

Tips for Negotiating Contract Provisions for Independent Contractors, Employees, and Employers

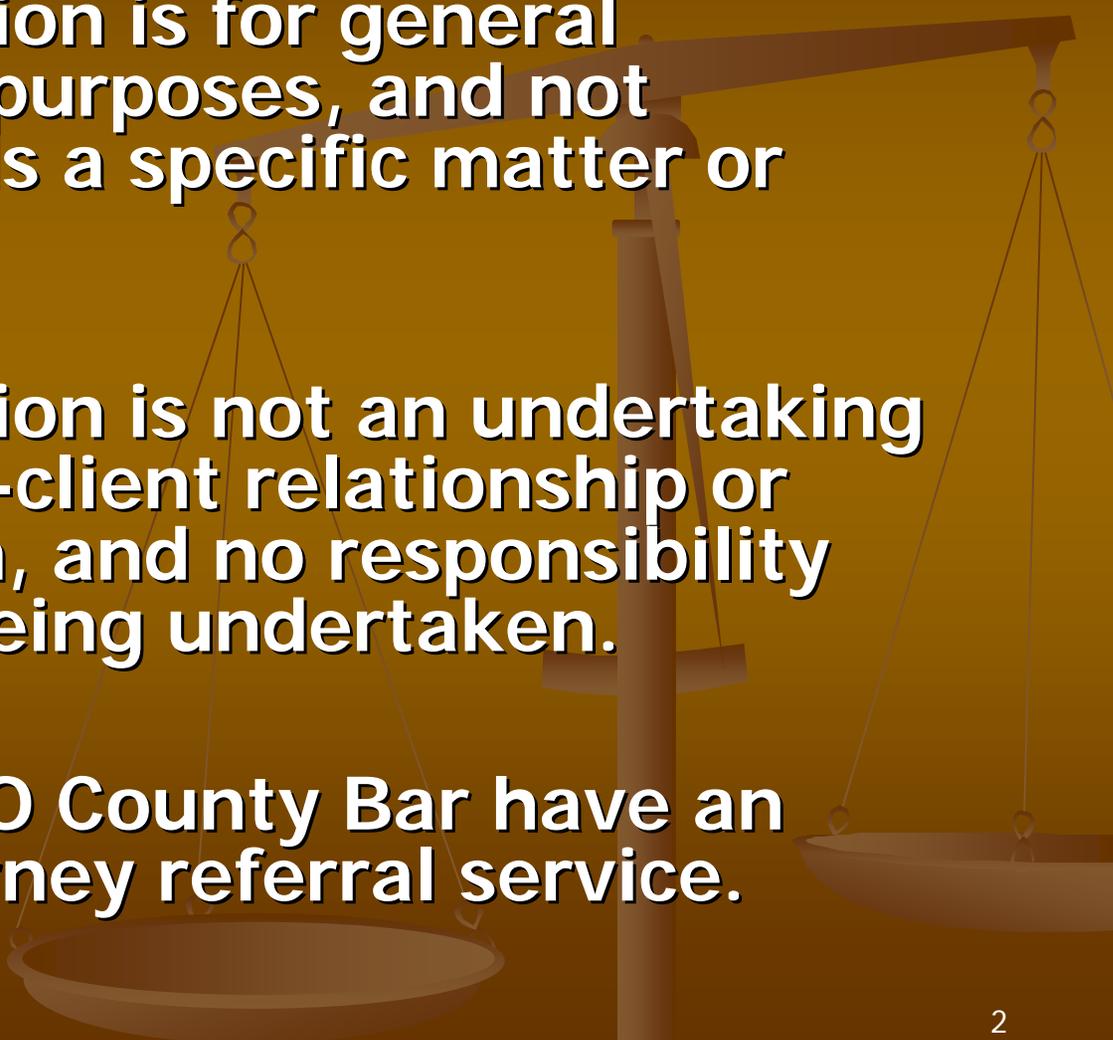
SOCIETY FOR
TECHNICAL COMMUNICATION (STC)

January 29, 2007

Bradford P. Anderson, Esq.

