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Jeff Large:

That's Tony Pearson, an attorney in the Rhoades McKee Business and Transactional Practice Group. You might remember my conversation with Tony from episode one where we discussed building a team of professionals to help you start your business. Today on Conversations with a Business Attorney, Tony and I explore what the key contracts are that business owners need to know about and use in their businesses. I'm your host and fellow business owner, Jeff Large.

So our conversation's going to be especially helpful for you if a few of these things are true. One, you want to learn more about the kinds of contracts that may be appropriate for your business, things like an operating agreement, shareholder agreement and buy-sell agreements. Two, you want to learn about how contracts can vary from contracts with your customers compared to contracts with your vendors, or three, you want to understand how to craft a contract so it protects your liability, but it's also still fair and appealing to the other parties involved. Now, the phrase that came up at the beginning of my conversation with Tony is that we don't live in a handshake world anymore, and I'm curious if we ever have.

Tony Pearson:

So I'm not sure we ever were in a handshake world. Handshakes quickly can turn into arm wrestling, so it's just a slight pivot and all of a sudden we're arm wrestling instead of shaking hands, and the perfect introduction to this conversation because what I always tell clients is when we're shaking hands, we have an idea in our head and some of it we've expressed verbally and we're hoping that the other side heard it the way that we tried to express it. Some of it we've probably taken as assumed and we're probably assuming the other side, the other person is making the same assumptions that we are when we said what we said, that we think they understood the way we think they understood it, and then something happens that we didn't anticipate, and now what are we going to do? And then we get upset because the other person's not doing the right thing, whatever. If we take the time to try and express in writing what we are, meaning when we handshake, suddenly that handshake has a lot more power.

We're saying, "Listen, I stand behind this. I did my best to express what I think we want to do here, so did you." Now, we've got that, and now when I shake my hand, I'm saying, "Yeah, this expression, I will stand behind it, that's what I want to do." I think it gives additional power to that handshake and it gives additional power to the relationship that started off with that trust relationship because we took the time to try and express what we really meant with some level of detail as we work our way through it. Not to jump ahead of us, but that's one of the places where I think lawyers can come in handy because we can ask some questions about things you either may not have anticipated or that you took as assumed and make sure that we pull out of you a little bit how to handle some of those things, and hopefully build in some tools for how we're going to deal with the unexpected.



Jeff Large:

So I'm hearing if I was going to simplify it, it sounds like it's just a matter of, "We're going to document clear communication and a way to hold each other accountable."

Tony Pearson:

Yeah. I think that's a great way of saying it.

Jeff Large:

All right. That's really interesting. So with this episode and how it falls in the season, I know we're going to be covering some of the specifics of other things that may be considered key contracts as well, but before our talk, before we started recording, you mentioned a very interesting and simplified breakup. What are the relationships that could use a contract? What are some of those as a business owner, the different types of relationships that we have that we may want contracts to be a part of?

Tony Pearson:

So to me, and I'm sure there are a lot of different ways of looking at this. By maybe somewhat oversimplified, break business down into four key sets of relationships. You have your owners, you have your workforce, you have your customers, and you have your vendors, the people you get service or goods from. If I break it up into those quadrants, there's a relationship there and in my judgment, anytime there's a relationship, that's a good time to have that shared understanding and shared terms of accountability to each other in there. So I know that we have other episodes where we will talk about the relationship between the owners, maybe it's an operating agreement or a shareholder agreement, a buy-sell agreement of some kind among the owners, relationships with your workforce, whether it's independent contractors, employees. I know we've got that in another episode. So then the other two big categories would be your customers and your vendors.

Jeff Large:

And maybe just from a high level, what are some of the key contracts we should have in place when it comes to our customers and our vendors?

Tony Pearson:

So I think that they are flip sides of the same coin, and that is when I'm dealing with customers or clients, I'm planning to provide some form of good or service and I am expecting to have some sort of compensation coming back to me. Now, I'm obviously painting with a broad brush here. There can be all sorts of other kinds of nuanced relationships where you might be getting some service back or some other goods back and you may be providing a different kind of service. I'm just trying to simplify here for purposes of our conversation. And then, of course, when I look at the flip side, there are situations where I am the customer of someone else. Those are the ones I'm referring to as my vendors, people that are providing me goods or services and I'm going to compensate them for it.

