

503 Teaching Contract Law to Non-lawyers: Learn Training Methods that Really Work

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Jack O'Neil

Jack O'Neil is general counsel and secretary for The Western Group, Inc. Western operates a specialty contracting business nationwide through subsidiaries with branch offices in 35 cities. Western's work involves many aspects of masonry and concrete restoration and waterproofing of commercial, public, and institutional structures. Mr. O'Neil started the legal department at Western in 1990, after 15 years of private practice and teaching experience.

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 has served as president of ACCA's St. Louis Chapter.

He has a BA from DePauw University and a JD *cum laude* from Saint Louis University School of Law.

Albert C. Peters, II

Albert C. Peters II is assistant counsel with the Pennsylvania Turnpike Commission, which has a six-attorney legal department. His primary practice areas include contracts, labor and employment, and litigation management. He also conducts training programs in contract management, labor relations, supervisory development, and construction law.

He is president of ACCA's Central Pennsylvania Chapter and a member of ACCA's Small Law Department and Labor and Employment Law Committees. Mr. Peters is an evening instructor for Penn State Harrisburg where he teaches a four-credit course on business environments. He has served as president of the St. Thomas More Society of Central Pennsylvania. Mr. Peters is active in coaching and scouting volunteer activities in his community.

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Meredith B. Stone is vice president, general counsel, Americas for NACCO Materials Handling Group, Inc. in Greenville, North Carolina.

Ms. Stone was previously vice president, general counsel, and secretary for Konica Business Technologies, Inc. in Windsor, Connecticut. She was responsible for representing Konica and its subsidiaries in litigation matters, providing advice on and representing the

company in corporate transactions, negotiating, drafting and approving contractual commitments, advising and counseling the corporation on employment law issues, providing preventative legal training to employees, supervising investigations, and overseeing the legal compliance of Konica in North, South, and Central America, including international transactions. Ms. Stone also managed the government compliance, safety, risk management, and environmental functions of the company. Prior to joining Konica, Ms. Stone was a general attorney for the Long Island Railroad Company in Jamaica, New York, an associate attorney with Levine & Robinson, P.C. in Mitchel Field, New York, and an assistant corporation counsel for the law department of the City of New York.

Ms. Stone is president of the ACCA's Connecticut Chapter, a member of the ABA Employment Law and Antitrust Sections, and a member of the New York State Bar Association.

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Planning Your Training Program:

- Y Determine your goals for the program
- Y Determine your method of training
- Y Tailor your presentation to the audience
- Y Remember you will never be able to present everything
- Y Enhance your credibility
- Y Draft and then shorten - you will run out of time!

Types Of Training Programs:

- Y One-on-One Sessions
- Y Web-based Training Programs
- Y CD ROM Training
- Y Small Group Sessions - responsibility driven
- Y Annual Meetings
- Y Company Intra-Net
- Y Newsletters

How To Present?

- Y Know your audience
- Y Use different methods
- Y Pre and Post tests
- Y War stories
- Y Examples of the good, the bad and the really ugly!
- Y Present as "business" not as "legal"

What To Include:

- Y Review your company's standard contracts applicable to your audience
- Y Why are the clauses there?
- Y What do they mean?
- Y What are the risks involved?
- Y What are acceptable alternatives?
- Y What does the contract mean to them?

Get Their Attention!

- Y Provide copies of approved agreements
- Y Explain how they work
- Y Explain how they will make the attendee's life easier (yours will be too!)
- Y Explain any personal liability, if this is a possibility
- Y Make it practical

What To Do And Not To Do?

- Y Don't bore your audience with "legalese"
- Y Try not to lecture
- Y Make the training practical
- Y Have a focus
- Y Provide guidelines or checklists
- Y Be available for questions

What Types Of Contracts For HR?

- Y Employment Agreements
- Y Severance Agreements
- Y ERISA Requirements
- Y Employment Applications
- Y Benefits Programs

Contract Types - Wholesale Distribution

- Y Traditional Distribution Agreement
- Y Sub-Distribution Agreement
- Y Buy-Sell Agreement
- Y Consignment
- Y Sales Agency
- Y Focus on what your company uses!

Contact Types - Retail Operations

- Y Supply Contracts
- Y Service Contracts
- Y Sale of Goods
- Y UCC
- Y E-Sign and E-Commerce

Pick Your Clauses To Consider

- Y Territory/Product Restrictions
- Y Exclusive Territories
- Y Just Cause for Termination
- Y Fixed Term or Auto-renew
- Y Warranty Disclaimers
- Y Remedies and other Limitations
- Y Software Licensing

Remember E-Commerce

- Y Same legal issues - different business issues
- Y Who can sign - still applies!
- Y What is a contract - need to educate
- Y How it affects core business
- Y How it affects customers
- Y What can your employees do?

