Getting a Workable Contract to Signature Sooner: Field Notes

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These notes are adapted from essays at my Web site, OnContracts.com, and from my work-in-progress contract form book at CommonDraft.org

About the author

I'm an AV-rated business lawyer and neutral arbitrator in Houston, as well as a part-time law professor teaching contract drafting. I'm licensed in Texas and California and am registered to practice in the U.S. Patent and Trademark Office. *(My last name is pronounced "Tate"; because of my Roman numeral my parents called me "D.C.," which stands for Dell Charles.)*

One of my main professional interests is finding ways to streamline the processes of business contract drafting and legal review. Toward that end, I'm developing the *Common Draft* contract form book, with extensive annotations, at CommonDraft.org, in part to serve as a resource for my law-school students.

I was formerly a partner and member of the management committee at Arnold, White & Durkee. AW&D was a 150-lawyer IP litigation boutique law firm with offices in six cities in the U.S. (After I left, the firm merged with Howrey & Simon, which, sadly, dissolved ten years later.)

I left the firm to became vice president, general counsel, and secretary of BindView Corporation, a 500-employee software company with operations in six countries, which had recently gone public; as outside counsel I'd helped the founder to start the company. I served there until our successful "exit," when we were acquired by Symantec, one of the world's largest software companies.

I'm active in the leadership of the Houston chapter of the Licensing Executives Society. Previously, I served on the governing council of the American Bar Association's Section of Intellectual Property Law, where I also chaired several committees. More recently, I served as one of the two co-chairs of the Commercial Transactions Committee of the Business Law Section of the State Bar of California.

I earned both my undergraduate degree in mathematics (with high honors) and my law degree (law review) from the University of Texas at Austin. Between college and law school, I served my ROTC scholarship payback time as a U.S. Navy nuclear engineering officer, including three years of sea duty aboard the nuclear-powered aircraft carrier USS ENTERPRISE.

My wife of more than 30 years, Maretta Comfort Toedt, and I have two adult children who live and work in Houston and (according to Maretta) don't call their mother often enough.

1. Drafting a *workable* contract

1.1 Thinking ahead: Do like Stephen Colbert

Stephen Colbert and his agent showed that there's more to contract drafting than just putting words on the page. They set up Colbert's contracts with the Comedy Central cable network so that the contracts would expire at the same time as David Letterman's contracts with CBS. That way, if Letterman ever decided to retire, Colbert would be available. As the New York Times reported:

> Mr. Colbert became the immediate front-runner for the position both because of an increasing recognition of his talent — his show won two Emmy Awards last year — and because he clearly wanted the job. His representation had ensured that he would be available to CBS by syncing his recent contracts with Mr. Letterman's.

Bill Carter, *Colbert Will Host 'Late Show,' Playing Himself for a Change*, New York Times, Apr. 11, 2014, at A1.

1.2 Business planning for contract drafters: Checklists of questions to ask about the business

If you don't know where you're going, you might not get there. *Yogi Berra*.

[N]o plan of operations extends with any certainty beyond the first contact with the main hostile force. *Helmuth von Moltke the Elder (this is often paraphrased as "no plan survives first contact with the enemy").*

Plans are worthless; planning is everything. *Dwight D. Eisenhower.*

Be Prepared. *Boy Scout motto.*

One of the big complaints clients have about lawyers is that "they just don't understand the business." But it's not useful to just say, *Hey you: Understand the business!* The beneficiary of such advice might not know what to <u>do</u> to make that happen.

Neither is it particularly helpful to add, *Just ask questions!* It might not be obvious what questions should be asked.

So, this article presents a series of questions, with handy mnemonic acronyms, to help contract professionals and their clients — collectively, "analysts" — to perform "business reconnaissance" (a term coined by my wife, Maretta Comfort Toedt) :

- *identifying threats and opportunities* that might need to be addressed in a contract;
- *developing action plans* to prepare for and respond to those threats and opportunities; and
- *fleshing out the details* of the desired actions;

all with the goal of drafting practical contract clauses.

TOP SPIN: Identifying specific threats and opportunities

The acronym TOP SPIN can help planners to identify threats and opportunities of potential interest. (The acronym is inspired by the business concept of SWOT analysis, standing for Strengths, Weaknesses, Opportunities, and Threats.)

The first part of the acronym, TOP, refers to the following:

- T: The *threats* that can arise in the course of the business relationship — this is just a reminder to focus on threats and opportunities;
- O: The *opportunities* that might present themselves — ditto;
- P: The five *phases* through which every relationship passes, and during which particular threats and opportunities might arise: *Startup* (of the relationship); *Normal operations*; *Infrequent operations*; *Trouble*; and *Shutdown* of the relationship. (A useful acronym for these five phases is SNITS.)

ICE-CREAM EXAMPLE: Suppose that a grocery-store chain is negotiating a supply contract with an ice-cream manufacturer. For that contract relationship, one set of threats and opportunities might arise during *normal operations* such as routine deliveries. Another set of threats and opportunities could arise during *infrequent operations* such as the introduction of new products, pricing specials, and

the like. Still another set of threats and opportunities could come to life during *trouble* such as customers' getting food poisoning from bacterial contamination.

The second part of the acronym, SPIN, helps planners imagine just what threats and opportunities might present themselves by thinking about the various "players," both organizations and individuals, whose actions (or inaction) can change things. SPIN refers here to the following:

- S: The *supply chains* in which the contracting parties participate as customers and suppliers. Remember that every business customer is a supplier to someone else, and vice versa.

- P: *People*, that is, the individuals associated with in the supply chains (and the people associated with the interveners discussed below). Remember that individuals will have their own various personal incentives, motivations, and failings, which might cause them to disregard contractual commitments, or even to lie, cheat, or steal. *[The "P" is out of order; it makes for a better acronym that way.]*

- I: *Interveners* such as competitors; alliance partners; governmental actors such as elected officials, regulators, taxing authorities, and law enforcement; the press; and acquirers. Don't forget the individuals associated with an intervener, as mentioned in the "People" paragraph above.

- N: *Nature*, because of course Mother Nature can cause all kinds of threats and opportunities to arise in a contract relationship.

ICE-CREAM EXAMPLE: Mother Nature might create a threat if the ice-cream manufacturer's products were to become contaminated with listeria bacteria. The parties' planners should keep that threat in mind when drafting the agreement documents.

INDIA TILT: Deciding on responsive actions

Once planners have compiled a list of threats and opportunities of interest, they should think about the specific actions that might be desirable — or perhaps specific actions to be prohibited — when a particular threat or opportunity *appears* to be arising. Many such actions will fall into the following categories:

- I: *Information* to gather about the situation in question;
- N: *Notification* of others that the threat or opportunity is (or might be) arising. Refer to the SPIN part of the TOP SPIN acronym above for suggestions about players who might be appropriate to notify.
- D: *Diagnosis,* i.e., confirmation that the particular threat or opportunity is real, as opposed to being an example of some other phenomenon (or just a false alarm).
- I: *Immediate action,* e.g., to mitigate the threat or to seize the opportunity.
- A: *Additional actions*, e.g., to remediate adverse effects or take advantage of the opportunity.

ICE-CREAM EXAMPLE: Consumers have been known to become ill, and a few have died, after eating ice cream that, during manufacturing, became contaminated with listeria bacteria. The grocery store's planners might want to use the INDIA checklist to specify in some detail how the ice-cream manufacturer is to respond to such reports, with requirements for notifying the grocery store; product recalls; and so on.

Some plans are likely to require advance preparation. Planners can use the TILT part of the acronym to decide whether any of the following might be appropriate:

- T: Acquisition of *tools* — such as equipment, information, consumables, etc. — for responding to the threat or opportunity.
- I: Acquisition of *insurance* (or other backup sources of funding).
- L: Posting of a *lookout,* that is, putting in place a monitoring system to detect the threat or opportunity in question.
- T: *Training* of the people and organizations who might be called on to respond to the threat or opportunity.