So not surprisingly, the terms of those can be somewhat similar. So you might hear terms of sale, service agreements, statements of work, supply agreements, purchase orders, those kind of terminology tend to generally describe a very similar relationship, and it's depending on which side of that vendor or vendee, customer supplier type of relationship that you're on. And I think managing one's relationships on both sides of that are important because if you're not, you're the



one caught in the middle because in the middle is where your profit is generated. That's how we generate profits.

We set business expectations for ourselves with our vendors that we know what it's going to cost us to get the goods and services that we need to compliment what we provide, and then we set a set of expectations of what we're going to get from our customer when we've taken what we got from the vendor, applied our special talents to it and then sold it to the customer and we get that back. And the difference there we all know is that's the profit margin. So if I'm losing on either side of my expectations with the customer or the vendor, I'm squeezing on my profits, and that's what I'm hoping that we can try to help protect against through making sure that we've got a clearer understanding and less likelihood that those relationships will not meet our expectations.

Jeff Large:

So through this conversation I realized that there are two types of relationships we need to be thinking about. The people that I am selling to or the people that you are selling to and the vendors who you are buying from, as Tony pointed out, the agreements are similar and it's the differences just depending on which side you're on. And that made me wonder, what are some of the principles that apply to these agreements regardless of the side that you're on.

Tony Pearson:

So let me start with something really basic, price. We all understand price. So if I'm a customer, I'm focused on making sure that I know what I'm going to have to pay for whatever I'm going to receive, if I'm on the supply side, I want to know why I'm going to receive for what I have to provide to them in doing that, very elementary. But you can see how that one key term, depending on which side of it you're on, you have a different aspect because if you're on the selling side, you'd like your contract if anything is going to go wrong, you don't want that price to go down and if anything, you'd like it to go up. So you want to try and structure your agreements as best you can to give you flexibility that if something goes wrong, if I have to increase my price, I probably can.

Look at our current economic status where there's a lot of volatility in the market. Gas prices are putting a pinch on people. Supply chains are tough. If I'm a vendor, I'm saying, "Whew, boy, I would really like to try to structure all my terms and conditions such that if I'm incurring an extra cost for fuel, if I'm incurring a delay because of reasons beyond my control in the supply chain, I don't want my price to go down and actually with my fuel surcharge," which is something many of our listeners probably have seen happening in relationships that they have, "I want to be able to at least pass that extra cost that I have onto the other person so I don't get pinched in the middle of my profit margin." But in the instance when I'm a customer and I see that fuel surcharge I think. "That gives me a lot of uncertainty."

So I'm hoping to put some sort of boundaries around that. Maybe I need to have some advanced notice. Maybe I need to have the ability to cancel if that surcharge is going to get too high so that I know that I can go try and find another vendor or a different solution for me. Those are the kinds of things that all of a sudden start changing what seems like a standard term of price. So what we're trying to do as we look at our vendor and customer relationships, at least from my perspective, is we're trying to look for those areas where something, whether it be timing, because that oftentimes can be really critical, price, which is oftentimes very critical, quality, those kinds of things. I'm trying to figure out where can those things go wrong and what do we want to have as an infrastructure for how we'll deal with those things if they don't go as expected?

How are we going to work our way through this ideally not a slanted one-sided way because then the other party I'm in a business relationship with, it doesn't matter which side I'm on, is going to



feel slighted. That's not going to help foster our business relationship, but if we can give some protections to each other and try to be fair with a structure that gives us fairness, then we can deal with some of those things.

Jeff Large:

Now, if you've spent any amount of time in business, you know complications happen, struggles come up, issues arise, and it's extremely important to have fair guidelines in place for all parties involved. Now, in my years of business, I can think of two situations that have come up that were just not very enjoyable to get through. The first one was before my team was working in podcasting, we actually did web development and I had a client who decided to make design changes after designs were finalized. If you work in web development, you understand that when that happens, it affects everything else down the chain because you typically start with design and then you move into development. That same client also locked my team out of the website mid-project and changed a bunch of code to their liking. Unfortunately, that made it impossible for us to continue because we would've had to revert code and there was just changes that we couldn't document, and again, because they changed foundational code, we ended up calling off that contract.

