ASSOCIATION OF CORPORATE COUNSEL

TITLE: **Reviewing and Negotiating Contracts – A Different Perspective**

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PRESENTED BY: **ACC's Corporate & Securities Law Committee**

SPONSORED BY: **Lindquist & Vennum PLLP**

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MODERATOR: **Tim Keller,** Lindquist & Vennum PLLP

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Operator: Just as a reminder, today's conference is being recorded. Welcome to the ACC webcast.

Tim, please go ahead.

Tim Keller: Yes. Good afternoon, good morning, as the case may be wherever you are. My name is Tim Keller. I'm going to be the moderator for the session today. Before we get started, I'd like to do a couple of housekeeping matters. We'll be taking questions throughout the broadcast today. We encourage you to send them in as the questions arise.

We'll try to get to some of them in context and as many as we can at the end of the presentation. To the extent we can't cover all the questions, we will be – provided to those later and we'll try to get some responses back through the ACC to you. You'll be able to ask those questions in the chat box at the lower left-hand corner of your screen. Just fill out your question there and click send and it will shoot off to us in real time and we'll see if we can get them all in. We also want to encourage you to fill out the evaluation forms at the end of this broadcast. It's the number one in the links box that you see there and we'll remind you a bit about that as well.

All right, with that, I'd like to start with introducing my colleagues that are going to participate in today's presentation.

First, I'd like to introduce Jill Bresnahan. I've been working with Jill for over 15 years now both as a colleague in an in-house position at Cray Research and Silicon Graphics and also Jill has been a client of mine. In fact, I'm pleased to say she was my very first client when I came back out from being an in-house lawyer and came to my current position at Lindquist & Vennum.

I think Jill is really my model for what an In-House Counsel should be. She's involved in the business and technological ends of the companies with which she works. Participates in all levels of the businesses and really brings the context to the legal work that she does.

Our other participant is Bruce Little. Bruce is a Partner of mine at Lindquist & Vennum. He is I think probably the finest Copyright Lawyer I've ever had the privilege to work with. He's incredibly knowledgeable. His practice is primarily litigation although he does some contractual and other work as well and as a lawyer, he's a really practical lawyer but also as a litigator he ((inaudible)) greatly in bringing some perspective about what agreements might look like in front of a judge, a

jury or opposing counsel and in fact, he's going to enlighten us later about some situations where my work appeared before such people.

So with that a little bit more introduction. This is a presentation that is agnostic as to the areas of law in which any of us might practice. It is intended to be as the title suggests principles rather than specifics of any particular transaction and a particular form of agreement and in fact in this regard any particular type of provision.

The idea for this arose from my 24-plus years of practicing and my practice I should say is intensely about contracts and contracts negotiation and the presentation arises from some frustrations I've felt and I'm sure all of you have felt from time to time about trying to find a way to express concerns about the agreements I was working on that wrapped up in the substance of the provisions but really the context and background of them. So with that I'm not withstanding the fact that I have said that this is supposed to be agnostic as to area substance of law.

We'll have to start off with a poll here where you can let us know what your primary practices are so we can sort of bear it in mind as we walk through it. To participate, all you need to do is click in the box to the left of the very substance area of law there and we'll see as we go through here how this develops.

First of all, it looks like we've got a lot of IT Practitioners out there. That's near and dear to my heart. I am primarily a technology lawyer so I do a lot of software licensing, a lot of information technology, hardware side deals and services deals, development deals, that sort of thing so you're going to see that personal prejudiced reflected in some of the slides as we go on here as I provide some examples.

So let me see where we're at in responses. We're almost all the way there. So we've got a relatively good balance here. We've got a lot of product, sales and purchasing and services folks and IT folks. I think in general that's the substance out there. Any government lawyers out there I'm hoping this would be helpful but I give you my sympathy. I've done a number of government contracts. I know Jill has as well – and we both know having done those there's a limit to what you can accomplish dealing with the government.

So with that in mind, let's talk about what we're going to talk about today. We have three categories to discuss.

The first is principles of review and really this is a question of context and striving to in our work get the proper context for the agreements we're working on so that they work for us and our clients, both in the present tense and the future tense.

The next category is principles of drafting and this is the meat of our presentation. We're going to discuss a number of different principles that you can use to both review and to draft in order to kind of keep in mind whether the approach we're taking to drafting really is going to get us where we want to go when the agreements come into operation.

And then finally and particularly as time permits, we'll talk about some negotiation issues and also as slide suggests since this is really not a presentation about the negotiation process so much as some fine points about focusing on the issues here in some places where sometimes we have extracted by how we approach things and how we might get back on track and get where we need to go.

