

# FDCC Corporate Counsel Symposium

**September 27-29, 2026**

*“Creating Contracts You Can Rely On”* -- Join this distinguished panel as they discuss creating contracts that work for you when you need them from both sides of the “v,” whether drafting with AI or not. The panel will explore and recommend contract best practices and discuss pitfalls so that attendees will leave understanding what works and what doesn’t with handy do’s and don’ts.

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## Learning Objectives

- Identify key contractual provisions that can reduce exposure, shift risk, and support early resolution of disputes.
- Distinguish between indemnity and defense obligations and identify the right balance in your agreements.
- Understand the value of limitation-of-liability, insurance, waiver-of-subrogation, limitation-of-action, warranty, and merger clauses in your agreements.
- Recognize common process failures that undermine otherwise enforceable contract protections, including missing signatures, lost contracts, inconsistent terms, and failure to verify insurance compliance.
- Assess online and electronic contract enforceability issues, including notice, assent, clickwrap/scrollwrap processes, and electronic proof of acceptance.
- Understand and apply best practices for AI-assisted contracting, including attorney oversight, clause-library controls, confidentiality safeguards, jurisdictional review, and documentation of final human approval.

## **I. Introduction and Program Overview — 5 minutes**

- Why contracts matter in litigation.
- Contracts as risk-allocation tools.
- The relationship between drafting, process, and enforceability.
- The emerging role of AI in contract workflows.

## **II. Litigation-Tested Contract Provisions — 10 minutes**

- Indemnity and defense obligations.
- Insurance procurement and coverage requirements.
- Limitation of liability.
- Waiver of subrogation.
- Limitation-of-action provisions.
- Warranty and merger clauses.

## **III. Contracting Process Best Practices — 20 minutes**

- Obtain and preserve signatures. (prove electronic assent (i.e. digital signatures))
- Maintain contracts under a reliable document-retention system.
- Confirm insurance compliance (and monitor ongoing compliance)
- Maintain uniformity across quotes, purchase orders, invoices, warranties, online terms, and literature.
- Memorialize amendments and post-contract changes.
- Use template agreements/provisions with planned negotiation fallback provisions.
- Train business teams on contract risk (the “why”).
- Create escalation and walk-away rules for too high-risk deals.

## **IV. Online and Electronic Contracting Best Practices — 10 minutes**

- Notice and assent (prove electronic assent).
- Clickwrap and scrollwrap best practices.
- Avoiding passive or hidden terms.
- Ensuring users consistently see and affirmatively accept terms before receipt of goods/services.

## **V. Best Practices for AI-Assisted Contracting — 10 minutes**

- Appropriate AI use cases, such as clause comparison, drafting from approved templates, issue spotting, summarizing legacy contracts, risk triage, and tracking deviations from standard terms.
- AI risks, such as hallucinated provisions, incorrect governing-law assumptions, inconsistent drafting, confidentiality concerns, and overreliance without attorney review.
- Best practices, such as human-in-the-loop review, approved clause libraries, confidentiality protocols, jurisdictional verification, audit trails, and final legal approval.

## **VI. Practical Takeaways and Questions — 5 minutes**

- Strong contract language is only valuable if executed, stored, and followed.
- Adverse outcomes often turn on insufficient contract discipline and contracting process failures.
- AI should enhance—not replace—legal judgment.
- Effective contracting requires coordination among legal, business, risk, and insurance stakeholders.

## **Appendix – Overview of Panel Discussion**

### **I. Introduction**

Contracts are among the most important tools available to lawyers and businesses for managing risk and exposure before a dispute arises. A well-drafted contract does more than define business obligations. It allocates risk, limits remedies, specifies insurance protections, shortens dispute timelines, and may provide dispositive defenses if claims are later made.

For corporate and defense counsel, contract review should not be limited to whether the parties' commercial obligations are adequately described. Counsel should also evaluate whether the agreement will function effectively in a dispute. A provision that appears favorable in negotiation may be difficult to enforce if it is ambiguous, inconsistent with other documents, unsupported by required signatures, contradicted by later communications, or not integrated into the company's actual business processes. When you negotiate a contract, you want a contract that will work for you, no matter which side of the "v" you may land on when a dispute arises.

Fundamental, best practice provisions, often known to most, require negotiation discipline and persistence, even in the face of business pressures. The strategic approach to negotiations and contract template preparation cannot be discarded for the sake of a deal at all costs because if a dispute arises, that's when you will discover how much that insufficient discipline ultimately costs. Also, contractual protections are only as strong as the processes that support them. Missing signatures, lost contracts, inconsistent terms, post-work execution, and failure to verify insurance compliance can undermine otherwise strong provisions.

Today, those traditional concerns and those raised by the implementation of online contracts and electronic signatures is a newer issue: how lawyers and companies should responsibly use artificial intelligence in contract drafting, review, negotiation, and administration. AI tools can improve speed and consistency, but they also introduce risk and exposure if used without controls and human legal safeguards.