And another situation that I can think of, we had a client fail to meet several deadlines and communication needs. Now fortunately, this doesn't come up that often because we do clearly communicate everything that we need and we try to just make it as plain as day in terms of what the client responsibilities are and our responsibilities are. But it didn't seem like this particular client read the contract or paid attention to any of these details because after ignoring a lot of our requests and the things that we needed from them in order to move the project forward, they came back and made some demands to expedite our delivery date from basically a few months to literally the end of the week. They also argued against some basic terms that were in our agreement that they signed off on. Now regardless, we cut ties with both clients. Fortunately, these types of situations don't come up that often, but as Tony's talking about, it's so important to have agreements in place for situations like these.

Tony Pearson:

You see the things that are key to the relationships, like we talked about before, price and getting paid is always going to be an important term, but we talked about such things as getting a shared expectation on the design side and having a sign-off and then there are no changes to happen after that. So again, as you were setting these agreements up identified, there is a certain period of uncertainty that's that design phase. I then need to be able to fix that to some clearer expectations for both of us so that when I go to build it out, I know what I'm building toward so I can set my budgets correctly, I can staff it appropriately, I can meet the deadlines, and I can't have them changing it without my agreement. That's why in building projects, change orders, having someone sign off on that, you want a different faucet, we can probably accommodate a different faucet, but first you're going to tell me what faucet you need.

I'm going to go find out if I can even get that faucet. If it's a different price or a different delivery date or it's going to change the construction schedule, we're going to have to talk through all that and then we're going to write that down, and we're going to have to agree on that so that we all know what those expectations are. I can't have you changing it willy-nilly anytime you want, and I can't have you coming in and doing the work yourself. You start doing that and now we've done anything, and a lot of times you'll see in contracts for products or especially pieces of equipment, if you tamper with it, if you make adjustments to it, if you remove any guards, if you take off any



panels, if you break certain seals, you're going to lose your warranty. I know how this machine functions, I know how this website works. I know how to fix it, if I'm the one who built it.

You start putting other changes in there, and so we want to make sure that we've got that locked into our agreement if we can anticipate those things. On the podcast side, you mentioned clear expectations, clear expectations of your lead times that you needed to have, of communications that needed to happen, and of how we would have a mutual understanding of when we would start providing service and then how much time we would have to provide that service. Again, timing schedules, whether it's shipping for hard goods or services that are provided, those are some of those key terms.

And so if you think about all those ways in which a project can go awry, it can sometimes vary from industry to industry and business to business what you do, but if you start with those principles, you'll often find we've just named off some very common ones, price, timing, communications, fixing certain expectations when you have something that has a design element and then a construction element, whether that's physical construction or in your case, so web design structure, developing software, developing applications, lead times that one needs, whether it's for your ability to provide services for someone to get goods from a third party vendor, those kinds of things. And then how do we mark the beginning?

How do we mark the end, especially in a service project, and how do we mark what is the deliverable? "At what point am I entitled to remuneration? Is it because of time that I spent? Is it because of materials or goods that I've provided? Is there a quality condition to it? Is there a quantity condition to it?" Those kinds of things are the main critical terms that we would look for and putting it into your master service agreement, purchase order terms and conditions of sale, statements of work.

Jeff Large:

And this is the part where it's like, to me at least, it becomes more clear that it is important to have an attorney or somebody that has seen this helping. So I mean, we hit several high level basic things, but I can also say knowing my contracts very well and working frequently with my attorneys that there's all kinds of stuff that I never personally-

Tony Pearson:

That's right.

Jeff Large:

... would've wrote.

