



202: Teaching Contract Law to Nonlawyers II

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Faculty Biographies

Eileen Morgan Johnson

Eileen Morgan Johnson is general counsel of the National Wildlife Federation (“NWF”) in Reston, Virginia. In this capacity, she oversees the provision of legal services to NWF and four other related corporations including eNature.com, Inc., a for-profit internet company.

Prior to assuming her current position as general counsel and former position as associate general counsel at NWF, Ms. Johnson was in private practice in Virginia and California specializing in domestic relations and estate planning.

Ms. Johnson currently serves on the board of governors of the Corporate Counsel Section of the Virginia State Bar.

Ms. Johnson received a BA from the College of William and Mary and a JD from Brigham Young University.

Jack O'Neil

Jack O'Neil is the general counsel and secretary for The Western Group, Inc. Western operates a specialty contracting business nationwide through subsidiaries with branch offices in 36 cities. Western's work involves many aspects of masonry and concrete restoration and waterproofing of commercial, public, and institutional structures.

Prior to joining Western, Mr. O'Neil was affiliated with the law firm of Armstrong Teasdale Schlafly & Davis in St. Louis. He has served as an instructor and adjunct assistant professor at the Saint Louis University School of Law.

Mr. O'Neil is a member of the ABA's Forum on the Construction Industry and ACCA. He also served as president of ACCA's St. Louis Chapter.

Mr. O'Neil has a BA from DePauw University and a JD *cum laude* from Saint Louis University School of Law.

Norman Wain

Norman Wain is the vice president—legal affairs at The Finish Line, Inc., a leading athletic retailer that specializes in footwear, apparel, and accessories, headquartered in Indianapolis. His responsibilities include negotiating lease points for retail stores in various nation-wide shopping centers, drafting and reviewing departmental contracts, policies, and marketing materials, supervising outside counsel and legal support employees, and assisting the general counsel in litigation and administrative hearings.

Prior to joining The Finish Line, Inc., he worked in the business & legal affairs department at Writers & Artists Agency, Inc., a Los Angeles talent agency. Mr. Wain spent some time in private practice (litigation), and he also worked in-house at BigShot Films International.

He is presently a member of the California and American Bar Associations, the International Council of Shopping Centers, as well as ACCA. Mr. Wain is also an adjunct professor at the University of Indianapolis.

He received his BA from the University of California at Berkeley, along with *Phi Beta Kappa* Honors, and his JD from the Pepperdine University School of Law.

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At a recent luncheon sponsored by the Washington Metropolitan Area chapter of ACCA (WMACCA), a representative sample of general counsels were asked to talk on a variety of subjects. As they talked, I took notes on some of the sage advice they were offering. While not all directly addressed the issue of teaching contract law to nonlawyers, they did offer some very good advice on dealing with our nonlawyer clients that can be useful in this context.

These pearls of wisdom were:

“Manage the expectations of your clients.” Joan Wise, General Counsel, AARP.

“Don’t let the perfect get in the way of the good. Sometimes a good contract will suffice.” Diana M. Daniels, Vice President, General Counsel & Secretary, The Washington Post Company.

“Give clear, crisp answers. Don’t go off on the legal ends of the spectrum.” Joseph M. Titlebaum, Senior Vice President, General Counsel & Secretary, XM Satellite Radio, Inc.

Manage the Expectations of Your Clients.

When working on contracts with your nonlawyer clients, you need to understand what their expectations are in terms of your level of involvement in the contract negotiations and drafting process. Likewise, they need to understand what role you expect them to play in the contract negotiation and drafting process. Once you each know what the other expects from you, it will be easier to work together and you can avoid misunderstandings and delays.

It is important to know your client’s level of expertise with contracts. Do they understand the terminology of contracts? Do they know their business, its terminology and the standards of that industry? Do they have enough of a background to be able to draw on their own experiences of things that have worked or not worked in contracts of the past? Do they have a history with this particular vendor or contractor they want to hire? Have they negotiated contracts with the vendor in the past or had experience in managing contracts between your company and the vendor? You are in the strongest position as a team when your clients know their business and what needs to be accomplished, and you can help them figure out the best way to get there.

Often, once you are familiar with a client’s particular business and level of expertise, you can turn over contract negotiation and even initial drafting to the client. This will make your life easier and your client will understand the contract better because they are the one responsible for

negotiating and drafting it. You can work with your client to identify what role you need to play in reviewing the contract and identifying any areas not covered in their draft before it is signed.

Real life example: About 12 years ago, I worked with our paper buyer to negotiate a new printing contract for our three magazines. We had been with the previous printer for many years and neither one of us had ever negotiated or drafted a printing contract of this magnitude. It was an arduous process taking over six months. I did most of the drafting and the client did most of the negotiating. I advised her on what to say in her contract negotiations with the printer, and she gave me detailed instructions on the terms they had agreed to include in the contract draft. Since that time, we have renewed the contract several times, and a few years ago we altered it substantially due to changes in the printing industry caused by new technologies. The paper buyer was at that time our quality control director for magazine publishing. She not only negotiated, but also drafted the new contract based on our existing one. I spent minimal time reviewing her draft and made only a few minor suggestions for improvement. Through our years of working together, she learned what points needed to be covered in a printing contract and what terms we expected to obtain in negotiations. I learned that she was a competent professional who knows more about the magazine printing business than I will ever know. We both learned that our printer was an exceptional vendor who never tried to pull one over on us and always honored its contractual obligations. Together, we have developed a system of working together that builds on our areas of expertise and allows us to quickly reach a quality final product. She is intimately familiar with the contract because she negotiated and drafted it. Since it is the business person, and not the attorney, who is responsible for day-to-day administration of the contract, this makes great sense.

Unfortunately, not all of our clients are able to negotiate or prepare the initial draft of their contracts. Some may expect to just turn a 30-page contract over to you and expect you to come back in two days with a new version that fully protects your company and gives them all of the terms they want. They expect a "turn key" contract process where they bear no responsibility for negotiating their contracts. While this may work in some companies, our legal department is too small to afford this level of service. Even if we had enough attorneys to do it this way, it is unrealistic to expect the attorneys to be able to read the client's mind or know the client's business sufficiently well to be able to negotiate and draft a good contract. If this is the situation you are faced with, you will need to reeducate your clients as to their role in the contract process. It is for that reason that we started the contract review sheet. (See Appendix 1.) Any contract sent to the legal department is supposed to be accompanied by one of these cover sheets. In it, we ask some basic questions about the contract such as the vendor's name and address and a description of the service or material to be provided. Then we ask questions such as detailed information about the payment terms, a summary of the important points in the contract, and information on the starting and ending dates. The goal is to at least get the client to read the vendor's contract and find the key information. We also ask if they have any questions or any points that they would like to change. Often we find that they have not read the contract at all. If a gentle reminder that they should read the contract (step 1) does not work, then we go to step 2. An attorney reads the contract and sends a detailed memo to the client asking lots of questions about the contract. This usually forces the client to read the contract or at least think about some of the terms. It is a tedious process but it gets the point across that they should read the contract. Sometimes even your most experienced clients need to be reminded of this.

Real life example: Recently one of our offices sent in their lease amendment for renewal. They are in an area with a declining commercial real estate market and their landlord offered them lower rent now if they would agree to amend the contract with an extension. The office manager sent it along with a brief note that only the rent and term of the lease had changed. She had not looked at the lease to see if that was true but had taken the landlord's word for it. In reviewing the lease amendment and comparing it to the existing lease, I discovered that the landlord had changed the allocation of other expenses (additional rent), parking allowance, and a few other terms of importance to us. When this was pointed out to the office manager, she was shocked. She had considered herself to be a savvy businesswoman and thought she had a good relationship with their landlord. She apologized profusely and promised to read all contracts in the future before sending them to legal for review.

When faced with a frustrating situation, some clients' initial reaction may be to terminate the existing contract and enter into a new one with a different vendor for the same services or materials. For them it is a simple thing to tell the legal department that they want to change vendors. They are pushing the job off onto you. You see it for what it really is – hours that will be spent on a contract termination, claims of breach, defense against claims of breach, negotiations and settlements. And that is just on the existing contract. Then you will have to negotiate and draft a contract with a new vendor. You have to weigh your client's expectations to see if they are reasonable. Sometimes all that is needed is an amendment to an existing contract or a negotiation to resolve a current breach situation. This needs to be pointed out to the client who may not have thought through all that is involved in what they had asked you to do.

Real life example: Due to some unique plumbing arrangements, our San Diego office was flooded every weekend by overflows from the dental office upstairs that is open on Saturdays. Goal: To stay in the current office but avoid the great flood every weekend. Solution: Check the lease. What does it say about damage caused to the leased space by other tenants (or faulty plumbing provided by the landlord)? Is this a plumbing problem that the landlord should fix? Is this a problem that the other tenant is not even aware of and can easily fix? A reasonable landlord will work with the two tenants to reach a solution where the flooded tenant neither has to move out nor pay the full cost of changing the plumbing to avoid the weekend floods. We had an urgent need to stop continued water damage in the office or to move out. Circumstances were such that the existing lease could have been terminated. But that would mean finding new space at a good rent in a market where commercial rates had increased significantly since the lease was signed. The staff liked their location near other nonprofit organizations, Balboa Park and the bus stop. The staff was operating at a reduced level due to several vacancies. They would have been pulled off of their primary program delivery tasks to find new space and organize a move. Relocation was not in the best interest of the company. The solution was to negotiate a fix to the problem. The best course of action in this situation was to brief the office manager on the terms of the lease and applicable state and local law, and then give her some pointers on possible ways of solving the problem. The office manager briefed the attorney on the solution that the parties agreed to and it was determined that the lease and its notice and remedies of breach provisions worked as they were intended. The problem was fixed and the client did not have to move to new offices.

Don't Let the Perfect Get in the Way of the Good.

Sometimes as attorneys we forget that our job is not to craft the best, tightest contract ever but to serve the needs of our client. Given the right tools and time, we could all draft brilliant, airtight, model contracts. But is that what our clients need?

When you begin working on a contract, consider how much the contract is worth to your company and allocate your time accordingly. Common sense tells you that you should probably spend more time on the million dollar contracts and less time on the hundred dollar ones. Do not "over lawyer" the product. Keep in mind not only your client's goals but also how much time they have to reach a resolution of the problem.