WHALER analysis: Fleshing out the action plans

In specifying actions to be taken, planners will often want to go into more detail than just the traditional 5W + H acronym (standing for who, what, when, where, why, and how). Planners can do this using the acronym WHALER:

- W: *Who* is to take (or might take, or must not take) the action.
- H: *How* the action is to be taken, e.g., in accordance with a specified industry standard.
- A: *Autonomy* of the actor in deciding whether to take or not take the action. Depending on the circumstances, this might be:
    - No autonomy: The action in question is either mandatory or prohibited, with nothing in between.
    - Total autonomy: For the action in question, the specified actor has sole and unfettered discretion as to whether to take the action.
    - Partial autonomy: The decision to take (or not take) the action must meet one or more requirements such as *reasonableness* (be careful: that can be complicated and expensive to litigate); *good faith* (ditto); *notification* of some other player, before the fact and/or after the fact; *consultation* with some other player before the fact; or *consent* of some other player (but is consent not to be unreasonably withheld? A claim of unreasonable withholding of consent could itself be one more thing to litigate.)
- L: *Limitations* on the action — for example, minimums or maximums as to one or more of time; place; manner; money; and people.
- E: *Economics* of the action, such as required payment actions (each of which can get its own WHALER analysis), and backup funding sources.
- R: *Recordkeeping* concerning the action in question (with its own WHALER analysis).

Finally, ask the investigator's favorite two-word question

When I was a baby lawyer at Arnold, White & Durkee, I worked a lot with partner Mike Sutton, who is now the senior name partner at intellectual-property litigation boutique Sutton, McAughan & Deaver

in Houston. One of the many things Mike taught me was that when interviewing or deposing a witness, a useful, all-purpose question consists of just two words: *Anything else?* That question can help planners make sure they've exhausted the possibilities that should be addressed.

1.3 When drafting, keep personal interests and incentives in mind

Berkshire Hathaway's vice-chairman Charles Munger has said that "Never a year passes but I get some surprise that pushes a little further my appreciation of incentive superpower. * * * Never, ever, think about something else when you should be thinking about the power of incentives." Charles T. Munger, *The Psychology of Human Misjudgment,* at http://goo.gl/ty2Ogh (law.indiana.edu, accessed Nov. 23, 2014).

When drafting a contract, it can pay dividends to give some thought to how to manage the so-called "agency costs" that can arise from these personal interests and incentives of individual players. That's because when disputes arise, the involved individuals will naturally want to protect their own interests, such as —

- not having fingers pointed at them;
- being thought of by their side as a committed team player who's willing to fight to win, not a defeatist who throws in the towel;
- protecting their bonus, their commission, their pay raise, their promotion, etc.

These desires can manifest themselves in a variety of ways; here are a few of those ways, along with some possible approaches to managing them contractually.

Problem: Things change, and memories are short. The people who negotiated the contract — if they're even still around — may now have an entirely different view of what's important to them than they did during the contract negotiations. (Buyer's remorse might be one such change.) **Drafting tip:** It can sometimes be useful to include explanatory parentheticals and/or footnotes in a contract to remind later readers why the negotiators agreed to certain things.

Problem: If a purchase goes sour, the individual who authorized the purchase might stubbornly insist on an aggressive strategy against the vendor. The individual might be concerned that his purchase decision might come back to haunt him, for example at bonus- or promotion time. **Drafting tip:** A dispute-escalation clause, requiring disputes to be kicked up to higher levels of management, can get people involved who have less personal skin in the game and therefore are able to assess the situation more objectively.

Problem: If the contract is vague or ambiguous on an important point, then the lawyers who negotiated the contract might pound on the table for an interpretation that covers their [flanks] — even if that interpretation barely passes the laugh test. **Drafting tip:** An early-neutral-evaluation clause can provide a useful sanity check from an outsider, before the parties' positions become set in stone and their legal bills start to mount up.

Problem: Partners at outside litigation firms will be pleased about the prospect of a lawsuit that could require lots of associates and paralegals to bill time on document review, witness preparation, etc. **Drafting tip:** A micro-arbitration clause, requiring arbitration of specific issues (for example, issues of reasonableness such as "reasonable efforts"), could let the parties cut to the chase before their legal fees get out of hand.

1.4 Contract clauses to preserve relationships and prevent lawsuits

Business relationships can be fragile things. When drafting a contract, it can be useful to include specific provisions to help cultivate a good working relationship and reduce the odds that a dispute will cause the parties to drift helplessly into a lawsuit.

(NOTE: Examples of all of the clauses discussed below can be found at CommonDraft.org.)

Status-review conference calls upon request

Many business-contract disputes could be avoided if the participants would just talk with each other every now and then. In particular, it’s often extremely helpful to hold such a conference immediately after — or better yet, before — a missed deadline or other po-ten-tial breach.

Sure, this is just Management 101. But it can't hurt for the contract to include a reminder.

Consultation in lieu of consent

Sudden, unexpected moves by one party to a contract can make the other party nervous. For example, the business relationship between a service provider and a customer could be damaged if the serv-ice provider were to suddenly replace a key person assigned to the customer's work with-out notice.

The usual, sledge-hammer approach to dealing with this problem is to contractually require the provider to obtain the customer's prior consent before taking such an action. The provider, though, will usually push back against such a consent requirement, because:

- The provider will be reluctant to give the customer a veto over how it runs its business.
- Moreover, it could be a management burden for the provider to have to check every customer's contract to see what internal management decisions required prior customer approval.

As an alternative (and compromise), the provider might be willing to agree to consult with the customer before taking a specified action that could cause heart-burn for the customer. That way, the customer would at least get notice, perhaps an explanation, and an opportunity to be heard, which can make a big difference in the customer's reaction and to the parties' business relationship.

For example, a software-development contract could say that, for example, "Except in cases of emergency, Service Provider will consult with Customer at least 10 business days in advance of replacing the lead software developer assigned to the Project." That will at least get the parties talking to one another, which can help avoid strains in their business relationship.

Escalation of disputes to higher management

Some lawyers believe that a dispute-escalation requirement can increase the chance of an amicable settlement. Getting different, more-senior people involved in the dispute can sometimes bypass individual animosities, hidden personal agendas, and other foibles; this can help break an impasse.

Early neutral evaluation

When a legal dispute arises, the parties' lawyers can some-times tell their clients what they think the clients want to hear. (In part this may be because lawyers — especially male lawyers — tend to be overly optimistic about whether they're going to win their cases.) That can hamper getting disputes settled and the parties back to their business (if that's possible).

Consequently, if a contract dispute starts to get serious, an early, non-binding "sanity check" from a knowledgeable neutral can help the parties and law-yers get back onto a more-productive track be-fore positions harden and relationships suffer — not to mention be-fore the legal bills start to mount up.

Mini-trial of disputes to parties' senior management

Mini-trials, in which the parties' lawyers put on a one- to two-hour "trial" to senior executives of the parties (and perhaps a neutral fa-cilitator), are thought to enhance the prospect of settling disputes. *(The head of litigation for a global services corporation told me that this was his favorite tool of dispute resolution.)*

1.5 Don't "assume a can-opener" *(or, hope is not a plan)*

Some people can be prone to wishful thinking. An old joke about economists seems to have been first published in 1970: A physicist, a chemist, and an economist were shipwrecked on a desert island. A pallet full of cans of food washed up on the beach with them, but they had no tools with which to open the cans. The physicist and the chemist each proposed ingenious mechanisms for opening the cans; the economist's proposal was, "Assume we have a can opener." *See* Wikipedia, "Assume a can opener," *quoting* Kenneth E. Boulding, ECONOMICS AS A SCIENCE at 101 (McGraw-Hill 1970).

Contract negotiators should keep this in mind in brainstorming sce-narios and action plans. EXAMPLE: When drafting a critical contract obligation for the other side — for example, an indemnity obliga-tion — consider imposing additional requirements to be sure that there's money *somewhere* to fund the obligation, such as an insur-ance policy; a third-party guaranty; a letter of credit from a bank or other financial institution; or even taking a security interest in col-lateral that could be seized and sold to raise funds.

1.6 Deferring decisions: Sensible practice, or lighting the fuse on a time bomb?

It’s not uncommon for negotiating parties not to know what they should "carve in stone" in the contract language. This could occur, for example, because the parties don't know (or disagree about) what's even feasible. It could also occur if one or both parties doesn't know what it might want in an actual event.

