Process #2 applies if the agreement disclaims Company's liability for consequential damages and limits Company's liability for direct damages to a hard cap. Approval Process #4 applies in all other circumstances.

Fallback Language. All third party products provided under this Agreement, including without limitation software, hardware, or other equipment, are provided "as is," with all faults, as between Company and Customer. Company represents that Customer is entitled to make warranty claims regarding the third party products specified in Exhibit 1 against the third party specified in Exhibit 1, under the terms of the warranty provisions set forth in Exhibit 1. Such claims shall be Customer's sole and exclusive remedy with regard to such third party products.

CSA Provision: Disclaimer. COMPANY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, ACCURACY, OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE. COMPANY DOES NOT WARRANT OR REPRESENT THAT ACCESS TO AND USE OF ANY TECHNOLOGY SERVICES PROVIDED BY COMPANY WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT ENJOYMENT OF SUCH TECHNOLOGY SERVICES WILL BE WITHOUT INTERFERENCE.

Purpose. This provision clarifies that Company only makes the warranties that are included in the CSA, and that all other warranties (including the implied warranties of merchantability and fitness for a general or particular purpose that are implied by the Uniform Commercial Code) are disclaimed. This disclaimer protects Company from a claim that it has made other express warranties, such as in proposals or promotional materials, or that it intends for any implied warranties to apply.

See discussion of the disclaimer of a warranty of non-infringement.

Support. This provision protects both Company and the customer in that it clarifies that all warranties must be specified in the CSA. Thus, both parties know what to expect regarding Company's services.

REQUEST: **Make this provision mutual.**	***Approval:***	**2**

Fallback. Company could agree to make this provision mutual, so that both parties would be disclaiming all other warranties.

Fallback Language. EACH PARTY DISCLAIMS ALL WARRANTIES NOT EXPRESSLY SET FORTH IN THIS AGREEMENT, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A GENERAL OR PARTICULAR PURPOSE.

Note: The non-infringement warranty should not be disclaimed by the customer if it is providing materials, such as ad copy, unless the customer agrees to a non-infringement indemnity.

Marketing

Roles/Responsibilities

- Define products and services-(descriptions)
- Packaging offerings
- Communicate offering
- Support offerings (program and product)

The Documents

- RFP Repository
- Proposal templates
- Presentation templates
- Collateral

Sales (SCS)

Roles/Responsibilities

- Ascertain customer requirements (scope)
- Confirm our ability to meet them
- Present offering to customers
- Proposal development
  - Pricing & Service level
- Proposal presentation
- Contract presentation & negotiation (close)
- Progress & Benefit reporting

The Documents

- RFP
- Framework
- Customer Implementation Profile
- LOI
- Confidentiality
- Proposal templates
- Contract templates
- Contract approval check list

Finance

Roles/Responsibilities

- Pricing
- Discount/rebate management
- Customer commitments
- Pro Forma
- ROI/Performance
- Presentation to Executive Group
- Reporting

The Documents

- Contract/Term Sheet
- Pro Forma
- Customer P&L – Account Profitability of the customer
- OPA (order profitability authorization)
- Contract approval check list

Legal

Roles/Responsibilities

- Development standard contracts and associated documents
- Review all non-standard contracts
- Create non-standard T&C's
- Negotiate with customer counsel
- Manage outside counsel

The Documents

- All documents preceding contract
- Contract w/addendums
- Contract approval check list

Contract Administration

Roles/Responsibilities	***The Documents***
• Manage Contract development process • Manage centralized repository • Compliance • Reporting • Manage actionable contract terms • Communicate issues to field	• All Documents preceding contract • P&L • Contract approval check list

Executive

Roles/Responsibilities	***The Documents***
• Proposal presentations • Approve deals outside pricing guidelines • Sign-off for deals over $250K	• Final contract • Pro Forma • Contract approval check list

Operations

Roles/Responsibilities	*The Documents*
• Data collection – baselines (Audit) • Implement Program • Manage implementation database • Drive operational communication to customer • Customer satisfaction	• Final contract w/addendums • Customer implementation profile (CIP) • Project Plans (objectives and deliverables) • Customer satisfaction survey • Contract approval check list

Association of Corporate Counsel
2006 Annual Meeting
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Glossary of Commonly Used Legal Terms

acceleration clause
A provision in a contract or promissory note that if some specified event (like not making payments on time) occurs then the entire amount is due or other requirements are due now, pronto. This clause is most often found in promissory notes with installment payments for purchase of real property and requires that if the property is sold then the entire amount of the note is due immediately (the so-called "due on sale clause"). Some states prohibit "due on sale" and always allow the new property owner to assume the debt.

accord and satisfaction
An agreement to accept less than is legally due in order to wrap up the matter. Once the accord and satisfaction is made and the amount paid (even though it is less than owed) the debt is wiped out since the new agreement (accord) and payment (the satisfaction) replaces the original obligation. It is often used by creditors as "a bird in the hand is worth two in the bush" practicality.

ad valorem
Latin for "based on value," which applies to property taxes based on a percentage of the county's assessment of the property's value. The assessed value is the standard basis for local real property taxes, although some place "caps" (maximums) on the percentage of value (as under Proposition 13 in California) or "parcel taxes" which establish a flat rate per parcel.

addendum
An addition to a completed written document. Most commonly this is a proposed change or explanation (such as a list of goods to be included) in a contract, or some point that has been the subject of negotiation after the contract was originally proposed by one party. Real property sales agreements often have addenda (plural of addendum) as the buyer and seller negotiate fine points (how payments will be made, what appliances will be included, date of transfer of title, the terms of financing by the seller and the like). Although often they are not, addenda should be signed separately and attached to the original agreement so that there will be no confusion as to what is included or intended. Unsigned addenda could be confused with rough drafts or unaccepted proposals or included fraudulently.

agency
The relationship of a person (called the agent) who acts on behalf of another person, company, or government, known as the principal. "Agency" may arise when an employer (principal) and employee (agent) ask someone to make a delivery or name someone as an agent in a contract. The basic rule is that the principal becomes responsible for the acts of the agent, and the agent's acts are like those of the principal (Latin: respondeat superior). Factual questions arise such as: was the agent in the scope of employment when he/she ran down the little child, got drunk and punched someone, or sold impure wheat? There is also the problem of whether the principal acted in such a way as to

make others believe someone was his agent-this is known as "apparent" or "ostensible" authority. When someone who is or is not an employee uses company business cards, finance documents, or a truck with the company logo, such use gives apparent authority as an agent.

alter ego
A corporation, organization or other entity set up to provide a legal shield for the person actually controlling the operation. Proving that such an organization is a cover or alter ego for the real defendant breaks down that protection, but it can be difficult to prove complete control by an individual. In the case of corporations, proving one is an alter ego is one way of "piercing the corporate veil." In a lawsuit complaint, it might be stated (pleaded) that "the Hotshot Corporation was the alter ego of Joseph Snakeoil."

anticipatory breach
When a party to a contract repudiates (reneges on) his/her obligations under that contract before fully performing those obligations. This can be by word ("I won't deliver the rest of the goods" or "I can't make any more payments") or by action (not showing up with goods or stopping payments). The result is that the other party does not have to perform his/her obligations and cannot be liable for not doing so. This is often a defense to a lawsuit for payment or performance on a contract. One cannot repudiate his obligations and demand that the other person perform.

appurtenant
Pertaining to something that attaches. In real property law this describes any right or restriction which goes with that property, such as an easement to gain access across the neighbor's parcel, or a covenant (agreement) against blocking the neighbor's view. Thus, there are references to appurtenant easement or appurtenant covenant.

arm's length
The description of an agreement made by two parties freely and independently of each other, and without some special relationship, such as being a relative, having another deal on the side or one party having complete control of the other. It becomes important to determine if an agreement was freely entered into to show that the price, requirements, and other conditions were fair and real. Example: if a man sells property to his son the value set may not be the true value since it may not have been an "arm's length" transaction.

assign
To transfer to another person any asset such as real property or a valuable right such as a contract or promissory note. 2) n. the person (assignee) who receives a piece of property by purchase, gift or by will. The word often shows up in contracts and wills.

assignee
A person to whom property is transferred by sale or gift, particularly real property.

assumption
The act of taking over a debt as part of payment for property which secures that debt.

bad faith
Intentional dishonest act by not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfill it, or violating basic standards of honesty in dealing with others. Most states recognize what is called "implied covenant of good faith and fair dealing" which is breached by acts of bad faith, for which a lawsuit may be brought (filed) for the breach (just as one might sue for breach of contract). The question of bad faith may be raised as a defense to a suit on a contract. 2) adj. when there is bad faith then a transaction is called a "bad faith" contract or "bad faith" offer.

bait and switch
A dishonest sales practice in which a business advertises a bargain price for an item in order to draw customers into the store and then tells the prospective buyer that the advertised item is of poor quality or no longer available and attempts to switch the customer to a more expensive product. Electronic items such as stereos, televisions, or telephones are favorites, but there are also loan interest rates which turn out to be only for short term or low maximums, and then the switch is to a more expensive loan. In most states this practice is a crime and can also be the basis for a personal lawsuit if damages can be proved. The business using "bait and switch" is an apt target for a class action since there are many customers but each transaction scarcely warrants the costs of a separate suit.