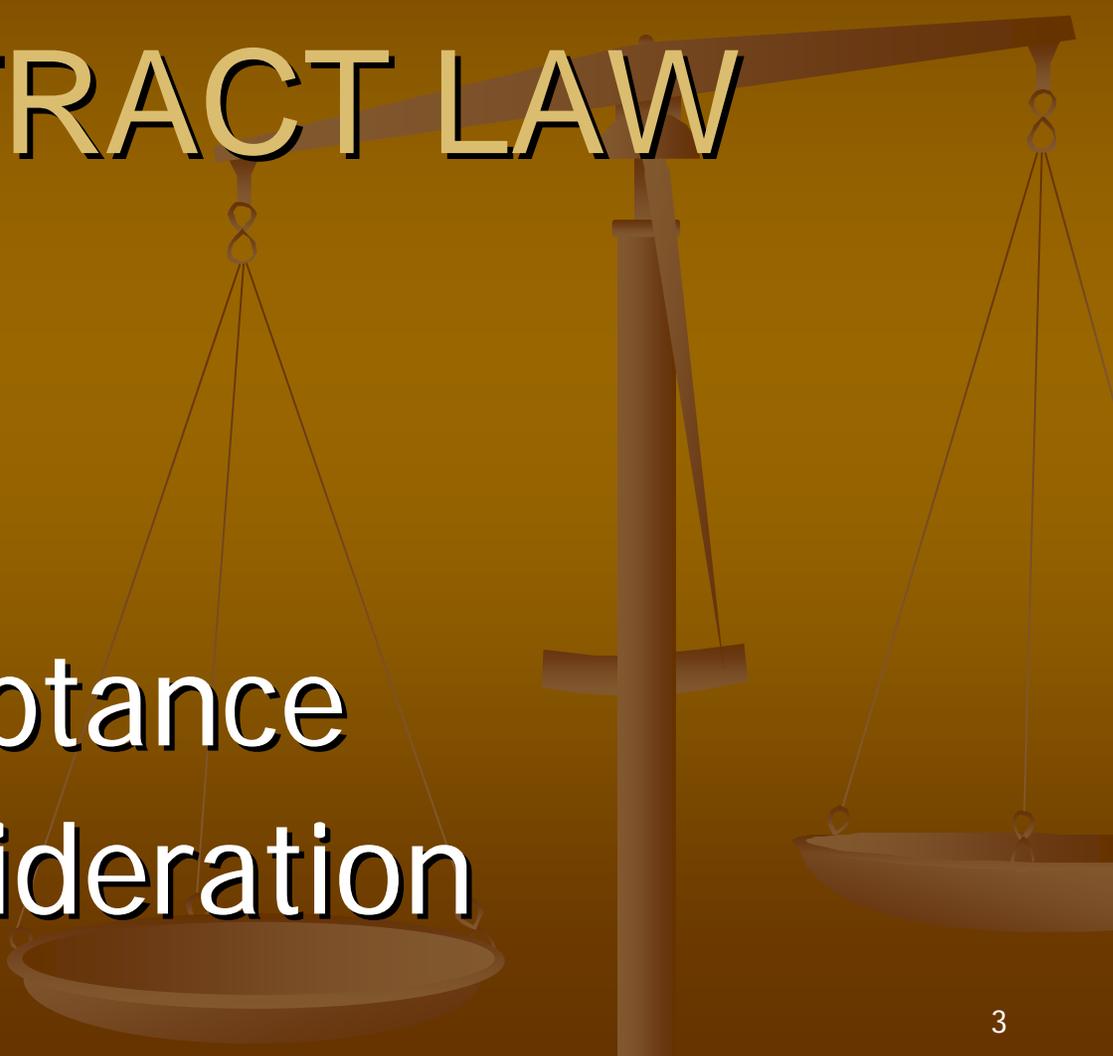
Copyright © 2007, Bradford P.
Anderson

Disclaimers!



- 1) This presentation is for general informational purposes, and not geared towards a specific matter or situation.
- 2) This presentation is not an undertaking of an attorney-client relationship or representation, and no responsibility or liability is being undertaken.
- 3) CA Bar and SLO County Bar have an excellent attorney referral service.

BASICS OF CONTRACT LAW



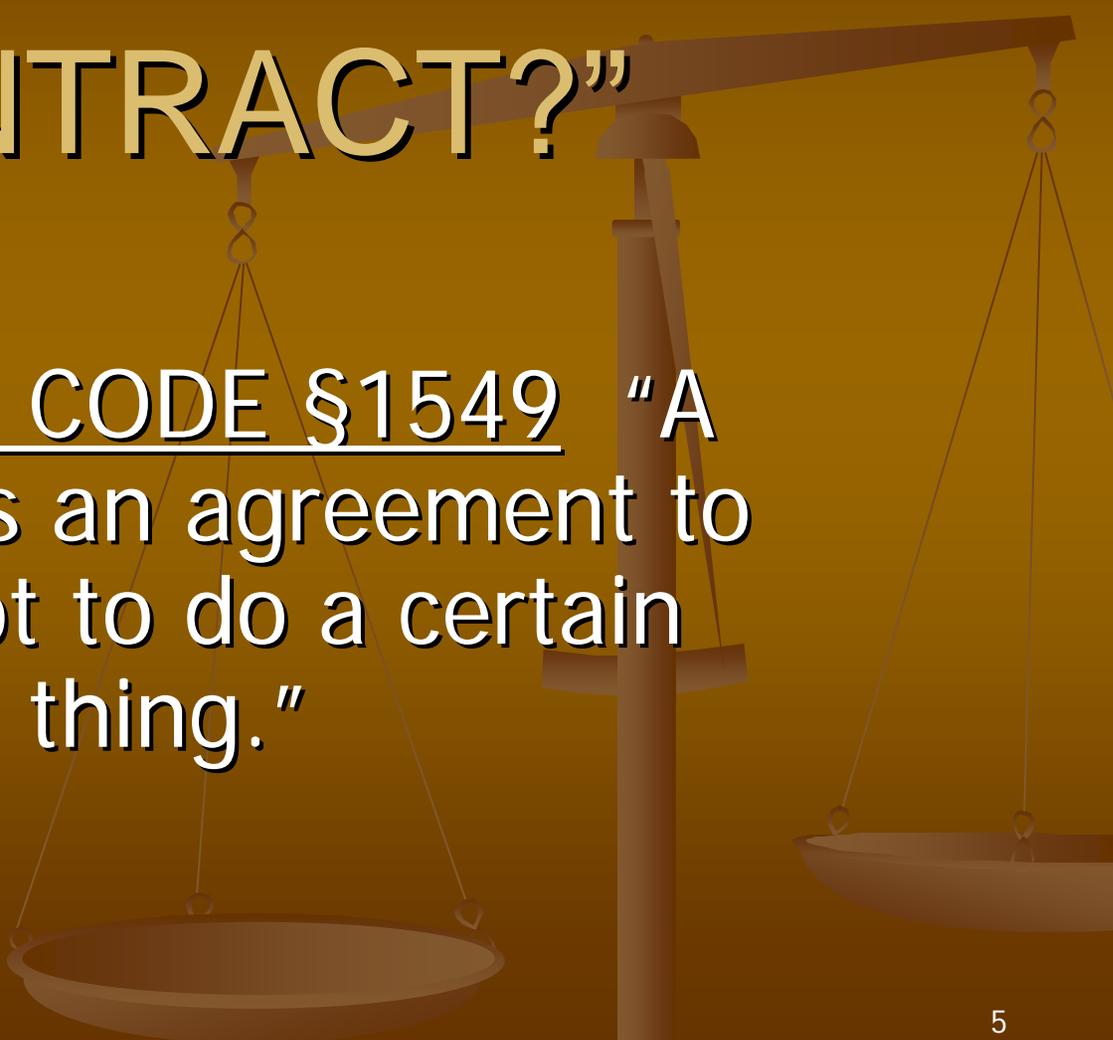
- 1) Offer
- 2) Acceptance
- 3) Consideration

CONTRACTS ARE BUSINESS DOCUMENTS!