In some situations like that, it might make sense for the parties to simply defer the discussion with the intent of working things out later. That might make sense if the consequences of failing to agree later would be comparatively minor.

But the parties might agree to vague and airy terms such as *commercially reasonable* or *negotiate in good faith* or *use its best efforts* — and those terms could end up being very contentious and expensive to litigate if the parties were unable to agree later.

The "Mack Truck Rule" of contract drafting: A fable

Once upon a time there were two companies that negotiated a very important contract. Each company was represented in the negotiations by a smart, experienced executive who understood the business and also understood the other’s company’s needs.

During the discussions, the executives hit it off on a personal level. Under pressure to get the deal done, they agreed that they didn’t need to waste time on picky details, because they were developing a good working relationship and would surely be able to work out any problems that might arise.

The executives signed the contract and marched off, in great good spirits, to a celebratory dinner. While crossing the street to the restaurant, they were hit by a truck.

Their successors turned out to be idiots who hated each other. Imagine how much fun they had in dealing with the picky details that the faithful departed had left out of the contract.

Consider agreeing to a decision *process* instead of to a particular outcome

When the parties don't know what outcome they want, perhaps they can agree instead to a reasonable *process* for deciding what the outcome will be. Such a process might include, for example:

- escalation of any disagreement to upper management
- micro-arbitration, possibly using baseball-arbitration procedures, and perhaps with a partial-retrial option.

See the provisions at www.CommonDraft.org for more details on these options.

1.7 Don't be hoist by your own petard *(i.e., blown up by your own bomb)*

In the song *Coplas* by the legendary folk group the Kingston Trio, a line goes, *Tell your parents not to muddy the water around us — they may have to drink it soon.* Contract drafters will often do well to heed similar advice: Their clients might someday have to live with the hardball provision they force the other side to accept. The sections below discuss a couple of examples.

Trump Corporation's form of corporate lease agreement gets turned around on it

Trump Corporation ("Trump") is a real-estate landlord, among other things. According to AmLaw Daily, years ago Trump's lawyers took one of the company's lease agreements, changed the names, and used it for a deal in which Trump was the *tenant* and not the landlord. Later, Trump found that the lease agreement gave the tenant significant leverage. Ouch …. *See* Nate Raymond, *Trump Misses Rent Payments …,* http://goo.gl/B72TIr (AmLawDaily.Typepad.com) (accessed Apr. 27, 2015) (Hat tip: ContractProfs Blog.)

Tilly's class-action case — a company sets the bar too high for its own good

Tilly's, Inc. and World of Jeans & Tops, Inc. ("Tilly's") had an employee sign an employment agreement (the "2001 employment agreement") containing an arbitration provision. That agreement included a carve-out for statutory claims (which thus could be brought in court, not in arbitration). Importantly, the 2001 employment agreement also stated that any modifications to the agreement

would need the signatures of three executives: The company's president; senior vice president; and director of human resources.

In 2005, the company had its employees sign an acknowledgement of receipt of an employee handbook containing a different arbitration provision — which didn't contain the carve-out for statutory claims. The acknowledgement, though, didn't contain the three executive signatures needed to modify the 2001 employment agreement. As a result, Tilly's found itself facing high-stakes litigation by a class of plaintiffs, whereas it had thought it would be arbitrating low-stakes claims individually. See *Rebolledo v. Tilly's, Inc.*, No. G048625 (Cal. App. 4th Div. July 8, 2014) (unpublished; affirming denial of motion to compel arbitration).

One-way NDAs can backfire

With a one-way nondisclosure agreement, only the (original) disclosing party's information is protected, and so any disclosures by the receiving party might be completely unprotected, resulting in the receiving party's losing its trade-secret rights in its information.

That's just what happened to the plaintiff in *Fail-Safe, LLC v. A.O. Smith Corp.,* 674 F.3d 889, 893-94 (7th Cir. 2012) (affirming summary judgment for defendant): The plaintiff's confidentiality agreement with the defendant protected only the defendant's information; consequently, the plaintiff's afterthought disclosures of its own confidential information were unprotected.

1.8 Don't kick a sleeping dog

The scene: You're in a contract negotiation, representing The Good Guys Company. The other side, Nasty Business Partner Inc., insists on requiring The Good Guys to get NBP's consent before assigning the agreement. NBP has all the bargaining power; The Good Guys decide they have no choice but to go along.

Trying to salvage the situation, you ask NBP for some additional language: "Consent to assignment may not be unreasonably withheld, delayed, or conditioned." But NBP refuses. **Have you just screwed your client?**

In some jurisdictions, The Good Guys might have benefited from a default rule that Nasty Business Partner Inc. had an implied obligation not to unreasonably withhold consent to an assignment of the

contract. See, e.g., S*honey's LLC v. MAC East, LLC*, 27 So.3d 1216 (Ala. 2009); *Pacific First Bank v. New Morgan Park Corp*., 876 P.2d 761 (Or. 1994).

But you asked for an express obligation — only to have NBP reject the request — and The Good Guys signed the contract anyway.

A court might therefore conclude that the parties had agreed that NBP would not be under an obligation not to unreasonably withhold its consent to assignment — that NBP could grant or withhold its consent in its sole discretion. This is pretty much what happened, on somewhat-different facts, in both the Shoney's LLC and Pacific First Bank cases:

In the *Shoney's LLC* case, the contract had an express provision allowing the non-assigning party to use its sole discretion in deciding whether to consent to an assignment. The Alabama Supreme Court held that this clause trumped the general requirement of reasonableness.

In the *Pacific First Bank* case, the lease agreement in suit included a consent-not-to-be-unreasonably-withheld requirement for certain sublet arrangements, but it did not include a similar requirement for assignments. The Oregon Supreme Court held that this amounted to an implied agreement that for assignments, the landlord was free to grant or withhold consent in its discretion.

Illustration: Conan O'Brien's lawyers win by letting a sleeping dog lie

You might remember that TV talk-show host Conan O'Brien's stewardship of The Tonight Show proved disappointing to NBC. The network decided to move Jay Leno back into that time slot and bump Conan back to 12:05 a.m. This led Conan to want to leave the show and start over on another network — but if he had, he would arguably have been in breach of his contract with NBC.

Conan's contract apparently did not state that The Tonight Show would always start at 11:35 p.m. Conan's lawyers were roundly criticized for that alleged mistake by ex-Wall Streeter Henry Blodget and some of his readers. See *Conan's Lawyers Screwed Up, Forgot To Specify "Tonight Show" Time Slot* (Jan. 11, 2010), especially the reader comments following the article.

But then wiser heads pointed out that Conan's lawyers might have intentionally not asked for a locked-in start time:

- The Tonight Show had started at 11:35 p.m. for decades; Conan's lawyers could have plausibly argued that this start time was part of the essence of The Tonight Show, and thus was an implied part of the contract.

- Suppose that Conan's lawyers had asked for the contract to *lock in* the 11:35 p.m. start time of The Tonight Show, but that NBC had refused. A court might then have interpreted the contract as providing that NBC had at least some freedom to move the show's start time.

- Indeed, NBC might have responded by insisting on just the opposite, namely a clause affirmatively stating that NBC was free to choose the start time. Given that NBC had more bargaining power than Conan at that point, Conan might then have had no choice but to agree, given that he wanted NBC to appoint him as the host of the show. And in that case, there'd be no question that NBC had the right to push the start time of the show back to 12:05 p.m.

Ultimately, Conan and NBC settled their dispute; the network bought out Conan's contract for a reported $32.5 million. This seems to suggest that NBC was concerned it might indeed be breaching the contract if it were to push back The Tonight Show to 12:05 a.m. as it wanted to do. As an article in *The American Lawyer* commented:

> ... If O'Brien had asked that the 11:35 p.m. time slot be spelled out in any agreement—and had NBC refused—the red pompadoured captain of "Team Coco" would be in a weaker position in the current negotiations.
>
> "If you ask and are refused, or even worse, if you ask and the other side pushes for a 180, such as a time slot not being guaranteed, you can end up with something worse," [attorney Jonathan] Handel adds. Without having their hands bound by language in the contract on when "The Tonight Show" would air, O'Brien's lawyers are in a better position to negotiate their client's departure from NBC.