It is often difficult for attorneys to let go, but sometimes the sheer lack of resources forces you to do this. In our case, a growing contract work load and finite attorneys on staff caused us to establish minimum dollar limits for contracts that had to be reviewed by an attorney. At first the bar was set at \$5,000. Then we raised it to \$10,000. We tell our clients that we will be happy to look at other contracts, but we prefer that they use the form templates we have provided on the company's intranet site whenever possible. These contracts are "fill-in-the-blank" type documents, some with alternative paragraphs they can select. We provide a brief explanation of how they should fill out each paragraph or select among several choices. So long as they stick with the text we have given them, they are good to go without any legal review. If they do want an attorney to review them, we know which parts they can change and a review can normally be done in a few minutes. The reality is that our company has too many contracts at the under \$10,000 value level for four attorneys to handle them from start to finish.

Maybe your client would not word the information in the contract the same way you would, but that is probably okay. Did they get their point across? Is it clear and unambiguous? Would someone not familiar with the negotiations understand what is meant? If you can answer yes to those questions, then while it may not be perfect, it is just fine. Not every contract needs to be great. Sometimes good will do just as well as perfect. And sometimes, a little amendment to an existing contract is all you need.

Real life example: A vendor offered a detailed proposal with many charts and exhibits. The new attorney started to draft a voluminous contract that turned all of the charts and exhibits into textual contract terms. She addressed every conceivable thing that could go wrong and offered multiple solutions to each scenario. The contract grew with each new addition and the cross references were mind numbing. The client complained that he could not understand the contract and could not explain it to the vendor. A senior attorney stepped in and reviewed the draft contract. It probably would have worked if the parties had paid close attention to all of those cross references and terms but it was just too much for them to handle. The senior attorney started from scratch with the vendor's proposal. It fit rather well into a form independent contractor agreement with only minor modifications. All of the charts and exhibits became exhibits to the contract, incorporated by reference. The actual contract (without exhibits) was only about four pages instead of 24. The language was clear and simple enough for the client and vendor to understand. It was not a great contract, but it would do just as well and probably better

under the circumstances as neither the client nor the vendor was inclined to try to figure out what the first draft of the contract said. If they could not understand it, they certainly could not be expected to enforce it.

Give Crisp, Clear Answers to Questions.

We can all remember our own first years of practice – the carefully researched legal memorandum outlining the pros and cons of every potential action a client could take. We not only identified a spectrum of options for the client, but we carefully evaluated each option from all possible perspectives and presented this menu of choices to our client, usually through a senior partner who handled all of the discussions. Now, we all know that practicing in-house is different. You might spend hours researching and writing that memo that sets forth all of the possible options and their consequences, and then your business manager says, “that’s great, but what should I do?” She is expecting you to pick one answer from among the many potential options you have carefully researched and presented!

Welcome to the world of in-house practice. Your client relies on you not only for your legal analysis but also your legal advice. Your advice is something that must be given carefully and thoughtfully. Do not operate in a vacuum. Make sure you understand your client’s business needs. Do not attempt to overwhelm them with the brilliance of your scholarly mind or your dedication to hours of legal research. They just want you to tell them how to solve a problem. You do not need to exhaustively research and present every possible complication that could arise, no matter how remote. What you need to do is give them sound advice based on the facts and circumstances known to you, then explain why you are recommending that course of action. The why is very important here. They will not learn why choice A is better than choice B unless you provide that background information to them. That is part of the learning process your client goes through as they learn to negotiate their own contracts.

First, help your client to identify all of the questions they should be asking. Are they entering into a new contract, trying to modify an existing one, or anxious to terminate an unsatisfactory vendor in favor of a new one? Once you know what the problem is, ask them some simple questions. What are they trying to accomplish? What is the end goal? Sometimes clients get caught up in jargon and it’s not clear what their goal is. Once you know what the problem(s) and the goal(s) are, you can help them solve the problem and meet the goal. No, it is not as simple as it sounds, but that is the general idea. As you help them ask the right questions, you are informally training them to analyze their contractual problems.

Once you know the client’s goals, you can help the client draft a term sheet that he or she can use with the existing contract and all future contracts. A term sheet will help the client analyze any contracts he or she receives from vendors and it will help you in working with the client to draft or review contracts. By using a term sheet, you can identify what terms might be missing in a contract and compare the proposed language, if any, against your standard contract terms. This will help you both to achieve a simple but complete contract that addresses your client’s business needs and your legal needs.

Why Have Someone Other than Attorneys Handle the Contracts?

Sometimes a company can get better results faster and with less complication if someone other than the in-house legal department is involved. That may be surprising to you but if you have much experience with contracts in-house, you will know that it is true. Sometimes just the mention of involving the company's attorney causes negotiations to escalate up the corporate ladder and drag out beyond what is a reasonable time. It inherently raises the stakes and places unnecessary importance on a contract.

Real life example: The office supply vendor has raised their prices yet again and all of the office managers are complaining about going over budget. Goal: To obtain cost effective office supplies for the company. Solution? The best solution may not be to terminate the agreement with the existing vendor and enter into an agreement with a new vendor. Perhaps the best option is to review the existing agreement (arrangement, MOU, terms of the deal, etc.) and find out if a modification would get them to the same result. Questions to ask: How is the quality of their products? Do they deliver on time? Do they have frequent back orders or items out of stock? Do they meet competitor's sale prices? Do they offer you discounts for early payment of their invoices or for meeting minimum order levels? How is their customer service? If everything about this company is fine except for their recent price increase, then maybe a simple negotiation on pricing options is all that is needed. This is something that is better handled by whomever in your company deals with the office supply sales rep on a regular basis than by you. They have a preexisting relationship that is probably at least cordial, if not friendly. If you have no preexisting relationship with this company or the sales rep, and your entrance into negotiations immediately escalates this into something that has to go up the chain at the office supply company, it is less likely that a reasonable solution can be worked out.

How Do You Teach Contract Law to Your Nonlawyer Clients?

There are a number of methods of teaching contract law to nonlawyers in your company. Most companies that allow people other than attorneys to negotiate or write their contracts employ one or more of these methods:

- Classes or seminars taught by members of the law department that cover either the basics of contract law or focus on specific subjects such as negotiation tactics.
- Outside programs at training centers, community colleges or other sites where a staff member takes a class for one to two days and learns the basic elements of contract law, negotiating and drafting.
- Establishing a contracts group of nonattorneys (most likely paralegals or contract specialists) in the purchasing department or some other business unit. These employees review vendor's agreements and prepare basic purchase orders or contracts within given parameters.
- The use of form contracts distributed by a company's intranet, employee manual or other means.
- The use of checklists to assist staff in making sure they cover all of the required elements in reviewing contracts from vendors or other parties.

- Informal training or mentoring where a lawyer pairs up with a nonlawyer and by working on a series of contracts together, the attorney trains the nonlawyer how to review and draft contracts.

At National Wildlife Federation, we have used contract training seminars taught by an attorney from the Office of the General Counsel as well as informal training on a contract-by-contract basis as we work with staff on their contracts. We also have a fairly robust set of materials on the company intranet designed to handle most of the company's minor or routine contracting needs.

Use of Your Company's Intranet for Contracts

I am a big supporter of using your company's intranet site to distribute information and templates for simple contract production. We provide basic educational information about contracts on our intranet in a four-page document titled "Introduction to Contracts at NWF." It covers the basic elements of a contract as well as negotiating, drafting, amending and terminating contracts. It also explains the value of using a company attorney to help with some contracts and how to use the internal contract review process. (See Appendix 2.)

Sample contracts that can be downloaded from our intranet site as Word documents are listed below. Most are "fill-in-the-blank" type documents. A few are more complicated than that. They have instructions for the drafter explaining the options they can select from or details that should be provided at certain points in the contract.

Basic Contract: This template is used with corporations, partnerships or other vendors that do not fit the description of an independent contractor. (See Appendix 3.)

Independent Contractor Basic Contract: This template is used for contracting with individual independent contractors, not corporations, for services. (See Appendix 4.)

Commercial Co-Venture Agreement: This template is used when a for-profit company uses NWF's name to imply that a portion of the sale proceeds is going to NWF.

Licensing Agreement: This template is used when a third party uses an NWF trademark on licensed products.

Public Reports Multi-Party Letter Agreement: When collaborating with other organizations or individuals, this template can be used to negotiate the details of the public report.

Public Reports Contributors Agreement: This template is designed to secure NWF's right to publish contributions from outside authors in an NWF public report.

Confidential Disclosure Agreement: This template is used for non-disclosure of confidential information provided by NWF to a vendor or other party. (See Appendix 5.)

Contract Amendment: This template is used for amending existing contracts. (See Appendix 6.)

Dispute Resolution - Contracts: This template can be used by senior management of both parties to establish how they will resolve contract disputes.

Some of our departments have special needs for contracts that they use on a daily basis. An example is our magazine staff. We publish four magazines and they are constantly buying rights to text, photographs and illustrations. They are also licensing those rights to third parties who wish to reprint selected articles or issues of the magazines. In order to accommodate the special needs of a publisher, we have forms that are intended to cover many of those needs. The forms were developed with input from members of the magazine staff and they have been time tested and modified to reach an end product that everyone finds useful.

Examples of these contracts that are located on our intranet are:

- Independent Contractor's Assignment of Copyright
- Copyright Registration Procedure and Questionnaire
- Photo Permission Process
- Publication Permission Request
- Image Release Form
- Educator Workshop Image Release Form
- Basic Letter Agreement for Specific Photography Assignment
- Photographer Waiver
- One Time Photo Rights - Magazines and Public Reports
- One Time Art Rights - Magazines and Public Reports
- Merchandise Image Permission Form
- NEM Card Program Image Permission Form
- NEM Calendar Publication Permission
- Letter Agreement for NEM Commissioned Art
- Photo Authorization - NWF Print and Internet Catalogs
- Photo/Art/Text Reprint Permission
- Video Duplication/Rebroadcast Permission

Other examples of special needs are permissions for videotaping or using videotape. We make our own promotional and educational videos. We like to use our program participants in these videos. We also like to include film footage that our members and others donate. To make sure that we are adequately protected, we use these forms:

Student Video Permission: Parents sign this form so that NWF can film students on a field trip.

Video Use: People who donate film to NWF sign this form.

The National Wildlife Federation sponsors travel trips and programs for families and teens that involve potentially dangerous activities. We also have writers and photographers traveling the world to prepare stories for our magazines. They are visiting wild places and wild animals,

activities that make our insurance company nervous. We have two release forms that are used by several departments:

Release for Program Participants: A generic release for program participants, including minors, who may be rafting, canoeing, or participating in other potentially dangerous or risky activities hosted by NWF.

Release for Attachment to Contracts: A generic release to be used as an addendum to contracts involving potentially dangerous or risky work.

Some Advice on Using Your Intranet for Contracts

When using your company's intranet to disseminate information about contracts and templates, you need to remember a few points.