Tony Pearson:

Yeah. Absolutely. Well, your cancellation fee piece of the podcast story is a great one. You anticipated that if that were to happen, you were going to have already committed certain resources that it's not like they can just walk away and you have no consequence. So you want to have the tool of a cancellation fee, and we're going to assume for purposes of conversation, and it sounds like you do have in your master service agreement also a statement of what law is going to apply and what jurisdiction you're going to be able to pursue them in so that you have shared expectations and most importantly, you have clearly understood expectations of, "I am entitled, I may choose not to exercise it," which you did and that's fine.



But you at least knew that, "If I wanted to, this is the amount of money I could pursue. I know Michigan law is going to apply, so I know how my contract is going to be interpreted at least as well as I can, and I know where I'm going to have to go, what kind of costs I'm going to have to incur, especially if I'm dealing with a customer in this day and age." Well, if your customer's in Indiana, Illinois, how about further away? How about Florida? I don't want to have to go all the way to Florida just to collect my cancellation fee because what position is that going to put you in?

They're going to stand there and thumb their nose from the border of Florida and say, "Come and get me," because are you going to want to incur the cost? Now you're having to do a cost benefit analysis on your cancellation fee versus that. Certainly still a lot of unknowns, but yeah, exactly. You start thinking through that and that's why you see some situations where you have contracts that go on and on and on. If you can think of a way this could go wrong, you could write a contract provision for it, so you can make it as long as you want and if you leave it shorter, you just leave yourself some ambiguities and then we'll have to figure out how we work through that based on what we did agree upon, and then what the law might apply to fill in the blanks, if you will.

Jeff Large:

How would you recommend striking the balance between covering your liabilities versus making a contract just usable?

Tony Pearson:

Well, I think that's probably a bit of a business art form because it's always a risk balance. If you have a zero risk tolerance, business might not be for you. Life might not be for you frankly, but at least business may not be for you. So you're trying to assess your own risk tolerance for that, and there's a relationship that goes with that. I have a client that I'm working with right now as a very successful business. He is proud of the fact that he does not have an agreement with his customers. He has taken lots of lumps for choosing to do business that way. It is his judgment that he builds more relationships than he loses by taking that approach to things. That's how he assesses that risk.

I have customers that are regularly revisiting their terms and conditions just about every time that they have a transaction that is very sizable that goes wrong, they want to try and address that in their next wave of terms and conditions because of the volume of work that they do and the amount of risks that they take in their business when they're dealing with customers. They really need to have these kinds of protections in place. Most customer or most of my clients focus on where are my biggest risk prospects, big projects or customers with a large volume of work. I might want to spend a little more time have a much clearer understanding with them because my risks are higher there.

Smaller projects folks that I don't have a huge amount of exposure to or that don't owe me a huge amount, maybe I'll have a little bit less formal. I can tolerate a little less formal relationship with them, and I think a lot of it differs based on the nature of your industry. Some industries tolerate a much higher level of having written terms and conditions that can be very one-sided and slanted and focused that way, and there are other industries where that's not all that well tolerated just by the power of the market that we're in.

Jeff Large:



So it sounds like a big variable then for that of how detailed should we really be? It sounds like to your judgment and probably some of the bigger influencing factors would be the size of projects or the volume in which that's coming through.

Tony Pearson:

Yeah. How you measure your risk is where I think I would focus as a business owner is, "Where are my risks and what is the magnitude of those risks?" And typically folks will be willing to invest more to manage the larger risks, and that's where I would focus. Just like you're focusing when we were talking about what kinds of terms do I want to address, your highest risk factors are the ones that you want to focus on and then you start working down. Then you start to get down to lower and lower level ones and you say, "I don't know that I need to have this contract go on and on. Some of those risks I can manage through some relationships or through some very general structural provision." So as an example, I don't need to address the way to handle every possible change in web design. I can have a very broad provision that says, "If you want any changes in web design, we aren't going to make it unless I agree to it and we'll agree at that time we'll work through."

So now if that situation arises, you can't be bullied into having to accommodate what your customer wants as far as changes in the web design, but at the same time, they are able to work with you to negotiate and try and find reasonable terms that work for both of you, "Okay, that's going to take some more work. Okay, I'm happy to pay a little bit more to get what I want," and now we can modify that agreement with just a general provision like that.

