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## 6 Tips For Drafting Autonomous Vehicle Contracts

By **Jim Jordan** (August 15, 2018, 1:39 PM EDT)

During the past year, I have been tossed headfirst into the murky water of autonomous vehicle contract drafting. It is a world in which no well-tested forms exist, and negotiating parties often do not even know what terms they should request.

So far I have drafted master supply agreements with autonomous vehicle manufacturers, first-mile/last-mile autonomous shuttle pilot contracts with municipalities and transit authorities, and a ride-sharing pilot agreement that may lead to a private autonomous ride-sharing network. Not surprisingly, I have encountered a remarkable level of negotiating and drafting uncertainty among all contract parties. In this article, I will pass on some lessons I have learned so far.



Jim Jordan

### **Uncertainty Is Everywhere and Things Are Moving Fast — So Keep It Simple**

No one has a good understanding of how all the pieces of the urban transportation puzzle will fit together when autonomous vehicles arrive in force. The technology has advanced more rapidly than most expected.

For example, Waymo LLC (owned by Google Inc.) reportedly expects to introduce a commercial autonomous taxi service in at least one market later this year, and expects to provide up to a million autonomous trips per day by 2020. General Motors reportedly plans to begin a commercial service in 2019.

Municipalities and transit authorities do not want to be left behind, and much of the industry action right now is in pilot and test projects for municipal transit systems. Requests for proposals for these pilot projects are everywhere. Local authorities issuing the RFPs demonstrate, understandably, a wide variance of sophistication in their grasp of autonomous vehicle operational and legal issues.

For companies that want to be players in various parts of the autonomous vehicle market, experience is everything. Transportation service providers and autonomous shuttle manufacturers are rushing to build résumés by winning and participating in pilot projects. They do not want to scare their way out of these projects by foisting 50-page agreements with 30 exhibits and schedules on local government agencies that are already uncertain about the implications of a transformational new industry and the contract issues that might accompany it.

Therefore, when drafting these contracts, simplicity is key. I have focused on stating plainly and concisely the terms most obviously critical to my client, while understanding (with my client) that some issues may have to be left unaddressed for now. To be blunt, the industry, and individual deals within the industry, are moving at high speed, and this is not the time to craft the Moby Dick of contracts.

For hopeful industry participants, getting in the game is the most important thing right now. Those who fail to get in quickly may find themselves so far behind they can never recover. That business reality trumps the drafter's natural desire to create an exquisitely thorough contract.

### **Data Is King — So Learn to Share**

All parties want and need access to the huge amounts of data these vehicles and pilot projects will generate. The manufacturer needs data to continue to feed its vehicle's artificial intelligence function, so the vehicle can learn and improve. The municipality or transit authority needs data to assess performance of the vehicles, efficiency of routes and passenger acceptance of the autonomous vehicle experience. The transportation service company needs data to improve its management and maintenance of the vehicle fleet, and operate the vehicles safely and efficiently.

The question of who owns specific data, however, may not be clear, and it certainly may not be something the parties can agree upon at the time of contracting. For example, I have encountered multiple requests for proposals that anticipate the possibility the transportation service provider may, in a later project phase, be asked to develop or adapt a software application to collect passenger fares. These RFPs do not indicate, though, which party will pay for the app's development or own the app when it is ready to use. That will depend on how each project plays out. We do know that irrespective of who owns the app, both parties will need to access and use the data the app generates.

Therefore, for the drafters on both sides, flexibility and cooperation are critical. With insufficient information to address the ownership issue, the drafters may have no choice but to skip ownership issues entirely and instead focus on the parties' rights to use the data, and the purposes for which they may use it. By focusing on permitted uses and compliance with any applicable privacy laws, rather than ownership, each party can preserve its ownership arguments for a time when more facts are available.

### **Operational Environment Is Critical — So Start There and Make It Clear**

A Level 5 (full automation) vehicle is designed to do something very different from a Level 3 (conditional automation) vehicle. It is essential that all parties have a clear understanding of what the project requires and what the project vehicles are designed to do. A car that can operate on cruise control on an interstate highway without the driver's hands on the wheel is a significantly different thing from a fully autonomous shuttle that does not even have an operator on board.

Every contract should include a clear statement of what the vehicle will be required to do, and under what environmental and road conditions. So far, I have been surprised at the huge variation in the level of understanding that contracting parties have had regarding autonomous vehicles in general, and specifically the legal issues that accompany them.

For example, some manufacturers have been so busy developing the technical capabilities of their vehicles that they have not really thought much about what their vehicle contracts should look like. It has not been unusual for me to run into an "educate me" approach from the other contracting party and its counsel. Starting with a discussion of the expected operating environment creates a quick and easy-to-understand common ground that can trigger the other side's thinking about unique autonomous vehicle legal issues that will naturally evolve from the envisioned project.

### **Insurance Is a Mess — So Cover Your Bases**

Where a vehicle has no human operator, no one — not even the insurance industry itself — yet knows precisely how vehicle liability issues and insurance will work. In my experience, parties typically insist on the same types of mandatory coverage provisions that have long been part of generic project and master supply agreements involving vehicles. Unfortunately, these provisions are not adequate.

For example, can anyone be confident that a traditional automobile insurance policy, which arises from a tort framework designed to assign liability based on a driver's mistake or a vehicle's defect, will cover an accident where there is no human driver and the vehicle performed in precisely the way it was programmed to perform? What party most closely fills the traditional role of the driver? The manufacturer? The project owner? The transportation services company? At this point, no one knows the answers to many of these questions.

Because no area involves greater legal uncertainty, I have found insurance to be one of the most difficult negotiating issues. At a minimum, a nonmanufacturer party should look to the vehicle

manufacturer for product liability and cybersecurity coverages. In the meantime, the party should have a thorough discussion with its own insurer to make certain it obtains whatever backstop coverages are available.

Significant coverage fights will arise from the first wave of autonomous vehicle accidents. That is a certainty. Those fights may take years to resolve. I attempt to arm my client with as many coverage weapons as possible, with respect to both its own insurer and the other contract parties.

### **Software Equals Safety — So Identify Who Is Responsible for What**

When was the last time you purchased a car and insisted that the manufacturer commit in writing that it would promptly install all software and cybersecurity updates as they become available? Never, of course. Yet, without even thinking about it, you expect your mobile phone service provider and phone manufacturer to update your phone's software promptly with all improvements and security patches.

I advise my clients to think of an autonomous vehicle as a mobile phone with four wheels. As with a phone, the vehicle's software runs the show, and it needs to be updated regularly. Since the vehicle can easily weigh two tons and move at more than 60 miles per hour, however, the potential safety consequences of delaying or missing a vehicle software update dwarf those related to a phone.

For example, all parties understand that the consequences would be dire if a terrorist were to hack a vehicle's navigation system and take control. Therefore, it is critical to assign clear responsibility, typically to the vehicle manufacturer, for keeping software updated as bugs are fixed, performance is improved and cybersecurity patches are issued.

### **New Areas of Law Are Not for the Timid — So Get Over It and Start Drafting**

Drafting contracts for a brand new industry is scary. The issues I have discussed in this article are merely a small sample of the novel drafting issues I have encountered. I could easily have tripled the list.

Ironically, despite its newness, what autonomous vehicle contract drafting requires more than anything is old-fashioned, common-sense business lawyering. Like the autonomous vehicles themselves, we lawyers will need to observe and continue to learn as we master the issues that arise from this exciting new industry.

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