So with that in mind, I also want to make one more general series of comments here. You're going to see that some of these points that we're going to discuss today may overlap. That's not unintentional. In the effort to be comprehensive we're confronted with the need to be a little bit overlapping. I'd also say that sometimes these issues might seem obvious and I'm glad if they do seem obvious because to those of you to – they seem obvious you'll know doubt the kind of

lawyers we like to negotiate with and kind of stick to your knitting. On the other hand, I'm hoping that you will be able to get some utility here with respect to the other person on the other side of the deals that you work with and maybe this will give you a point of reference you can use to help get a deal that's off-track back on-track.

Let's talk about our first category, principles of review. We're going to talk here about business, technical and physical realities. Some points where things might seem reasonable on the face when you first look at them but in fact if you sort through the practical realities might not really be the provisions that you want to have and let's talk about accommodating change here. You're looking forward in a business context to how things might be ((inaudible)) all and all this entire portion of our presentation is about context and keeping that in mind.

So let's talk a bit about the business and technical and physical realities here. I know Jill has in her capacity as in-house counsel done a great job as I've mentioned previously of integrating the issues raised by business people, technical people in the IT work that she's done and actually just the physical realities of how things operate and where things work proactively seeking these folks out and maybe Jill can give a little insight into how important it's been in her success in that regard.

Jill Bresnahan: Sure. You know when it comes to transactions a substantial part of my job is education. Educating people about the importance of having a full team at the beginning of a transaction and even accessing whether they want to do a transaction. So in my situation I have technical people and then there'd be a businessperson as well as the legal person that are part of the team when accessing the transaction. I'm sure most of you if not all of you have had the situation where the transaction basically has been not completed but has been negotiated.

The deal has basically been struck and you've been asked to review the document or you've been asked to draft the document. At that point, our ability to help has really been diminished and I find that when people first start to think about bringing legal and business people in then they think oh this is going to take time. It's going to lengthen the process. It's going to be a bad situation when in fact I think once they go through the process of having this whole team approach, having legal business as well as technology they find that this is invaluable.

That this is the way that you can actually get the things done. If you're a technical person you can probably get back to work quicker. You don't get a lot of negotiating and in the end you get a better result for the company, which basically is what we're trying to do here.

Tim Keller: And I'd like to add as former in-house and now currently counsel from the law firm that when we work with in-house counsel it is really important to us that the in-house counsel be a conduit to just exactly those kinds of people who need to provide that kind of input. It is difficult sometimes for us to know who they may be and also we've had a very longstanding relationship with the client and we like to think that the work we do for you as in-house counsel is going to be as effective as it should be going forward but unless and I refer back again to my information technology background.

In those cases, we can get to the (IS) people through you get from the financial folks through – we're not going to be able to do the kind of job that we'd like to do and so again, we rely on you and want to work closely with you to get us to those people as a member of your team as opposed to just an outside contractor.

Let's talk a little bit about the idea that some provisions might seem reasonable as you look at them at first blush but perhaps are not and here we're going to look at an example and don't feel any obligation to try to parcel this.

This is a typical obligation from a non-disclosure agreement with respect to a recipient of information and their obligation to give a disclosure of that information. Notice when there's a

subpoena or any sort of other governmental or judicial attempt to access the information as it is in those recipients' hands.

This provision as you can see here you know puts you in a position as a recipient to give immediate notice and to give the other party the opportunity to oppose the disclosure and also goes on to require the recipient to get an opinion of outside counsel about what is the minimum level of information that has to be disclosed.

And the problem with this is several-fold. Number one, it is standard and what's more not only a tempo matter or rather stringent standard but there were circumstances when even prompt might seem unreasonable and what's more there are also circumstances in which any notice might be impermissible to the extent that there is a confidential investigation being conducted by a governmental agency.

And certainly getting back to immediate. When you've got a gentleman or a gentlewoman with a badge in front of them and demand access to what's in your file cabinets my guess is your first movement is not going to be to call the disclosure of information and say gee I've got these people here as this provision goes on. Why don't you come over? I'm giving you the opportunity to oppose this proceeding. That's just as a practical matter not going to happen. So with that in mind, we should consider some alternatives.

Here what I would suggest and what I commonly do is say look, we the recipient we'll tell you – the disclosing party about these kinds of demands for your information as soon as we can to the extent we can and the language I used here as you see is as the circumstances reasonably permit. I like to think that that sort of embraces both the idea of what can be disclosed to you about – as a disclosing party about the nature of the inquiry as well as the timing of time and disclosing party.

Moving on. Let's talk about accommodating change here. This is a personal favorite of mine and you'll see here this is an example from a software license and this is a provision that we still see quite a lot today in doing software licensing but it really goes back to the days when dinosaurs roamed the earth in the software industry and we got software on fixed media and making a copy on fixed media was all that was really necessary.

Nowadays, we see a lot of different kinds of these technology and practices being used to allow users of software to backup both their data and their functionality. We have people making tapes every day. Putting those tapes in a box and sending them offsite. We have people who have their operational servers plugged into backup servers that are ready to rollover on a seconds notice and we have people who are piping their data and an image of their entire system which would include the functionality of all their software on an offsite which is backup on a real time basis so that keeping one copy that's just not going to be something that's going to be consistent with current best practices in this regard.