Jeff Large:

Yeah. No, I think that's important. I know for us, we'll do... I have an element of risk tolerance, but obviously I don't want unnecessary liability. The way that we've found our own structure for a service-based business is we'll typically have the more of the not very fun to read aspects and a master service agreement and then we sign off on that one time and then it just sits there and we never have to worry about it again, and then just moving forward, we have statements of work.

Tony Pearson:

Yeah. The next project, let's just talk about the important pieces of that project, "When do you want it? What's the subject matter? What are you expecting from me? What do I need from you in order to be able to provide the service? When am I going to get paid and how much? Let's sign that." We can do that in a page. We have this background understanding of what'll happen under all these other circumstances, and that is a very common way of doing business, especially in ongoing service relationships that I think is very effective. Well, and you'll see the same kinds of things in high volume sales and purchases of goods. You'll see sometimes you'll hear it called a blanket purchase order. We want to make sure we have a clear understanding of price per unit and delivery terms, and we've got all the other, usually the background terms and conditions.

And a lot of places will have a set of terms and conditions of sale. Then there will be a purchase order that almost like your statement of work will just identify what part, what equipment, whatever am I having, let's identify by part number or unit number or whatever so we understand what we're talking about. What's the price per unit, when's the delivery date? All the rest of the basic terms, who's going to pay for shipping, all that stuff, is in those general terms and conditions. Back in the day when we had carbon copy purchasers and some people still have them, sometimes it's on the back of the form, you'll have all the, quote, unquote, "fine print" that is in there that tells you what goes with that purchase order.



Jeff Large:

Another thing that sometimes I'll see, and I'm just curious of your thoughts on it, is say for some of those relationships where you maybe don't carry, it's like a lower volume or a lower price point or whatever it is, it makes it not as liable, so you don't have as much risk involved as some of these bigger projects. When you have a contract that will reference something else, that will reference say a terms of service on the site and then that can be updated periodically or whatever it is, what about things like that? What are your feelings on [inaudible 00:26:10]?

Tony Pearson:

I think those are very helpful tools, especially in this internet age. I think that is a wonderful way of keeping the face-to-face relationship with the customer relatively straightforward and simple, much like your statement of work. Listen, this is the part that we're really all focused on. There are a bunch of assumptions that are made in the background and we're going to put those on the internet, you can go look at them anytime. They are subject to change from time to time and we move forward that way. That can be very vendor friendly because I know that I've got my terms on my website structure in a way that meets all of my expectations. I'm the one who crafted them. That is something that just as a consumer or a customer one should be aware of the fact that, that's enforceable, that is something that you're going to be held to. Those terms and conditions are things you're going to be held to and they may or may not set your expectations and they may be perfectly acceptable. Just make sure that you plan with those basic principles in mind.

Yes, they are subject to change. I think that there are probably going to be some equitable limits on how much you could change it at the last minute like after everybody's already committed and everybody's already entered another contract, I don't know. They can really change the terms of that particular piece of the relationship, but if they make a change before the next order and then you place the next order, checking and monitoring whether there have been changes to those terms and conditions before you place your next order or sign your next statement of work would be a wise thing to do, and that's not anyone pulling their wool over your eyes. They said on there it's subject to change from time to time. That is something that we as a customer or a consumer ought to bear in mind and go check on that.

Jeff Large:

As a business owner, there's something I noticed at this point of the conversation, there is a tension that we need to work through. On one hand we have to create contracts that are covering our own risks and liabilities, but on the other hand, we need to make sure that our contracts are still user-friendly and fair to all parties involved. Tony thinks the answer is as simple as maintaining clear boundaries and communication.

Tony Pearson:

Yeah. I think in very broad principles, to me, there's an old saying that fences make good neighbors. It's knowing where your boundaries are and everything. It can keep you from getting in tussles and fights. So I think that having shared understanding can be a key to a good relationship that can continue moving on. Even like in an interpersonal relationship, communication is key to a continuing good relationship, sharing your understandings and assumptions and going forward, so that's a very broad principle. More practically and from the legal perspective, it's trying to make sure that I've identified where I'm a customer of your services for me to share with you and make sure that this contract addresses the key assumptions and expectations that I have and you're going to do the same thing. And then if I see an expectation



or assumption that you have that I had never even thought about it, I can see that, I can understand that and I can decide whether I can live with it and if I can, I can talk to you about what that might be.