### **II. Core Contract Provisions That Reduce Risk and Exposure**

#### **A. Indemnification and Defense Obligations**

Indemnification provisions are often the most prominent risk-shifting clauses in commercial contracts. They determine whether one party must reimburse another for losses, claims, damages, or expenses arising from a particular transaction or relationship.

The duty to defend is related but distinct. A defense obligation may be triggered by allegations in a complaint, rather than by an ultimate finding of liability. For that reason, lawyers should draft defense and indemnity provisions with precision. Important questions include:

- Is the duty triggered by allegations, claims, losses, or proven liability?
- Does the duty apply only to the indemnitor's negligence?
- Does it apply to concurrent negligence?
- Does it apply to gross negligence or willful misconduct?
- Is there a cap tied to contract price or insurance limits?
- Are attorneys' fees expressly included?
- Is the provision enforceable under applicable anti-indemnity statutes or public policy rules?

The broader the provision, the more likely it may create significant front-end dispute-related expense. Conversely, a narrowly-drafted provision may better align responsibility with fault.

## **B. Insurance Procurement and Coverage Requirements**

Insurance procurement and coverage requirements clauses can be more valuable than indemnity provisions because they may create a direct path to insurance coverage. Insurance provisions may trigger a defense obligation, provide protection even if the contracting party is insolvent, and allow pursuit of coverage without damaging the business relationship with the counterparty.

Effective insurance provisions should specify required coverage types, minimum limits, duration of coverage, primary and non-contributory status, additional insured requirements, contractual liability coverage, completed operations coverage where appropriate, proof of coverage, and ongoing affirmative compliance obligations.

A certificate of insurance is generally not enough. Companies should consider requiring actual insurance endorsements and should implement a business process for confirming that required coverage remains in place for the required duration.

## **C. Limitation of Liability**

Limitation-of-liability provisions can substantially reduce exposure by capping recoverable damages or limiting remedies to repair, replacement, refund, or a specified dollar amount.

A strong limitation provision should address the maximum amount recoverable, whether consequential damages are excluded, whether lost profits or special damages are excluded, whether the limitation applies regardless of legal theory, whether the limitation survives termination, and whether the limitation is conspicuous.

Counsel should also ensure the limitation provision is consistent with warranty language, indemnity language, insurance requirements, and any statutory or public-policy restrictions.

## **D. Waiver of Subrogation**

A waiver-of-subrogation clause allocates risk to insurance and prevents an insurer from pursuing recovery against the other contracting party after paying a loss. These provisions are particularly useful in industries where property losses often lead to insurer-driven litigation.

Effective provisions generally require the customer or counterparty to obtain insurance, state that the customer will look solely to insurance for covered losses, release the contracting party from covered claims, and expressly waive insurer subrogation rights.

Also, drafting matters. Language that merely references insurance “if any” may be less effective than language requiring insurance and expressly allocating risk to that insurance.

## **E. Limitation-of-Action Provisions**

Contractual time-to-sue provisions can shorten the period in which a party may bring claims. These provisions can meaningfully reduce long-tail exposure, but enforceability varies by jurisdiction.

Counsel should consider whether the chosen jurisdiction permits shortened limitations periods, whether the selected period is reasonable, whether the provision clearly defines accrual, whether

the provision conflicts with warranty periods, whether the provision applies to all claims or only contract claims, and whether the choice-of-law clause supports enforcement.

Because state law varies, these provisions require jurisdiction-specific review.

#### **F. Warranty Provisions and Disclaimer of Implied Warranties**

Warranty provisions define the scope of the seller's or service provider's obligations. They also limit expectations and reduce the risk that marketing materials, sales communications, or course-of-dealing evidence will create broader obligations than intended.

Effective warranty provisions should clearly define the express warranty, state the warranty period, identify the exclusive remedy, exclude implied warranties where permitted, avoid inconsistency with product literature or sales materials, define conditions precedent to coverage, and clarify that no other representations create warranty obligations.

#### **G. Merger and Integration Clauses**

Merger clauses provide that the written agreement is the entire agreement between the parties. These provisions reduce disputes over whether outside statements or documents are part of the agreement and may help prevent fraudulent inducement claims when paired with appropriate non-reliance language.

A strong merger clause may state that the written agreement supersedes prior agreements and communications, no oral or written representations outside the agreement are binding, modifications must be in writing and signed, the parties did not rely on extra-contractual representations, and incorporated terms and conditions are identified clearly.

These provisions are especially important where sales representatives, marketing materials, emails, proposals, or purchase orders may contain language inconsistent with the final agreement.

### **III. Process Best Practices: Making Contract Protections Enforceable**

Strong contract provisions do not enforce themselves. Litigation experience shows that process failures often defeat favorable contract language. To avoid those problems, organizations should implement practical contracting controls.

#### **A. Obtain and Preserve Signatures**

The organization should be able to prove who signed, when they signed, what they signed, and whether the signer had authority. For electronic signatures, the system should preserve audit trails, IP information, timestamps, authentication steps, and final executed copies.

#### **B. Maintain Contracts in a Searchable Retention System**

It is not enough to have signed contracts if they cannot be located during litigation. A contract management and retention system should allow legal, risk, and claims teams to identify the applicable agreement(s) quickly.