Brian Baxter, *Legal Angles Abound as Conan-NBC Standoff Nears Endgame* (Jan. 20, 2010).

Judging by the outcome, it may well be that Conan's lawyers did an A-plus job of playing a comparatively-weak hand during the original contract negotiations with NBC.

The lesson: Be careful what you ask for in a contract negotiation — if the other side rejects your request but you do the deal anyway, that sequence of events might come back to haunt you later.

1.9 Prepare for litigation: Include some demonstrative exhibits in the contract

Remember the cliché about a picture being worth a thousand words? Nowhere is that more true than the courtroom. That's why in litigation, lawyers and expert witnesses often use so-called demonstrative exhibits — diagrams, time lines, charts, tables, sketches, etc., on posters or PowerPoint slides — as teaching aids to help them get their points across to the jury during testimony and argument.

In a lawsuit, the jurors might or might not be allowed to refer to the parties' demonstrative aids while they're deliberating. Jurors normally take "real" exhibits — like a copy of the contract in suit — into the jury room with them and refer to them during deliberations. Judges, however, sometimes won't allow the jury to take *demonstrative* exhibits with them, on the theory that the jurors are supposed to decide the case on the basis of the "real" evidence and not on documents created solely for litigation by the lawyers.

True, in U.S. federal-court cases, Rule 1006 of the Federal Rules of Evidence allows summaries and the like to be admitted into evidence. Trial judges, however, have significant discretion over evidentiary matters; if a judge decides that a particular demonstrative aid should not be given to the jury for use in its deliberations, it's usually the end of that discussion.

If you plan ahead when drafting a contract, your client's trial counsel might later be able to sneak a demonstrative aid or two into the jury room through the back door — no, through the front door, but at the back of the contract — as "real" evidence, not just as a demonstrative exhibit, to help the jurors understand what the parties agreed to.

Ask yourself: *Is there anything I'd want the jurors to have tacked up on the wall in the jury room* — for example, a time line of a complex set of obligations? If so, think about creating that time line now, and

including it as an exhibit to the contract. The exhibit will ordinarily count as part of the "real" evidence; it should normally be allowed back into the jury room without a fuss.

Of course, before the contract is signed the parties would have to agree to include your stealth demonstrative exhibit in the contract document. But their reviewing your exhibit for correctness could be a worthwhile exercise — and if their review makes them realize they don't agree about something, it's usually better if they find that out before they sign.

There's always the risk of unintended consequences: The demonstrative exhibit you create today might not create the impression you want to create in a jury room years from now. But that risk is there when you write the contract itself.

Your time line, chart, summary, diagram, etc., doesn't necessarily have to be a separate exhibit: modern word processors make it simple to include such things as insets within the body of the contract.

1.10 Letters of intent are like teen-aged sex (SFW)

Letters of intent (LOIs) and business people can be like sex and teenagers: You tell them not to do it, but sometimes they really, REALLY want to. You won't always be there to chaperone them, and let's face it, in the throes of desire they're likely to forget — or ignore — your abstinence advice.

The “consequences” of entering into an LOI can be significant if a court finds that the parties intended to enter into a binding contract. The canonical example of this danger, of course, is that of *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex.App.—Houston [1st Dist.] 1986, writ. ref'd n.r.e.). In that case, Texaco was hit with a damage award of some $10.5 billion, or more than $22 billion in 2014 dollars, for interfering with Pennzoil's agreement with Getty Oil — in the form of a memorandum of understanding — under which Pennzoil would buy Getty.

Unless you want to be stuck dealing with such consequences, it might be a good idea to try to make sure that your "teenagers" use protection if they ignore your advice and start messing around with LOIs. The usual form of protection takes the form of various disclaimers of any intent to be bound. For sample “protection” lan-

guage and extensive research notes, see the annotated clauses at CommonDraft.org.

2. Getting to signature sooner

2.1 Which side's contract documents should be used?

Convincing the other side to use your paper

At my former company, our contract form was extremely customer-friendly. Every time we made a concession in a contract negotiation, we asked ourselves whether we could incorporate the concession into our standard form, in the interest of reducing the time to signature.

The result was rave reviews from our customers. One customer lawyer said to me, *when I first read your contract, I wondered if someone had already negotiated it for us.*

Another customer's lawyer said, *I told our business people that if your software is as good as your contract, we're getting a great product.*

We might have given away some theoretical legal advantages, but nothing worth worrying about, and the business people loved the speeded-up sales cycle.

A fringe benefit of having such a customer-friendly contract was that I could enforce a policy with our sales people: We would not negotiate a customer's contract form until the sales manager got me a five-minute phone call with the customer's contracting people.

In most cases, I was able to persuade the customer's contract reviewers that using our contract would get us to signature with less work for all of us.

In the cases where we did end up using the customer's form, that initial five-minute phone call helped establish a positive working relationship which, among other things, helped soften the blow if we had to do a serious markup of their paper.

How to kill a big-company deal in the cradle: Insist on using your contract form

For reasons good and bad, big companies usually want to use their contract forms, not yours. Certainly it's important to offer to draft the contract. And if the big company *reeaally* wants to do a deal with you, then you might get away with insisting on controlling the typewriter.

But bad things can happen, though, if you simply fold your arms and refuse to negotiate the other side's contract paper.

- Even if the big company's negotiators grudgingly agree to work from your draft contract, they'll start the negotiation thinking your company is less than cooperative (which isn't good for the business relationship). Then later, when you ask for a substantive concession that's important to you, they may be less willing to go along.
- In any case, their agreement to use your contract form, in their minds, will be a concession on their part, meaning that you now owe them a concession.

For a vendor lawyer, there's another danger in insisting on using your own contract form: Your client's sales people will blame their lack of progress on you.

- Sales folks are always having to explain to their bosses why they haven't yet closed Deal X.
- Your insistence on using your contract form gives them a ready-made excuse: They can tell their boss that you're holding up the deal over (what they think is) some sort of petty legal [non-sense].
- Even if that's not the whole story, it's still not the kind of tale you want circulating among your client's business people.

2.2 Legal review of a “fair and balanced” contract will likely be faster

A “hardball” contract form will slow things up

Some say it’s best to start a contract negotiation by sending the other side your "hardball" or "killer" contract form that's extremely biased toward your side. By doing so (the theory goes):

- you set the other side's expectations, and increase the odds that you'll eventually get more of what you want; and
- you get a batch of potential sleeves-from-your-vest concessions that you can use for horse-trading.

Certainly there are transactions in which it makes at least some sense to do this.

And of course it's always fun to play "the art of the deal"; it feels just plain good to come out on top when negotiating the legal fine points.

But don't underestimate the price you'll pay for these putative benefits. You'll spend more business-staff time. You'll spend more in legal expenses.

And you'll incur opportunity costs: As the 'shot clock' runs down at the end of the fiscal quarter, you'll be spending time on legal T&Cs instead of on closing additional business.

So when negotiating a deal, you might want to ask yourself whether "hardball" legal negotiation is really what you want to be spending your time doing.

It might make sense instead to lead off with a balanced contract form that represents a fair, reasonable way of doing business — one that ideally the parties could "just sign it" and get on with their business.

Cramming down a killer contract might give you a wounded tiger to deal with later

Suppose a customer company has a lot of bargaining power. And suppose the customer uses that power to force a vendor to make some tough concessions in a contract negotiation.

The customer's negotiators might well regard those concessions as an entitlement: *We're the big dog; of course we get what we want.*

But they should recall that ultimately, all contracts have to be performed by people. And people will almost certainly be influenced, not just by the words of the contract, but by their employer's then-current interests — and by their own personal interests as well.

If the vendor's people feel they've been crushed by the customer, they're unlikely to harbor warm and fuzzy feelings for the customer. (This is at least doubly true if the contract later proves to be a train

wreck for their company — most business people know that being associated with a train wreck is seldom good for anyone's professional reputation.)

The vendor's people are not likely to be motivated to go above and beyond for that customer. They may be tempted to "work to rule," to use an expression from the labor-relations world — to do just what the contract requires, and no more. That does neither party any favors.

The reverse can be true when the shoe's on the other foot. Suppose the customer thinks that it's been taken advantage of by a vendor. When it comes time for renewals, or repeat business, or recommendations to other companies, that vendor probably won't have a lot of brownie points with the customer's people.