E-Commerce Issues To Consider:

- Y E-Sign - what is an electronic signature?
- Y What is the contract?
- Y What documents/records must be kept?
- Y How must documents/records be kept?
- Y What customer consent is needed ?
- Y How can a customer opt-out?
- Y Privacy and disclosure issues

Contracts For Services

- Y Describe the services to be performed ("Scope of Work")
- Y Most other terms are affected by the Scope of Work
- Y Price
- Y Time
- Y Warranty
- Y Understanding customer's expectations

Training On Forms

- Y Focus on customer relationship
- Y Know what is important and why
- Y They are business decisions
- Y Are "standard" forms really a good idea?

"OPC" -- Other People's Contracts

- Y Recognize the time pressure for contract review.
- Y "Standard Terms" are someone else's standard.
- Y Anticipate the other party has no authority to negotiate.
- Y People will change things, if ---
- Y You are reasonable and know why

Training For OPC

- Y It is not just for the lawyers -- it is your agreement.
- Y Review one with the people who have to sign them.
- Y Emphasize the reasons and risks not the language.
- Y Contract review -- a priority for senior management.

Why Read OPC's?

- Y Do you look at your cards before you bet on a poker hand?
- Y Can you be good at any sport without knowing the rules of the game?
- Y Do you want to look like a professional ---
- Y Who knows how to conduct business?

Rules Of The Game

- Y What do customers want?
- Y What can you live with?
- Y Look at your cards
- Y If you know its there, use it.
- Y If it's your form, know what it says

Teaching Contract Law To Non-Lawyers

- Y Goal: add value to the business by enhancing decisions and avoiding problems
- Y Show that contracts are a business tool - contracts provide guidance for better-informed decisions
- Y See the parallels between making good business decisions and drafting good contracts

Teaching Contract Law To Non-Lawyers

- Y Making good decisions
- Y Benefit of legal training for business
- Y Good legal practice in drafting contracts
- Y Construction, Computer, and
Transportation Contracts
- Y Putting it together: enhancing decisions
and avoiding problems

Making Good Decisions

Show that you are a trusted business partner and encourage colleagues to come to you early

Making Good Decisions

Example of how an in-house lawyer can add value to the business:

Jones, Practice Preventive Corporate Law,
"Learn the Business" chapter case study

Making Good Decisions

Y In the training that you conduct, show how contract is a business tool; provide guidance for better-informed decisions.

Y Contracts are NOT just for the lawyers.

Y There are parallels between making good business decisions and drafting good contracts

Making Good Decisions

- Y Define the problem/question
- Y Gathering and challenging opinions
- Y Identify alternatives/consider choices
- Y Quantify alternatives

Y P. Hill and others, Making Decisions: A Multidisciplinary Introduction [1979]
Alexander Hamilton Institute, How Executives Make Decisions [1976]

Making Good Decisions

- Y Apply decision aids [judgment, experience, mathematical models]
- Y Decide, then implement
- Y Plan action and deviations; monitor; react

Y P. Hill and others, Making Decisions: A Multidisciplinary Introduction [1979]
Alexander Hamilton Institute, How Executives Make Decisions [1976]

Making Good Decisions

Y Forecasting outcomes

Y Developing contingencies

Steven Silbiger, 10 Day MBA

Y McCormack's "Deal Memo"

Benefit Of Legal Training For Business

Y Spot issues

Y Determine relevance

Y Sort and analyze facts

Y Communicate in writing and orally

Good Legal Practice In Drafting Contracts

Scott Burnham, The Contract Drafting Guidebook (1992) (Extensive bibliography)

- Y Predict what may happen
- Y Provide for that contingency
- Y Protect the client with a remedy

Good Legal Practice In Drafting Contracts

Christiansen, "Drafting Contracts" - The Exchange

- Y What each is to do and receive
- Y Rights and duties
- Y Assurances
- Y Performance: details and conditions
- Y Consequences of nonperformance

Good Legal Practice In Drafting Contracts

Christiansen, "Drafting Contracts" -
Providing for the Future in Ongoing
Relationships

Y Duration

Y Changes [parties, obligations]

Y Resolving disputes

Construction, Computer, And Transportation Contracts

Construction - Organizational Approaches

Y Goals of a project [schedule/time; budget/cost;
quality]

Y Thorough design [especially clear details]

Y Prequalification

Y Adequate budget to fund changes

Y Qualified owner's staff to deal with problems

Construction, Computer, And Transportation Contracts

Construction - Legal Approaches

Y Accurate description of work

Y Lack of ambiguity

Y Types of agreements based on role [owner, architect, designer, contractor]