What's more, going forward, eliminating all the copies you might have of a piece of software after the licensed governing that software has terminated might not be the most practical thing. When you've got 500 tapes that have copies of their functionality and the tapes include the software in question and other software and whole bunches of data all kind of munched together on a tape it's just really not going to that practical for someone to go through that and purge portions of that.

So as you see in this example here we've tried to provide for the licensee to retain copies of that as our embeddable but not to use them and I here I think is a place where Jill who is someone with a technology background can chime in about how there's a need to update technology folks so you'll know that the average of today's need but tomorrow's that might need to be addressed.

Jill Bresnahan: Yes, sure. You know I think it's important when you're reviewing a software or any other type of license for that matter. It's the taking countless – not only the company needs today but

also what it needs in the future. Like for example. How long are you going to need the license? You're talking about software tools.

How many setups do you need today and how many do you anticipate needing in the future? The real situation here is that you don't want to be caught off guard. You don't want to not anticipate what you need in the future and have to renegotiate something or have a license expire when you're in the middle of a project.

It takes away all your negotiating – the ability to negotiate and it really makes it difficult to get a good deal. So it is a lot easier to negotiate the terms upfront than when you've already become dependent on it and the software company knows you're dependent on the software. I think that's why it's so important to understand the needs of the company.

You need to talk to the business people. You need to talk to the technology people in this situation and you need to also understand the technology so you know the right question to ask because if you're not asking the right questions you're not going to get the feedback and you're not going to be able to comment on a license that may be evolving as time goes on.

Tim Keller: Yes, I totally agree with that and that's been my experience – bitter experience in a couple of cases where we really did nail down what we needed today but failed to get to the right people to find out what the needs are going to be the next time and end up without any bargaining position but needing to renegotiate.

So now we're going to move on to what we need here, which is our Principle of Drafting and Landmines. All right, so here are the categories we're going to talk about here.

Restatements of objective reality and some of the other issues here where we might be having either redundant or unnecessary provisions and that would include issues of outcome versus standard care of agreements to agree.

We're also going to talk about some issues that go beyond the scope of the agreement including third parties and then finally we're going to talk about mechanical certainty in the context of whether we've gotten the detail in the document we really think we might need going forward and a lot of this is in the context of – or here that we're seeing which is everything is given some meaning in an agreement if you can give it meaning and that was with this whole issue of if we're putting in redundant or unnecessary provisions what does that really do to our contract?

So let's get into that right away here with the idea of – oh, excuse me, our next poll yet. So the question here is whether you actually put – allow redundant or unnecessary provisions in your agreement? I'm really curious to see what people have to say about that. Apparently, most people don't which is I think a wonderful thing and about half of our respondees here – this is great. I think – this is something I know I'm confronted with in my practice quite a lot and to some extent we sometimes have different opinions on what is in fact redundant, what is in fact unnecessary – but this is great.

So most people will and say yes I think that's wonderful and again I'm hoping that that's substantively true. I know in my case I like to think that that's my approach but again other people may have a different opinion when I think of redundant or unnecessary.

And our second poll in this regard is and we were going to talk about this earlier. Has anything you worked on become the subject of litigation? This is something that I was able to say no to until a couple of years ago and my bitter experience was the subject of this slide coming up here in a few minutes here. Well, lucky you guys. This is a very lucky audience here, my congratulations. So the vast majority have never had this experience and I salute – the one percent for whom it's too painful to discuss I'm with you.

So let's move on here. Let's talk about one of my favorite issues here Restatements of Objective Reality. This provision here, which by the way is a good example of the overlap that I mentioned earlier. You know, it's basically an agreement to create. In that regard it's a restatement of objective reality. The parties can always do that going forward.

Another classic example so you may agree to amend that. As we know, you can always change your agreement so what does that mean when we get into the question of how does a redundant or unnecessary provision potentially causes problems.

Well, with these examples of agreements to agree knowing that we can always change our agreement perhaps invokes a duty to negotiate in good faith and in many agreements the sustentative law imposes in fact an obligation of good faith and fair dealing which would I would think subject itself to these agreements to agree and then that's the question is do you subject yourself to the potential judgment of a third party in the person of an arbitrator, a judge or third parties in the person of juries to determine whether your lack of agreement in this regard is something that's unreasonable and actionable so I studiously try to avoid this for that reason and here's another reason why.

So here we have one of the things I hate to see the very most in technology agreements. Here you have a customer whether it's a licensee or what have you saying I agree that you vendor own your stuff. Well this is also an example of something that might be reasonable. The problem with that is what if you get into a dispute in the future.

