SWATlaw® Series

Special Weapons And Tactics for Managing Risk

(Contracts and Negotiation: What you don't know <u>*can*</u> *hurt you)*

What does it take to make a contract?

The law school answer to that is: *Offer, acceptance, and consideration*. So what does THAT mean? If you make an "*offer*" to do (or pay for) some work, and there isn't an expiration date on that offer, and the party "accepts" it years later and sends in the check, you have a contract! Now, that's a bit of a stretch, sure, but it makes the point. Can an offer be oral? Yes, in a number of circumstances. Can *acceptance* be oral? Sure, unless your offer stated that acceptance has to take a specific form. Actually, it can even be the other party "doing something" in "reliance" that they have a contract! What's the "*consideration*"? The other party doing something "to their detriment, and your benefit." (Starting to work on your project, instead of watching TV could be a slightly sarcastic, but possible, example.) If the offer can be oral, and the acceptance can be oral, and consideration can be the other party doing something . . . does that mean you can have a contract without a writing? YES. And what are the "terms" of that contract? "Common law" terms . . . do you know them? Unlikely – and unlikely you want to be held to them, either. So, as you can see, it's certainly a good idea to know what you're getting into, and to have it all *written down* – and if you're the party giving the offer, to have it expire, and to give some restrictions on how the other party will accept!

I have a contract – I "borrowed" all the terms from an old employer, and if it was good enough for them, it's good enough for me, right?

Well, maybe yes, maybe no. Usually people have NO IDEA what they have given away – or are responsible for – in a contract. If your own "template" has been put together from pieces garnered from an old employer, or from a friend who got it from a friend, who got it from a friend (who (I think!) went to law school), you (a) could be infringing on the copyright of the original contract (didn't think of that, did you?), and (b) could be unwittingly using "legalese" that could actually get you in trouble! Because "legalese" is generally not "one size fits all" – it's usually written with specific circumstances (or a specific business) in mind. So, if you "borrow" legal terms or buy a boilerplate off the Internet, you can wind up actually being on the "wrong side" of your own language![1]

Everyone thinks that they can write or read a contract. This is the one area where people often feel that having a lawyer is unnecessary. Going to court – sure, you need someone there, but a contract? Heck – I have been reading contracts all my life! The problem is, unless you really are a contract law expert, you often don't know what has been *left out* of a contract. A contract can look fine "between its four corners," but actually there might be quite dramatic things missing. If you don't

[1] I recently had a client who had "borrowed" language which sounded very legal (you know, the "Miscellaneous Terms" language on page 20 of a boilerplate). Unfortunately, he had borrowed this from a deal that someone on "the other side" had drafted – which meant he had given warranties, indemnities, and all sorts of other "promises" with regard to *his* work! And suddenly he came to me, when his clients were holding him to that standard…! Oops…

happen to have these clauses on your mind (force majeure, audit, and termination clauses occur to me right off the bat – more on those below), then you could approve a contract that is actually enormously deficient in items that you might need to take advantage of later. So knowing what a contract "is saying" is important – but sometimes, what it *doesn't* say is equally, if not more, important.

When I deal with some companies, they make me sign their contract. I'm just a pee-wee consultant, so of course they wouldn't negotiate with me.

What do Sun Microsystems, Yahoo!, Microsoft, RKO Pictures, Victoria's Secret, Home Depot, Sheraton Hotels/Conference Planning, Sony Entertainment, Hewlett-Packard, and Time Warner/AOL all have in common? They have all negotiated terms in their "boilerplate" contracts for my "pee wee" clients. If you have something that these companies want, they will negotiate with you. Some more than others, but nothing is *ever* set in stone. If you hire an attorney who has negotiated with these companies on behalf of "smaller fish" before, you gain the attorney's expertise and knowledge on which phrases of the big companies' "boilerplates" are up for negotiation and which are not – also which language may be absent, that you really need to add to protect yourself.

Even big company NDAs (non-disclosure agreements) or Confidentiality Agreements – you know, those "innocuous" agreements that "everyone" signs without reading — can have Burmese Tiger Traps in them. See below regarding some of these phrases (the worst of which is "equitable relief"). You should just know that the second you sign the other side's contract "to get the business" or to "keep the deal going," you have entered The Risk Zone.

Moreover, if you ever decide to go for venture funding or God forbid go public, these sorts of things must be "trued up" before you can go forward. Imagine the nasty surprise you'd get if the venture lawyers tell you that you don't actually own the technology that you are basing your entire business plan on – because by "just signing the other party's contract," you gave ownership over to them! Not good.

If I'm dealing with a company that's about the same size as my company, we sign each other's contracts, so we're both happy. I'd be too embarrassed to force them to sign just mine.

If you "each sign one another's" contract, you are just making a mess. It's actually better to take *their* contract to your attorney and hammer in some phrases that work for you, than to have two contracts.

Think about it for a second. If there is ever litigation (let's say they don't pay you, or you get a faulty or shoddy product), then a court or arbitrator would need to actually compare the terms in the contracts, and try to figure out which terms "govern." This can be a disaster, particularly if there are paragraphs in each contract that are diametrically opposed to one another. Your contract might say that you are providing your services "AS IS" (without warranty). Their contract might state that your services are covered by warranty, and that you will indemnify them (more on that below) if anything goes wrong. Your contract might state that their work for you is "work for hire" (more on that below). Their contract might state that you only obtain a license (and maybe a non-exclusive one, at that!) By each signing one another's contract in this manner, you wind up with something "festering" in the back of your legal filing cabinet. And if a court is ever involved (or possibly even venture capital attorneys), they will knock out all the "opposing" paragraphs to make some sense of what the deal is, leaving you with an "agreement" with as many holes as Swiss cheese – and subject to "common law" in these areas.[2]

I don't need a contract – I'm hiring my good friend, and if I present a contract to them, they're going to freak out and think I don't trust them.

Ah, friends and business. The worst thing that can happen is that you don't have a contract at all – which mainly happens when "friends" go into something together. The law states that if you are doing something on a "handshake," that you have a general partnership. This implies that you both own everything – and that you both can obligate the other party, etc. Partnership law (which is "deemed" to apply) can be very, very bad for you. The biggest knots I generally need to untangle for clients are "friend/no contract" situations.