Y Dispute avoidance and resolution methods

- mediation and arbitration
- partnering
- dispute review boards

Construction, Computer, And Transportation Contracts

Computer Contracts

Y Types of agreements based on role [vendor and seller]

Y Specific contents [needs, deliverables, acceptance, warranty]

Transportation Contracts

Y Type of compensation based on degree of work [lump sum, cost plus, hourly]

Construction, Computer, And Transportation Contracts

Transportation / PTC

Y Need for the lawyers to ask the business questions [if you realize or sense that the "business people" haven't

Construction, Computer, And Transportation Contracts

Transportation / PTC [continued]

Validate Contract Need

Y Identify a program/department objective or need

Y Explain costs and benefits

Y Verify funding source

Y Verify that staff analysis has been performed

Enhancing Decisions And Avoiding Problems

Good contract drafting practices parallel good business decision-making practices

Y Contracts define the problem/question/goal

Y Contracts document the implementation
[the plan of action; the plan for deviations]

Enhancing Decisions And Avoiding Problems

Good contract drafting practices parallel good business decision-making practices

Y Contracts identify what should happen
[and what to do if it doesn't]

Y Contracts reflect forecasting outcomes
and developing contingencies

Enhancing Decisions And Avoiding Problems

Contracts deal with the risk that:

Y Needs are not thought out

Y Product/service/firm does not meet business needs

Y Deliverables are not completely listed

Y Something is missing

Y Disputes will consume too much time and money

Enhancing Decisions And Avoiding Problems

Show that by forecasting outcomes and developing contingencies you are a trusted business partner

FINDING THE DEVIL WITHOUT GETTING LOST IN THE DETAILS

"DE-LEGALIZED" CONTRACT TRAINING FOR OPERATIONS PEOPLE

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Getting contracts reviewed by the Legal Department is often seen as a necessary evil. Business people report that when they try to negotiate changes to someone else's contract form, the first response is "please don't make me have to send this to my lawyer." While we cannot do much about the reactions of the other parties, in house counsel can add value to their own efforts to improve the contracting process by conducting realistic, and practical training programs. The aim should be to advance the understanding of contract principles in the business context that controls the environment in which our operations clients work. How you accomplish this may vary with the organization you serve, and the business climate in which it operates.¹

WHAT ROLE DOES THE LEGAL DEPARTMENT PLAY?

Legal Department is a service, not a watchdog and not a bottleneck.

Begin with a clear understanding of the role the Legal Department plays in the overall structure of the company. If you charge for the service, you may want to consider giving the training away without the usual charge. If you don't charge the operating units for your service, they are probably paying for it in their overhead charges they send to the corporate office, so you can tell them they pay for it, they might as well use it. Contract review is a service to the business. It should not become a dreaded step along the way to closing the deal.

One question often asked is what contracts does the Legal Department "want" to see? This question needs an answer from senior management, not just from the lawyer. However, unless you have a clear understanding to the contrary, you are not there to make the business decisions on what deals are done and what deals are not. If they make a bad deal because they did not read the contract, or understand the rules, it is their bottom line that gets the hit, not yours.

If training is seen as one of the desired functions, you have a leg up. If it is not, you may need to do more to promote the idea as a preventive measure. Contract training takes place

¹ This article is drawn from my experience in the Legal Department of a specialty contracting company dealing in building restoration and new construction waterproofing on a nationwide basis. Because we deal in the commercial and institutional market, we are often signing contracts prepared by others. Our operations people are scattered in 35 branch offices from coast to coast plus Hawaii. This puts us squarely in the service sector rather the manufacturing or distribution of products. Hopefully some of the information here will be useful, or at least adaptable to other businesses. *JWO*

every time you discuss contract issues with your operations clients. It need not be a classroom setting. A discussion of what you have found in a contract review, why there are risks involved and what to do about the language is training in its most basic form. The purpose of such training is to make it easier for our clients to do their jobs right, avoid problems, or at least deal with them in a less stressful, and more proactive way.

There is a close relationship between, contract review and training. To keep a backlog of contract review from being the bottleneck in the chain of command, is to teach the business folks how to spot some of what is good and bad in the contracts they deal with on a day to day basis. There can be rules, and guidelines, but these should be management rules and guidelines, not just something put out by the legal department. Even if you do have a compliance oversight role, you should be able to separate that from the training function.

Provide guidance to aid better informed business decisions.

