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### *Legal Contract Tips-and-Tricks*

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#### **Prevent Legal Leaks From Your Contract, Bring Efficient Contract Drafting Process to Your Lawyer, Clear and Concise Contract Drafting**

#### **Why a Contract?**

Memorializes Arrangements, Relationships, or Transactions with Other Parties. Protects Fee payments. Provides road map for performance. "Insurance Policy" if there is a dispute.

#### **Types of Contracts**

You can write an agreement to provide *anything* you want, as complex or as simple as you want. Complex or novel contracts cost more in legal fees than simpler ones. Some typical types of contracts:

- Contracts with Customers (Products or Services):
  - Who does what, and they pay you, protections if they don't, and
  - Specify terms and conditions of delivery of goods or services.
- Development Contracts, to product or create something
- Contracts with suppliers:
  - For mission critical supply requirements, assures delivery and price of goods, and
  - If quality is not up to par, you can cancel or have other remedies.
- Contracts with Distributors
- Contracts between founding partners of company, documents who owns what and at what percentage, and what votes are required to pass issues, how to dissolve, what happens if one person leaves or competes.
- Employees (when economically feasible for the business)
  - Employment Terms
  - Noncompete, nondisclosure, nonsolicitation
  - Compensation
  - Equity issuance.
- Business Transaction (Buying or Selling Property, or a Business, or part of one)
- Licensing of intellectual property

- Leasing real estate or property
- Agreeing to Do Something
- Agreeing Not to Do Something

### **When To Involve a Contracts Lawyer**

- During or after your preliminary business negotiations, but before going too far down the path of no return, on expending time, money, energy or reputation.
- Before any money is paid or materials ordered or services provided.
- Documenting an oral discussion, and the mechanics of how the deal terms will work, can bring up deal-killing discussion points, which may not come up in the oral discussions.
- The reason a lawyer will not “just look over” a contract, is that the lawyer needs to learn all the facts about the parties and the transaction. Fact collection is necessary, so the lawyer can to set you up with the proper contract, and customize it to your transaction.

### **How to Memorialize Your Agreement Terms With the Other Party**

- A Writing:
  - Written, signed Agreement is best method
    - Don't forget to sign it!
  - An email is a writing, but not really a contract.
  - Email will be missing some contract operational and mechanical terms which will become important if dispute arises.
  - Email works well to serve as an Amendment to a Contract, or alteration or expansion of terms.
  - Email must cover all relevant terms and business terms, so it's not the best for an initial contract.
  - Email is less desirable as a contract, but will suffice in a pinch in litigation or in a dispute where the parties cannot recall what they said. Parties can be bound by what they said in an email.
  - As we lawyers say, “You Only Need a writing if a dispute arises later”.
- Mutual Assent. Both parties must have indicated agreement to the terms.
- Must include the elements of a contract:
  - Capacity
  - Offer, Acceptance, Consideration Exchanged, Legal Purpose, Meeting of Minds (Mutual Assent).
- Write in Plain English (both for formal contract or email), no legalese. See “Style”.
- Sign the Contract, either in paper or electronically.

### **Contract Tips**

- **Read the Contract!**

When an opposing party gives you a contract to negotiate, read the agreement, and understand it, before negotiating it, and again before signing it. Read every word, especially the business sections (more so than the “boilerplate” sections.) Don’t rely on your lawyer to have read the contract instead of you, but realize the lawyer reads in addition to you.

- Read it to identify, or add, business issues known only to you, but maybe not known to your lawyer. When you read it, those issues will come to your mind.
- **Business issues are Key - Contracts = 80% business and 20% legal stuff!**
  - Does the arrangement or transaction correctly articulate the relationship between the two parties? And the transaction as intended?
  - Does the transaction work for the businesses?
  - Industry-specific considerations - Based on your experience in your industry, business issues you experience. Research and read other agreements from your industry if you have been working in the industry. If you don’t have access, we will together come up with models to start.
  - Remove Sections and Attachments covering business issues that don’t apply to your business deal, to shorten the agreement and reduce legal fees
  - Don’t be shy about asking your lawyer to insert provisions that make the contract specific to your industry or to your deal
- **The “Template” Problem - Initial Draft of Contract Does Not Reflect Deal**

A party handing you a contract to sign, may have simply pulled a template off the shelf, or used another deal’s contract, and only has changed the names, dates and pricing, but has not changed anything else. This habit of sending out a “not deal specific” template (that has not been curtailed to the deal), can occur whether it has come from a business person or from their lawyer.