The lesson for contract drafters and negotiators: Even if you've got the power to impose a killer contract on the other side, think twice before you do so. You could be setting up your client to have to deal later with a wounded tiger.

A friendly, balanced contract can signal reliability as a business partner

Everyone wants reliable business associates. But how does someone know the other side is friendly and trustworthy?

Fair and balanced contracts can help. Toward that end, try to have your contract not read like the gruff, peremptory soliloquy of prison trustee Carr the Floor Walker in the Paul Newman movie *Cool Hand Luke:*

> Them clothes got laundry numbers on 'em. You remember your number and always wear the ones that has your number. Any man forgets his number spends the night in the box.
>
> These here spoons, you keep with ya. *[Tosses spoons on table.]* Any man loses his spoon spends the night in the box.
>
> There's no playin' grab-ass or fightin' in the buildin'. You got a grudge against another man, you fight him Saturday afternoon. Any man playin' grab-ass or fightin' in the buildin' spends the night in the box.

> First bell is at five minutes of eight, when you will get in your bunk. Last bell is at eight. Any man not in his bunk at eight spends the night in the box.
>
> *[And so on and so forth]*

2.3 Specific drafting tips to speed up the other side's legal review

Short sentences (and paragraphs) and plain language can work just fine

Contracts don't have to be written entirely in legalese. In all likelihood, short, plain statements of the parties' intent will do nicely. Other things being equal:

- Short, simple clauses are less likely to be summarily rejected by a busy reviewer just because she can't afford the time to study them.
- Short, simple clauses ideally can be saved for re-use, and later snapped in and out of a new contract draft like Lego blocks, without inadvertently messing up some other contract section.
- Short, simple clauses are easier to edit.
- Short, simple clauses reduce the temptation for the other side's reviewer to tweak more language than necessary — that's a good thing, because language tweaks take time to negotiate, which in turn causes business people to get impatient and to blame "Legal" for delaying yet another done deal.

If a sentence or paragraph starts running long, seriously consider breaking it up.

One major topic per paragraph, please

Too many contract drafters are guilty of mixing a variety of topics into a single paragraphs (often with topics separated by "provided, that ….."). That just makes the paragraph all the harder for the other side's legal reviewer, which in turn will slow up getting the agreement to signature.

Contract length isn't as important as *clause* length

"Wow, this is a long contract!" Most lawyers have heard this from clients or counterparties.

True, sometimes contracts run too long because of overlawyering, where the drafter(s) try to cover every conceivable issue. But too close a focus on contract length may obscure the more-important issue: contract **readability**.

This isn't just a question of aesthetic taste. The more difficult a draft contract is to read and understand, the more time-consuming the review process, which delays the deal (and increases the legal expense).

Readability has little to do with how many pages a contract runs. Many negotiators would rather read a somewhat-longer contract, consisting of short, understandable sentences and paragraphs, than a shorter contract composed of dense, convoluted clauses.

So the better way to draft a contract is to write as many short sentences and paragraphs as are needed to cover the subject.

Even if the resulting draft happens to take up a few extra pages, your client likely will thank you for it.

A "longer" contract might get signed sooner

I used to hold to the view that it was a good idea to use a "compressed" format for contracts, with narrow margins, long paragraphs, and small print, so as to fit on fewer physical pages. It was my experience that readers tend to react negatively when they see a document with "many" pages.

I've since concluded, though, that if you expect to have to negotiate the contract terms, then larger print, shorter paragraphs, and more white space:

- will make it easier for the other side to review and redline the draft — always a nice professional courtesy that might just help to earn a bit of trust; and
- will make it easier for the parties to discuss the points of disagreement during their inevitable mark-up conference call.

A more-readable contract likely will likely get you to signature more quickly, and that of course, is the goal. (At least that's the intermediate goal — ordinarily, the ultimate goal should be to successfully

complete a transaction, or to establish a good business relationship, in which each party feels it received the benefit of its bargain and would be willing to do business with the other side again.)

Use industry-standard terminology

When you're drafting a contract, you'll want to try to avoid coining your own non-standard words or phrases to express technical or financial concepts. If there's an industry-standard term that fits what you're trying to say, use that term if you can. Why? For two reasons:

First, someday you may have to litigate the contract. You'll want to make it as easy as possible for the judge (and his or her law clerk) and the jurors to see the world the way you do. In part, that means making it as easy as possible for them to understand the contract language.

The odds are that the witnesses who testify in deposition or at trial likely will use industry-standard terminology. So the chances are that the judge and jurors will have an easier time if the contract language is consistent with the terminology that the witnesses use—that is, if the contract "speaks" the same language as the witnesses.

Second — and perhaps equally important — the business people on both sides are likely to be more comfortable with the contract if it uses familiar language, which could help make the negotiation go a bit more smoothly.

Charts and tables

Instead of long, complex narrative language, use charts and tables. Here's an example of the former:

> If it rains less than 6 inches on Sunday, then Party A will pay $3.00 per share, provided that, if it it rains at least 6 inches on Sunday, then Party A will pay $4.00 per share, subject to said rainfall not exceeding 12 inches, [etc., etc.]

Here's the same provision, in table form:

AMT. OF RAIN ON SUNDAY	PAYMENT DUE FROM PARTY A
Less than 6 inches	$3.00 per share
At least 6 inches but less than 12 inches	$4.00 per share

Which one would you rather read?

Situation tables

There's no reason that a contract can't provide for Plan A, Plan B, Plan C, etc., when particular things happen. This can often be spelled out in situation tables. Here's a trivial example:

EVENT	PLAN A	PLAN B	PLAN C
Supplier experiences quality problems	Supplier will give immediate written notice to Buyer and correct the problem within 24 hours.	Buyer may obtain goods from alternative sources and bill Supplier for its expenses, less what Buyer would have paid Supplier under this Agreement.	[Be creative!]

One advantage of this format is that it's easy for the business people to grasp and, if necessary, correct.

Illustrative examples and sample calculations

Your contract might contain a complex formula or some other particularly tricky provision. If so, consider including a hypothetical example or sample calculation to "talk through" how the formula or provision is intended to work.

The drafters of $49 million of promissory notes would have been well served to include a sample calculation to illustrate one of their financial-term definitions — it would have saved them a lot of money in attorneys' fees. The case involved a group of affiliated franchisees of restaurants such as Burger King and Chili's, which had negotiated $49 million dollars worth of corporate promissory notes. During the negotiations, the borrowers asked for a change in the lender's standard definition of "Prepayment Penalty." The quoted term ended up being defined in a certain way in all 34 promissory notes. But in practice the definition led to an absurd result (the prepayment penalty would *always* be zero).

The appeals court reversed a summary judgment in favor of the lender and directed the district court to conduct a trial to determine what the parties really meant — watch the lawyers' meters run. In the end, the borrowers prevailed because the court adopted their interpretation of the language. *See BKCAP, LLC v. CAPTEC Franchise*

Trust 2000-1, 572 F.3d 353, 355-57 (7th Cir.2009) ("BKCAP-1") (reversing and remanding summary judgment) *after remand, 6*88 F. 3d 810 (7th Cir. 2012) (affirming judgment in favor of borrower after bench trial).

Worth noting: The court specifically mentioned calculations that the lender had submitted with its motion for summary judgment. It's a shame the promissory-note drafters didn't think to include one or two such calculations in the body of the contract itself — by being forced to work through the calculations, they might well have spotted the problem with their language in time to do something about it.

Explanatory footnotes

Suppose that, after intense negotiations, a particular contract clause ends up being written in a very specific way. Consider including a footnote at that point in the contract, explaining the same. Future readers -- your successor, your lawyer, a judge -- might thank you for it.