1. Review your instructions and forms on a regular basis, at least annually, to make sure they are current.
2. Periodically check with your clients to see if the forms are meeting their needs. Ask if they have needed to make any changes to the forms. They should ask before making any changes, but sometimes clients act independently. If you find that people are changing a form, you should consider revising it to meet your clients' changing needs. You may also need to clarify the instructions for a particular template if you notice any confusion among your clients as to how they should complete it or use it.
3. Review the contract templates that you offer from time to time against your current business needs. Are there any contract types that you have been seeing in increasing numbers that may be ready for a contract template of their own?
4. If your company's address, state of incorporation or other pertinent information changes, be sure to change the forms and remind those who are using the forms to make similar changes to any templates they have downloaded to their computers and use on a regular basis.
5. Remember to periodically offer training classes, in person or by conference call, so that new employees can learn about this resource and how to use it. This is also an excellent forum for eliciting comments about how the contract process in general and your templates in particular are working for your clients. It may also identify specific problem areas or topics for further training.

Some Final Advice From Our Clients

I asked some of our clients what advice they would give to an attorney trying to teach contract law to nonlawyers. These are their responses.

From a magazine editor:

- Don't underestimate how naïve we can be about things that can go wrong.

From our Finance Department:

- Under payment terms, they should include some type of performance milestone.
- Under the term for the final payment, include language to the effect "that final payment will be made upon a review and acceptance of the final product or condition."
- Review the nature of the relationship - specify whether or not it is an employee versus an independent contractor and include in the contract the federal tax ID or social security number.

From our Purchasing Department:

- What are the key terms that should be included with each contract?
- What are specific terms that should be excluded?
- Are there specific things we should be aware of as potential problems and detrimental to the company's interest?
- What can be negotiated and what cannot?
- What are the basic components of a good contract?
- What are the guidelines for indemnification and warranties, renewals, return of equipment?
- Who can sign a contract?
- Can a contract be changed?
- Can a contract be cancelled?

From our Licensing Department:

- Find out how important the deal/relationship is. This will tell the lawyer how far the client is willing to go/ the degree of compromise the client is willing to make in order to get the contract done. This point never gets communicated in a deal memo and will give the lawyer a sense of where they may encounter challenges with the client.
- Find out what the client sees as deal breakers.
- Understand the client's degree of familiarity with the legal issues surrounding the deal/relationship the contract will govern.
- Determine what the client sees as the worst possibly scenario (or the biggest risk)--this may be a different down side(or risk) that needs to be protected than what the attorney might be trying to protect against.
- Understand the real time frame for getting the contract completed. Everyone should be operating under the same set of urgency/expectations.

Perhaps a good place to begin in teaching contract law to nonlawyers is to start with your clients and find out what they would like you to teach them. Good luck!

CONTRACT ROUTING

Contract Title _____ **Date Initiated** _____

Date Needed _____

NWF Originator _____ **Ext.** _____

Dept. _____ **Contract Subject** _____

Person authorized to sign contract

Contract Routing Record
(Use to track who has seen and commented on contract.)

<u>Person Reviewing</u>	<u>Changes Needed</u>	<u>Changes Made</u>	<u>Changes Approved</u>	<u>Approved As Is</u>
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

FINAL REVIEWS

Date

General Counsel _____

Vice President _____

Return Original Contract to: Senior VP of Finance Office

Send Copies of Contract to: _____

1. Contract attached _____ Memo/letter attached _____

2. If contract is already drafted, are there any changes to be made to it?

No _____ Yes _____

Changes (a) noted in memo _____ or (b) marked on draft _____

3. Is there anything that you do not understand or need to discuss with an attorney before deciding if a change is needed?

No: _____ Yes: _____

Questions (a) noted in _____ or (b) marked on draft
memo _____

4. Description of goods or services covered by contract: _____

5. Important terms of contract: _____

6. Term: Beginning: Date _____ OR When signed by both parties _____

Ending: Date _____ Renewal or extension provided _____

7. Price terms: _____

Can price be changed during contract? No _____ Yes _____

8. Are funds budgeted for this contract? No _____ Yes _____

Account No.: _____

9. Other party's full name: _____

Other party's address: _____

Other party's SSN or Taxpayer ID No. _____

Appendix 2

Introduction to Contracts at NWF

What is a contract?

A contract is a promise. In legal terms, it is an agreement that the law will enforce which contains a promise to act or not act in a certain way at some time in the future. A contract can be a lengthy document or it can be a brief proposal, a "letter of intent," a "memorandum of understanding," or even a purchase order. Whatever its form, to be valid, the parties must have bargained, or had a "meeting of the minds," about the purpose and scope of their promises.

Does a contract have to be in writing?

Contracts can be oral or written, but for obvious reasons, written contracts are preferred. Certain types of contracts must be in writing to be enforceable (e.g., contracts for the sale of real estate).

When does a contract go into effect?

To be legally binding, the contract must be signed ("executed") by each party. The person signing must have the authority to do so on behalf of his or her company, otherwise, the contract may not be valid. NWF has a written policy about who can sign contracts of varying dollar amounts. A copy of this Signatory Authorization Policy is available from your department's staff assistant.

How is a contract negotiated and drafted?

Usually, one party comes to the other with a proposal or an idea that will benefit both of them (an "offer"). Over a period of time (days, weeks, or even months), the parties discuss the proposal and offer each other revisions or suggestions about changing the proposal so it would work best for them ("counteroffers"). After all the modifications have been made and each party agrees on all the terms, conditions, and wording of the proposal ("acceptance"), they each sign ("execute") the contract and it goes into effect.

What are the basic parts of a contract?

All contracts, whether long or short, should answer the following questions. This list can also help you in thinking about, negotiating, and drafting a contract, to make sure that the basics have been covered:

1. Who are the parties to the contract? Are they individuals or corporations? What is each party's official legal name and address?

2. What is the purpose of the agreement? Why are the parties doing business with each other? What does NWF expect to get out of the agreement?
3. Who is going to do what? When are they going to do it? Describe what each party is promising to do in as much detail as possible.
4. Is one party going to provide the other with a product or service? Describe the product or service as specifically as possible. Is there a guarantee or warranty for the product or service--will it do what it is supposed to do? What if it doesn't?
5. If the other party is providing NWF with a written product, photo, video, artwork, etc., what rights are you buying? Can NWF use the photo just one time or as many times as needed? Is NWF the only organization that can use the photo or is it available to other groups? Can the artwork be used only in a printed format (magazine, brochure, or newsletter), or can it also be used on NWF's World Wide Web site?
6. How much will the good or service cost? When is the money due? Are installment payments involved? Is there a limit or cap on what one party has to pay? Can you get all or some of the money back if necessary? Under what conditions?
7. How long a period does the contract cover? When does it end? At the end of that time, what happens? Can the agreement be renewed? Is the renewal automatic or do the parties have to agree on whether or not they want to renew? How long is the renewal period?
8. A good contract anticipates potential problems. What happens if one party doesn't do what it is supposed to or is unhappy about the product or service supplied by other party? What other problems can you anticipate occurring? How can they be resolved?

When does a contract terminate?

A contract can be terminated in several ways: The parties can agree to end their relationship, for example, if the contract's purpose has been achieved. Sometimes the contract is terminated because one party cannot, will not, or does not hold up its end of the bargain; in other words, the contract is "breached."

What can be done about a "breach"? What if problems occur during the contract?

In developing a contract or negotiating one, you should realize that the topic of breach, or what can go wrong, is one of the most important issues to consider and discuss before a contract is signed or even drafted. Each party should consider how it might be harmed if the other party doesn't do as it promised, and figure out what type of compensation, whether money or some other remedy, would make up for this harm. Is money an adequate substitute for the harm, for example, in a case when it is easy to buy a replacement product? If so, how much money is enough to obtain a substitute? Are there additional costs of having to start over again and find a

substitute? Is the product or service that is the subject of the contract unique or so unusual that only it will do (e.g., a certain piece of real estate)? If the cost of remedying the harm cannot be figured out in the beginning, can the parties come up with an estimate that would compensate for the damage caused ("liquidated damages")?

In the event that an actual breach of contract does occur, the first thing you should do is read the contract to see what it says about the problem. For example, it may require the unhappy party to inform the other party within a certain time that its performance is not adequate. Or the party causing the problem may not be entitled to be paid if it doesn't fix the problem by a certain time. Depending on the circumstances, you may want to contact the other party and try to resolve the problem informally, or try to modify the contract to eliminate the problem. Before doing so, however, you should consult with an NWF attorney to make sure that NWF's interests are fully protected.

Because of the significant time and expenses involved, bringing a lawsuit against the breaching party is usually a last resort. When there is a dispute about a contract, usually the parties can agree on ways to resolve the disagreement without going to court, either by ending or shortening their relationship, by agreeing on what amount of money is owed to whom by whom, or by coming up with ways to modify their original promises to avoid similar problems in the future.

Can a contract that is already signed be changed?

If the parties think it is necessary, they can negotiate and draft a document that changes the terms of the original agreement. These changes can be in the form of an "addendum" or an "amendment" to the contract. Essentially, this addendum or amendment is another contract in which the parties agree on changes to the original document. The addendum or amendment needs to be signed by both parties before it goes into effect.

How can a lawyer help you?

NWF's Office of General Counsel ("OGC") can explain the basics of contract law to you, help you draft a contract, or figure out how to solve a problem that has arisen during the contract's term. To help you the most, you should let the attorney know early on what your needs are and the particular issues you are dealing with. If you think there might be a problem, the earlier you let OGC know, the better. To make sure the attorney has a full understanding of the issue, you should keep notes about any conversations you've had with the other party to the contract, any correspondence or documents that you've exchanged up to that point, and records of any events that occurred before the problem arose.

Should the OGC review my contract before it is signed?

That depends. When the contract involves \$10,000 or more, NWF's Signatory Authorization Policy requires a legal review by the OGC. For contracts under that amount, a legal review is

optional and done upon request. Purchase orders exceeding \$10,000, except for routine purchase orders issued to the same vendor, require a consultation with OGC to determine the appropriateness of a written contract for the product or service being purchased. You should ask an NWF attorney to review your contract if you don't understand it or if the terms proposed by the other party aren't quite what you want.

What else should I know about the OGC's legal review procedure for contracts?