What if you're a vendor of software to my business. My business at some point wishes to be independent of your software, your support props going forward and wishes to develop their own in-house. Well if you've had this type of provision you may be seeing that pointed back at you as an acknowledgement that prejudices your ability to deal with an infringement claim from a vendor with respect to the technology you developed after you've terminated.

An acknowledgment that the vendor sets in all of this and when you think about it in all fairness in most agreements when this issue comes up the customer is going to expect an indemnification from the vendor with respect to this issue in the form of a non-infringement indemnification and so this will stand the vendor – customer relationship on its head somewhat to ask the customer why this representation instead of it coming from the vendor and the final bet in that regard is you've got to ask the customer how they would know that this is true. They have no reason to know that.

This is another good example. This is my bitter example and I call it the restatement of objective reality in this slide because this came up in the context of the resolution of a dispute between an employer and a former employee about a program that the employee was allegedly – had allegedly taken from the employer after the end of their employment and in the process of negotiating a settlement with that employee, the employee asked for this provision and the representation at the time was hey, I'm just this little guy. You're a big company. I'm worried that after I settle this particular issue you're going to come after me about this other thing which I say I developed later on and so therefore I just need some assurance from you that I'm not going to be on the hook for you coming back at me again.

Well, the client and I pondered over this for a day and I in fact described to the client as what should be a statement of objective reality and perhaps even a representation from this employee about the facts and circumstances with respect to this new program. Alas, subsequently, the employee was found to have sold this product to another company and we determined that the product was in fact derived from the program that was the subject of the principle dispute whereupon Bruce was summoned to rescue me from my failure to live by my own principles. Maybe Bruce you can describe how this is problematic in attempting to do that.

Bruce Little: Yes. The issue was that you had a copyrighted work and you had a representation made by the employee that he had developed the original work or the first work as a work made for hire

when he was employed by our client but that and he actually made this representation in the agreement. Tim's being too hard on himself probably.

He said that he had independently developed a second unrelated work after he had left the employment of our client. Well sure enough what he had done was he had developed a derivative work and those of you who practice in the intellectual property area will know what a derivative work is and the rest of you probably can just apply common sense and know what a derivative work is. But although I will add parenthetically that I found a number of judges who lack in common sense until you explain to them what a real derivative work is.

Anyway, the dispute arose because he kept saying look, you gave up all rights you could possibly have to my second work when you acknowledged that I own it and a third company or a third party had actually purchased this work based on what they viewed as a very clear contract that it was work A, work B, and they could buy work B and will suffer no claims from our client.

They initiated litigation after we complained about it. Filed for a declaratory judgment to show that there were in fact two separate and unrelated works. We counterclaimed for copyright infringement and I would think that – it ended up being resolved via settlement in one of the telling pieces of evidence which was extra contractual was that after entering into the settlement agreement and after selling the second product to his new customer, the employee and before there was a technical dispute the employee contacted us and asked if we could just clarify that these were two different works that admission that there was some lack of clarity as to whether the different works was the telling point you don't always get that sort of admission when you're trying to resolve a contract dispute and fortunately because there was some clear ambiguity here we were allowed to represent to them we'd be able to offer that into evidence and their lawyers being smart guys wanting to protect their client's financial investment decided to settle with us rather than to continue to litigate the matter.

But as Tim said at the beginning, we spent a lot more of the client's money than I'm sure the client would have liked to because an ambiguity was allowed to creep into the final agreement. In this case really because the client wanted to get the deal done and wasn't listening to Tim but nonetheless, it would have been better had the parties stuck to their guns and made sure that it was very clear what the difference was or lack of difference between the two works.

Tim Keller: And I will confess that I have been extremely aggressive in sticking to my own principles ever since then. The unstated principle as once learned is infinitely shy. I have really been very reluctant to involve that kind of hypocrisy. I do from time to time so let's get to another question here. Issues beyond the scope of the agreement and here's an example. Frankly, I think somewhat of a stunning example but you do see this from time to time. This is a disclaimer and it explains not to just to the issues in the agreement but to duties imposed independent of this agreement.

Now maybe the intention here is to get to as it goes on a tort claims related to the agreement but we just discussed a previous situation here where the ambiguity created a problem and this at a minimum read with some ambiguity could be read as a limitation of liability on any issue with respect to these parties and clearly that's not going to be the case so this is a provision that either needs to be clarified or that kind of language has to be eliminated.

A similar issue is dragging in third parties. Here we have an example of where licensors and this is not that uncommon. Say you're a licensee. You have limitations but also people downstream from you have a limitation. The problem is of course those people downstream don't have any contractual privity with the original licensors. So given that, the question arises what is the consequence of that about that language? Here's another example. Not likely the licensee or any third party. But the problem we have there is how would this be interpreted?