Why you should draft contracts with long, run-on paragraphs (a satire)

Forget all those self-anointed contract drafting gurus who claim that drafters should write short sentences and short paragraphs. You should do instead as the drafters did in the warranty provision reproduced below, which is excerpted from a Collaborative Research and License Agreement between Pfizer and Rigel Pharmaceuticals, whose citation is available on-line at http://www.oncontracts.com/why-you-should-draft-contracts-with-long-run-on-paragraphs:

> 9.2.12 PATENTS AND TRADEMARKS. To the best of its knowledge (but without having conducted any special investigation), Rigel owns or possesses sufficient legal rights to all patents, trademarks, service marks, trade names, copyrights, trade secrets, licenses, information, and proprietary rights and processes (including technology currently licensed from Stanford University) necessary for its business as now conducted and as proposed to be conducted without any conflict with, or infringement of the rights of, others. Rigel currently licenses certain technology from Stanford University (the

"Licensed Technology") on an "as is" basis, with no representation or warranty from Stanford University that such technology does not infringe the proprietary rights of others. To Rigel's knowledge, Rigel has not, as of the date hereof, received any claims from any third party alleging that the use of the Licensed Technology infringes the proprietary rights of such party. Except for agreements with its own employees or consultants and standard end-user license agreements, there are no outstanding options, licenses, or agreements of any kind relating to the foregoing, nor is Rigel bound by or a party to any options, licenses, or agreements of any kind with respect to the patents, trademarks, service marks, trade names, copyrights, trade secrets, licenses, information, and proprietary rights and processes of any other person or entity, other than the license agreements with Janssen Pharmaceutica N.V., Stanford University, SUNY, and BASF. Rigel has not received any communications alleging that Rigel has violated or, by conducting its business as proposed, would violate any of the patents, trademarks, service marks, trade names, copyrights, trade secrets, or other proprietary rights or processes of any other person or entity. Rigel is not aware that any of its employees is obligated under any contract (including licenses, covenants, or commitments of any nature) or other agreement, or subject to any judgment, decree, or order of any court or administrative agency, that would interfere with the use of such employee's best efforts to promote the interests of Rigel or that would conflict with Rigel's business as proposed to be conducted. Neither the execution nor delivery of this Agreement, nor the carrying on of Rigel's business by the employees of Rigel, nor the conduct of Rigel's business as proposed, will, to the best of Rigel's knowledge, conflict with or result in a breach of the terms, conditions, or provisions of, or constitute a default under, any contract, covenant, or instrument under which any of such employees is now obligated. Rigel is not aware of any violation by a third party of any of Rigel's patents, licenses, trademarks, service marks, tradenames, copyrights, trade secrets or other proprietary rights.

Think about all the advantages of having such a long provision:

- When your client reads a provision like the one above, she'll be impressed by your lawyering skills, and happy to be paying your fees to support the creation of a true work of art.
- Your client isn't *that* interested in getting the deal to signature quickly, so it won't bother her that the dense verbiage will take longer for everyone to review, edit, and sign off on.
- The other side's contract reviewer, lulled by the MEGO effect ("mine eyes glaze over"), might unwittingly skip over the problematic phrase that you (inadvertently?) buried in the middle of the paragraph. Don't fret — surely your counterpart won't think you were trying to pull a fast one on him.
- Nor will your counterpart object to spending a lot of time puzzling over long sentences and paragraphs; it means more billable hours for him.
- Your firm's managing partner will thank you for using such a dense writing style — using less white space in a contract draft means you need less paper and toner to print it out, and those things aren't free. And "readability" is such a vague, subjective thing; in contrast, the cost savings you achieve by printing fewer pages are easily measured, and will be noticed and rewarded.
- If the signed contract ever has to go to litigation, the judge's law clerk will be glad to have a fine specimen to study, to help fill those endless idle hours in chambers.

So by no means should you ever consider breaking up a long paragraph like the above into shorter ones, such as the following:

> 9.2.12 PATENTS AND TRADEMARKS.
>
> (a) To the best of its knowledge (but without having conducted any special investigation), Rigel owns or possesses sufficient legal rights to all patents, trademarks, service marks, trade names, copyrights, trade secrets, licenses, information, and proprietary rights and processes (including technology currently licensed from Stanford University) necessary for its business as now conducted and as proposed to be conducted without any conflict with, or infringement of the rights of, others. *[Non-satirical aside: This paragraph could still be*

> *broken up even further into two or even three sentences.]*
>
> (b) Rigel currently licenses certain technology from Stanford University (the "Licensed Technology") on an "as is" basis, with no representation or warranty from Stanford University that such technology does not infringe the proprietary rights of others.
>
> *[Non-satirical aside: I would have added the word "although" just before the phrase "on an 'as is' basis"; otherwise Rigel is warranting that it doesn't have any guarantees from Stanford, which is an odd thing to promise.]*
>
> (c) To Rigel's knowledge, Rigel has not, as of the date hereof, received any claims from any third party alleging that the use of the Licensed Technology infringes the proprietary rights of such party. *[etc., etc.]*

For that matter, don't even consider merely adding subdivision lettering, and perhaps pilcrows a.k.a. paragraph marks (¶), to serve as visual guideposts, like this:

> 9.2.12 PATENTS AND TRADEMARKS. ¶ (a) To the best of its knowledge (but without having conducted any special investigation), Rigel owns or possesses sufficient legal rights to all patents, trademarks, service marks, trade names, copyrights, trade secrets, licenses, information, and proprietary rights and processes (including technology currently licensed from Stanford University) necessary for its business as now conducted and as proposed to be conducted without any conflict with, or infringement of the rights of, others. ¶ (b) Rigel currently licenses certain technology from Stanford University (the "Licensed Technology") on an "as is" basis, with no representation or warranty from Stanford University that such technology does not infringe the proprietary rights of others. ¶ (c) To Rigel's knowledge, Rigel has not, as of the date hereof, received any claims from any third party alleging that the use of the Licensed Technology infringes the proprietary rights of such party. *[etc., etc.]*

Remember, lawyers have drafted contracts with long, hard-to-read paragraphs since time immemorial. That alone justifies their continuing to do so.

Bonus tip: Challenges to this or any other established practice can be met by closing your eyes, sticking your fingers in your ears, and chanting, "*we've always done it that way; we've always done it that way ....*"

2.4 To keep your “steak” intact, offer the guard dog some “hamburger”

When drafting a contract, it can pay to include a clause that you know the other side will insist on getting, even if you’d really prefer to omit the clause.

EXAMPLE: Suppose that you’re drafting a contract under which your client is obligated to pay the other side a percentage of its (your client’s) sales. The contract might be an intellectual-property license agreement, or perhaps a real-estate lease agreement.

It might be tempting to omit an audit clause from your draft. Your reasoning could be that the other side’s contract reviewers might not think to ask for such a clause, and it’s not your job to remind them.

But consider these points:

- Your notion that the other side’s reviewer won’t notice the absence of an audit clause omission is likely to be wishful thinking; the other reviewer might be an expert who knows exactly what to look for and what to demand.
- If the other side’s contract reviewer were to see an audit clause in your draft, he or she might well mentally check the box —*yup, they’ve got an audit clause* — and move on to other matters, without making significant changes to your wording. That’s a win, not least because it’s one less thing to negotiate.
- You might be better off setting the tone with an audit clause *that you know your client can live with*, and then standing on principle to reject unreasonable change requests.
- Suppose the other side doesn't really know what they're doing. Chances are you'll get the other side to signature faster — and

you'll be laying a foundation for a trusting relationship — if the draft you're proposing seems to address the other side's needs as well as your client's needs.

2.5 Give the other side's reviewer *something* to reject (that's close to OK)

Military people learn early that when preparing for inspection, you don't want to make everything perfect. The inspector will keep looking until he (or she) finds *something*, because if he doesn't find anything, his superior will question whether he really did his job.

The trick is instead to make everything perfect, then [foul] things up just a little. That way, the inspector will have something to find and can go away happy.

The same psychology can apply in drafting a contract. So, be sure to give the other side's reviewer *something* to ask to change.

(But make it fairly minor, so that you can quickly agree to the change — for example, if you're a supplier, consider specifying payment terms of net-20 days, and be prepared to agree immediately to net-30.)

2.6 Put "variable" terms in a schedule (up front) for faster review and editing

You might know from experience that the other side is likely to want to make changes to certain contract terms. For example, a supplier who asks for net-30 payment terms might know that some customers will want net-45 or even net-60 terms.

If that's the case, then consider putting the details of such terms in a schedule, either at the front of the document or at the beginning of the clause in question. This can speed up review and editing.