1. The Signatory Authorization Policy should also be consulted for determining the appropriate NWF staff member who can sign contracts involving various dollar amounts.
2. Contracts for legal review must be supplied in hard-copy format and accompanied by a "Contract Routing" form, which should be completed before legal review is requested.
3. Please allow a turn-around time of at least five business days for OGC to perform the legal review. It is also best to send us an e-mail (to "johnsone") alerting us when to expect your contract, its subject matter, and its approximate length (number of pages plus any exhibits, attachments, schedules, etc.)
4. OGC can provide NWF departments with guidelines and self-help form contracts for certain goods or services to be provided by outside individuals or companies on a one-time or limited basis. The guidelines help you determine whether an individual should be classified as an employee or an independent contractor for income tax withholding purposes. The form contract contains standard "legal" terms as well as provisions that can be modified to fit a particular situation.
5. When contracts that have been reviewed by the OGC are signed by both parties, please send OGC a copy of the signed agreement for its files. Consult NWF's records management policy for information on recommended retention periods. Originals of all contracts are kept in the Finance Department.

Appendix 3

[This is designed to be a fill-in-the-blank generic contract form. Note that if you are contracting with an independent contractor, you should use the contract form entitled "Independent Contractor." Whether a worker or a consultant is an independent contractor depends upon a variety of facts and circumstances. In general, independent contractors are in business for themselves and provide services under contracts for discrete consulting projects or other assignments. They also control the manner and method in which their work is done, rather than follow another's direction. This generic contract form is meant to be used with corporations, partnerships or other vendors that do not fit the description of an independent contractor. Instructions on what to fill in this generic contract form and which options to pick are in brackets and red font, which should be deleted from your final copy. Note that the word "VENDOR" may be replaced by the word "CONTRACTOR" or the contracting party's legal name. If you have any questions, call the Office of General Counsel at Headquarters.]

AGREEMENT

This is an Agreement by and between National Wildlife Federation (hereinafter referred to as "NWF") with offices at _____ [use address of NWF Headquarters or address of office that applies to you], and _____ [VENDOR's legal name] (hereinafter referred to as "VENDOR") with offices at _____ [VENDOR's official address], for the purpose of _____ [describe purpose of Agreement] pursuant to the terms and conditions described as follows:

1. Description: _____ [VENDOR and/or NWF] shall perform the following duties:

[**Option A:** define duties of VENDOR in as much detail as possible, listing separate tasks where necessary.]

[**Option B:** define duties of VENDOR and NWF in as much detail as possible, listing the duties of VENDOR and the duties of the NWF separately.]

[**Option C:** if description is really long, consider stating the following if either party has a proposal containing a written detailed description of duties.] The duties of _____ [VENDOR or NWF] described in _____'s [VENDOR or NWF] proposal dated _____ [date] is attached to this Agreement as Schedule A and is thereby made a part of this Agreement.

hereinafter described as "the Product or Service."

2. Deliverables: The Product or Service includes the following Deliverables:

[Describe intermediate and finished/final products/services/reports and dates to be delivered or performed. For example:

- (a) A draft report is due to NWF by MM/DD/YY;
- (b) NWF's revisions or comments are due back to VENDOR by MM/DD/YY;
- (c) A second draft is due to NWF by MM/DD/YY;
- (d) NWF's revisions or comments are due back to VENDOR by MM/DD/YY;
- (e) The final report is due to NWF by MM/DD/YY.]

3. [**Option A - one year contract**] **Term:** This Agreement shall be effective for a term of one year which shall commence on _____ [date] and expire on _____ [date], at

which time the Product or Service will be complete and final Deliverables due.

[Option B - fill in contract term if other than a one year term] Term: This Agreement shall commence on _____ [date] and expire on _____ [date], at which time the Product or Service will be complete and final Deliverables due.

- 4. **[Option A - mutual agreement to renew on same terms and conditions] Renewal:** As of the contract expiration date of _____ [date], this Agreement shall be renewed for a term of _____ [specify # of month(s)/year(s)] on the same terms and conditions provided for in this Agreement if mutually agreed to between the Parties.

[Option B - mutual agreement to renew on renegotiated terms and conditions] Renewal: As of the contract expiration date of _____ [date], this Agreement shall be subject to renegotiation and shall be renewed if terms and conditions are mutually agreed to between the Parties.

- 5. **[Option A - for lump sum contracts involving a tangible Product] Fees:** For successful completion of the Product and Deliverables described in this Agreement, VENDOR shall receive a one-time, lump-sum payment of \$ _____ on _____ [date] from NWF. Final payment will be held and not paid until NWF has received the final product, approved the work and verified that services are complete. All payments provided in this Agreement constitute full consideration for the Product. All payments made under this Agreement will be made to VENDOR at the address set forth above, or at such other address provided by VENDOR in writing.

[Option B - for lump sum contracts involving Service] Fees: For successful completion of the Service and Deliverables described in this Agreement, VENDOR shall receive a one-time, lump-sum payment of \$ _____ on _____ [date] from NWF. All payments provided in this Agreement constitute full consideration for the Service. All payments made under this Agreement will be made to VENDOR at the address set forth above, or at such other address provided by VENDOR in writing.

[Option C - for installment contracts involving a tangible Product or Service] Fees: In consideration of the Product or Service and Deliverables described in this Agreement, VENDOR shall receive payment in _____ [specify #] installments in the specified amounts and upon the dates set forth below:

[number each installment, specify each installment amount and include the date that each payment is due as follows:]

- (1) \$ _____ upon the ____ day of _____, 20__;
- (2) \$ _____ upon the ____ day of _____, 20__;
- (3) \$ _____ upon the ____ day of _____, 20__.

All payments provided in this Agreement constitute full consideration for the Product or Service. All payments made under this Agreement will be made to VENDOR at the address set forth above, or at such other address provided by VENDOR in writing.

[Option D: contracts involving a Product or Service where payment conditioned upon reaching benchmarks] Fees: In consideration of the Product or Service and Deliverables described in this Agreement, VENDOR shall receive a total of \$ _____ from NWF to be disbursed in payments based on performance as set forth below:

[Set forth benchmarks, which are usually different stages of delivering the Product or

Service, and the amount of the payment to be made at each benchmark. Payments are usually set out in percentages as recommended below]:

- (1) 25% of the total contract fee shall be made at the commencement of this Agreement on _____ [date];
- (2) 25% of the total contract fee shall be made upon delivery of the first draft on or before _____ [date];
- (3) 25% the total contract fee shall be made upon delivery of the second draft on or before _____ [date];
- (4) 25% of the total contract fee shall be made upon delivery of the final product on or before _____ [date].

All payments provided in this Agreement constitute full consideration for the Product or Service. All payments made under this Agreement will be made to VENDOR at the address set forth above, or at such other address provided by VENDOR in writing.

6. **Warranties:** VENDOR warrants and represents that:

[Delete any warranties listed below that do NOT apply to this Agreement.]

- (a) VENDOR has the right and ability to enter into this Agreement and to grant the rights and furnish the Product or Service, including Deliverables, described in this Agreement;
- (b) All materials prepared by VENDOR under this Agreement will be original to VENDOR or derived from materials to which VENDOR has obtained any required permissions, releases, rights or licenses, and that the use thereof by NWF will not violate or infringe any patent, copyright, trademark, trade secret or other personal or proprietary rights of any party;
- (c) VENDOR will not enjoin or interfere with the distribution, licensing or exploitation of NWF merchandise or other products;
- (d) NWF will not incur any liability or financial obligation to any third party based on the creation and/or use of any materials prepared by VENDOR under this Agreement;
- (e) The Product or Service delivered by VENDOR will meet the specifications given by NWF in the manner expected by NWF as set forth in NWF's Request for Proposal or VENDOR's proposal of _____ [date].

7. **Indemnities:**

[Delete any indemnities listed below that do NOT apply to this Agreement.]

- (a) VENDOR agrees to indemnify and hold NWF, its assignees and licensees, harmless from and against any losses, costs, expenses (including reasonable attorney's fees), judgments, settlements, and damages resulting from any claim or action arising out of a breach of any of the warranties and representations made in this Agreement;
- (b) NWF agrees to indemnify and hold VENDOR, its assignees and licensees, harmless from and against any losses, costs, expenses (including reasonable attorney's fees), judgments, settlements, and damages resulting from any claim or action arising out of a breach of any of the warranties and representations made by NWF in this Agreement provided VENDOR:

1. Provides NWF prompt notice of any such claim or suit;
 2. Permits NWF to retain counsel for the defense of any such claim or suit;
 3. Does not settle or compromise any such claim or suit without the express prior written consent of NWF; and
 4. Cooperates fully with NWF and/or counsel retained by NWF in the defense of any such claim or suit.
8. **[Option A - mutual right to terminate] Termination:** This Agreement may be terminated by either Party by giving the other Party a written notice of termination two weeks [or insert another appropriate period of days/weeks/months] prior to the termination date. Upon termination under this provision, VENDOR shall turn over to NWF all work in progress, provided that NWF shall not be obligated to pay for any Service performed by VENDOR after receipt of either Party's notice of termination unless NWF requested VENDOR to perform the Service during the two week period [or insert alternative period above-mentioned] preceding the termination date.
- [Option B - sole right to terminate] Termination:** NWF may terminate this Agreement before the end of the Term if it determines in its sole discretion that the Product or Service, including Deliverables, do not meet accepted professional or industry standards or VENDOR has breached other provisions of this Agreement. Upon termination under this provision, NWF may adjust the Fee and pay VENDOR for the value of the Product or Service and Deliverables provided, if appropriate, with such value to be determined by NWF in its sole discretion, taking into account the reduced value of incomplete or unsatisfactory Product or Service and Deliverables.
9. **Entire Agreement:** This Agreement sets forth the entire understanding of the Parties and supersedes all previous and contemporaneous written or oral negotiations, commitments, understandings and agreements relating to the subject matter contained in this Agreement.
10. **Modification:** The Parties agree that this Agreement cannot be changed or modified except by writing executed by both Parties.
11. **[Option A - no assignment] Assignment:** This Agreement shall not be assigned by either Party.
- [Option B - consent to assignment] Assignment:** In the event that either Party wishes to assign any services under this Agreement, it is agreed that the Party so requesting will obtain the other Party's consent in writing prior to making any assignment.
12. **Governing Law:** This Agreement and the rights and obligations of the Parties hereunder shall be governed by, and construed in accordance with, the laws of _____. **[Virginia is appropriate for work performed for Headquarters staff. The State of a regional field office is also appropriate for work performed for that particular field office.]**

[One of the following Assignment of Rights clause options should be inserted into this Agreement only if it applies to your situation. In most cases, this clause applies to contracts where the other Party is providing NWF with a written product, photo, video, art work, etc. If this type of clause does not apply to your situation at all, please delete all options provided below and do not include this type of clause in the Agreement.]