Well it might be interpreted to be a number of things. One of them might be that as a licensee is agreeing between the licensee and the licensor that the licensor won't have any liability to third parties perhaps the licensee is implicitly taking on that liability. In addition, in the context of a tort whether it's a potential contribution claim from both parties it may be read to be an acknowledgement that the licensor won't have to make any contribution with respect to joint liability they may have to a third party.

So it's really something that you're going want to avoid doing if at all possible here because you may end up on the hook. If you think as a licensor this is something unique or you think as a licensee this is something you're compelled to agree to in any way, at a minimum again you're going to want to clarify what this really means.

And here's another example of that and it is a further example of an issue we're going to discuss a little bit now about the difference between a standard of care and a guaranteed outcome. This is more of an outcome provision. Let's talk about mechanical certainty, which I think is something that we don't give as much attention to.

This is a classical notice provision and it says you give it to these people. The problem is if you get into the ending of the contract and there's a dispute or you want to terminate or what have you, or you have to give notice for any reason this provision doesn't tell you everything you need to know. This provision doesn't tell you when the notice is effective. It doesn't tell you how it has to be sent and so you you're going to be living with some concerns about whether the notices that you do give to the other party will in fact be deemed effective for whatever purpose. I mean that might include termination or breach but you need to be providing. So you're not going to have a date of certainty.

So here we go. Here's an example and please don't spend your time on this. But here we talk about the modality, certified mail. We talk about when it's effective. Alternatively, when it's posted or when it's actually received. So when you have this type of provision in the context of notice you'll at least know when your notice has been given effectively so that you can start the clock on perhaps termination with the right to cure for – in the context of breach.

Another example here and this is an overlap as well. It is an agreement to agree type of provision. We're going to work this out. The question is how are we going to work this out and if we don't know how we're going to work this out, how do we know that we can move on to another vendor to try to work it out. I should add that in the context of mechanical certainty a number of other places where the issues may arise.

Force majeure provisions are in fact a closet provision. Many of them merely recite that a party whose performance is presented from an act beyond their control is excused from that performance. The problem becomes and in particular in the context of say an exclusive supply agreement, one where there's an ongoing relationship anticipated between the parties the question becomes if and as that the force majeure so prejudices one party's performance that nothing will happen for some significant period of time how does the other party get out of that agreement and find an alternative without actually breaching the agreement and I must say that these things do come up.

They came up in the first Gulf War when a lot of containment traffic was bottled up in the Gulf. Then I saw an article recently about force majeure coming up with some weather related events. In particular, rail traffic being stalled through all those flooded areas in the Midwest and parts of the West. I think if we have those provisions but again when they come up and you've got a problem then you start scrambling to figure out what you're going to do.

Indemnification is another good example. In the context of indemnification you're going to want to know how you invoke that indemnification if you're the indemnidee. What kind of notice you have

to give and what the process will be for defending a third party client. Who takes the lead? Who's responsible and how that works.

Moving on here and we'll talk about another subject near and dear to my heart. outcome versus standard of process or care. Customer will take all options if necessary to ensure. Well we talk about ensuring this. We're talking about an outcome. This is a strict liability provision. In my mind we'd say that if the software is actually used by one of these unauthorized third parties, the licensee is on the hook without regard to whatever sort of precautions they've taken no matter how stringent they might have been.

Another example here from a non-disclosure is a little bit more reasonable. This is a standard of care. You will use this standard of care. You will protect your own information but at least reasonable care. So here we're not guaranteeing that if you put something in a bank vault no amazing criminal is going to be able to drill in there and get it out from that vault.

Bruce Little: Tim, here is an area that I've worked in a lot as well and I guess that I would like to add that in confidentiality provisions if a party is being required by the other party to maintain information secret or confidential, sometimes you want to let the party who wants to keep it secret or confidential be the one to impose the standard of care and I have frequently said your standard of care if you're the party keeping it secret may not be sufficient and so I get to dictate to you as part of this non-disclosure or part of this secrecy provision what standards you will apply for my information even if you use lesser standards for your own.

And surprisingly enough, I think the parties actually get along better after the initial chaos of the negotiation when you first raise that issue in the performance because they know they have to treat that information or that technology with extra special care and they often do it.

Tim Keller: And we did have a question here about standard of care versus outcome, which relates to the difference between – commitment to meet all timelines and a commitment to use best efforts to mean all timelines. Putting aside the question that best efforts is one of those issues that is subject to interpretation, my view of the difference there is meeting all timelines with a strict liability standard.

You either meet them or you're in breach. The commitment to use your best efforts is more of a standards issue and so that invokes if you consider the best efforts to be a commercial reasonable standard the excuse that it isn't commercially reasonable for you for example to double your expenses to get something there. It's not quite the force majeure as an excuse but it is in fact a circumstance that lets you off the hook because you've got a standard of care there.