Let's say you hire your good friend to create a logo for you, on a big project you're doing for a client. If you don't have a contract with that friend (now your subcontractor) – you don't own that work (even if you pay them for it). What if your contract with your client says that the client owns all the work you are giving them? Problem. What if your friend's work winds up infringing some other party's intellectual property – and then your client asks you for indemnification (more on that below)? What if your "friend" believes that they get 10% of *all* the work that you do for a certain client, because you enter into some sort of "revenue share" agreement on a handshake – and their work becomes shoddy, or you don't need them on a project with that customer? What if they aren't delivering their work on time? What if your client doesn't pay you — do you still owe your friend? What if you decide not to use your "friend" on a project, and they file with the unemployment commission, stating that they were really your employee, because they didn't have an independent contractor agreement with you? Or what if you form an LLC with a friend to do business, and you "never get around to" having an Operating Agreement – it goes bad, you want out, but there is no mechanism for "getting" out?

What then?

In the halcyon days at the beginning of your working relationship with anyone, it's all good. This is the time to nail everything down – especially what will happen when it goes bad. As my Family Law professor used to say, the time for a prenuptial

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[2] As an aside related to both of the above points, I am constantly amazed by clients who are too "scared" to tell the other side that they're giving a contract to their attorney to review. I made one of my clients practice saying "I'm just going to give this to my attorney, she should have it back to you next week" 50 times in the mirror . . . and he wound up emailing the phrase to his customer because he couldn't face it! But guess what? In my experience, unless you are dealing with "friends" (never ever when you are dealing with "real companies"), the other side *always* just says "OK, fine, let me know when she's done." Stand up for yourself – you're the only one looking out for you! You might not get all the changes you suggest – but you're bound to get some.

agreement is when you're in love – not when you're facing the "real life" after the honeymoon. You have to anticipate and come to fair conclusions and resolutions regarding "the bad things that might happen" when everything is good.

And believe me, you won't cover it all! It's Murphy's Law that something will sneak up on you that you didn't think about. This happens all the time. Of course, that's also why it's great to have a small business or entrepreneur-oriented attorney help you. Since they have a broad range of clients, they usually can anticipate issues you would never dream of (because they've seen it happen to others in your position).[3]

I don't want to go to law school – and lawyers always use language that I don't understand and I'm too embarrassed to admit it. So, what now?

I often joke that "Legalese" should be a class offered in the Foreign Language department of your local J.C. But it's actually not that difficult to understand just a few of the phrases that are generally shrouded in mystery – and glazed over – in contracts. And just breaking through the "language barrier" on these will help you to manage your risk.

Below, I will list a phrase, and then some considerations with respect to that phrase. This list is by no means exhaustive, but includes a lot of the "mystery" phrases that clients ask me about. I also cover what it means to be on "either side" of the contract containing each phrase. Some clients try to use the same contract, whether they are taking work "into" their business (hiring a subcontractor) or giving work "out" (to a client). It's important to understand that you can be on "both sides" at once in one deal – on the one hand, you can be hiring a contractor to help you out with a job (making you the "client"), while you are the "contractor" *to* your customer (the "client") on that same job. It all depends on whether you are "giving" or "getting" work. So you need to understand what phrases you want (or don't want!), depending upon which side of the table you are sitting on.

Here we go, with examples of phrases that you need to know and understand. I guarantee that you're subject to them – especially if you signed some other party's contract without really "reading it"!

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[3] And don't think that lawyers are interchangeable. A recent client lamented about the first lawyer she had approached to help her draft templates for her new business. She told him that she wanted her subcontractor agreements to be "friendly, not too legalese-y." To her shock, the lawyer retorted, shaking his head, "Well, I think that you're really starting your business off on the wrong foot – if you're going to be hiring your friends and business associates to subcontract for you, and you have to put stuff in writing, then you're telling them right off the bat that you can't trust them." This is a woman who was starting a technology-related company . . . and this attorney gave her advice that, if followed, could lead her to all sorts of potential horrific situations, including never owning (or having any exclusive rights to) anything a subcontractor did for her on behalf of her clients! Yikes! Worse, her potential clients are "big companies" – the ones *with* work for hire, indemnification, and warranty language in their boilerplates. Without a sub-contract passing those terms through, she could be in an awful situation in no time flat.

<u>"Work For Hire" Language</u>.[4] Let's say that you have signed your client's contract, which contains "work for hire" language. What does that mean? It means that your client owns whatever you have done for them. How broad is the language in that contract? Do they just own an "accepted deliverable" from you (or, better yet, a "paid for" deliverable), or do they own your "ideas, notes, etc." . . . or even "everything you produce during the time you work for them"[5]? Even the narrowest work for hire language usually doesn't have a provision that your client must "pay to own." This is one of the basic changes that should be made if you are the party getting paid – even if in the end the client *does* own your work product.

If you are willing to give up ownership of the work, have you retained the right to the "residual knowledge" that you learned while working on that job – or does their contract state they own that too? (Or is it *silent* on the fact – which is just about the same thing?) What happens if you use your work as a "base" for other work for other clients? What happens if you are a software developer – or an independent sales person – and you bring into the relationship your software "tools," or your Rolodex® of contacts? I have had clients lose control of all these things, by signing a contract without understanding the ramifications. Don't forget that if there isn't a carve-out for anything you had done before – or if they own your "ideas, notes, etc." – then you're an *infringer*, of what is now *their* intellectual property, if you re-use something you might consider "your stuff" (which they actually now own) after you complete your job for them.

How to remedy this? Give them a *license* to what you do — a license that's broad enough to make them comfortable, but that covers your assets. If you give them a license, you can also limit their uses of your deliverables to those that you anticipated when you entered into the contract. I have had many clients who "thought" they were designing a logo or giving over a photograph for one use – but by signing work for hire language, they lost all control over what was done with that deliverable.

Another possible remedy if you really are willing to let the deliverable "go" is to have the work for hire language only apply to the final deliverable that your client accepts – and only if they pay for it. All the drafts, ideas, etc. then still belong to you. And don't forget – you can "split the baby" – you can have a portion of the deliverable licensed (for example, your software tools, workbooks, procedures, ideas, etc. – things you want to use again), and the rest of it can be delivered as "work for hire." You can even deliver the entire thing as a work for hire to a client (so they own it), and carve out a license back to you to continue to use it.[6]

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[4] Just as an aside, watch out for unexpected effects outside of copyright law (which is where the "work for hire" doctrine stems from). In California, for example, the hiring party in a work-made-for-hire agreement may be required to provide the hired party with worker's comp and unemployment insurance.

[5] I have seen this language – it's broad enough to be construed that if you work for <u>another</u> client at the same time, they own that <u>other</u> work, too!

[6] This usually happens if you are faced with a large company that refuses to budge on a work-for-hire paragraph, but can be made to understand that you are coming into the relationship with certain pre-existing tools, and you need the rights to continue to use portions of the work when you leave the engagement. This can be fraught with difficulty, of course, and it's best to do these sorts of negotiations hand in hand with an experienced deal negotiator. Although

As mentioned above, also be sure that you have language that anything "residual" that remains in your "head" is yours to keep. Even if you sign an NDA/ Confidentiality Agreement with a client that's considering hiring you, you need to be sure that this sort of clause is inserted in your favor. Of course, if you make that Agreement mutual, they own anything that remains in *their* employees' heads after they have seen *your* confidential information – so if you are "giving" more crown jewels than you are "getting," a "residual knowledge" clause might not be so great!

