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## Handling Contract Modification Risks

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## COURSE OBJECTIVES

- The importance of written contracts
- Key written terms
- Contract modification authorities
- Best contract practices for keeping you out of hot water
- When to consult counsel and/or your insurance carrier

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## MEET THE SPEAKER

**Timothy J. Pastore**  
**Montgomery McCracken Walker & Rhoads LLP**  
**Partner and Vice-Chair, Litigation Department**

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<p><b>Education</b></p> <ul style="list-style-type: none"> <li>Bucknell University, B.A. </li> <li>Boston College Law School, J.D. </li> </ul>	<p><b>Public Service</b></p> <ul style="list-style-type: none"> <li>U.S. Air Force (USAF)  <ul style="list-style-type: none"> <li>Captain</li> <li>Judge Advocate General (JAG)</li> </ul> </li> <li>U.S. Department of Justice (DOJ)  <ul style="list-style-type: none"> <li>Special Assistant U.S. Attorney</li> </ul> </li> </ul>
<p><b>Private Practice</b></p> <p>Montgomery McCracken Walker &amp; Rhoads LLP</p>  <p><b>MONTGOMERY McCracken</b> Attorneys At Law</p>	<p><b>Electronic Security Industry</b></p> <p>Over 60 matters in courts around the country on behalf of large security companies, plus advisory and transactional experience in this industry.</p>

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## Representative Clients – Security Industry

Comcast		Cox
Charter		Altice/Suddenlink
Brighthouse		Time Warner Cable
Protection One		Mediacom
ADT		Criticom Monitoring Services

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## Written Contract

- You must have a written contract
- Liabilities are too significant
- Allocation of risk
- Protective provisions



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## Key Written Terms – Do Not Remove

- Limitation of Liability
- Indemnification
- Waiver of jury trial
- Limit on the time to sue
- Merger & Integration Clause



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## Contract Modification Authorities

- Authority to modify contracts
- Remove discretion from the field
- Use duly authorized representatives
  - Internal policy
  - Be prepared to produce such policy
- Sales staff should not have modification authority
- Beware of proper authority not signing



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## Real World Example – Authority

- Contract executed for commercial security services in Maine
- Contract contained favorable limiting conditions
- Company wanted to enforce the contract
- Signature block specified that the contract was not valid unless signed by General Manager
- Our only copy was not signed by GM – giving adversary an angle to suggest unenforceability



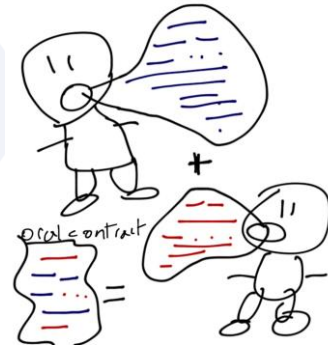
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# Merger & Integration Clause

- Your contract must include a merger and integration clause
- Written contract represents the full agreement between the parties
- Real consequences
- Parol evidence rule



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# Merger & Integration Clause

↓ This Agreement contains the full understanding of the parties and can be modified only by writing signed by the parties

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## Merger & Integration Clause

21. **Miscellaneous.** This Agreement contains the entire understanding between you and the Company and replaces any other documents or discussions the Company previously had with you. No handwritten changes or modifications to this Agreement shall be accepted by the Company, and no such changes shall be enforceable.

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## Merger & Integration Clause

21. **Entire Agreement.** This Contract, together with any related schedules, represents the entire agreement of the parties. If there is any conflict between this Contract and your purchase order, or any other document, this Contract will govern, whether such purchase order or other document is prior or subsequent to this Contract. It is mutually understood and agreed that any representation, promise, condition, inducement or warranty, express or implied, not included in writing in this Contract shall not be binding upon any party and that the Contract may not be altered, modified or otherwise changed at any time except with the consent of each of the parties hereto, and in the form of a written addendum to this Contract.

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# Merger & Integration Clause

**SECTION 13.1. Entire Agreement.** This Agreement is the entire agreement between the parties with respect to the subject matter hereof, and no alteration, modification or interpretation hereof shall be binding unless in writing and signed by both parties.