BFP
Slang for bona fide purchaser, which means someone who purchased something (e.g. a bond, a promissory note, or jewelry) with no reason to be suspicious that it was stolen, belonged to someone else, or was subject to another party's claim. The BFP must have paid a full and fair price and have received the item in the normal course of business, otherwise he/she might have some doubts ("wanta buy a watch, cheap?" from a character on a street corner).

breach
Literally, a break. A breach may be a failure to perform a contract (breaking its terms), failure to do one's duty (breach of duty, or breach of trust), causing a disturbance, threatening, or other violent acts which break public tranquility (breach of peace), illegally entering property (breach of close), not telling the truth-knowingly or innocently-about title to property (breach of warranty), or, in past times, refusal to honor a promise to marry (breach of promise). 2) v. the act of failing to perform one's agreement, breaking one's word, or otherwise actively violating one's duty to other.

breach of contract
Failing to perform any term of a contract, written or oral, without a legitimate legal excuse. This may include not completing a job, not paying in full or on time, failure to deliver all the goods, substituting inferior or significantly different goods, not providing a bond when required, being late without excuse, or any act which shows the party will not complete the work ("anticipatory breach"). Breach of contract is one of the most common causes of law suits for damages and/or court-ordered "specific performance" of the contract.

breach of warranty
Determination that a statement as to title of property, including real property or any goods, is proved to be untrue, whether intended as a falsehood or not. It can also apply to an assurance of quality of a product or item sold. The party making the warranty is liable to the party to whom the guarantee was made. In modern law the warranty need

not be expressed in so many words, but may be implied from the circumstances or surrounding language at the time of sale.

chain of title
The succession of title ownership to real property from the present owner back to the original owner at some distant time. Chains of title include notations of deeds, judgments of distribution from estates, certificates of death of a joint tenant, foreclosures, judgments of quiet title (lawsuit to prove one's right to property title) and other recorded transfers (conveyances) of title to real property. Usually title companies or abstractors are the professionals who search out the chain of title and provide a report so that a purchaser will be sure the title is clear of any claims.

chattel
An item of personal property which is movable, as distinguished from real property (land and improvements).

collateral
Property pledged to secure a loan or debt, usually funds or personal property as distinguished from real property (but technically collateral can include real estate).

collateral estoppel
The situation in which a judgment in one case prevents (estops) a party to that suit from trying to litigate the issue in another legal action. In effect, once decided, the parties are permanently bound by that ruling.

commercial frustration
An unforeseen uncontrollable event which occurs after a written or oral contract is entered into between parties, and makes it impossible for one of the parties to fulfill his/her duties under the contract. This circumstance allows the frustrated party to rescind the contract without penalty. Such frustration (called frustration of purpose) could include the destruction by fire of the goods to be purchased, the denial of a permit to construct a building by a potential buyer, or denial of an application for a zoning variance to allow expansion by a contractor.

condemnation
The legal process by which a governmental body exercises its right of "eminent domain" to acquire private property for public uses (highways, schools, redevelopment, etc.). Condemnation includes a resolution of public need, an offer to purchase, and, if a negotiated purchase is not possible, then a condemnation suit. The government may take the property at the time of suit if it deposits money with the court in the amount of the government's appraisal.

condition precedent
In a contract, an event which must take place before a party to a contract must perform or do their part. 2) in a deed to real property, an event which has to occur before the title (or other right) to the property will actually be in the name of the party receiving title. Examples: if the ship makes it to port, the buyer agrees to pay for the freight on the ship and unload it; when daughter Gracella marries she shall then have full title to the property.

condition subsequent
In a contract, a happening which terminates the duty of a party to perform or do his/her part. 2) in a deed to real property, an event which terminates a person's interest in the property. Examples: if the Dingbat Company closes its business, a supplier will not be required to fulfill its contract and deliver gidgets to the company and the contract will terminate; if daughter-in-law Beatrice terminates her marriage to Reggie Fauntleroy, her interest in the real property will terminate and revert to the grantors, Mom and Dad Fauntleroy.

consequential damages
Damages claimed and/or awarded in a lawsuit which were caused as a direct foreseeable result of wrongdoing.

constructive eviction
When the landlord does not go through a legal eviction of a tenant but takes steps which keep the tenant from continuing to live in the premises. This could include changing the locks, turning off the drinking water, blocking the driveway, yelling at the tenant all the time or nailing the door shut.

constructive fraud
When the circumstances show that someone's actions give him/her an unfair advantage over another by unfair means (lying or not telling a buyer about defects in a product, for example), the court may decide from the methods used and the result that it should treat the situation as if there was actual fraud even if all the technical elements of fraud have not been proven.

contiguous
Connected or "next to", usually meaning adjoining pieces of real estate.

contingency
An event that might not occur.

contract
An agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration. Since the law of contracts is at the heart of most business dealings, it is one of the three or four most significant areas of legal concern and can involve variations on circumstances and complexities. The existence of a contract requires finding the following factual elements: a) an offer; b) an acceptance of that offer which results in a meeting of the minds; c) a promise to perform; d) a valuable consideration (which can be a promise or payment in some form); e) a time or event when performance must be made (meet commitments); f) terms and conditions for performance, including fulfilling promises; g) performance, if the contract is "unilateral". A unilateral contract is one in which there is a promise to pay or give other consideration in return for actual performance. (I will pay you $500 to fix my car by Thursday; the performance is fixing the car by that date.) A bilateral contract is one in which a promise is exchanged for a promise. (I promise to fix your car by Thursday and you promise to pay $500 on Thursday.) Contracts can be either written or oral, but oral contracts are more difficult to prove and in most jurisdictions the time to sue on the contract is shorter (such as two years for oral compared to four years for written). In some cases a contract can consist of several documents, such as a series of letters, orders, offers and counteroffers. There

are a variety of types of contracts: "conditional" on an event occurring; "joint and several," in which several parties make a joint promise to perform, but each is responsible; "implied," in which the courts will determine there is a contract based on the circumstances. Parties can contract to supply all of another's requirements, buy all the products made, or enter into an option to renew a contract. The variations are almost limitless. Contracts for illegal purposes are not enforceable at law. 2) v. to enter into an agreement.

conveyance
A generic term for any written document which transfers (conveys) real property or real property interests from one party to another. A conveyance must be acknowledged before a notary (or if a court judgment be certified as the same as the document on file) and recorded with the County Recorder or Recorder of Deeds.

corporate opportunity
A business opportunity which becomes known to a corporate official, particularly a director or other upper management, due to his/her position within the corporation. In essence, the opportunity or knowledge belongs to the corporation, and the officials owe a duty (a fiduciary duty) not to use that opportunity or knowledge for their own benefit. The corporation may have the right to damages (to be paid off) for such improper appropriation (use) of the opportunity on the theory that the official holds it in "constructive trust" for the corporation. The corporation may obtain an injunction (court order) to prevent someone's use of the knowledge or opportunity. In such cases angry stockholders may bring their own legal action for their benefit in what is called a derivative action. Such insider misappropriation (inappropriate use of information) may also be criminal theft, or be violative of federal or state securities laws.

counterpart
In the law of contracts, a written paper which is one of several documents which constitute a contract, such as a written offer and a written acceptance. Often a contract is in several counterparts which are the same but each paper is signed by a different party, particularly if they are in different localities.

