



**MATTHEW S. JOHNSTON, LLC**

**L A W   O F F I C E**

# Better Business Contracts

February 15, 2018

© Matthew S. Johnston, 2018



Matthew S. Johnston, LLC  
122 E. Patrick Street, #103  
Frederick, MD 21701  
(240) 415-8425  
[matt@Johnston-legal.com](mailto:matt@Johnston-legal.com)



# MATTHEW S. JOHNSTON, LLC

- ▶ Small Business Focus
- ▶ Outsourced General Counsel Services
- ▶ Contracts, Drafting, and Advising
- ▶ Small Business Employment Law
- ▶ Trademark and Copyright Law
- ▶ Small Business Start Up Plans

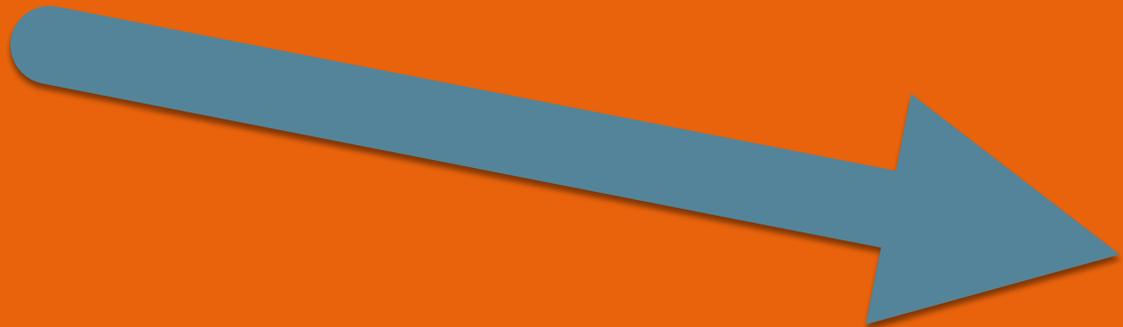
# Topics in This Session

- ▶ Contract Fundamentals
- ▶ Contract Horror Stories
- ▶ A Sample of My Daily Horror
- ▶ Geeky Lawyer Stuff about Contracts
- ▶ Writing Better Contracts
- ▶ “What Ifs” (because almost no one asks a lawyer a question without a “What if”, aka Q&A)

# The CMB Slide

- ▶ This session is designed for informational and educational purposes only. The subject matter is not intended to be legal advice.
- ▶ The discussions should not be construed as legal advice.
- ▶ No discussions between attendees and I are considered to be privileged communications.
- ▶ **NO** attorney client relationship is created as a result of your attendance at this session.
- ▶ If you need confidential legal advice you should consult an attorney.

Like this Guy



# Types of Common Business Contracts

- ▶ Customer Facing Contracts (master services agreement, services, retail contracts, unwritten contracts)
- ▶ Employee & Labor Contracts (employment contracts, non-compete agreements, independent contractor agreements, subcontractor agreements)
- ▶ Corporate Contracts (LLC operating/partnership agreements, shareholder agreements, buy-sell agreements)
- ▶ Service Contracts (attorney, accountant, IT, cell phone, realtor)
- ▶ Real Estate Contracts (leases, subleases, purchase agreements, transfer agreements)
- ▶ Other Contracts (equipment leases, purchase of goods)

# Fundamentals

# What Is a Contract?

# Fundamentals

A contract is a  
(hopefully) written  
description of a  
business relationship

# Fundamentals

What is the basis of a  
good business  
relationship?

Fundamentals

Trust, Clear  
Communication, and  
Understanding  
Between the Parties

# Fundamentals

- ▶ Trust is built when what you say matches what is written in the contract.
- ▶ Clear Communication is about knowing your audience and writing a contract that addresses your client's needs as much as your own.
- ▶ Clear understanding is about knowing what is expected of each party.

# Fundamentals

- ▶ Contracts have four major parts:
- ▶ The Exchange
- ▶ Process
- ▶ Protections
- ▶ Policy

# Negotiation Time!

- ▶ Most negotiation time deals with the Exchange and maybe a little bit on process.
- ▶ Most contract disputes involve process, protections, or policy language.
- ▶ How much do you negotiate process, protections, or policy terms.

# Want to Hear a Secret?

- ▶ This may shock you to hear....
- ▶ I HATE most contracts I read
- ▶ And I read a lot of them

# Horror Stories

- ▶ The time I found a 194 word sentence in a commercial lease
- ▶ The contract with 9 “notwithstanding anything else in this contract” clauses
- ▶ The noncompete that banned a doctor from all practice in 300 mile range for 10 years
- ▶ The employee stock purchase agreement that could be voided by the company with 15 days notice and no repayment (cancellation provision buried in a page long paragraph about transfers of certificates)

# Horror Stories (cont)

- ▶ The business purchase agreement that required the buyer pay \$8.4 million over 10 years for a company worth \$1.5 million.
- ▶ The five page contract that took me four hours to diagram and understand.
- ▶ The mandatory arbitration agreement for a claim worth at most \$6,000.

