



Whiteford|Taylor|Preston<sup>LLP</sup>

# Beginner's Guide to Contracts

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# Polling Question 1

Contracts make me uncomfortable:

<http://etc.ch/753T>

Results:

[https://directpoll.com/r?XDbzPBd3ix  
Yqg8diFrakzAriMvbOEaMvKf5e4hua9](https://directpoll.com/r?XDbzPBd3ixYqg8diFrakzAriMvbOEaMvKf5e4hua9)

TF

# What is a contract?

In most cases, written or oral expression of a commitment.

➤ MOU

➤ Letter Agreement

➤ Lease

➤ Service Contract

➤ Permission

➤ License

➤ Purchase order

➤ Signed proposal

What makes a contract enforceable  
and why is this important?

- Offer + Acceptance = Contract
- Generally, there must be a “meeting of the minds.”
- An offer by one party to preform the basic components of the contract must be accepted by the other party.
- Courts will generally uphold contracts if the basic elements are present including oral contracts.



➤ ***Example:***

- If you give me \$1.00, I'll give you my pen.

- Promise + Consideration = Contract
- A promise by one party to perform must be supported by consideration from the other party.
- Courts will generally find contracts unenforceable without consideration.

- What is consideration?
  - Something bargained for and received.
  - ***E.g.*** I promise to give you \$1,000 if you complete the Marine Corps Marathon.

➤ ***Hypothetical:***

A loses his job. B promises to A that A can live at B's house until A finds another job. A moves in and a month later, B asks A to move out even though A is still unemployed. A sues B to enforce B's promise.

## Polling Question 2

Can A legally enforce B's promise?

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➤ ***Answer:***

NO. B received no consideration in return for her promise.

## Polling Question 3

Is a contract enforceable without an oral or written agreement?

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***Answer: YES***



## ➤ Implied Contract:

- Courts find that the actions of the parties resulted in a contract.
- Courts will enforce a “contract” even if no intent by the parties to agree because it is the equitable thing to do.

➤ **Recap:**

- Generally contracts that have an offer and acceptance or a promise and consideration.
- Oral agreements can be enforceable as well.
- If the parties actions result in an inequitable situation, courts may enforce an implied contract.

## Elements of Contracts

- Next: Important contract elements to consider (*E.g.* Sponsorship Agreement)

## Polling Question 4

Do all contracts need the same elements?

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- Identification of parties
  - Breach
  - Obligations
  - Termination
  - Warranties
  - Indemnification
  - Representations
  - Data Security
  - Intellectual Property
  - “Four Corners”
- ***TIP: Use checklists when you are reviewing contracts to make sure that essential terms are not omitted.***

# Parties

This Agreement (hereinafter the “Agreement”) is made and entered on February \_\_, 2018 (the “Effective Date”) by and between ABC (“Client”), organized and existing under the laws of Delaware and with a principal address of \_\_\_\_\_ and XYZ (“Sponsor”), organized and existing under the laws of Maryland with a principal place of business at \_\_\_\_\_.

## Obligations

Sponsor agrees to be a sponsor for the Initiative. Sponsor will provide Organization \$20,000USD (hereinafter the “Funding”) in support of the Initiative. Sponsor shall pay the Funding at a time to be mutually determined by the parties.

## Warranties

The parties warrant that each shall comply with all applicable laws, rules and regulations and that each is duly authorized to enter into this Agreement.



# Representations

Each party represents that it is an independent contractor. Nothing herein shall create any association, joint venture, partnership, or agency relationship of any kind between the parties. Neither party is authorized to incur any liability, obligation or expense on behalf of the other, or to use the other's monetary credit in conducting any activities under this Agreement.

# Intellectual Property

Client owns all right, title and interest in and to any Intellectual Property developed under the Initiative and nothing in this Agreement provides Sponsor with any right, title or interest in any Intellectual Property developed under the Initiative.

## Termination

Either party may terminate this Agreement without cause by providing sixty (60) days' written notice to the other party.

## Indemnification

Each party shall indemnify, defend, and hold harmless the other party and its employees, contractors, agents, officers, and directors from and against any loss, liability, damage, cost, fine, penalty, or expense, including reasonable attorneys' fees, arising out of an audit, investigation, administrative proceeding, or litigation predicated upon the indemnifying party's acts, omissions or breach of this Agreement.

# Data Security

If Provider stores Client's Member's PII, Provider agrees to have in place a comprehensive written information security program ("WISP") that is appropriate to the size, scope and type of its business that protects PII. Among other things, the WISP must identify risks to personal information and evaluate safeguards, appoint a Provider employee to maintain the program, develop written security policies for electronic and physical files, and regularly monitor the program.

## Four Corners

This Agreement constitutes the entire agreement between the parties, supersedes and replaces all prior agreements, oral and written, between the parties relating to the subject matter within, and may be amended only by a written instrument clearly setting forth the amendment(s) and executed by both parties.

## Polling Question 5

Boilerplate language makes a contract better:

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➤ Boilerplate Language:

- Beware of “standard” or “form” language.



