



Contracts Law 101 for Chief Administrative Officers



J. Sean Lemoine, Wick Phillips Gould & Martin, LLP

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About the Webinar Speaker

- J. Sean Lemoine, Partner – Commercial and Bankruptcy Litigation
Wick Phillips Gould & Martin, LLP
- Complex Commercial Litigation
- Bankruptcy-Related Litigation
- Pre-Litigation and Corporate Counseling
- Alternate Dispute Resolution

Contracts Law 101 for Chief Administrative Officers

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Overview

- Security and Foundation of Business Relationships
- Forecast Risks
- Control Risks and Expenses
- What To Watch Out For/What To Include

Core Contracts Law Principles

- “Four Corners Rule”
- Read The Contract As A Whole - Every Clause Must Be Given Effect
- Courts Use The Plain And Ordinary Meaning Of Words (You Need To Define Terms)
- Avoid Unreasonable, Oppressive, Ridiculous And Inequitable Interpretations

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Core Contracts Law Principles

- **Four Corners Rule**
- If you want a concept to govern the relationship, get it in writing
- If a concept is not included in the four corners of the document, the court will not rewrite the contract for you.
- Handshake deals are hard to enforce, and could come down to a coin flip. If drafted well, a written contract will get you the benefit of the business arrangement.
- Ex. - Implied Bonus Theory – parties have discussions that if a contract is performed within a certain time, or within certain cost structures, a bonus of X will be paid
- He said/She said issues; hard to resolve without writing
- Resolve with a basic integration clause

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Core Contracts Law Principles

- **Read The Contract As A Whole - Every Clause Given Effect**
- Each provision in a contract must be harmonized with the other provisions
- Must interpret contract in a way that prevents conflicting provisions from negating each other
- Don't want an important provision of the contract inadvertently nullified
- Ex. – One clause says you can terminate at any time without cause, while a later clause says you must give the party 30 days notice and an opportunity to cure
- Creating a dispute over what parties intended because two provisions are contradictory

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Core Contracts Law Principles

- Plain General and Ordinary Meaning; Technical and Defined Terms
- Courts are not experts in your business
- Unless there is a developed body of law in your field, courts are going to apply general understanding as to what words means
- Many times economic terms are based on sales of “units of productions” or similar metric, so it must be clear what constitutes such metric
- Ex. “Gross sales received” versus “Gross sales to be received.” If you are a manufacturer and contract through a broker, but the end user does not pay the full contract amount, what does the broker get paid on
- Protects you to make sure that your company is compensated as expected

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Core Contracts Law Principles

- Avoid unreasonable, oppressive, ridiculous and inequitable interpretations
- Courts will not favor outlandish or absurd results when the interpret contract language
- Reasonability in drafting and interpreting contracts and avoidance of upholding sharp business practices
- Ex. Timing provisions – when payment is due for a product, or if you can back out of a contract because the product is delivered late, are the types of provisions that need to be explicit.
- Courts won't enforce an interpretation that doesn't pass the smell test
- Clarify any provisions in contract that may have any ambiguity

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How Chief Administrative Officers Can Benefit from Understanding Contracts Law

- Forecast Costs - Know your company's obligations
- Relationship Management – Utilizing preliminary measures in resolving dispute or breach
- Strategic Liability Management – Utilizing contractual measures to limit liability and control how a dispute is resolved

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How Chief Administrative Officers Can Benefit from Understanding Contracts Law

- **Company Obligations**
- Clear understanding of obligations allows for more accurate pricing
- Clearly spells out services or products to be provided and manner of provision
- Determination of compensation
- If contract does not include clear metrics and timing, you company could miss out on the expected benefit
- Larger morass for the court to deal with

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How Chief Administrative Officers Can Benefit from Understanding Contracts Law

- Preliminary Dispute Measures
- Mediation or resolution procedures
- Important for relationship management because parties need to understand rights with respect to failure to perform
- What constitutes a breach, and how to cure that breach
- Party that fails to observe and comply with a notice provision can unexpectedly be in breach

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How Chief Administrative Officers Can Benefit from Understanding Contracts Law

- **Strategic Liability Management**
- A good contract will have a provision setting forth the process by which disputes will be resolved, including, forum, arbitration or litigation, and types of remedies allowed
- The parties can plan ahead of time how disputes can be resolved
- Location, rules in which you operate, and potential remedies all affect the cost of recoverability in a lawsuit
- If you live in Texas and contract requires suit in New York, it can increase your costs in terms of travel, witness expenses, and engagement of local counsel
- Failure to comply with these provisions can derail your abilities to force compliance with contract

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How Chief Administrative Officers Can Benefit from Understanding Contracts Law

• Strategic Liability Management, continued

- Choice of law – “this contract will be interpreted under the laws of _____”
- Arbitration/Jury Waiver – “voluntary waive any right to trial by jury . . .”
“will submit this to one arbitrator before the American Arbitration Association . . .”
- Venue – “any dispute shall be exclusively decided in the State of _____, City of _____”
- Attorneys’ fees – “the prevailing party in any dispute shall recover reasonable and necessary attorneys’ fees . . .”
- Damage/Remedies Limitations – “ no party shall recover lost profits, consequential, or exemplary damages . . .”
- Statute of Limitations – “ all claims relating to this contract shall be brought within _____”
- Representation and Warranty Clauses – “the parties represent and warrant . . .”
- Indemnity/Defend/Hold Harmless – “agrees to indemnify, defend, and hold harmless from all claims . . .”
- Notice – “any notice must be sent by _____ method of transmission to _____ address . . .”
- Event of Default – “failure to cure within thirty (30) days one or more of the following . . . shall constitute an Event of Default, entitling company to do one or more of the following . . .”

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Case Studies

- Right of First Refusal – who can purchase the assets or stock of a target company
- Compliance with Non-Compete – making sure that your company is protected when key employees depart
- Collateral Security – what assets can the company look to in the event a business partner defaults on their obligations

FAQs

- Number 1: Under what conditions can I terminate a business relationship?
- Number 2: How do I ensure my company will get paid?
- Number 3: What are my company's material obligations under an agreement?
- Number 4: What types of definitions should I include in an agreement?
- Number 5: How much negotiating room is there on provisions that I don't like?
- Number 6: What provisions should I include to control litigation risks?
- Number 7: How can I protect my business process from departing employees?
- Number 8: How can I protect my business from competitors?
- Number 9: What are our prospects under this contract if litigation ensues?
- Number 10: When should I use an attorney to prepare contracts?

Conclusions

- Get it in writing
- Add clarifying language and ask questions when negotiating
- Have an attorney look at it, but if you can't, make sure reasonably educated third parties can understand agreement