# A Quick Sample Exercise

**Invoices.** All invoices are payable within \_\_\_\_\_ (\_\_\_) days of receipt. A monthly service charge of 1.5 percent (or the greatest amount allowed by state law) is payable on all overdue balances. Payments will be credited first to late payment charges and next to the unpaid balance. Client shall be responsible for all collection or legal fees necessitated by lateness or default in payment.

# Example's Lazy Language

- ▶ “Invoices?” Is that what this clause is really about?
- ▶ What does “are payable” mean?
- ▶ Parenthetical is unnecessary and could become a problem
- ▶ The last sentence is incomplete
- ▶ When does the term in the last sentence kick in?

# Example's Undefined Terms

- ▶ What does “receipt” mean?
- ▶ When is a balance overdue?
- ▶ What is a late payment charge?
- ▶ What is a monthly service charge?
- ▶ Are they different? How so?
- ▶ When is payment in default?

# Example's Assumptions

- ▶ Who is supposed to pay?
- ▶ When are payments due?
- ▶ When is a payment late?
- ▶ Can Monthly Service Charge or Late Payment Charge be waived?
- ▶ What is the greatest amount allowed by state law? Which state?

# Our Sample Rewritten

**Payments.** Client shall pay all invoices within 10 calendar days of the invoice date. If Company receives payment from Client more than 15 days after the invoice date, Company may impose a late fee of \$25.00. If Company receives payment from Client more than 30 days after the invoice date, Company may assess a service fee equal to one percent of the unpaid amount of the invoice for each month or portion of a month the invoice or a portion of the invoice is unpaid. Service fees will accrue each month until the invoice is paid in full. Unless waived by Company, Client shall pay all late fees or services fees or both at the time Client pays the unpaid invoice amount. If Client has not paid an invoice or part of an invoice for more than 90 days after the invoice date, Company may refer collection of the unpaid amount to an attorney or collections agency. If Client's unpaid invoices are referred to an attorney or collections agency, Client shall pay all reasonable attorney's fees or collections agency fees in addition to the late fee and accrued service fees.

# Disputes and Risk Allocation

- ▶ At the heart of every contract dispute (not a breach of contract) is a misunderstanding about something that was not made clear by the parties.
- ▶ Disputes often arise in a failure of imagination situation, spend time thinking about what can go wrong and what might be misunderstood.
- ▶ Analyze and allocate risks of every deal.
  - ▶ Balance scale /cost of what can go wrong against the likelihood of it going wrong.
  - ▶ Allocate risk to that party in best position to guard against the risk. If neither party can control it, look to limit liability.

# Risk Assessment Matrix

© Matthew S. Johnston, 2018

The diagram features a 2x2 matrix with a vertical arrow on the left labeled 'Costly' pointing upwards and a horizontal arrow at the bottom labeled 'Likely' pointing to the right. The matrix cells contain the following text:

Costly & Not Likely Insure It	Costly & Likely Proactive Policy, Active Mgmt. & Insurance
Not Costly & Not Likely General Policy	Likely & Not Costly Proactive Policy & Active Mgmt

# Four Key Points about Contracts

- ▶ A contract is a written description of a business relationship
- ▶ A contract is an important part of your customer's user experience
- ▶ A contract is as much a marketing document as a legal document
- ▶ A business is more than the sum of its transactions

# Six Steps to Writing Your Contract Your Way

- ▶ Define your company's brand and value
- ▶ Determine who your customer is and what they want (not just the product/service)
- ▶ Define the nature of the relationship
- ▶ Carefully describe the entire transaction
- ▶ Define, assess, and allocate risk
- ▶ Write clearly and explain why when needed

# Path to Better Contracts

- ▶ Contracts should be written for the people who are using them and signing them, not for the people who are writing them (lawyers).
- ▶ Clear language and clear terms are key to a quality contract.
- ▶ Contract language has more in common with computer programming than standard language.

# Time for What Ifs



# MATTHEW S. JOHNSTON, LLC

© Matthew S. Johnston, 2018

The preceding presentation is intended for educational and informational purposes. The presentation should not be construed as legal advice. No attorney client relationship is created through the presentation or reading of this presentation.

This presentation may be excerpted, reprinted, or redistributed under the [Creative Commons Attribution-No Derivatives 4.0 license \(CC BY ND 4.0\)](#). No changes may be made to this presentation without the written consent of the author.

All other rights reserved.



# MATTHEW S. JOHNSTON, LLC

For more information, contact:

The Law Offices of Matthew S. Johnston, LLC

122 E. Patrick Street #103

Frederick, MD 21701

(240) 351-9944

[matt@johnston-legal.com](mailto:matt@johnston-legal.com)

<http://johnston-legal.com/>

[www.linkedin.com/matthewsjohnston](http://www.linkedin.com/matthewsjohnston)

[www.facebook.com/LawOfficesMatthewJohnston](http://www.facebook.com/LawOfficesMatthewJohnston)

Twitter: [@msjohnston\\_law](https://twitter.com/msjohnston_law)

Instagram: [matthelawyer](https://www.instagram.com/matthelawyer)



© Matthew S. Johnston, 2018