2.7 Redline and explain all changes

Most contract professionals know that when they revise documents sent over by the other side, all changes should be redlined or otherwise flagged.

It can also be helpful to explain, in comments, the reasoning behind changes, to save time in negotiation conference calls.

As a “canary in the coal mine” clause, consider including, in the general-provisions section, a representation by each party that the party has redlined all changes it has made to the agreement documents (see CommonDraft.org for sample language). If the other side objects to including such a representation in the contract, you can ask some pointed questions as to *why* they object.

2.8 When you can't just say no in a contract: Creative compromises

Companies often don't have the bargaining power to get their way in contract negotiations. When that's the case, they have to think of other ways to help protect their business interests. Imagine, for example, that a customer is negotiating a master purchasing contract with a vendor.

- The customer would love to flatly prohibit the vendor from raising prices without the customer's consent. But the vendor's negotiators won't go along with such a prohibition.
- The vendor would love to have the unfettered discretion to raise the customer's prices whenever it wants. But the customer's negotiators insist on at least some protection on that score.

What to do? In no particular order, here are some approaches that the parties could consider trying.

Non-discrimination language

A non-discrimination requirement at least brings a bit of overall-market discipline into the picture.

EXAMPLE: Vendor will not increase the prices it charges to Customer except as part of a non-targeted, across-the-board pricing increase by Vendor, applicable to its customers generally, for the relevant goods or services.

COMMENT: Vendor might want to qualify this language, so as to limit how general a price increase must be before it can be applied to Customer.

Advance-warning or advance-consultation requirement

An advance-warning or advance-consultation requirement can buy time for its beneficiary to look around for alternatives (assuming of course that the contract doesn't lock in the beneficiary somehow, for example with a minimum-purchase requirement or a "requirements" provision).

EXAMPLE: Vendor will give Customer at least X [days | months] advance notice of any increase in the pricing it charges to Customer under this Agreement.

Transparency requirement

Requiring a party to provide information justifying its action, upon request, can force that party to think twice about doing something, even though it technically has the right to do it.

EXAMPLE: If requested by Customer within X days after notice of a pricing increase, Vendor will seasonably provide Customer with documentation showing, with reasonable completeness and accuracy, a written explanation of the reason for the increase, including reasonable details about Vendor's relevant cost structures relevant to the pricing increase. Customer will maintain all such documentation in confidence any non-public information in such explanation, will not disclose the non-public information to third parties, and will use it only for purposes of making decisions about potential purchases under this Agreement.

COMMENT: Note the *if-requested* language, which relieves the vendor from the burden of continually managing this requirement — although a smart vendor would plan ahead and have the required documentation ready to go.

Draw the thorn from the lion's paw

When a party makes tough contract demands, it could be because the party has been burned before. Institutionally, it may still "feel the pain" of a bad experience; its response is to roar at other counterparties.

The counterparty being roared at can try to find out why the lion is roaring. If it can identify the source of the pain, it might be able to figure out another way to make it better, without undertaking burdensome obligations.

Cap the financial exposure for the onerous provision

A party with bargaining power will often demand that its counterparty agree to an onerous provision. In response, the counterparty could ask the first party to agree to a dollar cap on the amount of the counterparty's resulting financial exposure. If the first party agrees, the onerous provision might look less dangerous to the counterparty than it would with the prospect of unlimited liability. (This is a variation on the old saying: *When in doubt, make it about money*.)

Impose time limits

When a party asks its counterparty to agree to an onerous contract provision, the counterparty might try to make its business risk more manageable by imposing time limits on the onerous provision.

For example, if a party demands an oppressive indemnity, the counterparty might counter by asking for a time limit on claims covered by the indemnity.

Or if a party demands a cap on pricing increases, or a most-favored-customer clause, the counterparty could counter with time limits on those as well.

Explain why the onerous provision actually hurts the demanding party

A counterparty can to try to explain to a demanding party why, in the long run, the onerous provision being demanded would ultimately cause problems for the demanding party.

Package the onerous provision as part of a premium offering

Suppose that a smallish supplier is regularly asked by its customers to agree to an onerous contract provision (e.g., an extended warranty). If the supplier plans ahead, it can package the onerous provision as part of a *higher-priced* premium offering — with the relevant contract language being written in a way the supplier knows it can support.

This approach has a huge advantage: The bargaining over whether to give a customer the premium offering is no longer about legal T&Cs: it becomes a negotiation about **price**. This means the supplier's legal people might not even have to get involved — which often

can be crucial when sales people are working hard to close deals before the shot clock runs down on the fiscal quarter.

Another advantage: The supplier might well score points with customers for anticipating their needs and offering a solution for them.

Maybe the onerous provision is worth the risk

The supplier and its lawyer should assess the actual business risk of agreeing to the customer's request — in the real world it might not be as big a problem as the supplier imagines.

2.9 Negotiate limitations of liability risk-by-risk, not one-size-fits-all

A common complaint: Too much time spent negotiating liability limitations

Limitation-of-liability provisions usually rank at or near the top of the annual surveys done by the International Association for Contract and Commercial Management concerning the most-frequently-negotiated contract terms. Ironically, the same surveys indicate that contract professionals fervently wish they could spend their time negotiating collaborative provisions (to try to keep trouble from happening) instead of liability provisions (in case trouble does come to pass).

The root of the complaint: Boilerplate.

I think I know why many companies have to spend too much time negotiating limitations of liability: A lot of the limitation provisions I've read over the years have been long, boilerplate statements; they might be fine for a simple, low-stakes contract, but their lack of specificity can give a reviewer pause, and complicate the discussion, when more is at risk.

First, consequential-damages exclusions seldom spell out just what specific categories of damages can and cannot be recovered — it seems as though each party crosses its fingers and hope the courts will interpret the phrase *consequential damages* in its favor. That, of course, makes negotiators nervous, because they don't know whether the particular type of damage they're concerned about will qualify;

Second, damages caps usually take the form of a single, one-size-fits-all number that applies to every conceivable form of liability. It's true that negotiators do sometimes debate whether particular types of damage (e.g., damages covered by an indemnity obligation) should be carved out entirely from the damages cap. But that's a false dichotomy; it assumes, for no reason, that a given type of damages will be either subject to the 'default' cap, or not subject to any cap at all.

Instead of resenting the time it takes to negotiate limitations of liability, perhaps we should try doing things a little differently — not necessarily in every negotiation, but definitely in those in which the liability limitations are likely to be closely scrutinized.

Systematically list the risks of particular concern, then address liability limits for each

Contract drafters can speed up discussions of liability limitations, I've found, by breaking up general boilerplate language into more-concrete statements of risks that are of particular concern, which the parties can focus on more readily.

One technique that works well is to provide a table, such as in the example below, that (i) lists specific risks, and (ii) states, for each specified risk, what if any liability limits are agreed.

Using that table, the parties can systematically work through the list of risks and, for each risk, negotiate the limitations they're willing to accept.

The example below is adapted from a couple of different large-scale software license agreements I've helped negotiate in recent years; the specific entries have been generalized (because it's a hypothetical example).

[BEGIN EXAMPLE]

Special cases ("carve-outs"): The following special cases are subject to the above excluded-damages and damages-cap-amount limitations above *[Not included here — DCT]* only as stated:

TYPE OF DAMAGES RESULTING FROM BREACH	CONSEQUENTIAL DAMAGES, ETC., ARE: [1]	AGGREGATE AMOUNT IS LIMITED TO:
All damages not listed below	Excluded	Damages cap amount

TYPE OF DAMAGES RESULTING FROM BREACH	CONSEQUENTIAL DAMAGES, ETC., ARE: [1]	AGGREGATE AMOUNT IS LIMITED TO:
Personal injury	Not excluded	No limitation
Tangible damage to property [2]	Excluded	Damages cap amount or Provider's applicable insurance coverage, whichever is less
Erasure, corruption, etc., of stored information that could have been avoided or mitigated by reasonable back-ups	Excluded	Only that amount that could not have been avoided or mitigated, up to a maximum of the damages cap amount
Other erasure, corruption, etc., of stored information	Excluded	Damages cap amount [or X dollars]
Lost profits from any of the above	Excluded	Damages cap amount [or X dollars]
Lost revenue from any of the above	Excluded	Damages cap amount [or X dollars]
Indemnity obligations	Excluded	No limitation [or X dollars, or X percent of the transaction]
Infringement of another party's IP rights [3]	[4]	As determined by applicable copyright law, patent law, etc.
Willful, tortious destruction of property [5]	No	No limitation

NOTES:

[1] Consequential damages, etc., refers to any and all damages within the definition of excluded damages set forth above *[not included in this example]*.