covenant
A promise in a written contract or a deed of real property. The term is used only for certain types of promises such as a covenant of warranty, which is a promise to guarantee the title (clear ownership) to property, a promise agreeing to joint use of an easement for access to real property, or a covenant not to compete, which is commonly included in promises made by a seller of a business for a certain period of time. Mutual covenants among members of a homeowners association are promises to respect the rules of conduct or restrictions on use of property to insure peaceful use, limitations on intrusive construction, etc., which are usually part of the recorded covenants, conditions and restrictions which govern a development or condominium project. Covenants which run with the land, such as permanent easement of access or restrictions on use, are binding on future title holders of the property. Covenants can be concurrent (mutual promises to be performed at the same time), dependent (one promise need be performed if the other party performs his/hers), or independent (a promise to be honored without reference to any other promise). Until 1949 many deeds contained restrictive covenants which limited transfer of the property to the Caucasian race. These blatantly racist covenants were then declared unconstitutional. 2) v. to promise.

de minimis
(dee-minnie-miss) Latin for "of minimum importance" or "trifling." Essentially it refers to something or a difference that is so little, small, minuscule or tiny that the law does not refer to it and will not consider it. In a million dollar deal, a $10 mistake is de minimis.

debtor in possession
In bankruptcy proceedings when a debtor has filed for the right to submit a plan for reorganization or refinancing under Chapter 11, and the debtor is allowed to continue to manage his/her/its business without an appointed trustee, that debtor is called a "debtor in possession."

defamation
The act of making untrue statements about another which damages his/her reputation. If the defamatory statement is printed or broadcast over the media it is libel and, if only oral, it is slander. Public figures, including officeholders and candidates, have to show that the defamation was made with malicious intent and was not just fair comment. Damages for slander may be limited to actual (special) damages unless there is malice. Some statements such as an accusation of having committed a crime, having a feared disease or being unable to perform one's occupation are called libel per se or slander per se and can more easily lead to large money awards in court and even punitive damage recovery by the person harmed. Most states provide for a demand for a printed retraction of defamation and only allow a lawsuit if there is no such admission of error.

diligence
Reasonable care or attention to a matter, which is good enough to avoid a claim of negligence, or is a fair attempt (as in due diligence in a process server's attempt to locate someone).

dismissal
1) the act of voluntarily terminating a criminal prosecution or a lawsuit or one of its causes of action by one of the parties. 2) a judge's ruling that a lawsuit or criminal charge is terminated. 3) an appeals court's act of dismissing an appeal, letting the lower court decision stand. 4) the act of a plaintiff dismissing a lawsuit upon settling the case. Such a dismissal may be dismissal with prejudice, meaning it can never be filed again, or dismissal without prejudice, leaving open the possibility of bringing the suit again if the defendant does not follow through on the terms of the settlement.

easement
The right to use the real property of another for a specific purpose. The easement is itself a real property interest, but legal title to the underlying land is retained by the original owner for all other purposes. Typical easements are for access to another property (often redundantly stated "access and egress," since entry and exit are over the same path), for utility or sewer lines both under and above ground, use of spring water, entry to make repairs on a fence or slide area, drive cattle across and other uses. Easements can be created by a deed to be recorded just like any real property interest, by continuous and open use by the non-owner against the rights of the property owner for a statutory number of years, typically five ("prescriptive easement"), or to do equity (fairness), including giving access to a "land-locked" piece of property (sometimes called an "easement of necessity"). Easements may be specifically described by boundaries ("24 feet wide along the northern line for a distance of 180 feet"), somewhat indefinite ("along the trail to the northern boundary") or just for a purpose ("to provide access to

the Jones property" or "access to the spring") sometimes called a "floating easement." There is also a "negative easement" such as a prohibition against building a structure which blocks a view. Title reports and title abstracts will usually describe all existing easements upon a parcel of real property. Issues of maintenance, joint use, locking gates, damage to easement and other conflicts clog the judicial system, mostly due to misunderstandings at the time of creation.

eminent domain
The power of a governmental entity (federal, state, county or city government, school district, hospital district or other agencies) to take private real estate for public use, with or without the permission of the owner. The Fifth Amendment to the Constitution provides that "private property [may not] be taken for public use without just compensation." The Fourteenth Amendment added the requirement of just compensation to state and local government takings. The usual process includes passage of a resolution by the acquiring agency to take the property (condemnation), including a declaration of public need, followed by an appraisal, an offer, and then negotiation. If the owner is not satisfied, he/she may sue the governmental agency for a court's determination of just compensation. The government, however, becomes owner while a trial is pending if the amount of the offer is deposited in a trust account. Public uses include schools, streets and highways, parks, airports, dams, reservoirs, redevelopment, public housing, hospitals and public buildings.

equitable estoppel
Where a court will not grant a judgment or other legal relief to a party who has not acted fairly; for example, by having made false representations or concealing material facts from the other party. This illustrates the legal maxim: "he who seeks equity, must do equity." Example: Larry Landlord rents space to Dora Dressmaker in his shopping center but falsely tells her a Sears store will be a tenant and will draw customers to the project. He does not tell her a new freeway is going to divert traffic from the center. When she fails to pay her rent due to lack of business, Landlord sues her for breach of lease. Dressmaker may claim he is equitably estopped.

escape clause
A provision in a contract which allows one of the parties to be relieved from (get out of) any obligation if a certain event occurs.

estop
To halt, bar or prevent.

et al.
Abbreviation for the Latin phrase et alii meaning "and others." This is commonly used in shortening the name of a case, as in "Pat Murgatroyd v. Sally Sherman, et al.

et seq.
(et seek) abbreviation for the Latin phrase “et sequentes meaning "and the following." It is commonly used by lawyers to include numbered lists, pages or sections after the first number is stated, as in "the rules of the road are found in Vehicle Code Section 1204, et seq."

executory
Something not yet performed or done. Examples: an executory contract is one in which all or part of the required performance has not been done; an executory bequest is a gift under a will which has not been distributed to the beneficiary.

failure of consideration
Not delivering goods or services when promised in a contract. When goods a party had bargained for have become damaged or worthless, failure of consideration (to deliver promised goods) makes the expectant recipient justified to withhold payment, demand performance or take legal action.

fair use
The non-competitive right to use of copyrighted material without giving the author the right to compensation or to sue for infringement of copyright.

fiduciary
From the Latin fiducia, meaning "trust," a person (or a business like a bank or stock brokerage) who has the power and obligation to act for another (often called the beneficiary) under circumstances which require total trust, good faith and honesty. The most common is a trustee of a trust, but fiduciaries can include business advisers, attorneys, guardians, administrators of estates, real estate agents, bankers, stockbrokers, title companies or anyone who undertakes to assist someone who places complete confidence and trust in that person or company. Characteristically, the fiduciary has greater knowledge and expertise about the matters being handled. A fiduciary is held to a standard of conduct and trust above that of a stranger or of a casual business person. He/she/it must avoid "self-dealing" or "conflicts of interests" in which the potential benefit to the fiduciary is in conflict with what is best for the person who trusts him/her/it. For example, a stockbroker must consider the best investment for the client and not buy or sell on the basis of what brings him/her the highest commission. While a fiduciary and the beneficiary may join together in a business venture or a purchase of property, the best interest of the beneficiary must be primary, and absolute candor is required of the fiduciary. 2) adj. defining a situation or relationship in which a person is acting as a fiduciary for another.

fixture
A piece of equipment which has been attached to real estate in such a way as to be part of the premises and its removal would do harm to the building or land. Thus, a fixture is transformed from a movable asset to an integral part of the real property. Essentially a question of fact, it often arises when a tenant has installed a lighting fixture, a heater, window box or other item which is bolted, nailed, screwed or wired into the wall, ceiling or floor. Trade fixtures are those which a merchant would normally use to operate the business and display goods and may be removed at the merchant's expense for any necessary repair.