#### **C. Verify Insurance Compliance**

When a contract requires insurance coverages, the company should verify compliance before work begins and periodically thereafter. Without a process to confirm the required insurance coverages, the company may only have a breach-of-contract claim against a potentially insolvent counterparty.

#### **D. Maintain Uniformity Across Contract Documents**

Inconsistent provisions across purchase orders, invoices, proposals, online terms, master agreements, warranties, and literature create ambiguity. Organizations should conduct periodic audits to ensure uniformity.

#### **E. Memorialize Amendments and Changes**

Business teams often modify agreements by email, phone, or informal course of dealing. Contracting policies should require written amendments or signed change orders for material changes.

#### **F. Create Template Agreements and Negotiation Fallback Positions**

Template contracts should include preferred provisions and pre-approved fallback language. This allows business teams to negotiate efficiently while preserving acceptable risk boundaries.

#### **G. Train Business Teams**

Business personnel should understand why provisions such as indemnity, insurance procurement, limitation of liability, waiver of subrogation, warranty disclaimers, and merger clauses matter. Training should emphasize that contract terms can directly affect dispute costs, settlement value, and bottom-line exposure.

#### **H. Establish Escalation and Walk-Away Rules**

Not every deal is worth the risk. Organizations should be prepared to walk away from deals that create too much exposure without adequate protections. Organizations should engage relevant stakeholders and secure mutual agreement to these thresholds in advance (alongside a delegation of authority policy), and when those thresholds are reached, walk-away.

### **IV. Online and Electronic Contracting**

Online agreements must provide notice and obtain assent. Best practices include requiring affirmative assent, making terms visible and accessible, avoiding hidden hyperlinks or obscure placement, requiring users to click acceptance before receiving goods/services, drawing attention to unusual or rights-altering terms, preserving electronic evidence of assent, and avoiding multiple pathways that allow users to bypass viewing of terms and acceptance.

Clickwrap and scrollwrap processes are generally stronger than passive browswrap designs because they require active participation by the user.

### **V. Best Practices for AI-Assisted Contracting**

AI is increasingly used in contract drafting, review, negotiation, and administration. These tools can be useful, but they must be controlled. AI should assist lawyers and contracting professionals; it should not replace legal judgment.

#### **A. Appropriate AI Use Cases**

AI may be useful for drafting first-pass agreements from approved templates, comparing counterparty redlines against standard language, identifying missing provisions, summarizing contracts, extracting key terms, flagging deviations from playbooks, reviewing legacy contracts for risk themes, creating contract checklists, and supporting contract lifecycle management.

## **B. Risks of AI Use**

AI can introduce risk if used without oversight. Potential risks include fabricated or hallucinated legal standards, clauses inconsistent with governing law, internal inconsistency across provisions, use of outdated language, disclosure of confidential or privileged information, failure to preserve negotiation history, overreliance by non-lawyers, and inability to explain how final language was selected.

## **C. Recommended AI Controls**

- **Human Legal Review:** No AI-generated contract language should become final without review by a lawyer or trained contracting professional.
- **Approved Clause Libraries:** AI tools should be grounded in approved clause libraries and fallback positions.
- **Jurisdictional Review:** AI-generated provisions should be checked against governing law, public policy, statutory limitations, and industry-specific requirements.
- **Confidentiality Safeguards:** Users should not upload confidential, privileged, proprietary, or sensitive contract materials into tools that do not provide appropriate privacy, security, and data-use protections.
- **Version Control and Audit Trails:** Organizations should preserve who used AI, what was reviewed, what language was accepted or rejected, and who gave final approval.
- **Training and Access Controls:** Employees should be trained on when AI may be used, what information may be entered, and when legal review is required.
- **No Unapproved Legal Advice by AI:** AI outputs should be treated as drafts or analytical aids, not as definitive legal conclusions.
- **Consistency Checks:** Final agreements should be reviewed for consistency across indemnity, insurance, warranty, limitation-of-liability, dispute resolution, governing law, and merger provisions.

## **VI. Practical Takeaways**

The most effective contracts share three characteristics: clear language, enforceable provisions, and disciplined implementation.

Contract provisions should be drafted with potential litigation in mind. Indemnity and defense obligations should be precise. Insurance procurement provisions should be verified, not assumed. Limitation-of-liability provisions should be conspicuous and coordinated with warranties and remedies. Waiver-of-subrogation provisions should clearly allocate risk to insurance. Limitation-of-action provisions require jurisdiction-specific review. Merger clauses help limit extra-contractual theories. Online agreements should require clear notice and affirmative assent. Contracting processes are as important as contract language. AI can improve contracting efficiency, but only with human review, confidentiality controls, approved clause libraries, and auditability.

Ultimately, contracts that actually work to mitigate risk and exposure are thoughtfully designed and patiently negotiated, long before a dispute arises. They result from coordination among legal, business, risk, insurance, sales, and operations teams. And, as AI becomes more common, that coordination becomes even more important.