And the question further went on whether it's advisable or practical to make it an absolute requirement and there I guess it really depends on the context. Certainly, if you're the beneficiary of this type of commitment you're going to want to be the beneficiary of a stringent a commitment as you can get. You can as a recipient for example of services cut people slack. Give them some extensions. That sort of thing at your sole discretion but you'll always want to have the ability to judge that otherwise as the person providing services on a timeline you are going to obviously want to have the waiver room that you'd like to have.

Jill Bresnahan: Yes and, Tim, this also goes hand in hand with like limitation liability. So if you get yourself back into a corner with a strict liability you want to really take a look at what you're on for on the limitation of liability. You just don't want everything open-ended.

Tim Keller: Yes, I totally agree with that. So we had another question about indemnification in turning – including attorney's fees if you're hooked to defend. You know, I'm not a big attorney's fees person. I think in the case of indemnification if there's for example an infringement claim I might be more sympathetic to that but based on the jurist principles you might assume that I'm not big

on people having to prove that they've deserved for example injunctive relief or the payment of attorney's fees. I'm a big believer that we have this large body of contract law.

We have it for a reason. We have it because people have over time run into as many kinds of disputes as we could probably have to and I think it is incumbent upon us to – whether you believe in the judicial system or not, I just think that when we start to create our own bodies of law we run the risk that we're starting all over in terms of ambiguity and to problems and I just – I think it's generally a bad idea.

Someone here just commented that they'd delete the attorney's fees generally as an incentive to run to the courthouse and I tend to agree with that. Put it in context. It may be that it's reasonable in some circumstances and frankly, if you look at the issue we just discussed with respect to standard of care versus outcome, there may be times when that strict liability is appropriate particularly if you have anxiety about in the context of a non-disclosure the faithfulness of the other side. So you know while I believe these are valid general principles I think the world is full of exceptions and that's one of the issues we're going to talk about in negotiating here in a minute.

So we're up to Agreements to agree here which again is again a personal favorite of mine. Here's an example in a litigation context. If you want a license to someone we'll negotiate in good faith. As I mentioned earlier that's pretty ambiguous so if you don't want to get that in front of a judge or a jury to determine what's commercially reasonable and what's technically reasonable this is my personal favorite. So you will find as part of the materials here is item seven, an article I wrote regarding dispute resolution mechanisms of this type you will see from an article on something of an event in good angelical mission to try to eliminate them because I think they either add nothing to the agreement or they add a layer of additional process that is both ambiguous and needless.

I'm a big believer that if two people can work something out without spending money on attorneys particularly in the context of litigation they would certainly do that as a commercially reasonable matter. On the other hand if they're not able to work it out that doesn't strike me as something we want to legislate in a courtroom. So I invite you to look at that article. If for some reason you have any problem getting it there you can look at my bio on Lindquist.com and you can click on the article there and you will find it there.

So – what I want to ask you in our last poll here. Do you use these types of provisions and we have the – well that's the first person. See what people think. I've got some people on my side that's good. I do find – I've got 19 percent so far.

This is a corporate policy in a lot of places and I've spent which you might assume from my taking the trouble to write the article a lot of hair pulling timeframe to deal with these things. So again since I'm on a mission here I'll ask you very nicely to take some time and look at that and see if you don't agree and perhaps we can all agree to take a different pack with us. So it looks like very few – a lot of these small percentage actually require but a lot of people actually use them. So – in other words there was a point here that non-legal executives seems to like them and I agree. That's because I think they don't understand how much trouble they can be in terms of spending money on whether you attempted to agree reasonably as opposed to the merits of the underlying problem.

So we're moving on here to negotiation issues. Again, the idea here is focusing on what's going on. My first kind of principle here is about false symmetry. We get a lot as I'm sure you've experienced yourself of tit-for-tat kind of negotiation well if you get that I should get that but of course the truth is in most agreements that perhaps the continuing of bilateral non-disclosure agreements the parties are different.

In other words, one party is licensing something. Another one's – two are party – another one is licensing from the party. One's party is selling something. The other party is buying something and then they are paying something. So they're not always the same position here and so not everything needs to be the same. Limitations of liability and indemnification are the place where I see this the most but this is a context driven frame.

It may be that the vendor in a situation moves more at risk than the customer. It may be the other way around. So I don't have any particular prejudice about how this might be a problem. I just think that we ought to consider when we say wait minute. You've got this. Why do I have this? Maybe there's a reason for that and maybe that's context driven and we should figure out what that is.

So now we're going to talk about focusing on the issues and what I call resume reasoning and to some extent we're all guilty of this. This idea they've never heard that before or this is the industry standard and really when you get down to it those statements if made with some confidence are really a representation that the person making those statements should be taken seriously and the other side should just agree with them because they really know what they're talking about. And of course the problem with that is you know everybody could be right but that may not be particularly important in the context of the transaction. But also it's a classic waste of time.