FOB
Short for free on board, meaning shipped to a specific place without cost.

forbearance
An intentional delay in collecting a debt or demanding performance on a contract, usually for a specific period of time. Forbearance is often consideration for a promise by the debtor to pay an added amount.

foreign corporation
A corporation which is incorporated under the laws of a different state or nation. A "foreign" corporation must file a notice of doing business in any state in which it does substantial regular business. It must name an "agent for acceptance of service" in that state, or the Secretary of State in some jurisdictions will automatically be that agent so people doing business with a foreign corporation will be able to bring legal actions locally if necessary. Example: the Whoopee Widget Corporation is incorporated in Delaware. It has a sales office in Arizona, which does not make a guaranteed refund to Jack Jones of Arizona. Jones can sue Whoopee in Arizona and serve the Arizona Secretary of State or Whoopee's designated agent

foreseeable risk
Danger which a reasonable person should anticipate as the result from his/her actions. Foreseeable risk is a common affirmative defense put up as a response by defendants in lawsuits for negligence. A skier hits a bump on a ski run, falls and breaks his leg. This is a foreseeable risk of skiing. A mother is severely injured while accompanying her child on a roller coaster when the car jumps the track and comes loose. While there is potential risk, she had the right to anticipate that the roller coaster was properly maintained and did not assume the risk that it would come apart. Signs that warn "use at your own risk" do not bar lawsuits for risks that are not foreseeable.

forfeiture
Loss of property due to a violation of law.

four corners of an instrument
The term for studying an entire document to understand its meaning, without reference to anything outside of the document ("extrinsic evidence"), such as the circumstances surrounding its writing or the history of the party signing it. If possible a document should be construed based on what lies within its four corners, unless such examination cannot solve an ambiguity in its language.

fraud
The intentional use of deceit, a trick or some dishonest means to deprive another of his/her/its money, property or a legal right. A party who has lost something due to fraud is entitled to file a lawsuit for damages against the party acting fraudulently, and the damages may include punitive damages as a punishment or public example due to the malicious nature of the fraud. Quite often there are several persons involved in a scheme to commit fraud and each and all may be liable for the total damages. Inherent in fraud is an unjust advantage over another which injures that person or entity. It includes failing to point out a known mistake in a contract or other writing (such as a deed), or not revealing a fact which he/she has a duty to communicate, such as a survey which shows there are only 10 acres of land being purchased and not 20 as originally understood. Constructive fraud can be proved by a showing of breach of legal duty (like using the trust funds held for another in an investment in one's own business) without direct proof of fraud or fraudulent intent. Extrinsic fraud occurs when deceit is employed to keep someone from exercising a right, such as a fair trial, by hiding evidence or misleading the opposing party in a lawsuit. Since fraud is intended to employ dishonesty to deprive another of money, property or a right, it can also be a crime for which the fraudulent person(s) can be charged, tried and convicted. Borderline overreaching or taking advantage of another's naiveté involving smaller amounts is often overlooked by law enforcement, which suggests the victim seek a "civil remedy" (i.e., sue). However, increasingly fraud, which has victimized a large segment of the public (even in individually small amounts), has become the target of consumer fraud divisions in the offices of district attorneys and attorneys general.

fraud in the inducement
The use of deceit or trick to cause someone to act to his/her disadvantage, such as signing an agreement or deeding away real property. The heart of this type of fraud is misleading the other party as to the facts upon which he/she will base his/her decision to act. Example: "there will be tax advantages to you if you let me take title to your property," or "you don't have to read the rest of the contract-it is just routine legal language" but actually includes a balloon payment.

free on board (FOB)
Referring to purchased goods shipped without transportation charge to a specific place. Free on board at the place of manufacture shows there is a charge for delivery. Example: if an automaker in Detroit sells a car "FOB Detroit," then there will be a shipping charge if delivery is taken anywhere else. If the contract reads "FOB New Orleans," then the auto will be shipped to that city without charge, but with charge for delivery from New Orleans to somewhere else.

good faith
Honest intent to act without taking an unfair advantage over another person or to fulfill a promise to act, even when some legal technicality is not fulfilled. The term is applied to all kinds of transactions.

goodwill
The benefit of a business having a good reputation under its name and regular patronage. Goodwill is not tangible like equipment, right to lease the premises or inventory of goods. It becomes important when a business is sold, since there can be an allocation in the sales price for the value of the goodwill, which is always a subjective estimate. Included in goodwill upon sale may be the right to do business without competition by the seller in the area and/or for a specified period of time. Sellers like the allocation to goodwill to be high since it is not subject to capital gains tax, while buyers prefer it to be low, because it cannot be depreciated for tax purposes like tangible assets. Goodwill also may be overestimated by a proud seller and believed by an unknowing buyer.

gross negligence
Carelessness which is in reckless disregard for the safety or lives of others, and is so great it appears to be a conscious violation of other people's rights to safety. It is more than simple inadvertence, but it is just shy of being intentionally evil. If one has borrowed or contracted to take care of another's property, then gross negligence is the failure to actively take the care one would of his/her own property. If gross negligence is found by the trier of fact (judge or jury), it can result in the award of punitive damages on top of general and special damages.

guarantee
To pledge or agree to be responsible for another's debt or contractual performance if that other person does not pay or perform. Usually, the party receiving the guarantee will first try to collect or obtain performance from the debtor before trying to collect from the one making the guarantee (guarantor). 2) the promise to pay another's debt or fulfill

contract obligations if that party fails to pay or perform. 3) n. occasionally, the person to whom the guarantee is made. 4) a promise to make a product good if it has some defect.

hold harmless
A promise to pay any costs or claims which may result from an agreement. Quite often this is part of a settlement agreement, in which one party is concerned that there might be unknown lawsuits or claims stemming from the situation, so the other party agrees to cover them.

implied consent
Consent when surrounding circumstances exist which would lead a reasonable person to believe that this consent had been given, although no direct, express or explicit words of agreement had been uttered. Examples: a) a "contract" based on the fact that one person has been doing a particular thing and the other person expects him/her to continue; b) the defense in a "date rape" case in which there is a claim of assumed consent due to absence of protest or a belief that "no" really meant "yes," "maybe" or "later."

implied contract
An agreement which is found to exist based on the circumstances when to deny a contract would be unfair and/or result in unjust enrichment to one of the parties. An implied contract is distinguished from an "express contract."

implied covenant of good faith and fair dealing
A general assumption of the law of contracts, that people will act in good faith and deal fairly without breaking their word, using shifty means to avoid obligations or denying what the other party obviously understood. A lawsuit (or one of the causes of action in a lawsuit) based on the breach of this covenant is often brought when the other party has been claiming technical excuses for breaching the contract or using the specific words of the contract to refuse to perform when the surrounding circumstances or apparent understanding of the parties were to the contrary. Example: an employer fires a long-time employee without cause and says it can fire at whim because the employment contract states the employment is "at will." However, the employee was encouraged to join the company on the basis of retirement plans and other conduct which led him/her to believe the job was permanent barring misconduct or financial downturn. Thus, there could be a breach of the implied covenant, since the surrounding circumstances implied that there would be career-long employment.

implied warranty
An assumption at law that products are "merchantable," meaning they work and are useable as normally expected by consumers, unless there is a warning that they are sold "as is" or second-hand without any warranty. A grant deed of real property carries the implied warranty of good title, meaning the grantor (seller) had a title (ownership) to transfer.

improvement
Any permanent structure on real property, or any work on the property (such as planting trees) which increases its value.

in toto
(in toe-toe) Latin for "completely" or "in total," referring to the entire thing, as in "the goods were destroyed in toto," or "the case was dismissed in toto."

incorporate by reference
To include language from another document or elsewhere in a document by reference rather than repeat it. Typical language: "Plaintiff incorporates by reference all of the allegations contained in the First and Second Causes of Action hereinabove stated."

Indemnity
The act of making someone "whole" (give equal to what they have lost) or protected from (insured against) any losses which have occurred or will occur

Indemnify
To guarantee against any loss which another might suffer. Example: two parties settle a dispute over a contract, and one of them may agree to pay any claims which may arise from the contract, holding the other harmless.

independent contractor
A person or business which performs services for another person or entity under a contract between them, with the terms spelled out such as duties, pay, the amount and type of work and other matters. An independent contractor is distinguished from an employee, who works regularly for an employer. The exact nature of the independent contractor's relationship with the party hiring him/her/it has become vital since an independent contractor pays his/her/its own Social Security, income taxes without payroll deduction, has no retirement or health plan rights, and often is not entitled to worker's compensation coverage. Public agencies, particularly the Internal Revenue Service, look hard at independent contractor agreements when it appears the contractor is much like an employee. An independent contractor must be able to determine when and where work is performed, be able to work for others, provide own equipment and other factors which are indicative of true independence.

injunctive relief
A court-ordered act or prohibition against an act or condition which has been requested, and sometimes granted, in a petition to the court for an injunction. Such an act is the use of judicial (court) authority to handle a problem and is not a judgment for money. Whether the relief will be granted is usually argued by both sides in a hearing rather than in a full-scale trial, although sometimes it is part of a lawsuit for damages and/or contract performance. Historically, the power to grant injunctive relief stems from English equity courts rather than damages from law courts.

