

## **FHH Telecom Law**

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### **Let Us Not To The Meeting Of Two Minds Admit Impediments**

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It was love at first draft.

She was a senior associate in the commercial finance department of Venerable & Gray, he a junior partner in construction contracts at Thrush and Perry, PLLC. One of the firm's banking clients asked Cornelia to review a construction contract drafted by Jerry for a deal in which the bank would be supplying the financing.

Cornelia was impressed. The contract was punctilious, well-organized and aggressive. It addressed and minimized every conceivable angle which could spell potential liability to Jerry's client. Written in plain English rather than legalese, the text was lucid and consummately thorough. The glossary of capitalized terms (which, of course, included a definition of Capitalized Terms) ran to seven pages. In every paragraph where Jerry's client had to actually commit to do something, the commitment was qualified and hedged, and the liquidated damages and indemnity clauses effectively eliminated whatever liability was left. She especially appreciated the touch of specifying Arkansas as the forum for choice of law issues. No one involved in the contract had any connection with Arkansas whatsoever, but the *cognoscenti* knew that courts in Arkansas had evolved a body of case law very favorable to construction companies. As Cornelia read the document, she began to feel excitement, even desire, stirring in her loins.

Since law school, Cornelia's only love had been contracts – drafting them, negotiating them, finding loopholes for her clients when they breached them. To her there was something sublime and utterly beautiful about two parties sitting down together and ordering their relationship by voluntary agreement, openly arrived at, negotiated in good faith, and rationally thought out, all with the input of legal counsel. Contractual relationships were so different from the disorganized mess that characterized most human relationships: always having to guess at what others meant, unspoken assumptions being relied on, terms not properly defined, major contingencies left unaccounted for. Cornelia's parents had bumbled their way into marriage and then divorce without any clear sense of who was responsible for what or what their respective obligations were. As Cornelia put it, when her parents got married there was offer and acceptance, but not a whole lot of consideration. To Cornelia it was astounding that more marriages did not end up in divorce given the imprecision and ambiguity of the whole enterprise.

Contracts, by contrast, were tidy.

Because they represented parties on the same side of the negotiating table, their exchanges regarding the contract were amiable. Jerry began to insert little jokes meant just for her in the e-mailed correspondence relating to the deal. The longer the process went on, the steamier their exchanges became. Cornelia had a way of saying “I take your point” that somehow made Jerry breathe heavily, and she wielded her mastery of the Uniform Commercial Code like a dominatrix with a whip. “I love it when you talk UCC to me,” he confessed one afternoon. When he put together a full copy of the voluminous schedules for her and had it couriered to her office, she was as impressed as a female sapsucker who is offered a tender grub by a male suitor. For her part, Cornelia would listen to Jerry holding forth on a conference call about environmental hazards (to his client, of course, not to the earth -- *e.g.*, the potential liabilities associated with the Resource Conservation and Recovery Act of 1976, the Clean Air Act, the Clean Water Act, and the Toxic Substance Control Act, as amended from time to time), and her knees would get weak. After one such session, they arranged to meet for a drink, and within six months they were living together. Soon it was time for The Talk.

“Darling,” said Cornelia one evening after the dinner dishes had been cleared, “I want to suggest something.” She led him back to the dinner table, sat him down on one side, and then took his hands in hers from the other side. “We’ve spent six months now doing due diligence and I think we’re both satisfied with the results. Don’t you think it’s time we moved on to the definitive agreement?”

Jerry removed his hands from hers and pressed his fingertips together. “I can see how that might be mutually beneficial, my sweet,” he allowed. “It *has* occurred to me that by pooling our assets we could achieve some real economies of scale and develop synergies which we could never exploit singly. Did you have a particular structure in mind?”

“Well, an LLC would normally be my structure of choice, offering both the tax advantages of a partnership and the liability limitations of a corporation. But under the circumstances, the marital state might actually be indicated. We’d have no plans to admit additional partners, so new equity offerings are not an issue. There are dramatic estate planning advantages, our joint assets would be secure from individual creditors, we’d enjoy certain evidentiary immunities, and, of course, the rights and obligations of both parties with respect to any resulting offspring would be established in advance.”

“All quite true. But what about the marriage tax penalty? That would be a bitter pill to swallow at our income levels.”

“I don’t see any way around it, though my sources on Capitol Hill assure me that the marriage penalty will be abolished in the next term or two. I’d be willing to trade off that short-term hit for what I really believe to be the long-term benefits. What do you think?”

“I imagine you’d want me to act as the managing estate holder, given my –

Cornelia cut him off. “Jerry, you’re not Stanley Kowalski, I’m not Stella, and we don’t operate under the Napoleonic Code. I’m talking a 50/50 split of profits and losses with

equal co-management responsibilities. And there'd have to be some strict reps and warranties on certain matters. Your track record with previous girlfriends has not gone unnoticed."

"Hey, don't get me wrong, I think the deal you're pitching is a great one. But there can't be any guaranties in a deal like this, baby, express or implied. I come strictly AS IS, WHERE IS – all caps. And I generally oppose sole source arrangements. Up until I met you, I always opted for multiple suppliers – the competitive incentives seemed to benefit all concerned."

"Sorry, sweetie – exclusivity is a dealbreaker for me. I need an airtight 'forsaking all others' clause or I walk. And I should also note that this arrangement applies to both 'sickness and health' as contingencies."

"No problem – our insurance policies should provide perfectly adequate coverage for the sickness eventuality. The risk of 'poorer' rather than 'richer' is harder to protect against. What about the term of the deal? Quite frankly, 'till death do us part' is somewhat beyond my predictability horizon. Wouldn't you feel more comfortable with, say, a ten-year term, renewable for successive ten-year terms at the option of either party?"

"Jerry!"

"OK, OK. But I do have to insist on naming rights."

"Sorry, I'm keeping my name, but if it's that important you can have the rights to the kids' last name."

"Done. Do you have a proposed effective date? It might take nine to twelve months to get the necessary clearances from our parents, locate a nondenominational officiator, settle on a closing location, and make the other pre-merger arrangements."

"Not to make too fine a point about this, Jerry, but the closing needs to occur in less than nine months. Six months might be a safer drop-dead date."

Jerry went slightly pale before a smile spread over his face. "Honey, you've got yourself a deal!" He walked around to the other side of the table and took Cornelia in his arms. She rested her head on his shoulder for a long moment and sighed. "Don't you think we should have a pre-nup?" he whispered.

"Probably, but that would be so unromantic."