# Identifying and Changing “Boilerplate” Contracts

- Form contracts are usually written to protect the party that drafts them:
  - Rarely fair to both parties
  - Often use “legalese”
  - Difficult to understand
  - Not looking out for your organization
- ***TIP # 1: Never skip over the boilerplate in a contract because you think you can’t change it.***
- ***TIP # 2: Look for “plain English” contracts.***

# Identifying and Changing “Boilerplate” Contracts

- Boilerplate lovers:
  - Contractors
  - Landlords
  - Office equipment suppliers
  - Service Providers
  - Consultants

## Identifying and Changing “Boilerplate” Contracts

- Don't be intimidated by a preprinted contract form.
- Remember, everything is negotiable:
  - If it's not negotiable with this party, then look for someone else.

# Renewals and Extensions

- Beware of the automatic renewal provision
  - Usually only benefits the party being paid
  - Often requires lots of notice to cancel

## Renewals and Extensions

- ***TIP: When presented with a contract that contains an automatic renewal provision, STOP and ask yourself if the auto renewal helps or hurts your organization.***

## Limits of Liability

- Beware of the limitation of liability provision.
  - Usually limits all liability to the cost of the contract which typically benefits one party significantly greater than the other party.
- ***TIP: Either strike it from the contract or negotiate a higher limit of liability.***

## Excessive Fees

- Beware of excessive late fees or termination penalties/liquidated damages.
- Some contractors expect to receive full payment no matter the circumstance.
- ***TIP: Make sure you have ways to get out of the contract for reasonable motives.***

## Exclusive Jurisdiction

- Beware of exclusive jurisdiction provisions.
  - These provisions obligate the parties to bring any court claims in one specific jurisdiction that is usually more convenient to one party.
- ***TIP: Take these out unless the jurisdiction is favorable for you.***



➤ How can you avoid “standard” or “form” language?

Develop a standard template for an independent contractor agreement.

➤ ***Use it:***

- When an independent contractor doesn't have a contract
- When a contract is very bare bones
- To provide model language when you don't like the "boilerplate" language
- To serve as a quasi-checklist for important provisions

***TIP: Have your template drafted or reviewed by an attorney and check with the attorney before you make any changes to it.***

***It will usually cost you more to fix a problem than to prevent a problem.***

# Other common contract terms you should understand

# Force Majeure Clauses

- Force majeure events are out of the control of either party.
  - “acts of God” – severe weather such as floods, hurricanes, tornados or earthquakes
  - Also wars, insurrections, strikes, utility failures, terrorist attacks, transportation shutdown
  - Excuse the party from performing their part of the contract.

# Force Majeure Clauses

- But what if the other party has already performed?
- If there is a force majeure event, both parties should be excused from performance and restored to original positions.
- Insurance coverage for force majeure events:
  - Event cancellation
  - Business interruption

# Confidentiality

- If there is any exchange of confidential information between the parties, both parties should be required to prevent the information from disclosure to third parties and to protect it with a reasonable degree of care.

## Polling Question 6

Confidentiality obligations end when the contract terminates or expires:

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## Dispute Resolution

Beware of mandatory arbitration or mediation provisions. While alternative dispute resolution can be a good option, it can be as costly as litigation and may preclude you from bringing any other court claims.

## ➤ **Best Practices:**

- Use the right contract
- Read and understand all contracts
- Use an expert (particularly nonprofit)
- Use a checklist
- Have a standard review process/protocols
- Remove/Negotiate Bad Terms

## Use The Right Contract

- Basic components are the same but different contracts are used for different reasons.
- Examples of additional terms in contracts for special circumstances:
  - Attrition – hotel contracts
  - Copyright assignment – research contracts

## Use The Right Contract

***TIP: Don't just download a form contract from the internet without knowing what you're doing – always use the right contract for the job.***

# Use An Expert

- Bad contracts can lead to:
  - Significant financial losses
  - Inadvertent liability to other party and others
  - Lengthy resolution processes in case a case of breach

# Use An Expert

- Continued:
  - Lack of remedies/termination options in case the other party is poorly performing
  - Hidden obligations and/or penalties
  - Loss of intellectual property or other rights

## Have a Contract Review Process

- Implement a contract review and approval process:
  - Articles or bylaws might specify contract authorization.
  - Board resolution authorizing staff to sign contracts.
- Know who is authorized to sign contracts:
  - Authorizations should be by title and not named individuals.

## Have a Contract Review Process

- Are there any restrictions on that authorization?
  - Multiple signatures required
  - Budget limitations



## Contracts Routing Protocols

- Have all contracts negotiated, reviewed and signed by one person

*Or*

- Set up a system to make sure everyone who needs to see the contract gets that chance before it's signed.

# Contracts Routing Protocols

- Process can be high tech or low tech:
  - Contract routing sheet
  - Electronic tracking log
  - Contract management software

# Conclusion

## ➤ *Remember:*

- All contracts are negotiable
- Use the right contract for the job
- Consult an expert
- Don't sign anything you don't understand
- Keep track of all contractual obligations

## Polling Question 7

Contracts make me uncomfortable:

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