insolvency
The condition of having more debts (liabilities) than total assets which might be available to pay them, even if the assets were mortgaged or sold. 2) a determination by a bankruptcy court that a person or business cannot raise the funds to pay all of his/her debts. The court will then "discharge" (forgive) some or all of the debts, leaving those creditors holding the bag and not getting what is owed them. The supposedly insolvent individual debtor, even though found to be bankrupt, is allowed certain exemptions, which permit him/her to retain a car, business equipment, personal property and often a home as long as he/she continues to make payments on a loan secured by the property.

insured
The person or entity who will be compensated for loss by an insurer under the terms of a contract called an insurance policy. 2) the person whose life is insured by life insurance, after whose death the benefits go to others.

interlocutory
Provisional and not intended to be final. This usually refers to court orders which are temporary.

hold harmless
A promise to pay any costs or claims which may result from an agreement. Quite often this is part of a settlement agreement, in which one party is concerned that there might be unknown lawsuits or claims stemming from the situation, so the other party agrees to cover them.

holdover tenancy
The situation when a tenant of real estate continues to occupy the premises without the owner's agreement after the original lease or rental agreement between the owner (landlord) and the tenant has expired. The tenant is responsible for payment of the monthly rental at the existing rate and terms, which the landlord may accept without admitting the legality of the occupancy. A holdover tenant is subject to a notice to quit (get out) and, if he/she does not leave, to a lawsuit for unlawful detainer.

i.e.
Abbreviation for id est, which is Latin for "that is" or "that is to say." It is used to expand or explain a general term as in "his children (i.e. Matthew, Mark, Luke and Joan)." It should not be confused with "e.g.," which means "for example."

implied consent
Consent when surrounding circumstances exist which would lead a reasonable person to believe that this consent had been given, although no direct, express or explicit words of agreement had been uttered. Examples: a) a "contract" based on the fact that one person has been doing a particular thing and the other person expects him/her to continue; b) the defense in a "date rape" case in which there is a claim of assumed consent due to absence of protest or a belief that "no" really meant "yes," "maybe" or "later."

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indemnity
The act of making someone "whole" (give equal to what they have lost) or protected from (insured against) any losses which have occurred or will occur.

installment contract
An agreement in which payments of money, delivery of goods or performance of services are to be made in a series of payments, deliveries or performances, usually on specific dates or upon certain happenings. One significance is that failure to pay an installment when due is a breach in which damages can be assessed based on the portion which has not been paid, and is an excuse for the other party not to perform further. In many installment contracts, failure to make a payment gives the seller of an article the right to repossess (take it back).

judgment debtor
The losing defendant in a lawsuit who owes the amount of the judgment to the winner.

jurisdiction
The authority given by law to a court to try cases and rule on legal matters within a particular geographic area and/or over certain types of legal cases. It is vital to determine before a lawsuit is filed which court has jurisdiction. State courts have jurisdiction over matters within that state, and different levels of courts have jurisdiction over lawsuits involving different amounts of money.

landlord's lien
The right of a landlord to sell abandoned personal property left on rented or leased premises by a former tenant to cover unpaid rent or damages to the property. However, to exercise this lien the landlord must carefully follow procedures which differ in each state, but generally require written notice to the ex-tenant and a public sale.

latent defect
A hidden flaw, weakness or imperfection in an article which a seller knows about, but the buyer cannot discover by reasonable inspection. It includes a hidden defect in the title to land, such as an incorrect property description. Generally, this entitles the purchaser to get his/her money back (rescind the deal) or get a replacement without a defect on the basis of "implied" warranty of quality that a buyer could expect ("merchantability"). Even an "as is" purchase could be rescinded if it could be shown the seller knew of the flaw.

loss of bargain
The inability to complete a sale or other business deal, caused by another's breach of contract, intentional interference with one's business, negligence or some other wrongdoing. The amount of monetary damages resulting from this loss can be determined in a lawsuit.

material representation
A convincing statement made to induce someone to enter into a contract to which the person would not have agreed without that assertion. Thus, if the material representation proves not to be true or to be misleading, the contract can be rescinded or cancelled without liability.

mitigation of damages
The requirement that someone injured by another's negligence or breach of contract must take reasonable steps to reduce the damages, injury or cost, and to prevent them from getting worse. Thus, a person claiming to have been injured by another motorist should seek medical help and not let the problem worsen. If a tenant moves out before a lease has expired, a landlord must make reasonable attempts to re-let the property and take in some rents (which are credited against the amount remainder of the lease) to mitigate his/her loss.

negligence
Failure to exercise the care toward others which a reasonable or prudent person would do in the circumstances, or taking action which such a reasonable person would not. Negligence is accidental as distinguished from "intentional torts" (assault or trespass, for example) or from crimes, but a crime can also constitute negligence, such as reckless driving. Negligence can result in all types of accidents causing physical and/or property damage, but can also include business errors and miscalculations, such as a sloppy land survey. In making a claim for damages based on an allegation of another's negligence, the injured party (plaintiff) must prove: a) that the party alleged to be negligent had a duty to the injured party-specifically to the one injured or to the general public, b) that the defendant's action (or failure to act) was negligent-not what a reasonably prudent person would have done, c) that the damages were caused ("proximately caused") by the negligence. An added factor in the formula for determining negligence is whether the damages were "reasonably foreseeable" at the time of the alleged carelessness. If the injury is caused by something owned or controlled by the supposedly negligent party, but how the accident actually occurred is not known (like a ton of bricks falls from a construction job), negligence can be found based on the doctrine of res ipsa loquitor (Latin for "the thing speaks for itself"). Furthermore, in six states (Alabama, North Carolina, South Carolina, Tennessee, Virginia, Maryland) and the District of Columbia, an injured party will be denied any judgment (payment) if found to have been guilty of even slight "contributory negligence" in the accident. This archaic and unfair rule has been replaced by "comparative negligence" in the other 44 states, in which the negligence of the claimant is balanced with the percentage of blame placed on the other party or parties ("joint tortfeasors") causing the accident. In automobile accident cases in 16 states the head of the household is held liable for damages caused by any member of the family using the car under what is called the "family purpose" doctrine. Nine states (California, New York, Michigan, Florida, Idaho, Iowa, Minnesota, Nevada, Rhode Island) make the owner of the vehicle responsible for all damages caused by a driver given permission to use the car, whether or not the negligent driver has assets or insurance to pay a judgment. Eight states (Connecticut, Massachusetts, New Jersey, Oregon, Rhode Island, Tennessee, Virginia, West Virginia) allow the owner to rebut a presumption that the driver was authorized to use the car. Negligence is one of the greatest sources of litigation (along with contract and business disputes) in the United States.

partial breach
The failure to meet a term of a contract which is so minimal that it does not cause the contract to fail or justify breach (breaking the contract) by the other contracting party. A partial breach can be remedied (made up) by a small reduction in payment or other adjustment. Example: a landlord promises to rent an apartment furnished, and when the tenants move in some furnishings are not there. The landlord may lower the rent temporarily until he/she can bring in the missing or expected items.

quiet title action
A lawsuit to establish a party's title to real property against anyone and everyone, and thus "quiet" any challenges or claims to the title. Such a suit usually arises when there is some question about clear title, there exists some recorded problem (such as an old lease or failure to clear title after payment of a mortgage), an error in description which casts doubt on the amount of property owned, or an easement used for years without a recorded description. An action for quiet title requires description of the property to be "quieted," naming as defendants anyone who might have an interest (including descendants-known or unknown- of prior owners), and the factual and legal basis for the claim of title. Notice must be given to all potentially interested parties, including known and unknown, by publication. If the court is convinced title is in the plaintiff (the plaintiff owns the title), a quiet title judgment will be granted which can be recorded and thus provide legal "good title." Quiet title actions are a common example of "friendly" lawsuits in which often there is no opposition.

ratification
Confirmation of an action which was not pre-approved and may not have been authorized, usually by a principal (employer) who adopts the acts of his/her agent (employee).

reasonable
In law, just, rational, appropriate, ordinary or usual in the circumstances. It may refer to care, cause, compensation, doubt (in a criminal trial), and a host of other actions or activities.

reasonable wear and tear
Commonly used in leases to limit the tenant's responsibility (and therefore liability to repair or repaint) upon leaving. It is subjective, but the considerations include the length of time of tenancy (the longer the occupancy the more wear and tear can be expected), the lack of unusual damage such as a hole in the wall or a broken window, and the condition of the premises when the tenant moved in. This is often a source of conflict between landlord and tenant, particularly when there is a deposit for any damages "beyond reasonable wear and tear."