In fact in some circumstances where it really gets out of hand I've taken to saying well OK so what we're really saying is you know more than I know or I know more than you know so maybe we should compare biographical information and decide on that merits who's going to actually win this argument.

I understand is something that could be both innocent and not innocent as it could certainly see. Sometimes I generally don't understand what's going on and I really want to understand because much like we talked about redundant and unnecessary provisions generally, I don't like to see something in an agreement that I don't understand because I want to understand what the other person's needs are that are being met by that provision. Otherwise, I can't help my client determine whether they're really is agreement on the substance of the contract at hand.

Moving on here. This is a matter of importance then. Oftentimes we say things like if I give you this I have to give it to everyone else. The truth is when you're on the other side of those arguments you don't care. Everyone agrees to this with the necessary framework. If you're a parent you're use to hearing from your kids you know Johnny can do this and Jamie can do that and of course the parental response is well if they walked off a cliff would you do that too so it hard to be a parent when you're doing that kind of reasoning. If I give this to Wes I give it to everyone else. Again, if you're on the other side you just don't care and you're going to say ((inaudible)) to give them.

I was on a Northwest Airlines flight that was on the ground for three hours and somebody ahead of me said I'd like a cup of coffee and the stewardess said well if I give it to you I'll have to give it to everyone else and the passengers response quite reasonably was I think you should give it to everyone else. So again, context driven. We really need to be focused on this deal, not everybody else's deal. I understand some people have those most favored nations provisions and there really is an issue there and I think that's a place in context where perhaps that argument has some merit but I tell that again the other party doesn't care. Policies against us. Policies that require this. I understand those arguments. People have policies. I have generally two responses to that.

Number one. To the extent that's true I think it's important again if we're going to be dealing with context that the people who own those policies be made available in the negotiation process so you can explore at least the possibility of making some exception however minor. It is not uncommon for purchasing organizations to be given a series of directives on a policy basis

regarding what they can and cannot do and – but not given the ability to bring the policymakers into the discussion. That is I think enormously frustrating but perhaps a little unfair to the other side and it may be that if those policymakers were available some exception might be made.

And now we actually do have our last poll, which is, do you take negotiation positions based on policies? A lot of people do. Sometimes you know – good response. Yes. Do we make exceptions?

I think that's the optimal thing. I think that policies are a good way to keep from moving management by exception is an important way to keep your life simple in a corporate environment so that's a reasonable position to take. I must tell you especially in doing a deal years ago I had someone on the other side who was working with an agreement that was really not involved in very much money and it was a bulk product and they did hundreds and hundreds of moves and so their position as policy was they don't negotiate any of these.

My response is if I were them I wouldn't either but nonetheless on our side we needed to make a change because it just didn't work for our intended use of their product so I said well then we just can't use their product and I got the response that we have a policy against not negotiating. I said well I understand that but I can't use your product so sometimes your policies get in your way even if there are rules and you need to figure out how you're going to work out around that when the case arises.

And now we're talking about another favorite of mine, reality versus economics. Limitations of liability and poor economic provisions to an agreement, indemnification as well and we have to bear in mind that indemnification is really insurance and if you go to State Farm they're not going to give you insurance for nothing so that's factored in to the economics of the transaction. Doesn't mean it's factored in reasonably but it does mean we need to talk about the economics and not make this a moral crusade as reflected in our last bullet there; don't you stand behind your product?

Because no doubt you do stand behind your product but not to the infinite of cost or obligation otherwise.

So in conclusion, again some of these issues might seem obvious and I hope they do but anyone – provisions have a number of different issues here and we can talk and we're looking at these provisions about how they may affect you adversely in all those different ways and I think it's important to consider that and I hope you'll find some of the points we raised here help you put that into context both for you as a negotiating party and the other person here who's on the other side of you transaction.

I've got a question here. Does a dollar amount of a contract alter your stance on principles? Yes. In my – that's a context issue that's very important but again as in the example I was just discussing regarding the conflict between policy and the product needs if the bulk product for example doesn't let you put a piece of software on a laptop and all you do is sell laptops, you either as a business will let policy – you need to figure out how to extend your policies to accommodate that new market or you need to make a decision you're just not going to be in it. But you can't negotiate with someone based on – that does not use their product and try to convince them they should sign up for it.

Someone asked if you can get a copy of slides. You should be able to download them from the site here. I would ask Sandy to chime in if she's got any more specifics there.

Next question here. Do you really think the price of product reflects the scope of an indemnification provision?

Well I'll interpret that to be accurately reflected and I think – you know not totally accurate in most cases. I think – in my experience, the people who have thought this through the best are the ones that have got through with their insurance coverages need to be because that is their backup for the level of exposure. But you know how they factor that in the price I will say that I am taking a philosophical stance and not being a financial person and hoping that my clients and the people on the other side have actually thought that through. But in all fairness as a purchaser you need to figure out what's left over from that indemnification.