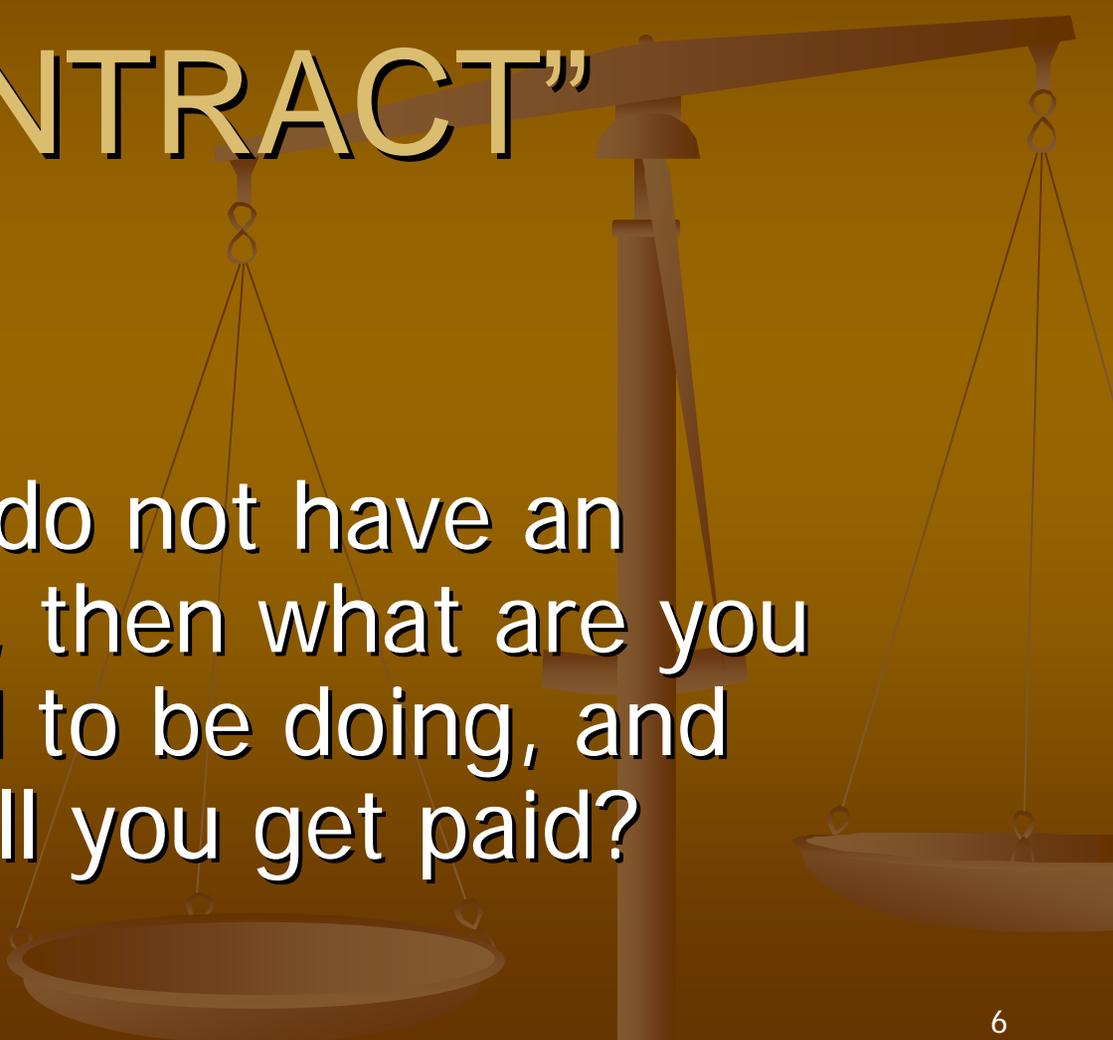
Talented business people participate in the negotiation, drafting, and implementation of contracts. Contracts are not "just a legal document for the lawyers."

“WHAT IS A CONTRACT?”



CA CIVIL CODE §1549 “A contract is an agreement to do or not to do a certain thing.”

“I DON'T NEED A CONTRACT”



If you do not have an agreement, then what are you supposed to be doing, and how will you get paid?

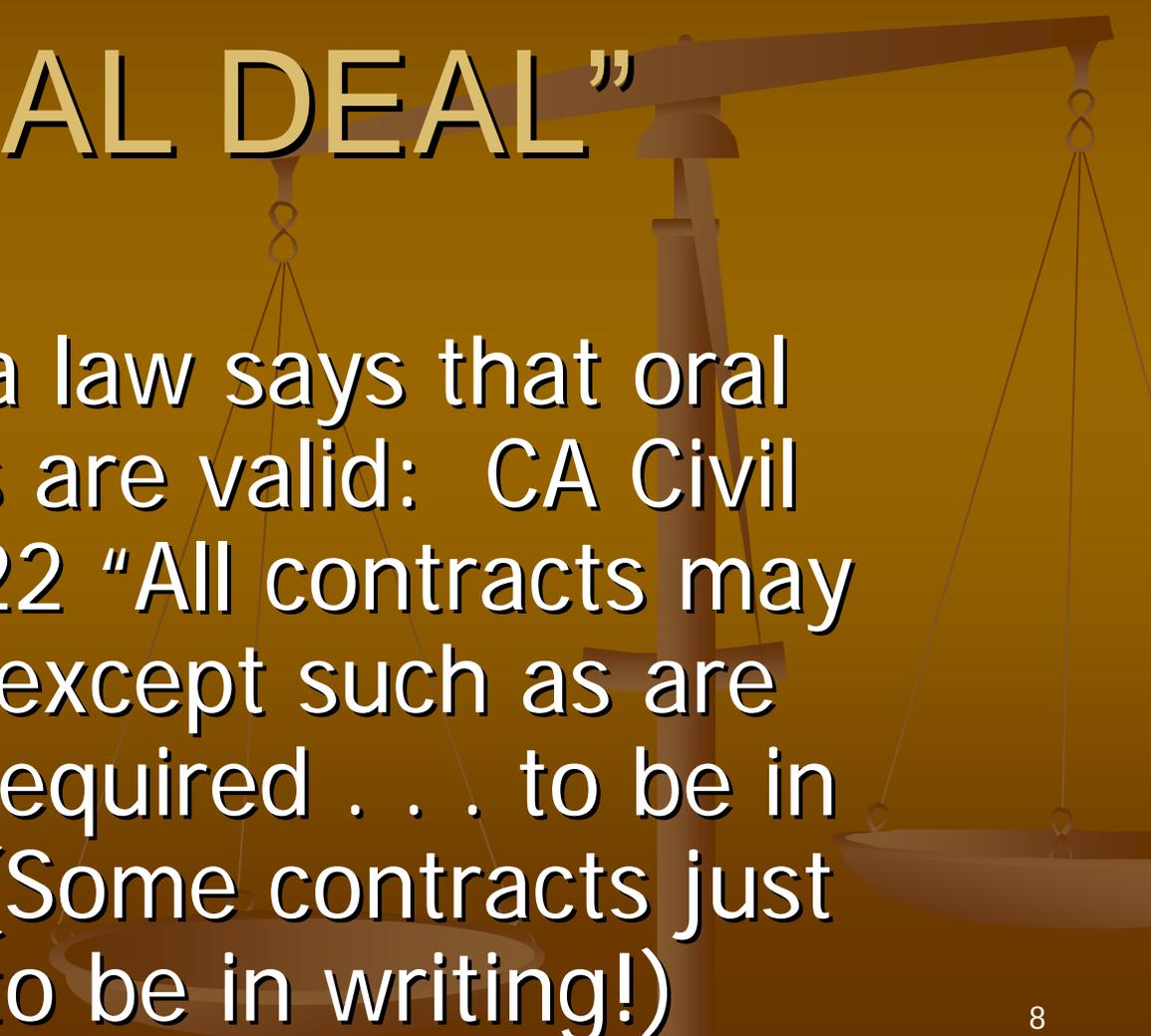
“CAN'T THE LAW 'IMPLY' A CONTRACT?”