But back to "work for hire." Let's say now, on the flip side, you hire some subcontractors to work for you on deliverables that you are planning to pass on to a client. Or maybe even deliverables that you would like to own yourself, to utilize more than once. You must have your subcontractors assign all their rights to you with strong "work for hire" and assignment language. If it's all just on a handshake, they continue to own that work. You don't even have an exclusive license to it.

This could be a big disconnect, if your client contract states that all your work is "work for hire" – and part of your deliverables are from a subcontractor with whom you don't have a "work for hire" agreement assigning all rights to you. You don't want to be in a situation in which the client sues you, because your subcontractor starts re-using the work that they did, and it comes out in court[7] that the subcontractor *can* do this, because you don't have a contract with correct "work for hire" language in it!

Force Majeure Language. A "force majeure" or "Act of God" clause is usually in the miscellaneous terms on page 20 of a contract. You know – the clauses you don't read. Or — it could be missing altogether. This paragraph states that if something "out of your control" or "out of your client's control" happens, the party that has been stricken by this "Act of God" (yes, that's a legal term, even if you're an atheist) gets some breathing room until the situation is rectified – and that party isn't considered in breach for that period of time, even if they miss a deliverable.

How can this affect you?

I remember when I was working for Lucasfilm, the Loma Prieta earthquake hit one of the Lucas facilities down in L.A. All legal hands were suddenly on deck,[8] scrambling to be sure that there was a "force majeure" clause in all client contracts – suddenly, "page 20" of the contract became literally the most critical part. If they didn't have a good force majeure clause, they would need to still produce their deliverables on schedule/as promised – from their squashed facility. So you can see, it's important that your force majeure clause works for you. And it's certainly immensely critical that the contract *has* such a clause – I have seen many, many contracts where

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beyond the scope of this FAQ, if you do design a license/work for hire arrangement, be sure to tie the license to the deliverable and the specific usage that you are allowing them to have, so that they can't expand on it like they can with work that they own — or separate out the licensed portion and re-sell it separate and apart from the deliverable.

[7] . . . as you're sitting next to your litigator with his meter running, AND possibly paying for your client's expensive litigator, depending on the contract you signed, with HER meter running . . .

[8] No fair coming up with mental pictures of rats scurrying out from the hold, now . . .

companies try to have my clients sign agreements without any ‘force majeure’ language. This means, regardless of what happens, the contractor (my client) is on the hook to deliver. If you’re the contractor, you had better be positive that there is some language of this type to protect you.

This means your force majeure clause with your client should include situations where YOU could invoke it. A good example might be to insert the word “sickness” into the clause. If you get sick (or even if someone you are caring for gets sick), you could call your client, invoke “force majeure” for the period of the sickness, pushing out your deliverable date for that time. Or, perhaps you want to include “Internet failures,” or “viruses or hackers” language. I had a client who unfortunately had her entire hard drive “eaten” by a virus that “crawled up” her cable modem – when she had a delivery in two days. She was able to invoke the force majeure clause we had worked into her contract with her client, to push out her delivery date.

In your contracts with clients (where you are the one getting paid), you probably want to start your Force Majeure clauses by exempting payment obligations from the clause. This means that your client can’t invoke the Force Majeure clause, then not pay you on time. In this day and age, even if a bank gets hit by an earthquake, there should still be SOME way to get paid. And a sneaky client could claim that their Accounts Payable clerk was sick (hey, an “Act of God”) – or their computer system crashed, or (dot dot dot) — and they can’t pay you. Not good – this should never be the case.

Most force majeure clauses have “including, but not limited to” language when it comes to the examples of what a force majeure event “is” – but spelling out some of them directly (such as sickness) means that if it ever comes up, you don’t have an argument with your client as to whether you can actually invoke the clause. And don’t feel bad invoking protections that you have put into your own contract! These provisions are there so that you don’t wind up in a stressful situation due to a situation beyond your control – where you just get sicker, running around trying to “make the deadline.”

If you have subcontractors, of course, the shoe is on the other foot, so to speak. You would probably start by excluding a force majeure clause in your contract. Then, if they want to negotiate one in, you want to make sure the clause only covers really catastrophic events – perhaps exempting things like sickness, and generally *excluding* the “including but not limited to” language. If you are depending on that subcontractor to get a deliverable to you, you don’t want them to invoke this clause at the last minute. You might even state in this clause that a “client’s non-payment” (to you) is an act of force majeure – wherein you can delay payment to your subcontractors until the money comes in. That sounds sneaky – but again, in this case, you are thinking "like a client," not like the contractor. Your subcontractor needs to think like the contractor![9]

__Indemnification Language__. This is a biggie. I will bet that you have a number of contracts out there that you've signed, in which you have indemnification obligations. Even scarier, I have had clients come to me who "drafted their own" template contracts – and they offered indemnification to clients in *their own* contracts! Ack!

So, what's it mean? "Indemnification" (also "hold harmless" language, or "defense" language) generally means that if the other party in a contract is sued because of something you did or did not do that is related to that contract (something for which you "indemnified" them), you have to pay all their costs (including their attorneys' fees, all court costs, and usually any awards that are found against them). This, tied with warranties, can be an enormous overhanging obligation for you. If a contract states, for example, that you are responsible for "indemnifying" them in the case of intellectual property infringement, that means that if some patent holder 20 years from now states that the website you designed today infringes their patent, you are on the hook . . . or if 10 years from now your client gets a cease and desist letter regarding the logo you designed for $50 when you were just starting out, you are also on the hook. Yes, even if it was years ago – and *even if they didn't pay you* but you delivered that work in a signed contract that doesn't "tie" indemnification to a cap, a time limit, or payment! Indemnification, like a diamond, is forever.

It's also important to realize that, if you have an indemnification clause with a client but NOT with your subcontractor, you are responsible for everything that the sub did (and standing behind your client in court with respect to that work), even if the only problem item is the sub's work. And no, they don't have to chip in on the costs (unless they feel sorry for you). So, you want to have strong indemnification obligations in your subcontracting agreements, while at the same time you will be trying to weaken them in your agreements with clients.