13. **[Option A - NWF has sole ownership rights] Assignment of Rights:** The Product and all materials or inventions created by VENDOR under the terms of this Agreement shall be the

exclusive property of NWF and VENDOR will not use, disseminate, disclose or publish the Work, materials or inventions in whole or in part without the prior written permission of NWF. VENDOR hereby irrevocably transfers and assigns to NWF in perpetuity throughout the world any and all rights, title and interests, including but not limited to copyrights, patent rights, trade secrets, trademarks and other proprietary rights, in and to all inventions and materials created by VENDOR in connection with or arising out of this Agreement, effective automatically as of the creation thereof. VENDOR agrees: (a) to disclose promptly in writing to NWF all inventions or materials under this Agreement; (b) to cooperate with and assist NWF to apply for, and to execute any applications and/or assignments reasonably necessary to obtain, any patent, copyright, trademark or other statutory protection for such ideas, inventions and materials in NWF's name as NWF deems appropriate; and (c) to otherwise treat all such materials as "Confidential Information or Trade Secrets," as is defined in this Agreement. VENDOR hereby waives any right of "droit moral" or similar right. As the copyright holder, NWF may, in its sole discretion edit the Product and all materials prepared or delivered by VENDOR to NWF under the terms of this Agreement. NWF may also choose not to publish the Product. The terms of this paragraph shall survive the termination of this Agreement

[Option B - joint ownership rights] Assignment of Rights: It is the intention of the Parties that they be joint owners of the Product and all materials or inventions created under the terms of this Agreement. In the event that it is determined that the contribution of one of the Parties is deemed not to meet the statutory requirements of copyright, trademark or patent law, the other Party hereby assigns an undivided interest in the Proposal to said Party, so that the Product and all materials or inventions created under the terms of this Agreement shall be jointly owned by both Parties.

[One of the following Confidential Information or Trade Secrets clause options should be inserted into this Agreement only if it applies to your situation. In most cases, this clause applies to Independent Contractor Agreements. If this type of clause does not apply to your situation at all, please delete all options provided below and do not include this type of clause in the Agreement.]

14. **[Option A - protects NWF only] Confidential Information or Trade Secrets:**
 "Confidential Information or Trade Secrets" consist of information and materials from NWF and knowledge about the business of NWF other than information that is or becomes part of the public domain through no fault of the VENDOR or that NWF regularly gives to third parties without restriction on use or disclosure. Confidential information or Trade Secrets includes, but is not limited to schedules, business plans, costs, names, marketing plans, licensing plans, research, preliminary drafts, supporting materials or other information related to the planning, production, licensing or distribution of NWF products and any information relating to the provision regarding the Product or Service under this Agreement. VENDOR agrees that it will not at any time directly or indirectly disclose Confidential Information or Trade Secrets in any way, commercially or otherwise, other than as is reasonably required to carry out the Product or Service provided for in this Agreement. VENDOR agrees not to allow any unauthorized person access to Confidential Information or Trade Secrets and to take all action reasonably necessary and satisfactory to protect such Confidential Information or Trade Secrets. This provision shall survive the termination of this Agreement.

[Option B - mutual agreement] Confidential Information or Trade Secrets:
 "Confidential Information or Trade Secrets" consist of information and materials from either Party and knowledge about the business of either Party other than information that is or becomes part of the public domain through no fault of either Party or that either Party regularly gives to third parties without restriction on use or disclosure. Confidential

information or Trade Secrets includes, but is not limited to schedules, business plans, costs, names, marketing plans, licensing plans, research, preliminary drafts, supporting materials or other information related to the planning, production, licensing or distribution of products and any information relating to the provision regarding the Product or Service under this Agreement. Both Parties agree that they will not at any time directly or indirectly disclose Confidential Information or Trade Secrets in any way, commercially or otherwise, other than as is reasonably required to carry out the Product or Service provided for in this Agreement. Both Parties agree not to allow any unauthorized person access to Confidential Information or Trade Secrets and to take all action reasonably necessary and satisfactory to protect such Confidential Information or Trade Secrets. This provision shall survive the termination of this Agreement.

15. **Breach and Remedies:** If VENDOR fails to perform any of the terms, covenants or conditions of this Agreement after ten (10) days written notice, VENDOR shall be in breach under this Agreement and NWF may, to the extent permitted by applicable law, exercise any one or more of the following remedies:

[Delete any remedies listed below that do NOT apply to this Agreement]

- (a) In the event that you breach any provision contained in the sections entitled [delete any section following that does not apply to this Agreement] **Warranties** (regarding enjoining or interfering with distribution, licensing or exploitation), **Assignment of Rights**, and **Confidential Information and Trade Secrets**, NWF's interest will be irreparably injured, the full extent of NWF's damages may be impossible to ascertain, monetary damages will not be an adequate remedy for NWF, and NWF will be entitled to enforce this Agreement by an injunction or other equitable relief without the necessity of posting bond or security, in addition to its right to seek monetary damages or any other remedy;
- (b) NWF may declare due, sue for and receive from VENDOR immediately, or at a time specified by NWF, the Product or Service, including Deliverables, due under this Agreement at the time of the breach, including the Product or Service and Deliverables due for the unexpired term of this Agreement;
- (c) NWF may withhold any monies due to VENDOR from and after the date of breach and require VENDOR to pay for all expenses incurred in connection with the enforcement of any of NWF's remedies, including all costs of collection, reasonable attorney's fees, and court costs;
- (d) All of NWF's remedies are cumulative, are in addition to any other remedies provided for by law, and may, to the extent permitted by law, be exercised either concurrently or separately. Exercise of any one remedy shall not be deemed an election of such remedy, or to preclude the exercise of any other remedy. No failure on NWF's part to exercise any right or remedy and no delay in exercising any right or remedy shall operate as a waiver of any right or remedy or to modify the terms of this Agreement. A waiver shall not be construed as a waiver of any other or subsequent waiver.
16. **Severability and Survival:** If any provision of this Agreement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court or arbitrator finds that any provision of this Agreement is invalid or unenforceable, but that by limiting such provision it would become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited. It is specifically understood that the terms of paragraphs _____ [insert applicable

paragraph #s] survive the expiration or termination of the Term of this Agreement.

- 17. **Waiver of Contractual Right:** The failure of either Party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that Party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.
- 18. **Authority:** The persons signing this Agreement on behalf of the Parties to this Agreement warrant that they have the requisite authority to make such commitments and undertake such responsibilities as provided for under this Agreement.

Signed and Agreed to this _____ day of _____ 20__.

NATIONAL WILDLIFE FEDERATION

[VENDOR]

Name

Name

Title

Title

Date

Date

Appendix 4

[This is designed to be a fill-in-the-blank type of form. Instructions on what to fill in are in brackets and red font and should be deleted from your final copy.]

AGREEMENT

This is an Agreement by and between National Wildlife Federation (hereinafter referred to as "NWF") with headquarters at 11100 Wildlife Center Drive, Reston, VA, and _____ [Contractor's name] (hereinafter referred to as "CONTRACTOR") with offices at _____ [Contractor's address], concerning independent contractual services to be provided by CONTRACTOR.

In consideration of the promises hereinafter set forth, the parties agree as follows:

1. **The Project** Pursuant to the terms and conditions of this Agreement, the CONTRACTOR shall perform the following duties:

[Define duties, listing separate tasks where necessary; if it is really long, consider saying something like: "The project is fully described in CONTRACTOR's proposal dated _____ attached to and thereby made a part of this Agreement."]

hereinafter described as "the Work."

2. **Independent Contractor Status** In establishing and performing their respective responsibilities under this Agreement, the parties shall act as independent contractors and nothing in this Agreement shall create any relationship as employer and employee, joint ventures, agent and principal or partners. CONTRACTOR will not receive nor will be eligible for any benefits provided by NWF to its employees. CONTRACTOR will be solely responsible for complying with all laws, including income tax laws, applicable in connection with the services rendered by CONTRACTOR under this Agreement and payments made by NWF to CONTRACTOR. CONTRACTOR understands that NWF will report all payments made to CONTRACTOR on IRS Form 1099 without any withholdings including without limitation by virtue of specification FICA, federal or state income taxes, or unemployment taxes. CONTRACTOR agrees and warrants that CONTRACTOR will report all payments made to CONTRACTOR on either an IRS Form 1120, if CONTRACTOR is a corporation, or on a Schedule C filed with the CONTRACTOR's U.S. Individual Income Tax Return, IRS Form 1040, if CONTRACTOR is a citizen or resident of the United States. CONTRACTOR further agrees (1) to submit to NWF with this Agreement or within 10 days a properly completed IRS Form W-9 and (2) if CONTRACTOR fails to submit a properly completed IRS Form W-9 within the time specified, NWF's obligation to make any or all payment(s) provided for in this Agreement shall terminate. CONTRACTOR agrees to indemnify and hold NWF harmless from any liabilities, claims or actions relating to employment taxes or benefits.
3. **No Contracting Authority** This Agreement does not grant to the CONTRACTOR any authority to enter into an agreement, hire personnel or purchase goods or services for or on behalf of NWF.
4. **Work Space and Equipment** CONTRACTOR shall furnish all necessary tools and equipment necessary to perform the Work which shall be performed primarily at CONTRACTOR's own office. [This is one of the IRS requirements. NWF should only provide work space and/or equipment in extremely rare situations. The contractor may attend meetings at NWF's offices, but the Work should be performed primarily in the contractor's own office or facility.]
5. **NWF Work Product and Copyrights** The Work and all materials or inventions created by CONTRACTOR under the terms of this Agreement shall be the exclusive property of NWF and CONTRACTOR will not use, disseminate, disclose or publish the Work, materials or inventions in whole or in part without the prior written permission of NWF. All works of authorship prepared by CONTRACTOR under this Agreement will be "works made for hire" for NWF and NWF will be deemed the sole author thereof, automatically upon their creation, as contemplated by Sections 101 and 201 of the

United States Copyright Act of 1976 as amended. In the event that any such work is not a work made for hire, CONTRACTOR hereby irrevocably transfers and assigns to NWF in perpetuity throughout the world and in all manner, media and channels of distribution now known or hereafter devised, developed or created, including but not limited to electronic media and the Internet, any and all rights, title and interests, including but not limited to the copyright and other proprietary rights, effective automatically as of the creation thereof. In addition, CONTRACTOR hereby irrevocably transfers and assigns to NWF in perpetuity throughout the world any and all rights, title and interests, including but not limited to copyrights, patent rights, trade secrets, trademarks and other proprietary rights, in and to all inventions and materials created by CONTRACTOR in connection with or arising out of this Agreement, effective automatically as of the creation thereof. CONTRACTOR agrees: (a) to disclose promptly in writing to NWF all inventions or materials hereunder; (b) to cooperate with and assist NWF to apply for, and to execute any applications and/or assignments reasonably necessary to obtain, any patent, copyright, trademark or other statutory protection for such ideas, inventions and materials in NWF's name as NWF deems appropriate; and (c) to otherwise treat all such materials as "Confidential Information or Trade Secrets," as is defined herein. CONTRACTOR hereby waives any right of "droit moral" or similar right. As the copyright holder, NWF may, in its sole discretion edit the Work and all materials prepared or delivered by CONTRACTOR to NWF under the terms of this Agreement. NWF may also choose not to publish the Work. The terms of this paragraph shall survive the termination of this Agreement.