At some level, us dreaming up problems can become unworkable, can become unmanageable. I don't know very many people that get excited about entering into a business relationship with a vendor or a customer that has a very one-sided agreement that everything that possibly could go wrong ends up working in their favor and they have no grace for you. You get into that and you're like, "Well, now I know whose profit margin is going to suffer if anything happens." So I think being fair handed and leaving some space, when I approach these things, I try to create a structure that tells us how we're going to address the unexpected. I don't try to answer everything that could go wrong.

Just how are we going to approach this if it does go wrong? Because usually when we're entering into a business transaction of whatever kind, you don't really want me to lose. You just don't want to lose, and I don't necessarily want you to suffer from anything. I just don't want to lose. So let's go in and try and find a way that we can always work through things and give ourselves a structure where one side doesn't always win and the other side doesn't always lose. We try to give ourselves both some incentive to work our way through this. Both of us might be losing, but maybe neither of us is losing quite as bad as we otherwise might. We can set up some structures that'll allow us to do that. Cancellation provisions are a common way of doing that.

"Well, if I don't like the way this is going, I get to pull the plug. I'll cover your costs that are incurred and we'll both walk away." Now we both have an incentive to preserve our profit margin of some kind to stay at the table and see if we can find a way to work this out. And if we can't, I'm not going to be stuck with what you say. You're not going to be stuck with what I say. We're both going to part ways, but to be fair, I probably ought to cover the costs that you've already incurred in getting us to this point before this unexpected thing happened. Trying to give a concrete example of a way that you can build a structure that will deal with a number of different unexpected things as opposed to trying to dream up every unexpected thing.

Jeff Large:

Yeah. So it's straightforward, but these are the reasons that agreements are so important. They create fairness and equity between both parties and they help create guidelines and frameworks to follow when the unexpected happens. So what happens in cases where you don't have a contract?

Tony Pearson:

So when we don't have a contract, and this also to a certain extent applies when we have a contract, but there are some things that aren't addressed in it. The law has developed over time to fill in a lot of blanks. Now, there are times where if we don't have a contract or we don't have certain contents to the contract, we don't have an enforceable agreement, all we have is risk. Now, we may have some, what the law calls equitable principles that says, "Well, even if we didn't have a contract, man, you made me some promises and I relied on those. I changed my legal or financial position. I committed expenses to it. And even if I don't have an enforceable contract, the right thing to happen is you should at least make me whole for having made this change in position based on your promise."

Or we may not have an enforceable contract, but I've received some sort of enrichment. There was an increase to value of some property that I have or asset that I have or I gained some money based on you thinking we had this agreement even though it's not legally enforceable, it would be



unjust for me to hang on to that benefit, that enrichment that I got because of that relationship. I should cough that back up if it came from you or we should share in it or whatever the situation might be. So there are some principles like that that might help to protect a gross injustice of some kind, but it's not really going to put us back in the position that we both were expecting to be in because we didn't have an enforceable contract. So there can be times where you just don't have a contract and at best you've got these equitable principles that you've got to prove your way through to a judge, which doesn't sound fun to anybody of our litigation.

And there are times where the law will imply certain terms, if we've satisfied some basic things, we know the really material terms of our arrangement, we've got the statement of work, but we don't have the master service agreement. The law will imply certain reasonable terms within us, "What's a reasonable time for me to start this podcast? I've got this agreement that you're going to provide me podcasting services and I'm going to pay you and I paid my initial deposit and then I never heard from you again, and I asked you a few times and I'm still not hearing from you."

The law is going to fill in that there's going to have to be some level of reasonable responsiveness by you to start the work, not that you can just wait and do it whenever you want. Now again, we may or may not really want to be in front of a judge arguing about what is reasonable and what is unreasonable in terms of the timeframe in which you're going to provide that service, but at least I have some stop gap from the courts in how I'm going to do that, and in the sale of goods in particular, and there are some other areas of the law where the law is more detailed.