One of the things I encourage my "service-provider" clients to have in their engagement letter is a provision that states that it is the responsibility of their customer to put into action any recommendations provided by them – and that the customer indemnifies *them* for the implementation of their advice. For example, let's pretend you are an HR consultant. If you recommend that a company downsize 200 people to better their bottom line, you better have something in your contract that states that you are not "responsible" if they take action on that recommendation! Furthermore, you want to have an indemnification provision that states that *they* will indemnify *you* (including paying you your hourly rate, if you need to be part of endless depositions, court actions, or the like), if you wind up

[9] Many of my clients work as "virtual" companies, hiring experts to do jobs that their clients need, sometimes based on an email and a handshake. Usually, they are dealing with friends. But as I've said before, the best way to preserve a friendship is to have everything that has to do with business carved out in "black and white" from the outset. As with all contract clauses, you could start from a "tougher" position — then expect to negotiate to a more neutral one. The other theory is to start from a more neutral position . . . but then you need to hope that the other side won't *still* try to make you negotiate, assuming that *is* your "tough stance"!

getting sued because of your recommendation (in a class action by the employees, for example), or pulled into court as an "expert" on your client's side when *they* get sued. Never be afraid to put this sort of language in your contract – the last thing you need is to wind up paying out the nose due to your recommendations, because you didn't have a provision that states your client has to stand behind you.[10]

It's also important to know that insurance companies will often want to see copies of your contracts – because indemnification obligations and warranties that you are granting can make your premiums skyrocket. That is why using your own template contract – that has been drafted by a competent attorney and even possibly that you have passed by your insurance company for their OK – is a grand idea.

And while we're talking about insurance companies, what about *Insurance* provisions in contracts? I was speaking about this subject the other day with Charles Wilson, who heads up www.risksmartsolutions.com. His business is reviewing the insurance risk in contracts – and he says that every day he sees incorrect (and impossible) obligations that people have blithely agreed to, without having any understanding of what they're promising. Perhaps this happens because the section sounds legal, and has so many glazed-eye-producing words. Charles was saying that clients should show all contracts to an insurance professional (broker or risk manager) as *well as* to their attorney before signing – to be sure that they understand what is (or even what *can be*) protected by insurance. I pass this on to you as wise counsel from a man whose business *is* "risk management."

Warranties. Does the contract you signed with your client state that you "warrant" your work? Then, just like a toaster, they can have a "warranty claim" (not just breach of contract) against you if it turns out that something goes wrong anywhere in the world. This can be devastating if you are developing (for example) a logo for a website, and you conscientiously check the USPTO database to be sure it doesn't look like it's infringing – then your client posts it and is hauled into court for infringement in Sri Lanka/Germany/Outer Hebrides (you get the picture). With a non-infringement warranty and indemnity in your contract – off you go to defend them! There is language that can get you around this – for example, you can warrant, but only "to the best of your knowledge" – this will help get you out of some warranty claims for things that you didn't know about. Because if you "warrant" something does not infringe, that means that it doesn't infringe here, there, or in Madagascar. If you warrant that "to the best of your knowledge" it doesn't infringe, it means that you sure think it doesn't infringe, but you haven't gone and checked out the Siberian Copyrights Laws to be sure that it doesn't.

Of course, it's best to actually not be subject to *any* warranties. If you are using your own contract, you wouldn't "offer" a warranty on your work to your clients –the best way around this is to state that all your services, advice, and deliverables are given to the client AS IS. As you can well imagine, of course, you do not want to have this language in any subcontracting agreement, where you are the *subcontractor's* client! You want your subcontractor to warrant her work to you!

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[10] Hadn't thought of that, had you? It happens all the time with my "CFO-for-hire", HR, Public Relations, Advertising, Marketing, Risk Management, etc. clients.

There are also “implied” warranties that you might want to disclaim in your contract with clients – these are warranties that every “consumer” is afforded under the law, to draw on if something goes wrong. Your clients “consume” your services, so they can invoke these, unless they are disclaimed in your contract. These “disclaimers” are usually all in block printing in a contract – I personally think it makes them harder to read, but there is case precedent that states that you need to make these “stand out” – hence, the ALL CAPS. So, what are these “implied warranties” you consider disclaiming? An example of one is the "implied warranty of fitness for a particular purpose." This "implied warranty" says that what you are providing will do exactly what the purchaser expects it to do. Let's take the example of a chair. The "implied warranty of fitness for a particular purpose" means that you will be able to do with that chair what you should expect to do with it (sit on it; maybe stand on it to change a lightbulb; etc.) If you can NOT do those things, you have a consumer "warranty" to be able to return it for your full refund. Now, let’s say instead that you are providing software, or you are a video/film producer. In that case, you don't really know exactly what your client "expects to be able to do" with your product – *except* what is written in the contract. But “implied warranties” are not found in the four corners of the contract – your client “gets them” under consumer law (unless your contract disclaims them). In other words, you don't want to be in a situation where your client asks for a "warranty refund" under an implied warranty/consumer protections statute (a/k/a, "blindside" you). That is why you will likely want your contract to "disclaim" anything that's NOT in the contract. And don’t forget – if you are signing your client’s “boilerplate” contract, I would bet you that *they* do not disclaim the implied warranties “for you” – that is another reason to try to memorialize the deal on your “paper."

Arbitration Clauses.[11] Consultants often cavalierly insert arbitration clauses into their contracts, thinking that they “never want to go to court” because that’s just “too darned expensive.”

The problem is, arbitration is much more expensive than you might think (just opening an arbitration can cost $10,000). And what happens when your client doesn’t make their last $2,000 payment, and you just want to take them to small claims court? No dice – you have to open up that arbitration. Or what if they stole your intellectual property, and you want to run to court to get an injunction to stop them from posting your source code on the Internet? No dice. Stand in line – pay your $10k, and wait for the arbitrator. Next.

This can be an enormous liability. If you are dead set on having arbitration (or mediation – which is *non-binding*) in your contract and you are getting paid, at least exempt collections efforts, so you can still go to small claims, or to regular court with a contingency fee/collections attorney (if the amount is over the small claims limit). Also, if you’re licensing intellectual property, you generally want to be able to quickly address an infringement action in a court of competent jurisdiction.

[11] It is beyond the scope of these FAQs to discuss arbitration clauses with respect to hiring employees and independent contractors. But due to some recent changes in the law, you really must have arbitration provisions in your employment-related contracts – otherwise, you can be up against some very serious problems given these new laws.

If, however, you're the client and we're drafting your subcontractor agreement, you might in fact want a pretty strong arbitration clause. If all you are doing is paying the subcontractor, if something happens and your payments are held up, the subcontractor is then responsible for opening an arbitration to sue you (they can't just go to small claims). You need to think about these things strategically.