Yes. CA CIVIL Code §1621:

“An implied contract is one,
the existence and terms of
which are manifested by
conduct.”

Now, are you ready to explain
the terms (via your conduct)
to the jury?

“WE JUST HAVE AN ORAL DEAL”



California law says that oral contracts are valid: CA Civil Code §1622 “All contracts may be oral, except such as are specially required . . . to be in writing.” (Some contracts just have to be in writing!)

**“GREAT! MY ORAL
CONTRACT IS VALID.”**

**(Unless “in writing” is
required by law!)**

In a dispute, the terms of an oral contract will boil down to your credibility in court versus the other party. What if the other party provides a convincing story to the jury?

INTELLECTUAL PROPERTY (IP) AND CONTRACTS



- A) Copyright
- B) Trademark
- C) Patents
- D) Trade Secrets

IP – Defining Your Rights



A) Assignment of Patents
(See Labor Code §2870)

B) Preservation of Trade Secrets (See
Civil Code §3426)

C) Work for Hire concerns (Copyright
Ownership)

IP – Defining Your Rights

Ownership

v.

License

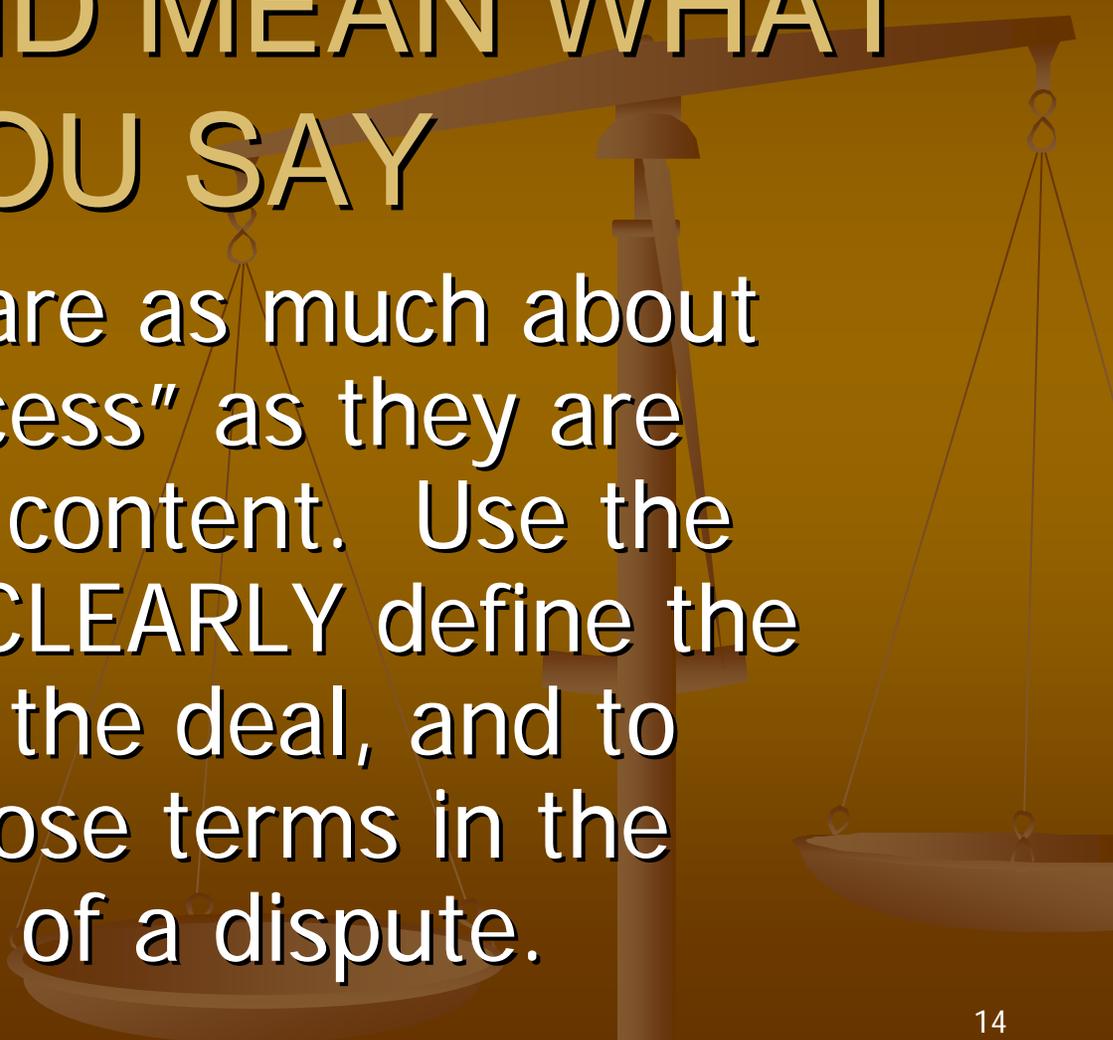


IP – Defining Your Rights (17 U.S.C. §101)