If you want people to do something, make it easy for them to do it. Look for ways to help people do the right things. This involves getting beyond the lawyers just say "no" attitude. Suggest that people not wait until you've all spent hours, days or weeks in the planning stages, allocated the funds, negotiated the contract's main business terms, and hired two more people for the new project, and then say "gee, maybe we should run this by legal". If you have a regular training function, it should help to get people thinking about those legal issues sooner, and maybe get you involved sooner. It also gives you an opportunity to discuss issues before they become deal breakers or roadblocks. If you have discussed the general ideas before, someone may remember it later, when it is part of a live transaction.

Emphasize that "legal issues" do not exist in isolation, particularly in the contract area. The question often comes in "so, counselor, what do we need to say?" Your reply might be "so, what is the deal?" If the lawyer understands the deal, he or she can probably write it up in a reasonable manner. It's when you really don't get enough information that you have to cover more issues than need be.

Unless the legal department is filling some contract administration function, the final decision on what gets done, agreed to, or compromised is with the responsible business manager, not the lawyer. However, you can use this as an opportunity to train people in what to look for. When you review a contract, don't just give an OK or not OK. Take the opportunity to do a little training. Point out some important issues, of which the business client should be

aware, even if no change in the language is warranted. One problem often overlooked by the business folks may be separate provisions that in isolation are acceptable, but in combination with others, change the allocation of risks. These items may not even be close to each other, and will only be noticed in a thorough contract review. If you point out that relationship, it may be remembered the next time. For example, in some service contracts prepared by building managers, they include an agreement that the manager is just an agent for the owner, and is not responsible for payment. Three pages later they ask the contractor to waive any rights to a lien on the property if not paid. Two pages after that there is a provision that the Owner is only responsible to the extent of its interest in the property. The combination of these provisions is much more troublesome than each individually, but the casual reading of one paragraph at a time can miss the connections.

OLD EXCUSES COOKED UP TO AVOID DEALING WITH LAWYERS.

Contracts are just for the lawyers.

This is probably just an excuse to keep from reading all that verbiage. It is all too common when someone is told, or understands that they don't have to know what the paper says, it is just something the legal department says we have to have. To point out that this time honored declaration is not correct, try asking the question of the business people this way.

Question: "So, when do you need the lawyers to look at the contract?"

Answer: "When we have a problem with a customer or supplier."

Second question: "How often are people willing to change or even discuss negotiating contract terms after there is a problem."

Answer: Uh, not very often?

How often do you get the question: "Can they do that?"

Chances are the answer is: "It depends on what the contract says."

You will probably get the reputation of always answering questions with "it depends...." However, once you have handled a few of the transactions in question after the fact, you may be able to suggest that they look for that certain troublesome provision that is lurking in most contracts of this type. You will gain some credibility when you can predict what they will find, and there it is. Fixing the problem is an easier next step.

Nobody ever changes anything anyway.

Why go through all the trouble of having legal review the contract, when no one will change anything anyway. The easy answer is that, of course they won't change it if you don't ask. However, the person asking should have some knowledge of the reason why they want the change, other than "our lawyer says we have to have this." Again training can be helpful. If the person negotiating knows the reason for the provision, they can evaluate the situation, and perhaps reach an accommodation that is fair to both sides.

SOME IDEAS THAT GET PEOPLE OUT OF THE RUT.**Gambling without looking at your cards.**

There is an element of gambling in every business transaction. Contracts are often written to stack the deck in favor of the party presenting their boilerplate form for another to sign. People get away with this either because they have the market power to dictate the terms, or because they know that nobody ever reads the contracts. Even if you know the deck is stacked, it is still a good idea to look at your cards before you put your money on the table. It may be a deal you can live with because you only need "one pair" to win, or it may be one that if the cards aren't just right, you will not be successful.

Think of it as the "Rules of the Game".

Try the ever-popular sports analogy. If in football (or any other sport) it was only important for the referees to know the rules of the game, there would probably be more flags thrown than there are, each time requiring an explanation of the rule, and some discussion of how it was violated. Imagine the flags that would fly, and the never-ending arguments. Aside from the obvious interest factor one gets from sports analogy, the approach can work if you as the expert can boil the rules down to an easily grasped and remembered level. Regardless of what the verbiage in the rule book is, everyone knows you can't catch the pass out of bounds.

With contracts, the party who does not know the rules may blunder on thinking they are doing the right thing and advancing the interests of the employer, only to find out that having made a big error, such as missing a short but key deadline. A substantial penalty may be due for late performance that could have been avoided had they paid attention to the rules set out in the contract.

Put a Customer Relations Spin on the Issues.