There's a uniform commercial code, which variations of it have been adopted I think by all of the states at this point, although they can make state specific tweaks to it, that lays out a lot of terms that once you're determined to have the material terms of your contract arranged, if there's any of these topics that aren't addressed in your contract, the law will tell you how that's going to be applied by the court. It gives everybody a lot more predictability. You can understand why something like that would be adopted to facilitate interstate transactions so that if they don't want to address all these topics, at least have some level of certainty and expectation of what they're going to have.

Jeff Large:

Mm-hmm. So the question that I have to approach because I feel like you might be a little biased, why do I need an attorney?

Tony Pearson:

That's a great question. Of course, nobody has to have an attorney, and as I talked about at the beginning, so much of this depends on your knowledge, your risk tolerance. You might say, "Why do I need to have that?" Well, first of all, having someone who is experienced in trying to express these kinds of principles and concepts and knows how the courts are going to interpret those expressions has experience in how case law says those things should be interpreted if they have to be enforced in court, that can be valuable in helping you craft those expressions. Someone who has experience with the kinds of transactions industry that you're working in that may have seen some things that you haven't yet experienced and can say, "Have you thought about this? How would you like this to go?" They can add something that you might not otherwise have thought of.

They can identify a risk area you might not otherwise think of, and they might be able to think of a creative solution that you wouldn't be able to, but that might give you some more flexibility just based on their experience and knowledge of the law. They also might be able to help you think of things you wouldn't think of, or think of things a different way that you're sure you know what you



want, you're certain of that, but you haven't thought about how one thing that you want might interact with another thing that you want and how those things might interplay with each other and cause an unexpected consequence. And I think probably the last category is the flexibility to help you apply things to your particular situation. The internet is full of examples that you can get, I am well aware of that. The question is how will that really apply to your situation?

Do you understand all the words that are in there? Do you understand how they're going to be interpreted? And do you understand the extent to which your business fits with the business that was in someone's mind when they crafted that? What was different about that business's structure, their vendor structures, whatever it might be that may have influenced them to write it that way, or what things were not important to them that are important to you because you're in a slightly different situation. A lawyer is a craftsperson who can help you customize that a little bit and help you to meet your expectations. It's like do you want to buy something that comes out of a box that is pre-structured? It may stand up, it may hold its own, but it may not do all the things that you want it to do.

Jeff Large:

Is it better to have something even if it's templated versus nothing, or is that not always the case?

Tony Pearson:

I guess, it depends on what my something is. If your something meets your expectations, you feel very comfortable with it and you are planning around that something, then I think it probably does because you at least have some level of certainty assuming that it's crafted in a way that's enforceable and so forth. Having nothing, the only time I guess, that I can say that that would be better than something is if you really don't well understand the something that you have and you are now bound to something that is not working the way that you thought it was going to work. And now boy, if I had nothing, at least I'd be able to ask the court to interpret it reasonably. At least give me the reasonable flexibility to understand my specific situation as opposed to being stuck to the letter of the document that I signed that I just didn't understand that's what that was supposed to mean.

Jeff Large:

It's always hard because obviously when you're in a situation like this, this is what you do. Of course, you would naturally want somebody to come and ask your expertise in that type of a thing. But for me, hopefully the listener can believe me as an objective third party. A couple of the things that stand up probably the most, like you said, the language has been a huge one for me because there are just certain terms, even if I vaguely understand how the term is, couple that with how the court will interpret it, those are huge ones for me that I know I'm just not well versed in. The other thing that's been really interesting too is the element of change. And it's with both the things that naturally as you grow as a business that can happen, but also the things like you said, that we never know how to predict.

I feel like the easiest example of something nobody ever predicted is just going through COVID with so many businesses affected, basically the entire playing field is changed, the rules are now suddenly different. How do you respond and operate? And most of us running businesses, I mean, maybe you're starting afterwards, but if you had a business through that, you probably experienced it in some regard and it's very hard to say that we ever would've predicted it in advance. And to have contracts, some of these key provisions and contracts that we're talking about to be able to address those things, I know for myself, I could get so far, but I wouldn't be



able to really cover my basis, and so that's why it's so helpful to have the proper experts in my corner to help me with the things that I don't understand.