6. **Confidential Information or Trade Secrets** "Confidential Information or Trade Secrets" consist of information and materials from NWF and knowledge about the business of NWF other than information that is or becomes part of the public domain through no fault of the CONTRACTOR or that NWF regularly gives to third parties without restriction on use or disclosure. Confidential Information or Trade Secrets includes, but is not limited to schedules, business plans, costs, names, marketing plans, licensing plans, research, preliminary drafts, supporting materials or other information related to the planning, production, licensing or distribution of NWF products and any information relating to the provision regarding the Work hereunder. CONTRACTOR agrees that he or she will not at any time directly or indirectly disclose Confidential Information or Trade Secrets in any way, commercially or otherwise, other than as is reasonably required to carry out the Work provided for herein. CONTRACTOR agrees not to allow any unauthorized person access to Confidential Information or Trade Secrets and to take all action reasonably necessary and satisfactory to protect such Confidential Information or Trade Secrets. This provision shall survive the termination of this Agreement.
7. **Term of the Agreement** This Agreement shall be effective from its execution by the second signatory through _____ [contract expiration date; add optional renewal terms here keeping in mind that NWF does not normally enter into contracts which automatically renew.].
8. **Project Fee and Expenses**
 - (a) For successful completion of the Work described in this Agreement, CONTRACTOR shall receive a fee of \$ _____, payable \$ _____ upon execution of this Agreement and \$ _____ upon completion and delivery of the final Work. [This is the standard way of paying contractors but you can put in anything you like except for payments biweekly which track the NWF payroll cycle. If the contractor is producing a paper or some other tangible product, a final payment of some amount should be held and not paid until NWF has received the final product, approved the Work and verified that the project is complete.] The compensation provided for herein constitutes full consideration for the Work. All payments made hereunder will be made to CONTRACTOR, with the Social Security Number or Federal ID Number provided below, and at the address set forth above, or such other address provided by CONTRACTOR in writing. CONTRACTOR is expected to use his or her own equipment, supplies and tools unless specifically stated otherwise in paragraph 1 above.
 - (b) NWF shall reimburse CONTRACTOR for actual, reasonable and necessary expenses of travel, telephone charges, and miscellaneous materials directly related to the Work NOT TO EXCEED \$ _____ [amount of expenses pre-approved (normally \$500 unless your budget is small)] during the complete term of this Agreement, PROVIDED CONTRACTOR furnishes NWF with adequate documentation of all such expenses for which CONTRACTOR seeks reimbursement under this paragraph. [You don't have to pay expenses, but if you do, they should be limited something like this.]

9. **Termination** This Agreement may be terminated by either party by giving the other party a written notice of termination two weeks prior to the termination date. CONTRACTOR shall turn over to NWF all work in progress, provided that NWF shall not be obligated to pay for any services performed by CONTRACTOR after CONTRACTOR'S receipt of NWF's notice of termination unless NWF requested CONTRACTOR to perform the services during the two week period preceding the termination date.
10. **Entire Agreement** This Agreement sets forth the entire understanding of the parties and supersedes all previous and contemporaneous written or oral negotiations, commitments, understandings and agreements relating to the subject matter contained herein.
11. **No Assignment** This is an agreement regarding personal services and shall not be assigned by either party.
12. **Governing Law** This Agreement and the rights and obligations of the parties hereunder shall be governed by, and construed in accordance with, the laws of _____. [Avoid using DC unless the contractor is also from DC; Virginia is appropriate for work performed for Laurel Ridge staff; state of a regional office is also appropriate for work performed there.]
13. **Independent Contractor's Warranties and Indemnities** CONTRACTOR warrants and represents that:
 - (a) CONTRACTOR has the right and ability to enter into this Agreement and to grant the rights and furnish the Work described herein;
 - (b) All materials prepared by CONTRACTOR hereunder will be original to CONTRACTOR or derived from materials to which CONTRACTOR has obtained any required permissions, releases, rights or licenses, and that the use thereof by NWF will not violate or infringe any patent, copyright, trademark, trade secret or other personal or proprietary rights of any party;
 - (c) NWF will not incur any liability or financial obligation to any third party based on the creation and/or use of any materials prepared by CONTRACTOR hereunder;
 - (d) CONTRACTOR operates as a business, and regularly makes his or her services available to other clients or the general public, and has adequate insurance, any necessary license, and other conventional means of conducting business;
 - (e) CONTRACTOR will not enjoin or interfere with the distribution, licensing or exploitation of NWF's merchandise or other products;
 - (f) CONTRACTOR agrees to indemnify, and hold NWF, its assignees and licensees, harmless from and against any losses, costs, expenses (including reasonable attorney's fees), judgment, settlements, and damages resulting from any claim or action arising out of a breach of any of the foregoing warranties and representations.
14. **Return of Records** Upon expiration or termination of this Agreement, CONTRACTOR shall deliver all NWF records, notes, data, models or other materials in any form that relate to the provision of the Work hereunder, including any ideas, inventions, materials and works of authorship created hereunder to which NWF has ownership rights pursuant to paragraph 5 above and any Confidential Information or Trade Secrets covered by paragraph 6 above, including all copies and evidence of the foregoing in any form.
15. **Severability and Survival** If any provision of this Agreement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court or arbitrator finds that any provision of this Agreement is invalid or unenforceable, but that by limiting such provision it would become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited. It is specifically understood that the terms of paragraphs 5 and 6 [add other paragraphs if applicable] survive the expiration or termination of the Term of this Agreement.
16. **Waiver of Contractual Right** The failure of either party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.

17. **Authority** The persons signing this Agreement on behalf of the parties to this Agreement warrant that they have the requisite authority to make such commitments and undertake such responsibilities as provided for hereunder.

Signed and Agreed to this ____ day of _____, 20__:

NATIONAL WILDLIFE FEDERATION

[CONTRACTOR]

Name

Name

Title

Contractor's SSN/Fed. ID#

Date

Date

CONFIDENTIAL DISCLOSURE AGREEMENT

This is an Agreement between _____("Disclosed Party") and National Wildlife Federation ("NWF"). Disclosed Party is receiving confidential disclosure of certain proprietary and confidential information of NWF for certain technical, educational, business or other purposes, and NWF would not make such disclosure without Disclosed Party's agreement to maintain confidential treatment of such information.

Therefore, Disclosed Party agrees that:

1. Disclosed Party will not disclose to any third party any business and/or technical information of NWF ("Information"), designated orally or in writing as "Confidential," "Proprietary" or any like word, without the prior written consent of NWF, and then only to the extent specified in such consent.
2. Disclosed Party shall limit access to the Information to its employees or independent contractors who have entered into appropriate confidential agreements, and Disclosed Party shall ensure compliance with the terms of such agreements.
3. The restrictions on disclosure of Information described in Paragraphs 1 and 2 do not extend to any item of Information which (a) is publicly known at the time of its disclosure, (b) is lawfully received by Disclosed Party from a third party who is not under a similar confidential agreement with NWF, (c) is published or otherwise made known to the public by NWF, or (d) was generated independently by Disclosed Party.
4. Nothing contained in this Agreement shall impair the right of Disclosed Party to make, procure and market products or services, now or in the future, that may be competitive with those offered by NWF. However, all unique ideas, concepts, know-how or techniques not currently available on the market that are disclosed in the Information provided by NWF are considered Confidential and Proprietary and cannot be used by Disclosed Party until after such Information is made public as described in Paragraph 3. Information that has been trademarked or copyrighted is protected by applicable laws and regulations.
5. Unless otherwise agreed, upon (5) five business days' written notice, Disclosed Party agrees to return any written Information and all physical media on which Information was received from NWF, with a letter confirming that the Information has in no way been reproduced or copied. The obligations of this Agreement expire three (3) years after its date of execution.
6. This Agreement shall remain effective with respect to any disclosure of Information by NWF to Disclosed Party within one (1) year of the date hereof unless either Disclosed Party or NWF notifies the other party that subsequent disclosures are not to be included within the terms of the Agreement.

National Wildlife Federation

By: _____

Title: _____

Date: _____

Disclosed Party

By: _____

Title: _____

Date: _____

Appendix 6

AMENDMENT

WHEREAS the National Wildlife Federation and **XXX** entered into an Agreement of _____ [date] for _____ [describe subject matter of contract]; and

WHEREAS the parties desire to change certain terms of the said Agreement to their mutual benefit;

NOW THEREFORE, the Agreement between National Wildlife Federation and **XXX** of _____ [date] is hereby amended as follows:

[enumerate contract changes using either paragraph numbers or letters to set forth the terms that are changed citing each by paragraph number]

In all other respects the aforesaid Agreement remains in full force and effect subject to the changes noted herein.

National Wildlife Federation

XXX

Date: _____

Date: _____

CONTRACT TRAINING II

Building a Sequel to Your Successful Contracts 101 Program

Jack O'Neil
General Counsel and Secretary
The Western Group, Inc.
St. Louis, MO

At the American Corporate Counsel Association's 2001 Annual Meeting panel from the Small law Department Committee presented a program on teaching contract law to non-lawyers, namely, our in house business clients. We are following up on that this year at the 2003 Annual Meeting.

If you have been around the company with your initial contract training program, what are you going to do to build on the success of that venture? You may be getting more calls now from people that have questions about the contracts that they never thought of before. Or, maybe people are finding new reasons not to call you because they think they now know everything they need to know about the contracts they are signing. In my experience, the former is more often the case. You can only plant the seeds in the first session.

Getting beyond "is this OK?" After one session, you may find that people who never called you before are sending you things to review. However, this often comes with just: "is this OK?" A variant is "any problems here?" This assumes that in the 20 pages that just came over the fax machine there is either a yes or a no that applies to the whole document. Now it is time to take the next step. Exactly what you will do depends in large part on the nature of your business, the size of your law department, and what kinds of contracts your clients are using, or being presented with. Even if you do much of your business on your own forms, there will be those customers or vendors who have legal departments to review your forms. You then get the proposed changes with the same questions. Whether you are reviewing other party's contracts or the proposed changes to yours, the ideas discussed here will likely find some application in either situation.

The problem with being proactive, is that you are never finished. The challenge is to find new and different ways to present the information so that it becomes more useful to your clients and, thus adds value to the business. This discussion will focus on some different approaches that you might try to get yourself back on the program at the next sales meeting. Encourage your regional offices to give you a half day to discuss these new approaches, or just get people's attention with e-mails that give them something they can use.