One thing I feel – one thing I'm negotiating right now which is really maddening as a customer is a combined limitation of liability in an indemnification provision where there's a cap of the total – absolute total aggregate liability of the vendor and an indemnification provision under which the vendor is – takes control of the defense of any claims but given that cap the vendor is taking control potentially of a client with leftover liability for the customer. That combination of provisions really is maddening if you're the customer because you're agreeing that the vendor can in fact settle for a billion dollars and leave you holding the vast majority of that. So that's the context.

So I'm going to scroll back here and see what other questions we have here.

Out of the size of your company impact your ability to push back on contractual provisions? The short answer is a lot. Most of the – frankly, most of the businesses I work with are small medium in their startups and yes that is a real problem. Some of the businesses I work with are very large businesses and it's really funny when they end up working with another large businesses and find someone who's in an economic position to actually push back. I think it's a great experience to work with businesses that don't have a lot of bargaining position. I think it makes you a sharper lawyer.

I think it makes you think through things. If your client reduces you get good at playing poker and if you're playing poker with five aces you don't have to think very much about why you're right or wrong. So the short answer to your question is yes, I think it does have a lot to do with it. Some of the companies who have a lot of leverage driven by being reasonable and some are not. So you've just got to throw yourself to the carpet and plead mercy in some cases.

Bill Little: Tim, if I could chime in.

Tim Keller: Sure.

Bill Little: There is the old saying from Brande Trickie who said sometimes the best trades are the ones you don't make and I think it's really important in advising your client when they don't have the bargaining power sometimes to walk away from the contract. They can often find someone else to supply them with the good or service they need who is not the leviathan and will get a better deal for both parties and it will help both smaller companies grow. So I am not shy about saying to my clients if the big company is insistent upon that provision tell them no deal.

Tim Keller: Yes, I'm a big supporter of that. Sometimes people make an emotional investment in a transaction and they can't decide not to do it. Another thing people do is ignore what you've been saying for a long time. Several times in my life I've had a provision in a document that's been under negotiation for weeks and they get down to the last few provisions and the other side says do you really mean that and your response of course is that's why it's been there for the last six months but these things happen in the negotiation process involves people so it's inherently flawed in that regard.

So let me see what other questions we have here that we have not responded to.

When you use language like commercial reasonable in relation to confidentiality how do you establish the practical test for what's commercially reasonable IT security to be asking from the IT

department. The other side will say that whatever we did was not commercially reasonable where is the ((inaudible))?

Well I feel we're at balance that there is some ambiguity about commercial reasonable. I do think that with regards to security you can vote the idea of industry standards, which again is perhaps not as precise as you like but it is something and Bruce can chime in as a litigator for which expert testimony is available rather than something totally ambiguous.

Bill Little: And that's absolutely true. If you are going to rely on industry standards it helps to spell out what those industry standards are in the agreement or by reference to something that establishes the industry standards or else you do end up with two different experts telling you that the industry standards are two different things.

Tim Keller: That's right. To the extent it's possible you can be very specific about what you will do. Where you'll lock them up blah blah blah and some companies have solely depailed with respect to confidentiality practices that are documented and you can invoke them as well.

Next question. OK. Do you have advice for a company that wants their defenders to certify to compliance about raising – I just got blasted out of question here. Hang on one second here folks.

Bill Little: There's a question here about incorporating recitals too in the agreements and again I think incorporating the recitals is sort of counterproductive as a general rule. Although sometimes it's going to be important depending on the agreement but typically those are the recitals that lead to the agreement and I would favor as a general rule with 50 percent exceptions probably that you say we're not going to incorporate the recital as part of the agreement.

Tim Keller: Yes and I actually – can answer that question because I spent a whole bunch of hours this weekend looking at this issue and I would generally with Bruce and to actually to extend his thoughts I would say that if you think something is important enough to put in the recitals, generally speaking it's important enough to get in the substance of the agreement because you don't want to be in an argument about whether or not something in the recitals really means anything and more of getting the substance of that because I can assure you it's a lengthy chat based on the research I've just done.

OK. Let's see here next question. Beyond principle of proportionality of thought to penalty historical context liability issues state a good defense why it's necessary or fair? I'm not sure I understand that question. Bruce, do you understand that?

Bruce Little: I'm not sure I do either. I wish you could get it clarified but I think our time is up too. We could answer that offline couldn't we?

Tim Keller: Yes. In fact, that's right. My understanding is that the ACC folks are going to gather up the questions that have not been answered and shoot them off to us and we're going to do our best to respond and if the individual that asks that question wants to provide some clarification please do but we will get back to you through the ACC.

Finally, one question is how do you get my article in the damaged number seven there? In your preview screen and you can go to Lindquist.com and click on Tim Keller's bio and if you look at the presentations and articles page there's a link there and you can click on it and get the article. Thanks very much for your participation and please remember to fill out the evaluations.

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