  - Does the contract have any of your and their data filled in? Or is it completely blank?
  - Even if yes, does the contract describe the transaction as intended? Does it describe it as it will actually work? If not, get the attorneys to fix the contract.
  - Do all the terms and provisions apply to your deal, or to some other deal?
  - Remove Sections and Attachments covering business issues and legal issues that don’t apply to your business deal. Make the other side do this, at their cost, not you or your lawyer at your cost. Have them take the first pass at removing inapplicable provisions, then you and your lawyer will need another second pass.
  - No side agreements, written or oral, get all the facts and understandings written in this one agreement.
- **Read the Attachments, Exhibits and Supplements.**

Attachments, Exhibits and Supplements are part of the deal and sometimes they actually articulate the whole deal right there in the attachments. Sometimes they alter or supersede the content of the main contract, crucial to read them and have a full knowledge of them. And ask the opposing party to edit them if they are not reflective of your deal.

➤ **Think Through Your Deal**

- Understand and consider how the mechanics of the arrangement or the transaction will work:
  - Think through your own transactions, processes, money flow, and permutations of any of them.
  - Think through the whole process or transaction of THIS transaction, from beginning to end, how the services or product will flow and how the money flow, and especially how the money will be calculated. Consider what each person is required to deliver and how delivery will work, and what other obligations are triggered as a result.
  - Think through what can go wrong, tell your lawyer what can go wrong, what would keep you awake at night, so that the lawyer can make additions to address.

➤ **Compliance with Terms**

- Can you comply with its terms and requirements ...? All of them?

➤ **Lawyer's Input.**

- Have a lawyer read, comment, edit, explain, and discuss your business and related business issues, before signing. Allow enough time to do this, it's not a 30 minute process.

➤ **No Side letters, No Oral Term Changes!** All arrangements should be in this agreement. If any side agreements, put them in writing.

➤ **Capacity to Contract and Corporate Authorization of this Contract.** A

corporation or LLC's corporate foundation documents must include operational and corporate authority to do the transaction, to sign the docs, and giving permission of the signer to sign.

- Corp docs must give you the corporate capacity to contract and sign, with your corporation standing behind your contract.
- If not, you personally may be liable for performance and value of contract.
- If a non-lawyer, or non-corporate lawyer, has formed your corp or LLC, it is very likely that the corporate contracting authority is not in place if the corporate docs have not been done correctly. Might need to put operating provisions into place.

- Does the other Party have the “capacity and authority to contract”? If not, then even though you negotiate and sign, there will be no contract.
- Corporate Resolutions or LLC Agreement must authorize the signing of this specific Contract, or instead generally its type of terms; signing by Officer, Director, or Member of both Parties.
  
- **Representations and Warranties**
  - Be sure you can carry out each “Rep and Warranty” in the agreement that you agree to do
  - Be sure all facts you have stated are true.
    - That you have insurance if required,
    - Can meet deadlines,
    - Reps are all true.
  
- Obtain your own Insurance to cover indemnification
  
- Negotiate terms with the other party, but please don’t negotiate terms in final before seeing lawyer and accountant, including:
  - Selling your business,
  - Buying a business,
  - Joint Venture,
  - Supply Contract,
  - Distribution Contract,
  - Services Contract.
  - Products Contract.
  - Employment Contract
  
- **Unintended Deductions of Money** Many contracts provide for deductions from the selling price, or from the profit calculations on which you will be paid. Run the numbers while reading the language to make sure you understand how the money will work and what you will be paid, or what you will be obligated to pay. Not understanding can lead to receiving less money than you thought, or unmet expectations or relationship disruptions.
  
