

# The Melito & Adolfsen Law Firm

## Conan O'Brien and the problem of omitted terms in a contract

According to the New York Times, the New York Daily News and many other news services, NBC is arguing that its contract with Conan O'Brien only guaranteed that he would be installed as the host of "The Tonight Show" but did not promise when the show would air. Unlike deals for other shows, purportedly Mr. O'Brien's contract contains no specific language about the time period the show would occupy. The argument is that the absence of a "time-slot" term allows NBC to relocate The Tonight Show from the 11:35 slot to after midnight to make room for Jay Leno without breaching its contract with Conan.

How did this happen? Some commentators have suggested that Conan's lawyers made a mistake. But that is doubtful. If the time-slot term is a standard term in the contracts for other shows, the lawyers for both sides must have known this fact. Why wouldn't it be included here? Unless the matter is litigated, we will probably never know. Perhaps there are insiders who can answer the question but maybe they are not permitted to explain how this omission, if that's what it is, came about. The matter is apparently being settled and the dispute will come to end. Nevertheless, the time-slot dispute raises interesting questions about contract drafting.

The American Law Institute's Restatement of Contracts addresses the issue of "an omitted essential term" in a contract. As the RESTATEMENT (SECOND) OF CONTRACTS: SUPPLYING AN OMITTED ESSENTIAL TERM §204 (1981) states: "when the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Comment b. to §204, entitled, "How omission occurs", states: "the parties to an agreement may entirely fail to foresee the situation which later arises and gives rise to a dispute; they then have no expectations with respect to that situation, and a search for their meaning with respect to it is fruitless. Or they may have

expectations but fail to manifest them, either because the expectation rests on an assumption which is unconscious or only partly conscious, or because the situation seems to be unimportant or unlikely, or because discussion of it might be unpleasant or might produce delay or impasse."

See, e.g., Dobson v Hartford Financial Services Group, Inc. 389 F.2d 386 (2d Cir. 2004), which states: Under "general principles of contract law," a failure to locate explicit contractual language does not mark the end of proper judicial interpretation and construction. Contracting parties often express their agreements imprecisely or incompletely. In such cases, if the interpreting court can discern from the contract as a whole what the parties "must have intended," it should enforce that intention despite a lack of express terminology. See 11 Richard A. Lord, Williston on Contracts § 31:7, at 321 (4th ed. 1999) ("It should be noted that terms are to be implied in contract, not because they are reasonable, but because they are necessarily involved in the contractual relationship, such that the parties must have intended them and must have failed to express them only because of sheer inadvertence or because they are too obvious to need expression. In this connection, it has been said that most contracts include implied conditions that are indispensable in effectuating the intentions of the parties."); Sacramento Navigation Co. v. Salz, 273 U.S. 326, 329, 47 S.Ct. 368, 71 L.Ed. 663 (1927) ("[A] contract includes, not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made."). See also Restatement (Second) of Contracts § 204 & cmt. b, at 96-97 (1981) (stating that if the parties "fail to foresee the situation which later arises," or fail to manifest their intentions "because the situation seems to be unimportant or unlikely, or because discussion of it might be unpleasant or might produce delay or impasse," the court may supply a term "which is reasonable in the circumstances.").

What might have happened with Conan and NBC is that the parties did not manifest their intention for reasons that each side withheld from the other. Sometimes it is because the expectations rest on assumptions, such as that, naturally, The Tonight Show will be aired in the 11:35 p.m. time-slot. However, any such expectation or assumption is not supported by the

history of the show. According to Wikipedia, the Tonight Show, which has run since 1954, started as early as 11:15 p.m., most commonly at 11:30, and since 1991 started at 11:35 p.m. Incidentally, since 1954 the show has ended at 12:30 or 1:00 p.m., and since 1991 the show has ended at 12:37 p.m.

Perhaps the time-slot term was thought of as unimportant because, as long as the show is "The" Tonight Show, the time-slot does not matter. The successful Tonight Show formula has been in place for decades and thousands of shows. But maybe the real reason is that, as the commentary in the Restatement suggests, discussion of the time-slot may have been "unpleasant" or might have produced a "delay or impasse." Recent events certainly suggest that the time-slot would or should have been a subject of concern for both sides.

In other words let's assume that both NBC's attorneys and Conan's attorneys knew full well that the time-slot might be an issue. Perhaps neither side wanted to bring it up. Both parties may have suspected that NBC might later decide to move the time-slot of The Tonight Show. However, let's not forget that the Conan/NBC contract was negotiated 5 years ago. Thus, we cannot imagine NBC may have harbored (or even imagined) concerns that a 10 p.m. Jay Leno Show, (which was not conceived, we assume, until the last year or so), might not be successful and that NBC would want to move Jay Leno into the 11:35 p.m. time-slot for one-half hour and push back Conan and The Tonight Show for half an hour.

Nonetheless, one may assume that Conan's lawyers may have been concerned that at some point NBC would want to push The Tonight Show back past the 11:35 p.m. time-slot to reinsert Mr. Leno's persona into TV programming at 11:35 p.m.

In sum, if either party raised the subject, there might have been, as the Restatement of Contract suggests, a discussion that might have been "unpleasant or might produce delay or impasse." Thus, both parties may have avoided the subject simply because they did not want to have an unpleasant discussion or have a delay or impasse in the negotiations.

Unless someone with full knowledge comes forward, and that is unlikely, we may never know whether this omission of the time-slot was intentional, inadvertent, careless, or simply "the elephant in the room" that no one wanted to discuss.