



## 502 - Don't Lose the Battle of the Forms

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The following is a summary of the course materials for this session. The full version is available on the course material CD and online at <http://am.acc.com/>.

## **Session 502 – Don’t Lose the Battle of the Forms**

### **First Document: Flow chart**

#### **Description:**

Flow chart covers the process up to the point at which a contract negotiation is completed and the contract is ready to sign.

### **Second Document: Outline**

**Presenter:** Tim Bass, Boston Communications Group Inc.

#### **Description:**

Outline addresses version control and related contract administration issues and highlights best practices and traps for the unwary. Topics include:

- Exchange versions in negotiation and sign an agreed-upon version.
- First drafts
- Negotiating the rules of engagement
- Unmarked changes
- Securing the FINAL text from further changes
- Components of the negotiation process:
  - Internal approval process
  - Keeping track of what is the current version
  - Incorporation by linkage
  - Verifying a version
  - Generating a new version
  - Execution
- Keeping track of the mechanics of negotiation is part of the “Battle of the Forms.” Having a good foundation allows for more effective dealing with substantive issues.

### **Third Document: Outline**

#### **Presenter:**

Hannah K. Joseph, The Finish Line, Inc.

#### **Description:**

Outline addresses the use of forms. Topics include:

- Often when 2 companies deal with each other in the course of business, they will use pre-printed standard form agreements. Often the terms of the agreements conflict and yet offer and acceptance are achieved forming a binding contract. The battle of the forms refers to the resulting legal dispute of these circumstances, wherein both parties recognize that an enforceable contract exists, however they are divided as to whose terms govern that contract.

- UCC § 2-207 and Second Restatement of Contracts – relating to additional terms in acceptance or confirmation
  - Purpose is to do away with the mirror-image rule of common law
  - Between merchants, additional terms proposed in an acceptance can become part of the contract if the offeror remains silent.
  - Includes representative situations covered by § 2-207.
- Real life examples, including battle of the purchase orders, strategy in exchanging purchase orders, lessons learned.

#### **Fourth Document: Outline**

##### **Presenter:**

Ron Peppe, Canam Steel Corporation

##### **Description:**

Outline addresses typical negotiated clauses and paying special attention to copyright, patent, trademark, and intellectual property indemnification. Topics include:

- Convincing the sales/procurement people
- Typical negotiated clauses overview and examples – includes indemnification clauses and examples.
- Confidentiality and Non Disclosure Agreements – key issues are scope and duration. Example clauses are included.
- Warranties – if selling a product, reinforce that a warranty is the proper solution for potential defects, rather than an indemnification. The warranty will cover the product itself and, absent an indemnification, the other party can still use. Caveats:
  - Limit the term, control the choice of remedies, limit the remedies.
- Damages
- Insurance
- Electronic contract issues – often not a matter of pure electronic contracting – it is a mixture of paper and electronic terms
  - Early on, courts were split on how to treat electronic documents. In response, 46 states have adopted the Uniform Electronic Transactions Act, which give electronic signatures and records the same validity and enforceability as manual signatures and paper-based transactions.
  - Electronic Signatures in Global and National Commerce Act (E-SIGN) – applies to agreements that the parties intend to be in electronic form.
  - Tips for posting terms online

#### **Fifth Document: Outline**

##### **Description:**

Outline discusses contracts and purchase orders, provides a sample “bad” contract and a sample “good” purchase order for material suppliers. Addressed in the outline are:

- Why a contract is needed

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- Forms of contracts
- “Standard” purchase orders
- Formalities
- “Battle of the Forms”
- Negotiation Tactics
- “Typical” terms and conditions, including:
  - Indemnification
  - Dispute resolution
  - Insurance
  - Price and credit terms
  - Assignment and subcontracting
  - Attorney fees
  - Inspection, rejection
  - Transportation and risk of loss
  - Cancellation, termination, default
  - Changes and modification
  - Choice of law, venue, waiver
  - Time for performance
  - Integration
  - Limitation of liability
  - Headings, severability
  - Government contracts
  - “Buy American” requirements
  - Limitation on publicity
- Sample “Good” Purchase Order – for a material supplier
- Sample “Bad” Contract – for a material supplier