WORK MADE FOR HIRE

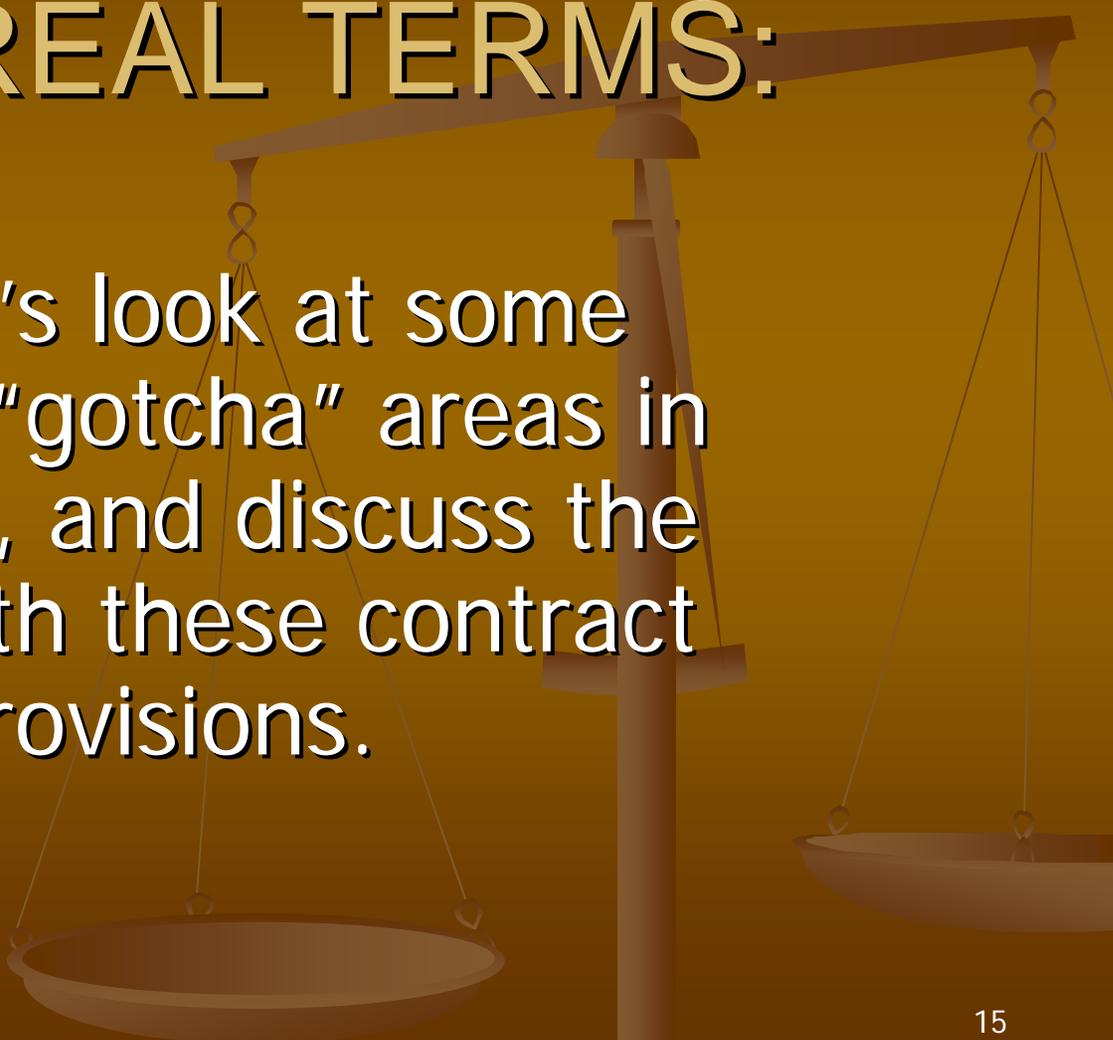
-Issues

YOUR CONTRACT HAD BETTER SAY WHAT YOU MEAN; AND MEAN WHAT YOU SAY



Contracts are as much about the “process” as they are about the content. Use the process to CLEARLY define the terms of the deal, and to prove those terms in the event of a dispute.

READ THE CONTRACT! SOME REAL TERMS:



Now let's look at some common "gotcha" areas in contracts, and discuss the issues with these contract provisions.

“GOTCHA! (what is wrong with this?)”

DEFINITIONS

"Contract" means this contract document, plus the attached service agreement, plus the Consultant's rate chart for the service agreement with such rates subject to revision from time to time upon thirty (30) days prior written notice to Customer.

“GOTCHA! (what is wrong with this?)”

DURATION/TERM

Section 2; Term of Contract

The Term of this Contract commences upon the Effective Date and continues for thirty six (36) months from the Effective Date.

Thereafter, unless either party provides written notice to the other party of such party's election not to renew this Contract in the last month of the then current Term, this Contract shall automatically renew for additional Terms of thirty six (36) months each, at the then applicable rates.

“GOTCHA! (what is wrong with this?)”

TERMINATION

Section 2(B); Termination

Customer may terminate this Contract at any time upon notice to Consultant. Consultant may terminate this contract by providing sixty (60) days' advance written notice to Customer.