Change focus from language to concerns and expectations. Too often people look to lawyers for the “magic words” that will solve all the problems. Hopefully you can get past the notion that the written contract and the business agreement are in separate but parallel universes. Perhaps some don't even see them as parallel. If you have achieved some awareness of what is in those boilerplate pages of “general terms and conditions” you are on the right track.

While you can never get away from the language, it is more productive to look at the concerns of the party drafting the contract, since that is the reason for the language. Remember the “intent of the parties?” Then, look at the risks inherent in your business, and examine ways that these risks are allocated, shifted, or even exacerbated by the contract language. There are two points of view. If it is your contract draft, why do you need to handle the risk in that way? How does the language in your form do it? If it is the other parties draft contract, why do they have a different take on the risk? What language have they used to deal with it. What is the core concern that the drafter is attempting to deal with? In fact, this is precisely the information we, in the legal department, need if we are going to intelligently respond the persistent “is this OK?” The difference is that in a contract review it is many questions, not just one.

For example, in the construction industry, building owners are concerned about creeping price escalation from changes in the work, and extra work required to complete the project, but not included in the original plan. They are also concerned with a practice among some contractors to bid low, then look for changes and extras to enhance the bottom line. For this reason, contracts drafted from the owner's point of view contain many provisions that create a disincentive for contractors to look for extras on a project. They do this by reducing the chance for getting paid for the extra work unless very strict guidelines are followed. From the Contractor's point of view, it is important to know what is there, so they can prepare their bids and plans for performing the work to deal with such requirements. There may be no need to change anything, but just realizing it is there, and knowing what to do with it may be the key to a successful project, and reduced tension.

Based on my review of a limited number of contracts for technology services, there is a risk that if something goes wrong with the application, the consultant, software vendor or hardware will be blamed for all kinds of consequential damages. Therefore, such contracts contain many disclaimers of such damages as well as responsibility for results. This sometimes leaves the

customer wondering if the vendor has really provided anything. Often what is needed here is not boilerplate changes to boilerplate language sent back to the client, but a discussion of what your client's real expectations are, and how the language may play on those expectations. Do they understand the limitations, and can they live with them? Then a proposal for change that helps the situation without killing the deal can be explored.

What we as lawyers have done in drafting the boilerplate is give our clients the option to be strict or lenient. We create documents that do not require our client to take certain actions by contract, but can, if they choose, take such action as an exercise of business judgment. A company may choose to grant some relief to a customer, as a matter of good customer relations, but does not want to be required to do so because of a provision in the contract. For instance, in a warranty situation, we all want to limit our warranties as much as possible. But, in any given situation the sales people may want to take care of a good customer who might be having problem with our product or service. If other party's seemingly heavy handed terms are explained this way, your business clients may find it easier to look at the other party's point of view. A discussion of the relationship with the customer, and experience with similar situations may be helpful here in aiding the business client in making the business decision. A better understanding of those concerns, of course, will also come in handy for negotiating terms of the deal.

If your clients face frequent situations when presented with contracts prepared by others, look for all the similarities that appear in all of them. Can you summarize the concerns and how they show up in the contract? For my business, I prepared a one page summary called "Rules of the Game." A copy is attached at the end of the text. It is used as an outline in various programs designed to teach the basics of what to look for in a contract. It can also lead into a discussion of how to prepare to perform work under conditions that may not be to our liking, but with which we can deal, if only the operators appreciate the reasons for, meaning of, and risks associated with the particular contract provisions.

Focus on business risks, not legal problems. This is frequently just a semantic difference, but the more you can integrate the contract language into a business context, the more receptive your audience. Look at the areas that bring problems to your desk. What are the risks that someone took and lost? This not only gives you an insight into the problems you

operations people face, but also gives you a few "close to home" war stories to use in your training efforts.

While examining the concerns of the other party is similar, the focus on risks brings it closer to home. You are examining the risks to your business, and perhaps thereby creating some concerns. Express these risks in business terms. This will vary depending on whether you are training them to look at risks in your own contract forms, or training them to look for risks in contracts presented to them to sign. For example:

Collection risk = If you don't get paid on time, what rights do you have in the contract for Interest, late charges, attorneys fees?

Cross default Risk = Is there an agreement on any set-off against claims under this or other contracts? How many contracts do you have with the other party? Can they leverage all you contracts to get concessions on one?

Delivery risk = If the delivery, of the goods or services are late, who pays for the costs of the delay? Is there any exposure for consequential damages?

Damage risk = What are your responsibilities if your work, or your product are defective and damage something or hurt someone?

Injury risk = What if your employee is injured while working for you on someone else's property and sues them?

Intellectual property risk = What if your customer is sued because the parts you sent are claimed by someone else to infringe a patent?

Insurance risk = Who has the responsibility for carrying insurance, and between carriers which one pays first?

Warranty risk = If the stuff does not work, how long do you have to notify, and what is the limit of your responsibility?

Once you identify the risks go back and look at the contracts to see where those risk are transferred either to or from your business. Is there any risk of giving rights away if you don't know what is in the contract?

Of course don't leave out the impact on the bottom line, which is always a way to get people to listen. This is where those war stories really come in handy. One "experience" that cost three times the contract value, can get the folks responsible for the bottom line to take notice. A simple cure for the problem that would have avoided the loss if someone had just read the contract may also be helpful.

The in house lawyer should be able to bring more to the game than just the iron clad maximum protection. We frequently get the questions, "Can't we just put some language in our contract to cover that?" The possible answer is: "I can write it if you can sell it." Perhaps you just have to tell them, "that would not be enforceable." If you have a market where most contracts are drafted with the assumption that people will sign whatever is presented to them without reading or understanding it, then maybe you can get away with more heavy handed provisions. Companies that are tuned into contract risks enough to have in house counsel may not do that. If your competition does not read it, then it becomes a business issue on which much discussion, questioning, and counseling is needed.

Another approach is to look at some of the issues that come to your desk in the form of questions, and problems, and go back to the contract and highlight all the things in the contract that deal with or impact that issue. Often these start out with a brief description of a crisis, followed by "can they do that?" So often, the answer lies in the contract. If no one has ever looked at it, there may not be good news.

So, you can build a training program around one of those "hot" issues, and use the contract provisions as a starting point.

Collections. Some of your clients do not even think about these issues until they have a problem receivable. These people need some help in looking for all the provisions in the contract that have an impact on collections. Interest, security interests, reasons why payment can be withheld, or things that do not justify withholding payment. If there is a termination, what happens to pending transactions, or uncompleted work? How do

changes in the contract get priced? As you can see there is overlap into areas that are not purely collections, but it allows you, once you develop several programs to reinforce the same ideas from different angles.

Changes, and unexpected developments. In some industries change is rare once a deal is done. In others change is the exception that devours the rule. There are provisions in those contracts that deal with how to request, approve, and document changes. Often if these rules are not followed, someone, usually the person looking for more money, comes up short. Start by pointing out the rules, and how to find them, and this can lead right into developing ways to make following the rules easier. Forms and formats that make this process easier, and are always appreciated.

Contingencies. What contingencies are there in the “general terms and conditions?” Start with the ones that are common to your industry, and everyone may have discussed, but don't forget the ones that no one ever thinks to look for. Contracts commonly have force majeure clauses and recite all kinds of potential disasters. Shouldn't someone see if the consequences are ones we can live with? Many people think that because they have always done things a certain way, that it is OK. The real reason is that they have never been tripped up by the contract language. Since contracts are designed to cover all potential problems, they cover many that often don't come up.

Assignment, or subcontracting. Many contracts have anti-assignment clauses. What does this mean for your industry. Does it restrict your ability to assign receivables for working capital? Does it impact your ability to subcontract part of the services you're agreeing to perform.

Measuring performance and deliverables. What does that contract say about measuring performance? What if the deliverables are not what you expected? Do you waive the right to return something if no inspection is made in some specified time? Are there any standards outside the contract that are incorporated by reference? In construction contracts, the contractor is required to build according to local building codes, with language that calls for this regardless of what is in the plans, which were prepared by a design professional with whom the contractor has no relationship. Some

trades have more code issues to deal with than others. For anyone, this represents added responsibility that they may not expect.

There are many other things that can come up. Don't try to cover everything in one program. The purpose of this approach is to present it as a way to help people do what they know they have to do everyday, and make it easier for them to do it right. Think of it not so much as a "legal" program, but as a "contract management". It can also dovetail with other departments in the company.

Team up with the sales and marketing folks. The legal function is often viewed as the natural antithesis to the sales function. But, if you can team up with them you will both look for ways to promote a better understanding of how a better understanding of the contract can be a sales tool.

Understanding Customers Concerns. One of the primary tools to negotiating terms and conditions is understanding why people have those terms in their contract in the first place. If you are lucky, you may get deeper analysis than "our lawyer says we have to have it." Once you understand those concerns, you can address them in your sales presentations, and put them in a light more favorable to your position, but which takes the customers concerns into account. Try to arm your people with some middle ground that they can negotiate, rather than taking the "we have to have it this way approach.

Attention to Detail. Show an attention to detail that your competitors may not have. Understanding the contract, and being able to discuss the issues intelligently, should be indicative of the kind of attention to detail that your people will bring to the project as a whole. This might be especially helpful when your sales people run across a customer who reads and asks questions about the terms and conditions of the contract. The answer, "that's just something for the lawyers" is rarely satisfactory.

Create training helps that they can take away, and use. Books and references are great, but often people are looking for a checklist to help them remember the questions, before they can really look up the answers. In the course of several training programs, I have created several checklists to help the operations clients spot the issues. Once they do that, they can look it up in the book from the Contract review course, and maybe even call to discuss it.

Encourage involvement by employees at different levels. While some of the lower level employees may not be out there negotiating the deals, they maybe the last line of defense before the agreement goes out the door. In our system, each branch office has a branch administrator who handles many of the clerical and record keeping functions. That person needs to have some idea what the Contract should look like, and what attachments, riders, etc. normally go with it. We routinely include this person in some of the contract training.

Don't just answer, respond. When you get the "is this ok? question, take the opportunity to engage in a little one on one training. Try to be constructive, by having alternatives to suggest, and be willing to discuss these risk and concern issues. It is actually easier when you are discussing a particular deal, and not talking in the abstract. The more you do this, the more you will become a part of the business team.

SAMPLES TRAINING AIDS

The attached documents have been prepared for training use by the member Companies of The Western Group, Inc.

The attached are specifically geared to the operations of a specialty contractor with operations concentrated on restoration and waterproofing of masonry and concrete structures.