Choice of Law/Forum Clauses. One of the clauses that can prove immensely important to you if you are dealing with out-of-state clients, subcontractors or companies is the choice of law and forum selection portion of a contract. Sometimes contracts don't have these at all. In that case, if someone is unhappy and wants to haul the other party into court, they have to be able to serve that party. The party might avoid service, or might argue that they don't have "contacts" with the state in which the litigation has commenced. However, if you agree to another state's jurisdiction (or if your out-of-state client agrees to California), you are agreeing that in any dispute, both of you will litigate/arbitrate to that state.

If you agree to another state's law governing the contract, *wherever* the lawsuit is brought, you both agree that the court/arbitrator hearing the case must apply the named state's law.

So how does this work? If your North Dakota client doesn't pay you, and you signed their contract that stated that you agree to North Dakota jurisdiction, you must go to North Dakota (and hire a North Dakota lawyer, etc.) to get your money. Not good!

If you can't get California law/jurisdiction, then at least try to strike the "forum/law" language, so that the contract is "silent" on this issue (e.g., cross the paragraph out). Then if the North Dakota client wants to sue you, they can go to North Dakota court . . . but they have to prove you have "minimum contacts" with North Dakota to make you come and defend the lawsuit (or arbitration) there. You haven't agreed in the contract that you will just "go." A good fallback position is to agree to North Dakota *law* if they make you agree to something – but really try to avoid agreeing to "*venue*" or "*jurisdiction*" out of your state.

Because, you can "split the baby." You don't need to agree to both law and jurisdiction in a certain state. If the contract merely states that a certain state's law applies (but not that any litigation/arbitration must take place there), you can still sue them in your home court, and if they are deemed to have "minimum contacts" with that state, they have to come defend here.[12] But that court needs to apply whatever law has been agreed to in the contract. A little bit of a sticky situation, but at least you're not flying to North Dakota small claims! ☺

"Best Efforts" Language. This is a clause that means something different legally than it probably does in your mind. If you contractually agree that you will use "best efforts" to do something, you probably mean that you'll "try your best" to get it

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[12] Mind you, it is a good idea to find out whether that state's law has some sort of "twists" that might be of detriment to you – which is often difficult to ascertain without hiring an attorney from that state. Also, if the contract's "Notice" provision states that a party can be served by mail or commercial courier, then there is no issue with the party avoiding service — your views on this will of course change depending upon which side of the contract you're on!

done. That's not what this phrase means, legally. "Best efforts" actually has been interpreted to mean that you must do EVERYTHING – even if it's not economic – even if it might ruin your company! – to get that thing done, immediately. Woah! Not what you meant! You never want to agree to a "best efforts" clause. You can soften this, if you are being made to sign another party's contract, by making it "best commercial efforts" – you really want to try to change it to "reasonable commercial efforts" or "reasonable efforts" when possible. You should at least "corral" the "best efforts" language by limiting the budget and/or workforce you will put behind the "effort," or the minimum and maximum amount of budget/worker hours that will be committed to the "best efforts," or perhaps the priority (if you are developing a new product for a customer, for example) of that product relative to other product lines you are developing in terms of importance, profit, volume, etc.

But NEVER, EVER agree to just "best efforts"![13]

Automatic Renewals. If you are entering into licenses and don't understand how to book your revenues – well, you should. Automatic renewals, deliverables, service contracts, money-back guarantees, and the like can lead to revenue recognition problems. However, more importantly from the legal context, you need to pay attention to contracts that are for a term of years, possibly with "renewal" options. If you have any, you should use your Daytimer or Outlook, and make sure that you have "tickled" when the contract will expire (or will "automatically renew") – and any notification that you might need to give before that date. I have had more than a handful of clients who are suddenly faced with a bill for a contract that they "didn't realize" had an automatic renewal clause – which they didn't cancel in time. This can happen on copier leases, photographic licenses — any sort of licensing or leasing contract. In other words, once you sign a contract, don't forget it! Do you have a contract database that keeps track of all these things? You should!

And if the contract that is expiring is a license to YOUR deliverables, be sure to "tickle" the consequences if your client doesn't notify you before a certain date! You don't want to miss out on a payment or a license renewal, because 5 years have passed and you "forgot" that the contract actually had an end date! This is especially important if you grant exclusive licenses – the exclusivity may expire, allowing you to re-market that IP or deliverable to a wide range of clientele after the expiration date. Don't lose track![14]

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[13] Of course, putting it in your subcontractor's agreement is a grand idea.

[14] The most frustrating experiences often happen for clients when they get big enough to consider venture funding, or even an IPO, and they need to do "legal archaeology" on contracts and issues going back to the "dawn of time" in their company. Don't let this happen to you. By having a database or even an Excel spreadsheet that contains the information on all your contracts – including expirations, whether that contract is assignable or considered confidential (more on that below), you can save yourself an immense headache. If it seems like too daunting of a task – well, of course, you can pay us to come in, review all your contracts, and set a system up for you. But don't think that "just because you're small" you don't need a system like this. The smallest start-up with a great idea is going to get noticed by the "big boys" at some point – and you need to know whether you really can open your drawers and show them all your contracts and deals without any issues.

Confidentiality; Equitable or Injunctive Relief. Usually, confidentiality clauses are long-winded, and incorporate all sorts of things that are supposed to be kept "confidential." Equally important, though, is the clause that generally states when something is NOT considered confidential. Be sure to review these. Do you know what's missing, or what should be included? All "confidentiality" provisions are not created equal! Is the agreement itself the "confidential property" of the other side? Then you can't let on that you have that contract, if you are being considered for a merger, acquisition, or venture funding. You want to strike that sort of language if you ever see it.

Similarly, if your intellectual property is held on a "trade secret" basis (*e.g.,* the Coca-Cola or Kentucky Fried Chicken recipes, which are protected for so long as they remain secret, not for a term of years like the protections for patented information), you want to be sure that the confidentiality provision doesn't have any end date. You want your trade secrets to be kept confidential for so long as you hold them to be confidential.

If you are subject to a confidentiality agreement, be sure to read what you're in for – do you have to give the other side's stuff back? Shred it? How do you have to "guard" it? You need to be sure that you agree to treat this property in a way that really works for the way you do business – otherwise change the phrase to say that you will guard confidential property "no less well" than you guard your own. And be sure that the business people know exactly how they are supposed to treat any information from the other side. At one of the huge international software companies at which I worked before starting my own company, we had a "term sheet" that was circulated after a contract was signed, which included specific pointers like this. Everyone understood how information was to be treated, what terms to watch out for, etc. When a contract has been highly negotiated, it's critical that the people that are on the 'front lines' really understand what to expect.