[2] Tangible damage to property does not include erasure, corruption, etc., of information stored in tangible media where the media are not otherwise damaged.

[3] For purposes of this clause, the term "intellectual-property rights" includes, for example, rights in confidential information.

[4] Damages for infringement are deemed direct damages and not consequential, special, etc.

[5] Willful, tortious destruction of property includes, for example, intentional and wrongful erasure or corruption of computer programs or -data.

[END OF EXAMPLE]

Using this kind of systematic approach, if the parties decided to address additional risks in the contract, they could just add rows to the table.

The parties could also add columns to the table: Instead of including a single column for "consequential damages, etc.," they could add separate columns for consequential damages, incidental damages, punitive damages, lost profits, lost revenues, and so on.

To be sure, if the non-drafting party won't care much about the limitation of liability anyway, then including such detailed limitation language could actually hinder the overall negotiations.

But remember, by hypothesis we're talking about contract negotiations in which the limitation language is indeed going to be carefully negotiated — in which case this kind of systematic approach will almost always make sense.

2.10 Negotiate limitations of liability that vary with time or circumstances

Exclusions of consequential damages and damage-cap amounts don't necessarily have to be carved in stone for all time. The parties could easily agree to vary them, either as time passed or as circumstances changed.

Consequential-damages example

Suppose that:

- A software vendor is negotiating an enterprise license agreement with a new customer for a mature software package.
- The customer has successfully completed a pilot project, but it hasn't rolled out the software for enterprise-wide production use.

- Knowing how tricky a production roll-out can sometimes be, the customer is concerned about the vendor's insistence on excluding all 'consequential' damages, whatever that really means.

The vendor might try offering to waive the consequential-damages exclusion during, say, the customer's first three months of production use of the software, subject to an agreed dollar cap on the vendor's aggregate liability for all damages — which might be a higher dollar amount than at other times, as discussed below. This approach could make the customer more comfortable that the vendor is 'standing behind its software' during the roll-out phase.

In theory, certainly, the vendor would be exposed to additional liability risk during those first three months. But the business risk might be eminently worth taking. Remember, we're assuming that the software is mature, that is, most of its significant bugs have already been corrected. In that case, the vendor might be willing to take on that additional theoretical risk — which in any case would go away after three months — in order to help close the sale.

Damages-cap example

As another example, perhaps such a vendor could agree that the damages cap would be, say —

- 4X for any damages that arise during, say, the first three months of the relationship, or possibly until a stated milestone has been achieved;
- 3X during the nine months thereafter;
- 2X thereafter.

In the 4X / 3X / 2X language, X could be defined —

- as a stated fixed sum;
- as the amount of the customer's aggregate spend under the contract in the past 12 months, 18 months, etc.;
- in any other convenient way.

The details in the above examples aren't important. The point is that sometimes 'standard' limitation-of-liability language is too broad to allow the parties to specify what they really need. Negotiators might have more success if they drilled down into the language.

2.11 When doing a "page turn" online, start with Webcam video small talk

[From a 2013 DCT essay]

I've been helping a client negotiate a contract. The other side is in another country. The other side's lead lawyer and I have been doing our markup sessions using GoToMeeting's screen-sharing capability — I edited the document on my computer as he "looked over my shoulder" in real time. (Zoom.us has similar capabilities, which I've used extensively in working with another client.)

Yesterday we had a similar screen-sharing conference call, but this time with the business people on-line as well. We knew we had some knotty issues to discuss.

I started the GoToMeeting session. All but one participant logged in.

As the rest of us were waiting for the last participant, I turned on my Web camera, more playing around than anything else.

I asked everyone else to turn on their cameras, too. They did.

So now everyone could see and hear everyone else, in four different physical locations. The video images on my screen looked a little bit like the famous arrangement on Hollywood Squares.

We smiled and made small talk. Some of the participants seemed intrigued by the novelty of seeing everyone "face to face."

A few minutes later the last person dialed in. We turned off the cameras. All hands focused on the draft contract on my screen and discussed the parties' remaining issues. The discussion went pretty well.

Afterwards, something occurred to me: It might have helped that we were initially able to see each other as we made small talk. Seeing facial expressions and body language helped reduce the uncertainty (and the accompanying low-grade anxiety) of dealing with comparative strangers.

It seemed to me that we were no longer mainly just a collection of isolated, faceless voices in a telephone earpiece. Instead, we seemed to be at least a little more like an ad-hoc team that was trying to achieve a common goal, namely to get the deal done.

It reminded me of one of the things that famed surgeon Dr. Atul Gawande says in his best-seller, *The Checklist Manifesto*. Gawande strongly recommends that when a surgical team starts an operation, each team member should introduce him- or herself and identify any concerns he or she has. He says that this practice helps bond the team together; he recounts an anecdote of how it saved the life of one of his patients when things started to go catastrophically wrong during a surgery.

2.12 Note-taking during negotiations: Easy habits your lawyer will love you for

Chances are that at some point in your career, a lawyer — yours, or someone else's — will want to review notes you took at a meeting or during a phone conversation. With that possibility in mind, whenever you take notes, you should routinely do as many of the following things as you can remember, **especially the first three things**. This will increase the chances that a later reviewer will get an accurate picture of the event, which in turn can help you stay out of undeserved trouble and save money on legal fees

1. **Indicate *who said what* you're writing down**. Unless you want to risk having someone else's statements mistakenly attributed to you, indicate in your notes just who has said what. EXAMPLE: Suppose that John Doe says in a meeting that your company's offshore oil-well drilling project can skip certain safety checks. Remembering the BP drilling disaster in the Gulf of Mexico, you don't want anyone to think you were the guy who suggested this. So your notes might say, for example, "*JD: Let's skip safety checks*"; if you omitted John Doe's initials, it wouldn't be clear that you weren't the one who made his suggestion.

2. **On every page, write the meeting date and time, the subject, and the page number.** The reason: Your lawyer will probably want to build a chronology of events; you can help her put the meeting into the proper context by “time-stamping” your notes. This will also reduce the risk that an unfriendly party might try to quote your notes out of context.

3. **If a lawyer is participating, indicate this.** That will help your lawyer separate out documents that might be protected by the attorney-client privilege. EXAMPLE: *“Participants: John Doe (CEO); Ron Roe (ABC Consulting, Inc.); Jane Joe (general counsel)*."

4. **Start with a clean sheet of paper.** When copies of documents are provided to opposing counsel, in a lawsuit or other investigation, it's better if a given page of notes doesn't have unrelated information on it. This goes for people who take notes in bound paper notebooks too: It's best to start notes for each meeting or phone call on a new page, even though this means you'll use up your notebooks more quickly.

5. **Write in pen** for easier photocopying and/or scanning, and also because pencil notes might make a reviewer (for example, as an opposing counsel) wonder whether you might have erased anything, and perhaps falsely accuse you of having done so.

6. **Write "CONFIDENTIAL"** at the top of each page of confidential notes. That will help preserve any applicable trade-secret rights; it will also help your lawyer segregate such notes for possible special handling in the lawsuit or other investigation.

7. **List the participants.** Listing the participants serves as a key to the initials you'll be using, as discussed in item 1 above. It can also refresh your recollection if you ever have to testify about the meeting. If some people are participating by phone, indicate that.

8. **And indicate each participant's role** if isn't obvious or well-known – remember, you might know who someone is, but a later reader likely won't know. EXAMPLE: *"Participants: John Doe (CEO); Ron Roe (ABC Consulting, Inc.); Chris Coe (marketing)."*

9. **Indicate the time someone joins or leaves the meeting**, especially if it's you (so that you're not later accused of having still been there if something bad happened after you left).

10. **Write down the stop time of the meeting.** This usually isn't a big deal, but it's nice to have for completeness.