Look at the contracts you prepare, and the ones others ask you to sign. Can you see what they are concerned about? This may help you to reduce the contract to a few basic rules. One way is to express them in terms of the concerns of the party who drafted the form. Under each heading make a series of short one-line descriptions of the terms that address that concern. For example: Building owners, contracting for construction services, want a predictable result, at a fair price, and a firm timetable. The forms they present are full of provisions designed to discourage contractors from looking for changes to increase the price, expanding the time and cost by claiming delays, and raising issues about unanticipated conditions. Form the contractor's point of view, if these provisions are understood in that context, then a meaningful business decision can be made about the desirability of the project.

The bottom line is that the Contract is an agreement between your operations people, and the operations people of their customer, supplier or vendor. It is not an agreement between the lawyers. You are there to help them understand the rules, and propose changes when needed.

WAR STORIES!

Everyone seems to prefer real life stories to hypothetical situations. Training in this area can get pretty dry if not given a real world outlook. War stories have many times the impact of theoretical possibilities, especially when you can put a dollars and cents impact on the final outcome.

One that went wrong. You can really get people's attention by recounting the tales of woe that arose from some sloppy contract practice.

When talking about the importance of documenting a change agreed to halfway through a project, tell the sad tale of the \$50,000 project that ended up with a \$60,000 judgement against the company. The killer fact was that no one bothered to document the agreed change in the way the work was to be performed. Needless to say, memories faded in the intervening time, and the judge did not buy the story about everyone agreeing to the change.

Most company's have some war stories like this. Call it "Learning from Experience."

One that went right. For every bad story, look for a good one.

Remember the time that a customer wanted some work done that we didn't recommend? The manager wrote a short letter stating that it was not recommended and why, and when it didn't work, the claim meeting was shortened substantially when the letter was produced.

When using stories that are recent, I generally leave out the names and places involved, so that people do not get touchy about having their dirty laundry exposed to the rest of the company. If you can pull up an experience for each of the key contract terms you are discussing, it will make for a much more attentive audience.

Even if you don't have your own war stories, look up a few cases, and let them learn from someone else's mistakes, or good practices. Nothing brings it home like putting a price tag on bad practices.

MAKE THEM READ ONE.

If you can create a condensed version of a typical contract, taking some of the more difficult terms and spreading them through the document, you can have an eye opening training exercise. If you are in a meeting or class session, have them read through it, mark anything they don't like, and come back in 20 minutes and discuss it. Every time I have used this technique, I get some comments about how bad those terms really are. I then tell them that there is nothing there that is not in the forms they see every day. They have been signing them, just not reading them.

NEGOTIATION.

Half the battle in negotiation is understanding what the other party's concerns are about. Include some explanation of why the other party wants the very onerous and heavy-handed language that they are proposing. If you deal with similar contracts on a regular basis this should not be hard information to collect. You can then look for compromise positions that give some credit to legitimate concerns without the approach taken by many drafters of "killing ants with a sledgehammer."

It is important for your people to have some knowledge of what is in the forms that they use. It is not easy to negotiate something you have never read. Shouldn't you at least know what your own form says?

Getting to someone with the authority to think. A common problem is that the person on the other end of the phone, fax, e-mail or maybe even a table, has neither the knowledge nor the authority to make any changes. All they can say is:

"Our lawyer says we have to have this, and I don't want to have to send anything back to our lawyer."

If your people have some working knowledge of what the contracts mean, they can try to work things out without the lawyers. A revision does not have to be artful to be persuasive, if the meaning can be gleaned from it.

The next step is to kick it up a notch to a person who does have the authority to think. The last resort is the telephone conversation between the lawyers. My best luck comes from talking to a knowledgeable lawyer who is sufficiently tuned in to the business situation so that he or she is not afraid to concede that there is a little "overkill" in the language.

NUTS AND BOLTS.

If you want people to do things right, make it easier for them to do it. In one on one sessions, the result is the contract under discussion, but if you do formal programs, they should give the attending person something they can take back and use right away. Some of the things that you can offer as a part of training program.

A new Contract form that makes something easier to write or put together.

An addendum that they can attach to a contract that covers a key point.

A checklist of things to look for in going over contracts

Sample language and how it can be easily and effectively amended.

A reference book that will help them spot the issues.

If you offer these nice parting gifts, you may find that people will seek out your programs rather than recoil in horror at the thought of training by the Legal Department.

No matter what portion of your time you spend on training, it does add value to the company. It also gets you closer to the clients you work with, and can enhance your credibility. Here are a couple of hints to end on.

Seek an understanding of the problems your business clients face.

Try to talk your client's language.

Dress the same way as your audience.

Remember, you are not trying to make lawyers out of them, just helping them to be better informed, so they can make better business decisions.

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.