- **Ownership of Intellectual Property (ideas) and work produced under the contract:**
  - Work for Hire and Work Product issues
  - Licensing Issues
  - Co-development issues
  - Confidentiality items
  
- **Noncompete Agreement**
  - Terms and conditions must be custom to this transaction, don’t use a template, customize it to your deal
  - The reason a lawyer shouldn’t or wont “Just use a template, just use boiler plate”,
  - Someone else’s Deal

- Someone else's drafting

## **Due Diligence on Opposing Party**

- Conduct your own Due diligence on the other party to the agreement before you get too far into investing your time into it, before you perform anything on it, and before spending money on legal fees:
  - Due Diligence in any scenario, whether they will be your partners, suppliers, customer and clients.
  - Can they do what they propose to do?
  - Are they legally able to sign and contract?
  - If they have sued, or been sued, frequently, run, don't walk away.  
Reputation: You are judged by the company you keep.
- Do they have the insurance required, if insurance is appropriate for service or product they provide to you?

## **Elements of a Contract and Typical Provisions**

- Recitals
  - Name the Parties, state of formation or residence
  - Date of Agreement
  - State the business or industry of each party
  - State other factually relevant data that is already known and agreed to, so that you don't have to agree to existing facts in the agreement.
  - State what they desire to do or the reason for the agreement.
  - Conclude with what we are going to cover in this agreement
- Definitions (Optional, see below)
- Business Provisions
- Industry specific provisions
- Consideration Stated (need not be cash)
- Price, payment, timing of payment, payment conditions, payment deductions.
- Performance:
  - Performance of services, or
  - Delivery of goods, or
  - Mechanics of effecting the transaction
  - Time of performance
- Conditions of Performance/ Closing
- The "What ifs" – If anything goes wrong, think through business issues what could go wrong, and provide for the "What if" in the agreement.
- Representations & Warranties
- Covenants – Future Performance - Agreements to Perform
- Indemnification
- Operational and Interpretive Provisions, Boilerplate

- Signatures – must have signed copy, even if electronic. No contract unless signed, the signatures, or email signatures, or email stating agreement to terms, are the “mutual assent” required.

### **Basics of Services Contact (as Example)**

- Recitation of the parties, and what they do for a living
- Recitation of what they intend to do together
- Who does what work, for whom
- Specification of the Work to be done (include detailed Statement of Work)
- For how much
- Timing of delivery of goods or project
- Conditions to performance or nonperformance if applicable
- How and when do you get paid?
- On what conditions they can hold payment
- What other obligations are triggered by the work or payment, ie. What else do you have to do under this contract? Make a list
- Mechanism for addressing scope and content changes of project
- Who owns IP rights to the work on completion and payment? Is it Work for Hire?
- What happens if you don't get paid ?
- What happens if you don't deliver ?
- Nondisclosure, nonsolicitation, (and Noncompete, if appropriate), one-way, or two-way ? Should be mutual.
- Legal mechanics, interpretation mechanisms, and other boilerplate
- Industry-specific considerations - Based on your experience in your industry, business issues you experience. Grab other agreements from your industry if you have been working in the industry. If you don't have access, no worries, we will together come up with some.
- Many items in an agreement is based on business issues, not legal issues: We say in legal industry “80% business”, 20% legal”.

### **Writing Style of Contracts - for Most Efficiency, and Understanding by the Parties**

1. Remove Sections and Attachments covering business issues that don't apply to your business deal, to shorten the agreement and reduce legal fees
2. Two Schools of Thought on “Definitions Section”:
  - a. Use a Definitions Section. If you do use one, remove definitions that dont apply to this deal, or
  - b. Don't use a Definitions Section, integrate Definitions into the section where first used, defining at “first use”
3. Write it in Plain English!! Clear concise plain, understandable English.
4. Use Active Voice, not Passive Voice, which improves clarity greatly, especially in longer sentences:
  - a. No: “The Agreement was signed by Bob”,

- b. Yes: "Bob Signed the Agreement"
- 5. No legalese (legalese is not necessary.) Change all legalese words to Plain English Words. i.e., Replace, "Provided however", with "If". Replace "Shall" with either "Will" or "May" as the meaning requires". Replace "Notwithstanding" with "regardless of", and many more
- 6. Use Outline formatting for the Contract (MS Word has great "format" buttons, use them!).
  - a. Use section numbers and sub-numbers or letters for breaking up content
  - b. Use section headings describing the content, same for subsections. The headings tell your reader where you are going, and they help readers find topic or content when looking for it later.
- 7. Reduce Cross References, unless necessary.
- 8. Remove Definitions that don't apply
- 9. Remove Redundancies

**Read Every Word!**

Read and understand every word of the written agreement again after all terms are negotiated. Before you sign, know every word