Tony Pearson:

Yep. And the COVID example is a great, very recent and concrete example that very many of our listeners, if they are in business, had to deal with. The language that the lawyers call force majeure or it's just the provision that in simple terms provides an excuse for delays that are caused by reasons outside of the control of the parties. And there were a lot of litigation about the contents of certain force majeure clauses and whether they covered delays that were caused by a global pandemic, or even further stretch, maybe was the delay really caused by the global pandemic or was it caused by a government restriction that was placed on your business to prevent further spread of the global pandemic?

Did the pandemic really cause that or was it because of a government intervention, and does your language address that? So as you can imagine, there have been some changes that lawyers have suggested to some otherwise typical force majeure language. But being able to review your own force majeure language, "First of all, do I have it? Second of all, what does it cover? Third of all, am I happy with what it covers? And fourth, do I really understand what it covers based on the words that are used and how they've been interpreted by the courts?" That's a great, very real life current example of things that people have gone through.

Jeff Large:

Perfect. If someone was coming to you to get help on something like this, what are some maybe baseline things they should be thinking about in advance?

Tony Pearson:

I can think of three key things I would suggest. If you have an existing agreement, don't throw it out the window, bring that in. Let's use it as a starting point. It helps us to understand what your baseline has been and help us to understand some things that are key to your business and to be able to ask some questions based on that, so that's really helpful. And along those lines, but not limited to that, what are things that you like or don't like about that agreement as it's applied to your business, as you've been through things? Are there times where something's been thrown in your face or something's been raised as a risk factor that, "My contract says this and a customer said, 'Well, [inaudible 00:43:56],'" because it says that you ought to do something different and you've just walked away from it, but made a mental note. "Boy, I don't know if they're right or wrong about that," things like that.

And then the related point to that would be, as we had our conversation earlier, what are things that have gone wrong in your business? Where are things that have gone awry? You may have worked your way through them, but are those things that we might now identify as a more significant risk that we'd like to protect against? And then that segues into the last one which would be, think about your business. Think about where your key points of risk or exposure are in your business relationship, whether we're an instance where you're a customer of someone else or where you're providing goods and services to your customers.

Where are your risk points? I mean, you can start by even looking at your own profit analysis, "Where are my expectations? Where do I need to make sure that my costs don't shift too far or my revenues don't shift too far? Where are those opportunities, where that happens? Where have I experienced unexpected changes in that?" Those areas, especially, again, you judge by the magnitude of that risk and the frequency of that risk are those things that I want to address? Let



us know what those risks are. You may not know exactly how to solve it, but if we understand what those risks are, we can maybe help you figure out how, whether it could be a tweak to your existing agreement or whatever.

And if you don't have an existing agreement, don't worry about that either. Come to us, let's talk about those other couple of points, what experiences you've had that have been good, bad or otherwise, or what you understand. Even if you're brand new into the business, then what do you understand to be the key points from your business plan of expectations you have for, "How I'm going to generate revenue," expectations you have for, "Where my costs are?" And then let's talk about where those risks might find their way to the surface over the course of your business relationships, and we'll try and help you manage that.

Jeff Large:

A big thanks to Tony Pearson for sharing his time and wisdom on today's show. If you need some of these key contracts that we discussed in today's episode or maybe some help reviewing the contracts that you do have, consider connecting with Tony or one of his peers. You can learn more at rhodesmckee.com. The link for that will be in the show notes. Conversations with a Business Attorney is a project from Rhodes McKee, and it's produced by Come Alive Creative. I'm your host, Jeff Large. Thanks to Rachael Workman, Isadore Nieves, Elaine Moore, and everybody who helped make this episode possible. If you found this episode helpful or this conversation was able to answer some of the questions you had about key contracts, please do me a favor and make sure that you share it with other business owners who also need help. Your share goes a long way. Thanks for listening.