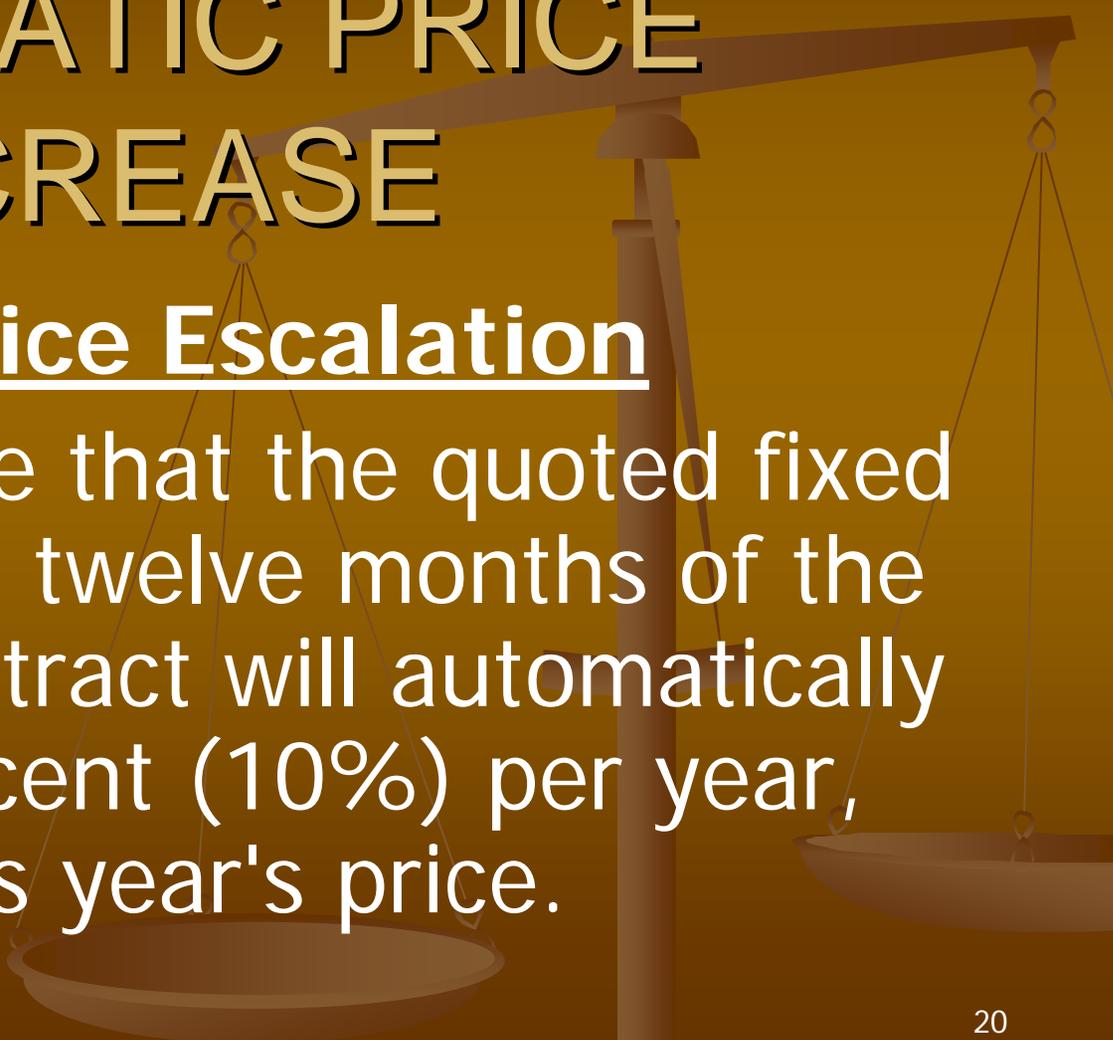
“GOTCHA! (what is wrong with this?)”

COPYRIGHT/IP OWNERSHIP

Section 3; Creation of Deliverables

Consultant shall create and deliver the software, logos, and product design specifications to Customer in accordance with the specifications to be mutually agreed upon.

“GOTCHA! (what is wrong with this?)”
AUTOMATIC PRICE INCREASE



Section 10; Price Escalation

The Parties agree that the quoted fixed price for the first twelve months of the Term of this Contract will automatically increase ten percent (10%) per year, over the previous year's price.

“GOTCHA! (what is wrong with this?)”

RETURN TERMS

Section 12; Return of Materials

Upon the conclusion of the Term of this Contract, Customer shall return the loaned equipment to a location designated by Consultant. Customer shall be responsible for all packing and shipping costs, and shall utilize a packing and shipping company acceptable to Contractor.

“GOTCHA! (what is wrong with this?)”

INDEMNITY

Section 13; Indemnification

Consultant shall indemnify and hold Customer, its assignees, agents, officers and employees harmless from and against any damages to property and/or bodily injury to persons, including death.

“GOTCHA! (what is wrong with this?)”

LIMIT OF LIABILITY

Section 14; Limitation Of Liability

Consultant's aggregate maximum liability for any and all claims under this Contract shall be limited to the lesser of thirty percent (30%) of the total contract sum, or the amount paid by Customer to Consultant in the one month period prior to such claim.