And, what is *equitable or injunctive relief*? Usually there is an "equitable relief" or "injunctive relief" paragraph somewhere near the Confidentiality section. If you have signed a contract that states that for "any breach or suspected breach", you agree that they can get injunctive relief against you – this means that they can stop your business! "Injunctive relief" is like getting a restraining order – just like a TRO ("temporary restraining order") against an abusive spouse, it can stop you from doing your business "until" they "find out" whether there really is a breach. Not good! If you agree to an equitable relief/irreparable harm paragraph, you have agreed that they can go to court (alone) and get this TRO to potentially stop your

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If you are an accountant or CFO, you certainly know that you're going to check and re-check the "financial information" that you are sending out to the venture capitalists – "getting the books in order" to go out is sometimes a bit of a scramble. I have seen so many clients, however, who do not have an attorney on staff, and the "smart person" (usually the CFO) just lets the venture people – or the company considering purchasing them – riffle through their contracts without any thought. From a lawyer's prospective, this is an enormous problem, and one rife with potential risk. What if you have a contract that states that its terms are confidential – and you just produced it to the other company? You've just breached that contract.

business in its tracks – and you have no say about it, because you already "agreed" when you signed the contract. Without agreeing to this relief in a contract, they would need to *prove* to the judge that they are being harmed, you get to go to court to fight it, and they often have to post a bond. Not so if you just rolled over and agreed, by signing the contract without understanding the importance of this phrase.

You can just insert a word or two to get yourself out of hot water in this area. For example, you could change that they can "have" injunctive relief to that they can "seek" injunctive relief, and that a breach of contract "may" — not "will" — cause them irreparable harm. You also shouldn't waive your statutory protections without consideration. For example, as noted above, someone seeking injunctive relief generally has to post a bond; if they are mistaken, and you lose business, etc., you can be paid out of that bond. But if you agree by signing their boilerplate that they can get injunctive relief without a bond (usually, for a breach or "suspected" breach) – you allow them on that "suspicion" to go solo to court, get a restraining order, come in, and stop your business, without even needing to post a bond so you can get paid back if they were wrong.

Another phrase to watch out for is *"specific performance."* Specific performance means that you can be forced to *do* something — it is akin to equitable relief (where you can be forced to "stop doing" something). If you agree to "specific performance" language in a contract, you are agreeing that the other side can actually "force" you to perform.

On the flip side, you might want your subcontractors to agree to an injunctive relief/irreparable harm or specific performance paragraph. In the case of equitable relief, this means that if you suspect they are stealing your intellectual property or doing something nefarious, you can go to court (without posting a bond) and get an injunction to stop them immediately. If you include specific performance language, it means you can hold their feet to the fire and "make them" do the work that they have contracted to do. Again – it just depends on which side you're on!

<u>Assignment Clauses</u>. I will just touch on these. Assignment clauses in contracts can state that if you (or anyone else) wants to "assign" the contract to another party, that you (or they) need to ask for permission. This can be a problem. For example, if you wind up incorporating and want to pour your contracts over into your new corporation, you would need to "ask permission" to do that if the contract is in your sole proprietorship and you can't assign without it. If they don't *give* that permission, you can't be protected by the corporate form with respect to that contract – it ends up remaining 'outside' your corporation and you wind up remaining personally liable. Or if your company is bought (or you are buying another company) and you can't assign a contract without "authorization" from the other side, this can cost you valuable time and effort. Moreover, if there isn't a phrase that states that the other side can only object to the assignment for certain valid reasons (like you are trying to assign the contract to their competitor), they can just decide that they don't want to do it – and you are stuck with the contract, even if you have sold the rest of your business! You want to think about this. You certainly want your contracts database to keep track of any assignment language to which you *are* subject.

Of course, if you are hiring a subcontractor, you probably want to state that he or she *can't* assign – because you want him or her to actually do that work personally.

Bankruptcy Clauses or *Termination Clauses.* Again, these could really be the subject of an entire treatise![15] But there are some provisions in bankruptcy law (particularly with respect to software) that you need to know. You also need to know that paragraphs stating that the contract terminates if the other side goes bankrupt are never valid. (Yes, I know, you see them all the time – they're just never valid.) Bankruptcy can be a very scary situation, particularly if you are a "nice" company that lets its customers get into arrears in payment. If you allow your customers to get into arrears and then they declare bankruptcy, usually there is no way to get the money they owe you. Almost worse, if you make them pay, and it turns out because you were a "squeaky wheel" they paid you but didn't pay other creditors, a Bankruptcy Court (months or years later) can make you *pay back the money they paid you,* if the Court decides that they made a "preferred" payment to you that was unwarranted. (A "preferred" payment just means that they preferred to pay you instead of, say, the gas company or their landlord, or any number of other contracts.) Yes, they really can make you give the money back.

To add insult to injury, I can give you an example that happened to a client of mine. They had developed a website for a client, and that client had fallen severely in arrears in its payments (thousands and thousands and THOUSANDS of dollars). But my client was too nice to send out the breach letter that their own template contract provided for, in the case of late or non-payment. Then, their customer declared bankruptcy, to "reorganize." The court wiped out the entire back debt, *and,*[16] the customer then started to make its monthly "service" payments (from the bankruptcy date, forward). As they were not late in making these service payments (a couple hundred dollars a month), my client had no ability to cancel them. My client had to keep maintaining and servicing this client, even though it had basically never paid for its enormous, robust e-commerce website — because the payment for that website and all "back debt" was basically "extinguished" in the bankruptcy.

What a blow! The moral of this story? If your customers get in arrears, it really doesn't pay to be a nice guy. It's time to send a breach letter — and hopefully your contract with them states what exactly will happen in that case. If it's your template, it should state that they're responsible for any collections expenses, interest, etc.[17]

If you are dealing with software licenses, there are specific "magic words" you want to insert into arbitration clauses, to be sure that you are protected by the language actually there to protect you in the Bankruptcy Code (*if* you invoke it). Though beyond the scope of this FAQ, it's good to know, if you are dealing with intellectual

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[15] OK, so you think this is already a treatise. I mean *another* treatise. You know, my *magnum opus contract termus.*
[16] this is the "insult to injury part" – pay attention . . .
[17] Often customers try to strike this language when I'm negotiating for my clients, but we in the legal trade call these "shame on you" phrases. In other words, they try to strike it, and I say in my "sad" voice – "Now, are you telling me that you are NOT going to pay my client? Because this language will only bite you if you are not paying. Are you really telling me you're not going to pay?" (Shame on you!)

property licenses, that there are “magic words” you can take advantage of to protect your company.[18]

When it comes to *termination* language, it should be obvious, but you want to reserve the right to get out of a client engagement if necessary. This is generally called “termination for convenience.” On the other hand, you don’t want to have *any* termination provisions in your contracts with your subcontractors! The last thing you need is for them to “terminate for convenience” when they are supposed to be doing a piece of a job for you, for delivery to one of your clients!