receivership
The process of appointment by a court of a receiver to take custody of the property, business, rents and profits of a party to a lawsuit pending a final decision on disbursement or an agreement that a receiver control the financial receipts of a person

who is deeply in debt (insolvent) for the benefit of creditors. Thus, the term "the business is in receivership."

revocation
Mutual cancellation of a contract by the parties to it. 2) withdrawing an offer before it is accepted ("I revoke my offer"). 3) cancelling a document before it has come into legal effect or been acted upon, as revoking a will. 4) to recall a power or authority previously given, as cancelling a power of attorney or cancelling a driver's license due to traffic offenses.

save harmless
Also called hold harmless, to indemnify (protect) another from harm or cost. 2) to agree to guarantee that any debt, lawsuit or claim which may arise as a result of a contract or contract performance will be paid or taken care of by the party making the guarantee. Example: the seller of a business agrees to "save harmless" the buyer from any unknown debts of the business.

security interest
Generic term for the property rights of a lender or creditor whose right to collect a debt is secured by property.

service of process
The delivery of copies of legal documents such as summons, complaint, subpoena, order to show cause (order to appear and argue against a proposed order), writs, notice to quit the premises and certain other documents, usually by personal delivery to the defendant or other person to whom the documents are directed. So-called "substituted service" can be accomplished by leaving the documents with an adult resident of a home, with an employee with management duties at a business office or with a designated "agent for acceptance of service" (often with name and address filed with the state's Secretary of State), or, in some cases, by posting in a prominent place followed by mailing copies by certified mail to the opposing party. In certain cases of absent or unknown defendants, the court will allow service by publication in a newspaper. Once all parties have filed a complaint, answer or any pleading in a lawsuit, further documents usually can be served by mail or even FAX.

servient estate
Real property which has an easement or other use imposed upon it in favor of another property (called the "dominant estate"), such as right of way or use for access to an adjoining property or utility lines. The property giving usage is the servient estate, and the property holding usage of the easement is the dominant estate.

setoff
A claim by a defendant in a lawsuit that the plaintiff (party filing the original suit) owes the defendant money which should be subtracted from the amount of damages claimed by plaintiff. By claiming a setoff the defendant does not necessarily deny the plaintiff's original demand, but he/she claims the right to prove the plaintiff owes him/her an amount of money from some other transaction and that the amount should be deducted from the plaintiff's claim.

solvency
Having sufficient funds or other assets to pay debts. 2) having more assets than liabilities (debts). The contrast is "insolvency," which may be a basis for filing a petition in bankruptcy.

specific performance
The right of a party to a contract to demand that the defendant (the party who it is claimed breached the contract) be ordered in the judgment to perform the contract. Specific performance may be ordered instead of (or in addition to) a judgment for money if the contract can still be performed and money cannot sufficiently reward the plaintiff. Example: when a defendant was to deliver some unique item such as an art- work and did not, a judge may order the defendant to actually deliver the artwork.

statute of frauds
Law in every state which requires that certain documents be in writing, such as real property titles and transfers (conveyances), leases for more than a year, wills and some types of contracts. The original statute was enacted in England in 1677 to prevent fraudulent title claims.

statute of limitations
A law which sets the maximum period which one can wait before filing a lawsuit, depending on the type of case or claim. The periods vary by state. Federal statutes set the limitations for suits filed in federal courts. If the lawsuit or claim is not filed before the statutory deadline, the right to sue or make a claim is forever dead (barred). The types of cases and statute of limitations periods are broken down among: personal injury from negligence or intentional wrongdoing, property damage from negligence or intentional wrongdoing, breach of an oral contract, breach of a written contract, professional malpractice, libel, slander, fraud, trespass, a claim against a governmental entity (usually a short time), and some other variations. In some instances a statute of limitations can be extended ("tolled") based on delay in discovery of the injury or on reasonable reliance on a trusted person (a fiduciary or confidential adviser who has hidden his/her own misuse of someone else's funds or failure to pay). A minor's right to bring an action for injuries due to negligence is tolled until the minor turns 18 (except for a claim against a governmental agency). There are also statutes of limitations on bringing criminal charges, but homicide generally has no time limitation on prosecution. The limitations (depending on the state) generally range from 1 to 6 years except for in Rhode Island, which uses 10 years for several causes of action. Louisiana has the strictest limitations, cutting off lawsuit rights at one year for almost all types of cases except contracts. California also has short periods, usually one year, with two years for most property damage and oral contracts and four years for written contracts. There are also statutes of limitations on the right to enforce a judgment, ranging from five to 25 years, depending on the state. Some states have special requirements before a lawsuit can be filed, such as a written warning to a physician in a claim of malpractice, making a demand upon a state agency and then waiting for the claim to be denied or ignored for a particular period, first demanding a retraction before filing a libel suit, and other variations. Vermont protects its ski resorts by allowing only one year for filing a lawsuit for injuries suffered in a skiing accident as an exception to that state's three-year statute of limitations for other personal injuries.

subordination agreement
A written contract in which a lender who has secured a loan by a mortgage or deed of trust agrees with the property owner to subordinate the first loan to a new loan (thus

giving the new loan priority in any foreclosure or payoff). The agreement must be acknowledged by a notary so it can be recorded in the official county records.

subpoena duces tecum
(suh-pea-nah dooh-chess-take-uhm or dooh-kess-take-uhm): a court order requiring a witness to bring documents in the possession or under the control of the witness to a certain place at a certain time. This subpoena must be served personally on the person subpoenaed. It is the common way to obtain potentially useful evidence, such as documents and business records, in the possession of a third party. A subpoena duces tecum must specify the documents or types of documents (e.g. "profit and loss statements of ABC Corporation for years 1987 through 1995, all correspondence in regard to the contract between ABC Corporation and Merritt") or it will be subject to an objection that the request is "too broad and burdensome."

substantial performance
In the law of contracts, fulfillment of the obligations agreed to in a contract, with only slight variances from the exact terms and/or unimportant omissions or minor defects. A simple test is whether the omission, variance or defect can be easily compensated for with money. Examples: a) the contract is for supplying 144 pumps for $14,400, and only 140 were delivered; b) the real property was supposed to be 80 acres and only contained 78 acres. This constitutes substantial performance unless the loss of two acres is crucial to the value of the property (e.g. reduced the number of lots able to be subdivided); c) the product was to be delivered on October 25 and did not arrive until November 5. This constitutes substantial performance unless the product was required for a Halloween sale.

surety
A guarantor of payment or performance if another fails to pay or perform, such as a bonding company which posts a bond for a guardian, an administrator or a building contractor. Most surety agreements require that a person looking to the surety (asking for payment) must first attempt to collect or obtain performance from the responsible person or entity.

temporary injunction
A court order prohibiting an action by a party to a lawsuit until there has been a trial or other court action. A temporary injunction differs from a "temporary restraining order" which is a short-term, stop-gap injunction issued pending a hearing, at which time a temporary injunction may be ordered to be in force until trial. The purpose of a temporary injunction is to maintain the status quo and prevent irreparable damage or change before the legal questions are determined. After the trial the court may issue a "permanent injunction" (making the temporary injunction a lasting rule) or "dissolve" (cancel) the temporary injunction.

tort
From French for "wrong," a civil wrong or wrongful act, whether intentional or accidental, from which injury occurs to another. Torts include all negligence cases as well as intentional wrongs which result in harm. Therefore tort law is one of the major areas of law (along with contract, real property and criminal law) and results in more civil litigation than any other category. Some intentional torts may also be crimes, such as assault, battery, wrongful death, fraud, conversion (a euphemism for theft) and trespass on property and form the basis for a lawsuit for damages by the injured party. Defamation, including intentionally telling harmful untruths about another-either by print or broadcast (libel) or orally (slander)-is a tort and used to be a crime as well.

unconscionable
Referring to a contract or bargain which is so unfair to a party that no reasonable or informed person would agree to it. In a suit for breach of contract, a court will not enforce an unconscionable contract (award damages or order specific performance) against the person unfairly treated, on the theory that he/she was misled, lacked information or signed under duress or misunderstanding. It is similar to an "adhesion contract," in which one party has taken advantage of a person dealing from weakness.