**“GOTCHA! (what is
wrong with this?)”**
INSURANCE

Section 15; Insurance

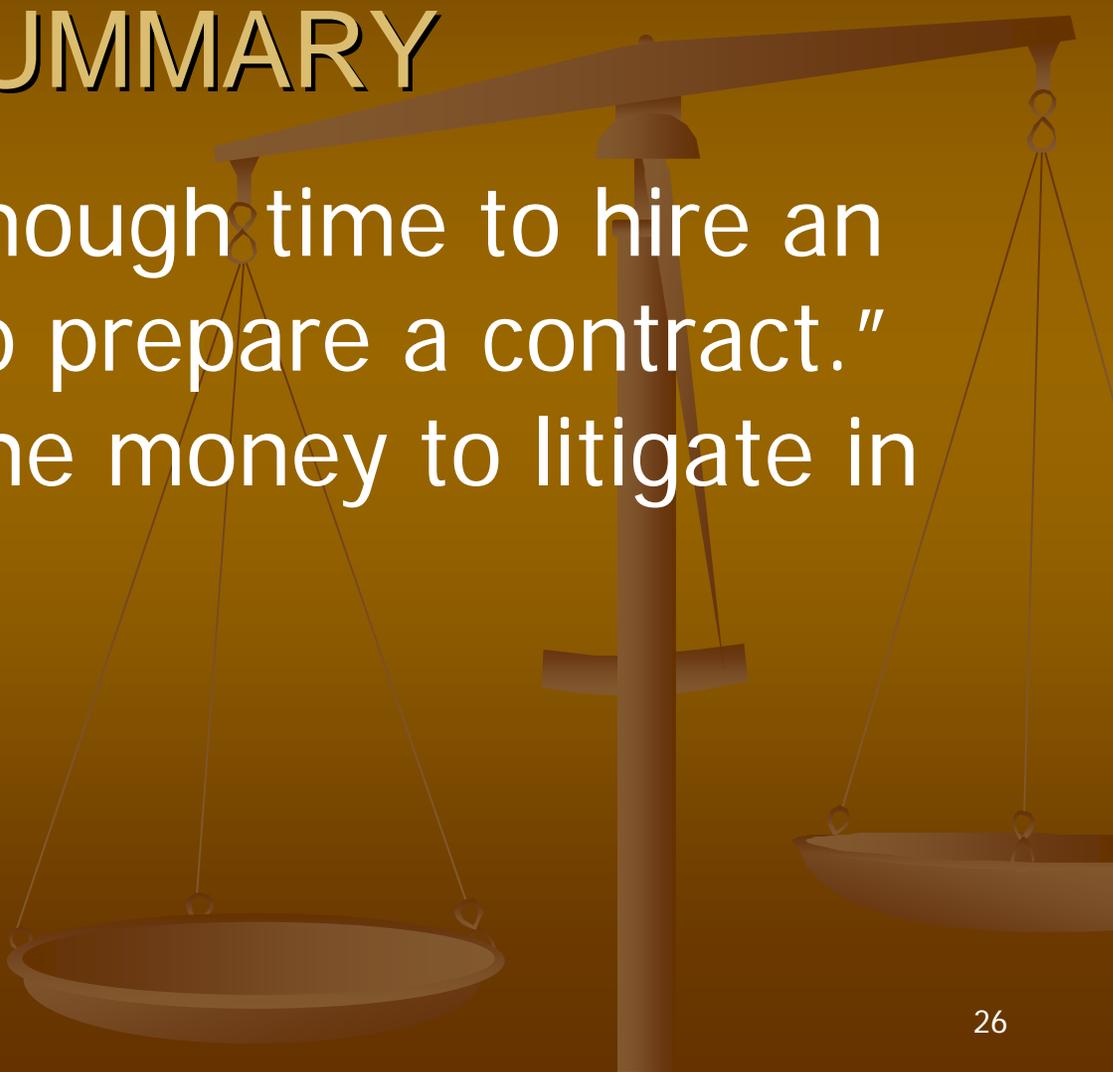
**As of the date of this Contract,
Consultant has commercial general
liability insurance in the amount of
\$1,000,000.**

CONTRACT NEGOTIATION

Your approach:

- A) Interest based bargaining?
- B) Position based bargaining?
- C) Honesty in negotiations.

SUMMARY



“I don’t have enough time to hire an attorney to help prepare a contract.”
(Do you have the money to litigate in the future?)

Tips for Negotiating Contract Provisions for Independent Contractors, Employees, and Employers

SOCIETY FOR TECHNICAL COMMUNICATION (STC)

January 29, 2007

Bradford P. Anderson © 2007

Presentation Outline:

A. Introduction

1. This presentation is for general informational purposes, not a form of legal counseling, and not geared towards a specific matter or situation.

I teach law related topics at Cal Poly and at Cuesta College, and I'm not here to render legal advice, or to offer or sell you any legal services. I'll point you to a referral service to find lawyers for your needs later tonight. As I don't render private legal services, you'll appreciate the fact that my concerns about your legal "well being" are not motivated by an effort to recruit clients or make money!

It is impossible for me to effectively comment upon a specific situation for which you may have legal concerns, because detailed facts and analysis are necessary in every situation.

2. This presentation is not an undertaking of an attorney-client relationship or representation, and I am not providing you with "legal advice" tonight, and therefore no responsibility or liability is being undertaken for any contract or situation that you might have.

Attorney-client privilege is such an important part of the relationship, and if you ask questions in public, you lose such privilege. Moreover, this setting is not appropriate for understanding details of specific circumstances, so I want to be clear that I am not serving as your attorney or giving you legal advice. The presentation is intended to

provide general information to help you better understand the topic of contracts so that when you hire an attorney, you can better discuss the topic with your attorney.

3. CA Bar and SLO County Bar have an excellent attorney referral service, and we'll discuss that at the end of tonight's discussion.

B. Basics of Contracts

It is helpful to understand some key terms in contract law.

1. Offer - This is the act of communicating a potential contract deal to another party. Keep in mind, that typically the communication of the offer then vests the power of acceptance unto the parties receiving the offer.

2. Acceptance - One example would be saying "yes, I accept" to an offer. The time to negotiate details is BEFORE the acceptance (or contemporaneously with the offer) and NOT after the deal effectively has been accepted.

3. Consideration - This is the "value" that flows each way. For example, cash flowing one way, and a car flowing to the other party.

C. The contract contains the terms of YOUR deal. Please never say, "a contract is just for the lawyers." The contract contains YOUR business terms, so you had better read and understand your contract. Unfortunately, there are sometimes words in a contract which have important legal meaning, but may not immediately jump out at you with the importance that they convey to a lawyer.

D. What is a contract? CA CIVIL CODE §1549 "A contract is an agreement to do or not to do a certain thing."

You can agree to do, or not to do, something in a contract. This is vital, because contracts typically contain both types of terms in business arrangements. Be careful about focusing only on what you are going to receive in a deal, such as payment of money, because you are probably agreeing to do, and not to do, a variety of acts.

E. Although in certain circumstances California recognizes "implied contracts," which are contracts arising from intent and conduct, and also recognizes verbal contracts in certain situations, it is always best to have an express, written, signed document. That way, it is easier to prove the terms of the deal without getting into a battle, and the negotiation process helps the parties to hammer out the details. Note that verbal contracts are not valid in certain circumstances, so why even beg the issue. Get all of the terms of your deal in writing so that when a dispute occurs, you can point to what was agreed upon. Also, how many times have you entered into an oral deal, or had a vague contract, and then encountered a change in personnel on the other side, resulting with the new contact person having no details of your deal? Simply avoid this!