Audit Provisions. If you are receiving payment on a royalty basis, is there a provision in the contract that you can audit the other side? And if there is a provision that they can audit you, is it limited? There are a number of tricks to audit provisions, including limiting review of your books to items strictly related to the deal, making sure that you receive a copy of the audit, not allowing the other side to copy and carry away any of your documents, capping reimbursement for audit costs to the actual amount you are found to have underpaid (if you are the one being audited), and the like. If you are the one who will be doing the auditing, you need to look for phrases like those listed above, and try to broaden all these terms. If you don’t have a CPA on staff, try to state that “any representative” can do the audit if you are carrying one out – on the other hand, if they are the one to audit you, make them come in with an accounting firm (making the “hurdle” to audit you a bit more expensive for them). If they audit you, you want to be sure that the clause provides that if they find that they *underpaid you*, they are responsible for paying you that underpayment immediately (potentially with back interest, and some amount for the pain of having to undergo the audit). You also want to consider time limitations — can they only audit you once a year? And on what portion of your back books and reports? — plus possible back interest payments if you find a discrepancy in an audit, and a host of other items a bit too involved to mention here.

Breach Clauses; Payment Clauses. If you are being paid, you might want to include in your breach language that if the other party doesn’t deliver/pay/etc., that you can withhold your deliverables (or switch off their website – subject to a reconnect fee once they pay, of course), or that all other payments in the contract are “accelerated” due to their breach/nonpayment. *You* might be subject to these clauses if you have signed a standard copier or furniture lease without reading it – if you have, be sure if your company falls on hard times, this is NOT the contract you decide to pay slowly on!

You also want to consider what sort of time limit you want to give the other party (whether client, or subcontractor) to “cure” a breach. Often, if you sign the other side’s contract, it states that for “any material breach” (non-payment, for example), you have to notify them in writing.[19] THEN they get “thirty days” to cure. Let’s say as an example you are already being paid Net 30 days, maybe upon their “receipt” of

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[18] When I wrote this, I had “of which you can take advantage,” but my editor said that correct grammar didn’t fit in such a colloquially-written piece. Just so’s you know.
[19] Sometimes this has to be via some sort of antiquated method, like registered mail – always change that to “commercial courier with tracking capabilities.”

your Invoice.[20] You wait 30 days — no check. You then give them a couple of weeks' grace period, because they say "the check is in the mail." Now it's 50+ days after you delivered your work to them. Still no check. You decide to "call them into breach" in accordance with the contract. If they have a 30 day cure period, they get *another* 30 days to make good. So you delivered, and are about three months out (if you really only waited 15 days to send the breach letter) before you even know if you are going to get payment. And if they don't pay at that time, *then* you get to do…whatever the contract states you can do. Can you terminate the contract? Can you sue them in court, and have them pay the collections costs? Can you charge interest? Do you just have to sit there, because you forgot to put in the "what if" provisions and you signed their contract? Just be sure you understand all the ins and outs.

Miscellaneous. There are a number of other clauses that show up in the "Miscellaneous" section of a contract. You need to at least have some idea what you are signing up for, when you see one of these. Here is an smattering of some of those clauses:

* *merger* or *integration* clause. This is language in a contract that states that the agreement contains the "entire agreement of the parties." If you see this language, then only the terms contained in the agreement (and any exhibits) will be enforceable; the moral of the story here is, if you have something else that modifies, enhances, or changes the terms in the agreement (particularly in email), it needs to be in the contract. This is particularly true if the contract also contains language that any changes *must be approved by a signature* of either both parties or – if you sign the other party's contract – often just the other party. At least make that language mutual – it means that your emails can't be 'held against' you without a further signature – but it also means you need to be careful about documenting any changes and getting them signed off.
* *statute of limitations* clause. This language usually changes the time that applies to the contract – especially for lawsuits. For example, if the statute for suing on a contract in your state is six years, and the agreement states that the parties agree that any action on a breach must be brought within one year, then you have lost your ability to sue on that contract after the year is up. This is particularly important because it can eliminate the "discovery" rule, which can state that the statute can be tolled (extended) if the party was unaware of the breach.
* "*time is of the essence"* clause. This clause can be sneaky. If you do not specifically complete your obligations under the contract within the time listed in the contract (even if that time limit proves unreasonable), the other party can sue.
* *severability* clause. This language, also called a "savings" clause, states that if any part of the contract is found to be unenforceable, that the rest of the contract will still stand. If this language is not found in the contract, courts have taken down the entire contract for one clause.
* *waiver* clause. This language states that, if you waive compliance with specific terms of the contract, you do not waive your right to enforce those terms at a later date. As an example, if your contract states that interest shall be paid on any amounts overdue, but you do not charge that interest for a period of time that the

[20] You really want this to be from the *date* on your invoice — otherwise you've just given them another week or even more to claim they never "received" it.

customer is late in paying, it does not mean that you can't charge it in the future. Or if your contract states that the customer must pay you weekly, but they pay you monthly for a period of time, you have not waived your ability to claim breach of contract due to "accepting" their conduct for a period of time.

OK, that's way too much information. Anything else I should look out for? (Maybe I don't even want to know.)

Although it's actually the subject of another talk in the SWATlaw® series, you should certainly understand how to watch out for infringing another company's intellectual property, and in particular its registered trademarks – for example, when you name your company, or are branding a product or a slogan/tagline. It's fairly easy to check the U.S. Patent and Trademark Registry for marks, and if you are not doing so (or if *someone* is not doing so), you run the risk of receiving a "cease and desist" letter – and possibly being hit with statutory treble damages and attorneys' fees if you are even inadvertently infringing another party's mark. Yes, even if the state allowed you to name your company that name, or your county allowed you to file a d/b/a, or the state allowed you to file for a (basically worthless) "state" trademark.[21]

You should also know a bit about copyright law. If your product is "inspired" by another party's copyrighted work, you are making an unauthorized derivative work, and can be sued. Neil Diamond certainly found this out when he was sued over his song *Heartlight*, which Steven Spielberg's company held was an unauthorized derivative work of the film *E.T.*[22] When I was working for a large software company, one of our graphic design contractors found this out to *his* detriment when we were called by an attorney, who stated that our contractor had utilized his client's Civil War oil painting in work that he had done for us – which we were using on the front of our retail software box. The story is actually even worse than it sounds – the attorney had called our marketing department, who, without contacting Legal, gave the attorney our contractor's number directly to "sort things out." When the attorney questioned our contractor, he stated indignantly, "No way, I didn't infringe – I looked at that painting, but I drew my figures with my own hands!" The attorney, in his call to me, was laughing and trying to decide just how *much* he was going to sue us for – as this admission alone was a direct admission of infringement. Luckily (for us) we had an indemnification clause in our contract with the graphic designer – let's just say that it didn't get pretty, and he got to keep most of his assets . . . (why one should be incorporated is the subject of an entirely different lecture).