unfair competition
Wrongful and/or fraudulent business methods to gain an unfair advantage over competitors, including: a) untrue or misleading advertising, b) misleading customers by imitative trademark, name or package, c) falsely disparaging another's product. Although state laws vary, unfair competition is the basis for a legal action (suit) for damages and/or an injunction to halt the deceptive practices against an unfair competitor if the practices tend to harm one's business.

unjust enrichment
A benefit by chance, mistake or another's misfortune for which the one enriched has not paid or worked and morally and ethically should not keep. If the money or property received rightly should have been delivered or belonged to another, then the party enriched must make restitution to the rightful owner. Usually a court will order such restitution if a lawsuit is brought by the party who should have the money or property

venue
The proper or most convenient location for trial of a case. Normally, the venue in a criminal case is the judicial district or county where the crime was committed. For civil cases, venue is usually the district or county which is the residence of a principal defendant, where a contract was executed or is to be performed, or where an accident took place. However, the parties may agree to a different venue for convenience (such as where most witnesses are located). Sometimes a lawsuit is filed in a district or county which is not the proper venue, and if the defendant promptly objects (asks for a change of venue), the court will order transfer of the case to the proper venue. Example: a promissory note states that any suit for collection must be filed in Washington County, Indiana, and the case is filed in Lake County, Indiana. In high profile criminal cases the original venue may be considered not the best venue due to possible prejudice stemming from pre-trial publicity in the area or public sentiment about the case which might impact upon potential jurors. For these various reasons either party to a lawsuit or prosecution may move (ask) for a change of venue, which is up to the discretion of a judge in the court where the case or prosecution was originally filed. Venue is not to be confused with "jurisdiction," which establishes the right to bring a lawsuit (often anywhere within a state) whether or not it is the place which is the most convenient or appropriate location.

vicarious liability
Sometimes called "imputed liability," attachment of responsibility to a person for harm or damages caused by another person in either a negligence lawsuit or criminal prosecution. Thus, an employer of an employee who injures someone through negligence while in the scope of employment (doing work for the employer) is vicariously

liable for damages to the injured person. In most states a participant in a crime (like a hold-up) may be vicariously liable for murder if another member of the group shoots and kills a shopkeeper or policeman.

waiver
The intentional and voluntary giving up of something, such as a right, either by an express statement or by conduct (such as not enforcing a right). The problem which may arise is that a waiver may be interpreted as giving up the right to enforce the same right in the future. Example: the holder of a promissory note who several times allows the debtor to pay many weeks late does not agree to waive the due date on future payments. A waiver of a legal right in court must be expressed on the record.

wrongful termination
A right of an employee to sue his/her employer for damages (loss of wage and "fringe" benefits, and, if against "public policy," for punitive damages). To bring such a suit the discharge of the employee must have been without "cause," and the employee a) had an express contract of continued employment or there was an "implied" contract based on the circumstances of his/her hiring or legitimate reasons to believe the employment would be permanent, b) there is a violation of statutory prohibitions against discrimination due to race, gender, sexual preference or age, or c) the discharge was contrary to "public policy" such as in retribution for exposing dishonest acts of the employer. An employee who believes he/she has been wrongfully terminated may bring an action (file a suit) for damages for discharge, as well as for breach of contract, but the court decisions have become increasingly strict in limiting an employee's grounds for suit.

Pocket Law - What Business Executives Should Know
Vol. 1 - How is an "agreement" different from a "contract"?

An "agreement" occurs when two people agree on something. You don't need anything written. It could be a handshake, a wink, a nod, or a glance. All that matters is that the two people understood the same thing. For example, say you're in a bid meeting. You hold up a box of chocolates that tells the procurement officer that the sweets are hers if she awards the bid to you. She winks back letting you know it's a deal. Do you have an agreement? Yes, because you both have a "meeting of the minds" about a give and take. But the next day, you learn that she awarded the bid to a Cisco guy who gave her a bouquet of flowers with a smile. To pour salt on open wound, she kept the chocolates and shared them with the Cisco guy! Has she breached your agreement? Yes. Can you prove it? No, because you have nothing to evidence your agreement. You can't even get the chocolates back. This is where a contract comes into play. A contract is the written instrument that proves the terms of the agreement. This is why auditors require contracts to evidence our sales. It allows us to show what exactly was agreed upon. What was to be sold? How much was to be paid? When and where was the equipment to be installed? What warranties were provided? What damages are available? The paper that contains the details of the agreement is called the CONTRACT.

Does this mean that next time you should make a contract with the procurement officer obligating her to award you the bid? No, that would be "Bid Rigging", which will be the topic of the next Pocket Law.

Pocket Law - What Business Executives Should Know
Vol. 1.2 - Bid Rigging

Bid rigging is a criminal offense, punishable by penalties and fines for the Company and imprisonment for the individual(s) involved. It's simple enough to say "Just don't do it !" But understanding the difference between "bid rigging" and "bid positioning" can help you win the deal and let others go to jail trying.

The first thing to know is that bid laws apply only to "public" projects. The determining factor is the source of the funding, and not the customer. Hence, an RFP issued by ABC Construction Co. as part of a government funded transportation project will be subject to bid laws, even though the customer issuing the bid is a private company. Next, there's no universal proscription against bid rigging (other than don't bribe or threaten bodily harm). This is because the particular circumstances surrounding each RFP are always different. Often times it's hard to know when you've skimmed the line or crossed it. But as a guiding principle, keep in mind that the purpose of an RFP is to stage a FAIR and HONEST competition to get the best product at the best price. This means you should focus on highlighting or supporting the merits of your proposal and avoid any other attempt to influence the customer or conspire with other vendors. So, showing the consultant or project manager the results of a lab test from PC Magazine is bid positioning, but giving them a free subscription to the magazine is bid rigging. You can help resellers configure their proposals and give your opinion on their individual chances of winning, but you cannot dictate which reseller should or should not bid. It's ok to discuss the bid proposal with the consultant or project manager over lunch, but it's not ok to buy their lunch. And this goes both ways. The consultant or project manager should not be taking or asking for anything that has nothing to do with evaluating the merits of the bids (or express personal bias). If a vendor or the customer violates a bid law, the other bidders can file a "bid protest" to overturn the award or require a re-bid. (Note that bid protests must be filed within short time frames, so report any suspicion to Legal as soon as possible.)

If a project is not funded by the government, does bid rigging become fair play? It's true that bid laws won't apply, and you would have broader latitude to compete and woo the customer to win the business (e.g. wine and dine, show them a good time). BUT there are limits - - remember that your conduct must always be ethical and legal, which means complying with our Code of Business Conduct and being accurate on

any information relayed to the customer (e.g. don't say anything about us or the competitor that isn't true). When in doubt, check with Legal.

For those involved with sales outside of the U.S., stay tuned for a review of the Foreign Corrupt Practices Act (FCPA) in the next issue of Pocket Law.

Pocket Law - What Business Executives Should Know
Vol. 1.3 - Foreign Corrupt Practices Act (FCPA)

You don't hear it much, but it happens. In August 2003, the SEC and the U.S. Justice Dept. began investigating Lucent for allegedly bribing Saudi Arabia officials to get favorable treatment in its business dealings in that country. A massive audit of Lucent's business practices revealed more bribes in China, which in turn prompted a separate investigation by the Chinese government. The people involved at Lucent were fired and the company is currently facing ongoing investigations in the U.S. and China. The SEC and the Justice Dept. are also currently investigating IBM for alleged bribes made in Korea. A separate investigation in Korea resulted in IBM being fined and debarred from doing any business with the Korean government for a year. The IBM employees involved were prosecuted and sentenced to prison.

Why does the U.S. government make such a fuss? Much like the Enron/WorldCom debacle that brought on SOX, hundreds of U.S. companies in the mid-1970's were caught bribing foreign officials to win overseas business. The U.S. Congress saw this practice as corrupt and passed the "Foreign Corrupt Practices Act" (FCPA), which makes it a federal crime for any person or company in the U.S. to make a payment to a foreign official for the purpose of securing business. This applies to any affiliate of a U.S. company. For instance, if a Mitel EMEA employee bribes an official somewhere in Asia to help out Mitel AP, the U.S. government can (and will) prosecute Mitel USA by virtue of the fact that Mitel EMEA is related to the U.S. subsidiary. And the penalties are stiff - - substantial fines for the company and imprisonment for the individuals involved. Does this mean that all payments to a foreign official are illegal? Not necessarily. The FCPA allows a narrow exemption for "grease" payments that facilitate what is otherwise a routine government action. For example, if a company ships products to Country X and the customs official there is slow in processing the papers, it may be ok to pay a "fee" to expedite the process. The general test is whether the official is doing what they should be doing anyway and the payment is merely facilitating the action. But beware that the test is very fact specific and the laws of the foreign country must also be considered, so consult with Legal before offering any side payments. What if a consultant or sales agent working for Mitel in a foreign country bribes an official there without telling us? Mitel will still be held responsible unless we screened the consultant or agent under U.S. guidelines. Again, consult with Legal before using a foreign-based consultant or agent to be sure we're protected against unauthorized behavior.