F. Intellectual Property Rights and Contracts

1. Be sure to have a clear understanding and explanation about who will own the rights to any resulting work. For example, if you are being hired to develop a new "logo" for a computer, will the customer own all rights to that logo for any purpose? Or, will a grant of rights be limited to allowing the customer to ONLY use the logo with the computer, and not other products? Can the customer modify the logo, and own both the original logo and the modified logo? Can the customer license rights of the logo to third parties?

What about an owner's manual that you are asked to write. Does the customer "own" the resulting work product with the right to modify it for future products, or are you merely licensing the manual, and not transferring ownership rights, to be used and copied by this customer only in association with the specific product for which you were retained?

What about information in a technical manual or software program which is something "standard" that you've created and used multiple times over the years? If you are not clear, the customer might assert that they are now the owner of that material, and might assert that you have to obtain a license from them to use it in the future!

I am not speaking to any particular issue or circumstance here, but my purpose is to get you thinking about ownership terms and how important it is to CLEARLY spell out the EXACT terms of the deal. That way, there can be no confusion later on. The biggest problem in contract disputes involves people who say "I thought" (don't just think; READ the contract) or who say "That was in the fine print" (there is no "fine print;" just a contract!) Be

careful about contracts which are vague, and fail to address work product ownership terms. You'll likely end up in a battle later on if your contract doesn't clearly address the issues.

2. While we are talking about ownership rights and intellectual property, be sure to consider the issues of patent ownership, especially if you might possibly "invent" something useful in the context of a project; copyright ownership for expressions that you create; trademark and service mark ownership; and any other work that you are creating, or might generate, for a project.

3. Be sure to consider whether ownership of your resulting work is being granted, or just a license, and be crystal clear in the contract. Your lawyer will help you watch for terms of art in the legal trade, such as "work for hire" which has a very special meaning under the copyright law. Deeming a project as a work for hire can result in a complete transfer of ownership rights to the party hiring you, so be sure that you don't simply gloss over words in the contract, assuming that if you don't know or understand those words, that they aren't somehow important. Moreover, "work for hire" generically sounds like you are being hired to perform work, so a layperson might not understand that those words have clear statutory meaning which could convey all ownership rights in the project to the hiring party. That would be a huge mistake if care was not taken in understanding the terms of the contract, and that is why lawyers are important.

G. "Gotchas" - - The purpose of this interactive discussion is just to get an idea of some language you might see in a real contract, and get you thinking about business risks. This does not replace counsel from an attorney, but at least we can discuss some concepts here. If you at least read the contract and identify areas of concern that you have BEFORE you visit with an attorney, you will be using your attorney's time, and your money, more efficiently. Keep in mind that the contract sections and terminology in these examples is just for demonstration purposes. Your contract terms, section numbering, and other details could be dramatically different. We're just talking general concepts here, so don't be afraid to volunteer your input.

1. Definitions. Discussion regarding other documents brought into the "contract" as well as potential for rate revisions. Some problems include the rate revisions and other documents dragged into this contract.

2. Term of Contract. Discussion about evergreen clauses which automatically renew contract, and limited time periods in which to avoid automatic renewal. Some problems include automatic renewals, rate increases, and this limited window of opportunity to cancel.
3. Termination provisions. Discussion about cancellation rights, mutual right to cancel vs. one party getting better cancellation rights, what occurs during the period after a cancellation notice (i.e. can you continue performing work, or are you supposed to just sit and wait?), payment after a cancellation (i.e. pro-rata for term of contract or work milestone based). Problems include wind down costs and calculation of fees when contract is permissibly terminated.
4. Creation of deliverables. Discussion about "open ended" terms, such as agree to agree on some future specifications, concerns about work product ownership. Problems include undefined scope of work and lack of ownership clarity.
5. Price escalation terms. Discussion about automatic price escalation, plus concerns over provisions which allow rates to be modified simply by providing notice. Fixed rate vs. variable rate contracts. Problems include continuous rate increases, plus potential other rate increases (from the definition of "Contract").
6. Return of materials. Discussion about ownership and who owns what, what is subject to return, problems with returning materials to unknown destinations, problems with designated return or packing services.
7. Indemnification. I'm frightened just looking at this! Discussion about potential unlimited liability, being asked to step up to the plate to pay legal fees and money for personal injury including death, property damage, etc., regardless of how caused. Discussion about indemnity without any allocation or limitation based upon who committed the wrongdoing which caused the liability. Indemnity is a serious legal and monetary obligation, so be sure you understand it, and discuss with legal counsel. Consider limits upon monetary amount, and reasons for which indemnity will apply, etc. Even then, still a serious obligation and not to be undertaken without legal counsel guidance.
8. Limitation of Liability. Discussion about calculating the limits, who do the limits apply to, and the fact that there could still be claims outside of the contract limits which create a legal risk for you.

9. Insurance. Discussion about what insurance is, complying with insurance requirements, will insurance coverage actually cover what you want it to? Problems include the fact that the statement just asserts that today there is insurance, but unknown how long the policy is, whether you will get notice of cancellation or non-renewal, what are the coverage terms, and problem of "subrogation" where the other party's insurer may cover a claim but come after you to get reimbursed for the claim.

H. Negotiations

1. Different styles - - Will you look at "interests" of parties, or establish "positions?"
2. Honesty in negotiations - - What are your actual concerns and are there various ways to address those concerns.

I. Importance of Lawyers in Contracting

Pay now or pay later. There are terms of art in contracts which only lawyers might know, making it beneficial to have that knowledge.

J. How do I find a lawyer?

1. California State Bar. www.calbar.org
2. Locally, San Luis County Bar Association
Lawyer Referral and Information Service (LRIS)
Call at (805) 788-2099, or go to www.slobar.org

K. Thanks for attending. Again, our goal was to emphasize the importance of jumping into the contract, and obtaining appropriate legal advice so that your deal contains all of the terms that you want and need to reduce risk and remain successful in business.