As a final little "drive by," I should probably mention the traps inherent in marketing copy. If someone in your company is giving your clients (or you are a client receiving) marketing copy, and no attorney with direct marketing experience is

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[21] If you want to know why it's "basically worthless," I'll have mercy on you and won't write another long footnote – instead, check out my "Trademark Chat" PDF on goodsolutions.com.
[22] Diamond had been silly enough to say in public that he had been "inspired" by the movie *E.T.* to write *Heartlight*. One can be inspired by a sunset, a tree – but not someone else's copyrighted intellectual property. In law school, the old adage was that you can draw Whistler's mother (e.g., sit her in a chair, and draw the exact image of the famous painting), but you can't draw *Whistler's Mother* (the painting) or you're infringing. Yes, I know, *Whistler's Mother* is probably in the public domain by now, but you get the point. ☺

reviewing that copy, you are leaving yourself open to consumer fraud and other claims. Just using the words "New" or "Free" have so many strictures around them, it makes your head spin. And let's not even get started with laws surrounding sweepstakes or contests. Just be sure you call someone if you're doing one – the sanctions are *ugly*.

So, I'm scared now. Give me a few tips on how I can manage the risk in my business – or, if a "hired gun", help my clients manage their risk?

As a small business and entrepreneur-oriented attorney, the best method that I can suggest is: Get It In Writing. Have a contract that outlines the risks, and who bears the responsibility for each risk. The bulk of this FAQ dealt with just that.

Another seemingly simple suggestion I have made to clients is to be sure you PDF your contract before you email the final draft off for signature. A client recently wound up in a very nasty situation, because, after a contentious negotiation, they sent their contract over in Word for signature, which their customer dutifully faxed back. My client then co-signed, and faxed a copy back to the customer. Unfortunately, their customer had inserted one tiny word – "Not" – into the contract. My client co-signed without realizing that the client had just evicerated their protections. When the relationship went South, the other party pointed out this phrase (on a copy of the co-signed agreement). Whose fault is it? Unfortunately, my client's fault, for not locking the document up before sending it! It's obviously difficult to read every single word on a fax to be sure it's the "same contract you sent them" – but if you PDF it, unless they can "unlock" the PDF, you won't generally have this happen to you (and wind up having to argue about "fraud" while looking at your own John Hancock on your own ("just slightly altered") contract).

Another method of managing risk, once you understand how important contracts are for your business (you do now, don't you?), is to notify your A/P department that no checks are to go out without a contract. For example, you can institute a procedure whereby contracts are routed to you for signature — so that your sales people aren't obligating your company to some risk without your knowledge! — then, you route them to A/P with an "OKTP" (Okay To Pay) stamp. Without that OKTP, A/P doesn't send out the check. This will eliminate the issue, discussed more fully above, of your company paying for (but not owning) work that is done by a contractor on your behalf. Once that check goes out, there is no leverage against the contractor, if in fact she has not signed your "consulting agreement" before your business person hired her to do their work. (Worse, she might have been hired on an "emergency" basis – and therefore maybe you're even subject to *her* contract, which your business person just signed to "get the deal going"!)

It's important to realize that sometimes the least "expensive" things can be your biggest headaches. This often happens when executives decide that "small ticket items" don't need approval or oversight. In this case, line managers (sometimes even sales people!) are given "dollar authority" up to a certain amount. When I worked for a large international software company and first instituted an "A/P needs the contract to pay" system – regardless of the dollar amount — the CFO and I certainly ferreted out how this system had been abused. In almost every division, we found that graphic designers, artists, business plan writers, and the like had been hired, either without a contract at all, or on their contract (which the line manager had "just signed" because the artist/writer/contractor said that it was "just a formality" and "just their boilerplate, no biggie"). In each case, we therefore found (much to our horror) that the logo, or design, or brand, or business plan, or case study that we were distributing internationally really wasn't our property at all – it was merely ours "on non-exclusive license" or for "a limited term." Sometimes, it was even worse — sometimes we were obligated to terms like those that were discussed above. By instituting some sort of policing policy at the A/P level, you can make sure that your company really owns what it thinks it does – and that there aren't "festering risk pockets" out there that you know nothing about (until someone sues you).

In closing, you *certainly* want to be sure that you have a copy of every "writing" that obligates your company. In a due diligence situation I once did for a client, the company that my client was purchasing dutifully produced all the contracts that were in their Legal and Finance Department's files. This included a variety of contracts, the corporate Minutes,[23] and the like. Fortunately, I had attended the big "sales pitch" that was given with respect to this corporate merger— so I had a whole list of questions with respect to deals that had been alluded to in the "sales pitch." Neither the general counsel of this company, nor the CFO, had *ever seen* the contracts for these deals. Were there contracts? Oh yes. Where were they? In various sales people's desks, and the COO's desk . . . in a couple of cases, we had to get the contract from the other side.[24] Let that be a warning to you — if you haven't instituted some procedure whereby every contract that obligates the company comes through your desk for approval (the easiest method being a "gate" at A/P — the "problem contracts" aren't usually for money coming *in*), there can be contracts stuffed into desks and in eternally overflowing Out boxes, just waiting to trap you.

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As you can see, all these contractual terms work together. Ready to tear your hair out? Thinking about a few sleepless nights, mulling over your risk? Or just a few nights crawling around the back file room, reading all those contracts you signed without really reading them? Maybe tentatively opening a few sales people's desk drawers?[25]

Just go slowly. I often tell my clients that "enlightening" them to risks reminds me of the old Road Runner cartoon series. If you remember that series, Wile E. Coyote often would run off the cliff as he was trying to catch the Road Runner. He would keep running and running – until he looked down. As soon as he "realized" he was off the cliff, he'd get that "OH NO" look on his face – and down he would go.

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[23] Are you responsible for the Minutes at your company? You do know that doing certain corporate acts without a board meeting (even telephonically) and with Minutes memorializing that board meeting can jeopardize your corporate standing, right? Right?

[24] Quite an embarrassment for the company my client was acquiring — and they certainly made a stink to my client that I was "queering the deal" by my "bullying." I wasn't too worried about that, as I felt pretty confident that my client would understand that they didn't want to purchase the target without knowing what they were in for!!

[25] You *do* have agreements with all employees and independent contractors that you can do this, right? Right?

If after a sleepless night you go back into your filing cabinets and find out that you are indeed subject to some of these provisions – well, don't feel like Wile E. They haven't blown up on you yet (right?), and at least hopefully now you know better than to run off that cliff again!