Now that the FCPA is a bit less *foreign* (punned), you might wonder what all the fuss is about SOX. We'll unravel that one in the next issue of Pocket Law.

Pocket Law - What Business Executives Should Know
Vol. 1.4 - SOX Explained

The term "SOX" is common today in the corporate world - - you hear it all the time. But what is it really all about? Well, let's start with the name. "SOX" is short for the "Sarbanes-Oxley Act of 2002" which is named after Paul Sarbanes (U.S. Senator from Maryland) and Michael Oxley (House of Representative from Ohio) who together co-sponsored the legislation in Congress. It was prompted by the massive corporate misconduct that came to light in the wake of the Enron/WorldCom scandals. SOX is a complex law (an "act" is the same as "law") with many rules and technical requirements that are too numerous to discuss here in detail. In a nutshell, it requires companies to implement certain safeguards called "internal controls" to assure accuracy and integrity in the company's financial reporting. Its two basic purposes are to (1) deter corporate fraud and (2) ensure that companies provide thorough and accurate information about its finances and risk exposures so that the general public can make informed decisions about investing (or divesting) in the company. Compliance with SOX must be demonstrated, monitored and reported. This is why we go through "audits" to verify that the rules are being followed and the requirements are being met. How does this affect our business operations outside of the U.S.? Like many U.S. laws (i.e. FCPA), a U.S.-based company will be held responsible for the acts of its foreign subsidiaries and affiliates.

If all of this sounds a bit onerous and burdensome, well, it is and many companies have complained about the high cost and drain on resources to meet compliance standards. But the law remains, and the rules and requirements are strictly enforced by the SEC (Securities and Exchange Commission), the DOJ (Department of Justice) and zealous State Attorneys General (e.g. Eliot Spitzer in New York). So who at Mitel is actually responsible for making sure we comply? Everyone. At the highest level, the CEO and CFO are required to certify compliance under threat of severe penalties ($5M fine and 20 yrs in prison). But the responsibility is not limited to them alone. Each employee along the business line plays a role in adhering to the rules and requirements that relate to their job function - - at minimum, this means following company procedures, policies and codes of conduct, and also reporting any violations.

Look for the next issue of Pocket Law: "LOIs and MOUs - When to Use Them and Why."

Pocket Law - What Business Executives Should Know
Vol. 1.5 - LOIs and MOUs: When to Use Them and Why.

Letters of Intent ("LOIs") and Memorandums of Understanding ("MOUs") both serve as valuable tools in negotiating business transactions. These relatively simple agreements are designed to help facilitate negotiations between the company and its potential partners and/or customers with basic overall terms and conditions that will hopefully lead to final agreements. At a basic level, they provide mutual assurance of each party's "intents" and "understandings" by laying out their respective expectations and any preconditions for engagement. They can also contain more specific language about the general framework of the intended relationship or transaction and establish the parameters and rules for the negotiations (i.e. the general scope of the deal and the time-frame within which the parties must complete discussions). In most cases, LOIs and MOUs are used for complex or lengthy transactions where both parties will want assurance that there is a certain level of a "meeting of the minds" before expending considerable time and effort to negotiate. When used appropriately, LOIs and MOUs can provide a solid basis for an ultimate agreement as well as comfort to the respective parties in a negotiation that the other party is serious about the engagement. However, keep in mind that LOIs and MOUs are enforceable agreements. Although the facts and circumstances surrounding each LOI or MOU are always unique to the transaction, there are some general questions that should be considered prior to executing an LOI or MOU:

(1) Is there a need to establish a written understanding of the general framework for the contemplated transaction? If the transaction is relatively simple and straightforward, such as a sale of a specific number of products to a customer, then an LOI or MOU is probably not necessary. On the other hand, an LOI or MOU would be appropriate for a large, complex transaction that is being negotiated over a long period of time such as a joint venture or multi-year supply agreement. In this instance, each party may have a basic framework in mind, but would require more time to hammer out the complex terms of such a transaction before reaching final agreement. An LOI or MOU will help to establish the framework of the terms and conditions.

(2) What is the ultimate expectation of the transaction and the basic terms you can agree upon with the other party? This is a very important question. An LOI or MOU should only contain the basic key terms on which there is already full agreement between the parties. Inserting provisions that the parties will likely want or need to modify during negotiations defeats the purpose and function of an LOI or MOU. For example, a joint venture is contemplated for sales of products in

Country X, that fact can be included in the MOU or LOI so that there are no misunderstanding or confusion later in the negotiations where key points.

(3) How committed are you to the transaction and how much time do you want to allow for the transaction to be concluded? LOIs and MOUs can contain varying levels commitments. If the transaction is critical to the Company and/or the other party, a commitment to negotiate a final agreement in good faith may be appropriate. On the other hand, if the transaction is still not well defined or if the consequences of not ultimately entering into the transaction are not significant (e.g. there are other potential parties with which to do the transaction), then it may be wiser to keep the commitment at minimum (i.e. "to hold discussions").

(4) How long do you want the effort to continue? The MOU or LOI should not be effective for period longer than what is reasonably required to complete the contemplated transaction. An open-ended LOI or MOU may commit the company to negotiations with another party long after the economic justification for the transaction has lapsed.

Because LOIs and MOUs are enforceable agreements with legal consequences, they should be treated like any other contract. When in doubt, consult with Legal to be sure that the language of the LOI or MOU is consistent with your business objections and expectations.

Deirdre C. Brekke
ACC Annual Meeting 2006

SALES CONTRACT CHECKLIST

- ☐ 1. Identify parties
- ☐ 2. Identify goods or service to be sold
- ☐ 3. Purchase Commitment (Exclusive or preferred supplier? Requirements? Minimums?)
- ☐ 4. Term (renewable? Dependant on quantity purchased/completion of project? Indefinite?)
- ☐ 5. Recite consideration/payment (pricing adjustment mechanism? Reference published # (CPI); Check your formula, provide an example)
- ☐ 6. If goods:
  - Delivery terms
  - Retention of security interest

  If services:
  - invoicing (how frequently?)
  - hourly or fixed price?
  - Identified resources (personnel)—consider whether vendor can substitute or buyer has to approve
- ☐ 7. Exclusivity/non-compete for vendor?
- ☐ 8. Warranties / Representations
  - Title
  - Specifications
  - FDA or other regulatory (catch – all: comply with applicable law)
  - Non-infringement (Do you give a non-infringement warranty or only indemnify buyer for infringement claims?)
- ☐ 9. Default/breach (materiality?)
  - Notice and cure (different time frame for payment defaults)
- ☐ 10. Remedies for default/breach

- Replacement or refund
- Termination of contract
- Interest/price adjustment for late pay
- Seller may withdraw extension of credit or demand deposit

☐ 11. Indemnity for Buyer-breach of reps and warranties, negligence, infringement

☐ 12. Indemnity for Seller-negligence; violation of exclusivity; if using Buyer's trademarks, copyrights or IP, infringement

☐ 13. Procedure for indemnification claims
- Notice for indemnity claims (required or optional)
- Can indemnitee participate in defense?

☐ 14. Limitation of liability / damages

☐ 15. No consequential / indirect damages
- Consider defining (no lost profits; is cost of cover a consequential or indirect damage?)
- Define responsibility for costs associated with product recalls?

☐ 16. Intellectual property – is there a license? Right to use trademark?

☐ 17. Confidentiality – one-way or two-way?

☐ 18. Force Majeure – allocation of product; does contract terminate after Force Majeure has continued for a time?

☐ 19. Governing law/exclusive jurisdiction, venue

☐ 20. Termination

☐ 21. Notices
☐ 22. Assignment
☐ 23. Dispute Resolution-mediation, mandatory arbitration?
☐ 24. Independent Contractor
☐ 25. Entire Agreement
☐ 26. Non-Waiver
☐ 27. Severability
☐ 28. Survival of provisions