Therefore, they are offered as examples only, and may not be applicable to other industries or companies.

If you have questions, or would like to discuss these, please contact:

Jack O'Neil

General Counsel

The Western Group, Inc.

314 427-6733

jacko@westerngroup.com

RULES OF THE GAME

Owners make the rules for most construction projects. They may do it themselves, or it may be based on the recommendations of lawyers, engineers or architects. Many of these recommendations are drawn from bad experience that someone has had with a contractor in the past.

HERE ARE SIX BASIC RULES AND HOW THEY SHOW UP IN CONTRACTS

NO SURPRISES IN SCOPE.

- ✓ Scope includes everything to give the desired result.
- ✓ Requirement to notify of problems with Plans and Specs.
- ✓ Representations that you have inspected site, plans specs and contract documents. and you know what you are doing.
- ✓ Time limit to submit requests for changes.

FINISH ON TIME.

- ✓ Liquidated Damages.
- ✓ No Damage for Delay.
- ✓ No excuses for ordinary bad weather.
- ✓ No work stoppage.
- ✓ Supply sufficient men and equipment to do the job on time.

FIRM OR PREDICTABLE PRICE.¹

- ✓ No price changes without prior written change order.
- ✓ Limited mark-up on extras.
- ✓ Lump Sum Prices.
- ✓ Agreed estimates for Unit Price.
- ✓ "Not to exceed" prices for T&M work.

NO CLAIMS.

- ✓ Indemnification.
- ✓ Insurance requirements.
- ✓ Additional insured.
- ✓ Up Front Lien Waiver.
- ✓ Defend or bond off any liens.

DO IT RIGHT.

- ✓ Execute the work in accordance with all plans and specifications.
- ✓ Comply with all laws, codes and regulations.
- ✓ Work and material of highest quality, unless otherwise specified.
- ✓ Produce intended results.

BACK IT UP.

- ✓ Warranty, to repair or replace defective work or material.
- ✓ Manufacturer's warranty on material.
- ✓ Protect work until job completed.
- ✓ Repair any defective work.

¹ Contracts with property managers, and subcontracts also have "pay if paid" clauses.

CONTRACT BASICS CHECKLIST

THIS IS NOT ALL THE THINGS YOU SHOULD CONSIDER AT THE BEGINNING OF A JOB, BUT IT IS A BASIC MINIMUM.

- Do you have a complete original of the contract signed by the other party?
- Have you and the other party initialed any changes to a preprinted form?
- If there was a proposal and response, do you have a final agreement on what is included?
- Are there any Addenda, "side" agreements or amending letters that need to be incorporated?
- Have you reviewed any other documents referred to in the contract as being "incorporated by reference?"
- Are there any Amendments to the Contract?
- Have you included the same terms in contracts with subcontractors?
- If manufacturer's warranties are called for, are they available from the manufacturer?
- Do you have bonds, if needed?
- Has Contract been qualified to meet bond limitations, e.g. warranties, alternates?
- Do you have bonds from subcontractors?
- Do you need a special insurance certificate?
- Do you have an insurance certificate from each subcontractor?
- Do you know what payment requests are needed?
- Do you know what the time limits are for claims?
- Are their special wage, EEO or affirmative action requirements?
- Do you have any mechanics lien notice requirements at the beginning of the job?
- Have you read the document you are signing?

SOME THINGS TO CHECK BEFORE YOU SIGN THE CONTRACT.

<p style="text-align: center;">CONTRACT DOCUMENTS. <i>Do you have?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> Clear understanding of Scope and Customer Expectations? <input type="checkbox"/> All Attachments, Addenda, Riders, Exhibits that are referred to in the Contract, Including reference to your Proposal? <input type="checkbox"/> All Bonds that are needed? <input type="checkbox"/> Any Special Insurance Requirements? <input type="checkbox"/> List of T&M rates and Unit Prices incorporated into the Contract? <p><i>Have you?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> Read what you are signing? <input type="checkbox"/> Included any Negotiated Changes on an Addendum? <input type="checkbox"/> Checked for Supplemental Conditions? <input type="checkbox"/> Asked for help from Legal Department? <input type="checkbox"/> Filed any Pre lien Notices required at the beginning of the job? (Check State Law?) 	<p style="text-align: center;">CHANGES, CLAIMS AND DELAYS. <i>Do you have?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> An agreed form for Change Orders? <input type="checkbox"/> A definite time allowed to do the work? <input type="checkbox"/> Agreement for time extension when additional quantities or additional work is ordered? <input type="checkbox"/> A plan to deal with problem issues typical to the type of work? <input type="checkbox"/> A pre-job inspection agreed to record conditions before you start? <p><i>Do You Know?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> Who must be notified on any Changes or Claims? <input type="checkbox"/> Time to notify Customer that Change Order is needed? <input type="checkbox"/> Time to make a claim for extra time due to delay? <input type="checkbox"/> Whether you can get damages for a Customer caused delay? <input type="checkbox"/> What date triggers any Liquidated Damages?
<p><u>INSURANCE AND INDEMNITY.</u> <i>Do You know?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> What your indemnification obligation is? <input type="checkbox"/> Is there an Additional Insured Requirement? <input type="checkbox"/> If there are any other special Insurance Requirements for this Job? <input type="checkbox"/> Whether this job is covered by a Wrap-Up? 	<p><u>WARRANTIES.</u> <i>Have you?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> Checked the Contract and Specifications for Warranty Requirements? <input type="checkbox"/> Confirmed the availability of required Manufacturer's Warranties? <input type="checkbox"/> Checked terms and conditions for Company warranties? <input type="checkbox"/> Checked for hidden tie ins to Manufacturer Warranty?
<p style="text-align: center;">PAYMENT AND CLOSEOUT. <i>Do you have?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> An agreed form for Lien Waivers partial and final? <input type="checkbox"/> Specified Payment request form? <input type="checkbox"/> All backup documents required by the Contract? <p><i>Do You Know?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> If the Contract requires up front lien waivers? <input type="checkbox"/> What the last day to file for liens is? <input type="checkbox"/> If there are limitations on the Owners payment Obligations? <input type="checkbox"/> If special EEO, or affirmative action reports apply to this job? <input type="checkbox"/> Whether this is a prevailing wage job, and what the rates are? 	<p style="text-align: center;">SUBCONTRACTING. <i>Do you have?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> A signed copy of a subcontract for each subcontractor? <input type="checkbox"/> An insurance certificate from each subcontractor? <input type="checkbox"/> Payment and performance bonds from your sub, if required? <input type="checkbox"/> A copy of any warranty that the Sub will be responsible to deliver at the end of the job? <p><i>Do You Know?</i></p> <ul style="list-style-type: none"> <input type="checkbox"/> If your contract requires you to pass certain specific obligations on to the Subcontractors? <input type="checkbox"/> If your Sub will be able to make his payroll, if payment is held up?

202 Teaching Contract Law to Nonlawyers II

Norman Wain, Vice President – Legal Affairs, The Finish Line, Inc.

I. THE VARIOUS LEVELS OF POTENTIAL LEGAL INVOLVEMENT

- (1) Based on certain criteria (ie. contract cost/value)?
- (2) At the pre-negotiation level?
 - a. good cop, bad cop negotiation strategy
 - b. more time = more leverage
- (3) At the contract negotiation level?
- (4) At the termination of the contract?
- (5) If the parties are contemplating subsequent modifications to an existing contract?
- (6) For monitoring of contractual (ie. triggering) events/ performance?
- (7) Beyond the contract – form contracts, general contracts w/ specific riders, etc.

II. HOW OUR BUSINESS COUNTERPARTS CAN BETTER UNDERSTAND THE CONTRACT PROCESS

A. Pre- Contract Education

1. Internal Review: Has someone actually reviewed the contract and accepted responsibility for all its terms and conditions?
 - a. any potential conflicts with already existing contracts?
2. Checklist of questions to discuss internally
 - a. flush out the business points
 - b. help crystallize the actual agreement
 - c. understanding of party relationships, dynamics, etc.
 - (1) who will be involved in the negotiation?
 - (2) how critical is this contract to us? to them?
3. Understanding of corporation objectives – making sure contract meets those objectives

4. Anticipation of problems in performance, and discussion of “outs” for those problems
5. Whose contract will be used? Consequences on timing and deadlines?
6. Performance of due diligence
 - a. competitive offers = leverage
 - b. leverage in the business points AND the legal points
7. Process flow of contract within the corporation
 - a. who does the contract go to?
 - b. what is the timeline for review?
 - c. why does the process take so long?
 - d. management of expectations

B. Contract Negotiation Education

1. Making sure business people can accurately identify drafts
 - a. the ball is in whose court?
2. Who pays what?
3. Review of contract obligations – who is responsible for what?
 - a. does language reflect all performance promises the corporation expects
 - b. acceptable consequences for performance breaches
4. Maintaining the collaborative environment

C. Post-Contract Negotiation Reality Check

1. Now that contract is executed, where does it go?
2. Making sure that the corporation will comply with all contractual obligations
 - a. who will be responsible for monitoring compliance, performance deadlines, renewal/termination dates, etc?
3. Creation of value (effect on corporation's potential expenses/ savings)

4. Existence of contract database
5. Corporate checks and balances (validation of invoices, etc.)

III. THE LEGAL POINTS YOUR BUSINESS PERSON MAY WANT TO KNOW

A. Obligations & Warranty Sections

1. Affirmative language that the other party will perform according to certain acceptable criteria (ie. performance, quality, etc.)
2. Recap of all the affirmative obligations
3. Confidentiality concerns (whose information needs to be protected)
4. Requirements for protection of marks (ie. approval of usage, etc.)

B. Payment Terms

1. Defined payment schedule (reserve a good chunk of payment until the end)
2. Penalty language for failure to pay (right to dispute charges)
 - a. withholding of performance?
3. Characterization of the payment
4. Travel and other related expenses – need to monitor (pre-approval, consistent with YOUR existing policies and procedures, etc.)

C. Timing/Deadlines

1. Length of the contract
2. Time necessary for completion of performance – beware of the “sunset” clauses
3. Renewal terms – not a fan of automatic renewals

D. Restriction Clauses

1. No-Assignment clauses

2. Exclusivity provisions
3. Non-compete provisions
4. No-solicitation provisions

E. Termination Provisions

1. The events that could trigger the end of the contract (ie. assignments, mergers, certain failures to perform, etc.)
2. The ability to terminate at any time for any reason whatsoever with notice (ie. the easy "outs")

IV. HOW TO TREAT THE BOILERPLATE

- (1) Indemnity
- (2) Force Majeure
- (3) Governing Law
- (4) Modification
- (5) Notice
- (6) Severability
- (7) Waiver of Jury Trial