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# Merger & Integration Clause

**41. Entire Agreement:** It is specifically understood by both parties that this Agreement, plus the attachments, constitute the entire agreement between them and they are not bound by any other terms or representations, oral or written. NO REPRESENTATIONS, PROMISES, CONDITIONS, INDUCEMENTS OR WARRANTIES, EXPRESS OR IMPLIED, THAT ARE NOT INCLUDED IN WRITING IN THIS AGREEMENT ARE BINDING ON YOU OR ██████████ ALL PRIOR AGREEMENTS AND NEGOTIATIONS ARE SUPERSEDED AND INCORPORATED HEREIN. THIS AGREEMENT SHALL NOT BE MODIFIED OR AMENDED (EXCEPT AS EXPRESSLY PROVIDED HEREIN) EXCEPT BY A WRITTEN DOCUMENT EXECUTED BY YOU AND A DULY AUTHORIZED REPRESENTATIVE OF ██████████ YOU ARE NOT ENTITLED TO RELY ON ANY OTHER AGREEMENTS, UNDERTAKINGS, REPRESENTATIONS, PROMISES, CONDITIONS, INDUCEMENTS OR WARRANTIES, EXPRESS OR IMPLIED, MADE BY ██████████ PERSONNEL OTHER THAN AS SET FORTH IN THIS AGREEMENT AND ITS ATTACHMENTS.

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12 And I'm just wondering under what  
13 circumstances are you contending that there were  
14 verbal changes to the management agreement in light  
15 of Mr. [REDACTED] comment in this e-mail, "There are  
16 no changes to the management agreement that we  
17 agreed to?"  
18 A. Because prior to this writing, there were  
19 multiple changes to requirements of the management  
20 agreement.  
21 Q. Okay. Did you ever seek to memorialize  
22 those in writing?  
23 A. I believe many were verbal. I believe  
24 several were in writing.  
25 Q. Okay. In writing signed by the parties?  
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1 A. I think -- I believe that they were in  
2 e-mail exchanges.

## Real World Example Purported Contract Modification

**SECTION 13.1. Entire Agreement.** This Agreement is the entire agreement between the parties with respect to the subject matter hereof, and no alteration, modification or interpretation hereof shall be binding unless in writing and signed by both parties.

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## Amenability to Contract Modification

- Is "take it or leave it" the best approach?
  - Not a good practice for consumer contracts
- Protect against unconscionability
- Contracts of adhesion unenforceable
- Unequal bargaining power



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# Real World Example – Bargaining Power

**DYNWATCH AND INSTALLER ARE NOT INSURERS. DISCLAIMER OF WARRANTIES: LIMITED LIABILITY**

9 a SUBSCRIBER agrees and understands that the INSTALLER and DYNWATCH are not insurers and that insurance, if any, covering personal injury, including but not limited to personal property loss or damage in about or to the premises shall be obtained by the SUBSCRIBER.

9 b In the event that the SUBSCRIBER wishes to increase the maximum amount of such limited liability, SUBSCRIBER may, as a matter of right, obtain from the INSTALLER and DYNWATCH a higher limit (by paying an additional amount for the increase in such limit of liability), but this additional obligation shall in no way be interpreted to hold the INSTALLER or DYNWATCH as an insurer.

product of strict liability and/or any breach of warranty, express or implied, and/or breach of contract, express or implied, notwithstanding the above provisions, should there arise any liability on the part of the INSTALLER or DYNWATCH, such liability shall be limited to the maximum sum of \$250, regardless of whether any loss or damage was caused by or contributed to by any conduct, act or omission of the INSTALLER or DYNWATCH, or their agents, servants or employees, and this liability shall be exclusive. Some states do not allow the limitation or exclusion of incidental or consequential damages or the limitation or exclusion of implied warranties, therefore, the above limitations or exclusions may not apply to you.

9 b In the event that the SUBSCRIBER wishes to increase the maximum amount of such limited liability, SUBSCRIBER may, as a matter of right, obtain from the INSTALLER and DYNWATCH a higher limit (by paying an additional amount for the increase in such limit of liability), but this additional obligation shall in no way be interpreted to hold the INSTALLER or DYNWATCH as an insurer.

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# Real World Example – Bargaining Power

A story about almost falling off my chair in a deposition



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# When To Consult Counsel

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Consult counsel...

Early & often

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