

Contract Negotiations 101

March 11, 2015

by the
Office of Legal Affairs 

Contract Negotiations

- No particular personality required
- No particular degrees or titles
- But effective negotiations *do* require:
 - Knowing your market
 - Knowing your leverage
 - Knowing your risk
 - Understanding basic principles, terms and pitfalls
 - Diligence

What This Training Will Cover

- Who plays what role
- Contracts in general, basic principles
- Basic contract anatomy and terms
- Terms to avoid
- Useful tools
- Legal review
- Common questions
- Checklist

Roles in Contracting

Legal Affairs' Role, Your Role

- Legal is willing to help with any contract, but keep in mind:
 - Legal should be contacted with **plenty of advance notice**, ahead of due date; we ask for at least 2 weeks
 - Legal does not make the *business* decisions (\$, length of time, etc.)

Legal Affairs' Role

- Legal Affairs *should* review certain types of contracts (discussed later, pp. 69-71)
- Legal Affairs also can help by:
 - Providing a template for certain common transactions
 - Drafting contracts from scratch (when a draft is not provided by other side)
 - Review; suggest revisions
 - Help assess University's broader interests

Your Role

- Legal looks to the unit for:
 - Did the person/unit sponsoring the contract read and understand the contract?
 - Does it capture the deal?
 - Does it make sense?
 - Is it a fair deal for the University based on industry standards, available resources, etc.?
 - Handling the negotiations (if it's a business person on the other side)
 - Managing the contract once in place

Basic Principles

Contracts Come in All Shapes & Sizes

- Formal documents with whereas clauses, witnesses, etc.
- Memoranda of Understanding
- Letter agreements
- Clickwrap / clickthrough agreements
- Verbal contracts (beware of creating!)
- Anything with consideration & a mutual understanding

Consideration

- Something of value given by both parties to a contract that induces them to enter into the agreement to exchange mutual performances
- Examples include:
 - Exchange of money
 - An obligation
 - Promise to do something
 - Promise *not* to do something
- If there's consideration and mutual agreement, then yes – handwriting on a napkin would suffice

Basic principles

- A contract should address all parts of the deal
- From the University's perspective, a contract should be fair, reasonable and doable
- The language should be clear in meaning
- Terminology should be used consistently
- An objective 3rd-party should understand it

Basic principles, cont'd

- Avoid non-essential language, as that can have inadvertent consequences
- For example, avoid marketing hype in the body of the contract, such as:

*Rudy Flyer Dish Wash-n-Dry (“Rudy Flyer”) has been providing dishwashing services to large universities since 1952. Rudy Flyer places a high priority on technology, allowing it to surpass its competition. Further, Rudy Flyer has been recognized by the industry as a leader of tomorrow.**

* However, such hype *could* be included in the recitals (addressed in more detail later)

Basic principles, cont'd

- Avoid:
 - Imprecise or vague words
 - Flowery language
 - Here-and-there words & other legalese (such as “said;” just say “this” or “that)

Basic principles, cont'd

- Exceptions:
 - Legalese words that play a unique part in the contract world, *e.g.*, whereas and witnesseth
 - Certain vague words are okay – such as reasonable, undue delay, material, substantially and properly, good faith – so long as you know what they mean in your context

An important basic principle:

***Read
the
contract***

Anatomy and Terms

Anatomy of a Contract

1.	Title	→ Note: Substance trumps form
2.	Preamble	} Some people refer to both of these sections as the preamble
3.	Recitals	
4.	Definitions (optional)	
5.	Body	
6.	Boilerplate / General Provisions	
7.	Signature Block	
8.	Exhibits/Attachments (optional)	

2. Preamble

- An introductory sentence or two at the beginning of the agreement, identifying the agreement, the full names of the parties and typically including the effective date

Preamble – poor example:

The intent of this contract (the “Agreement”) is to provide dish-cleaning services to Kennedy Union to be performed by Rudy Flyer commencing with the Fall Semester 2015.

Preamble – good example:

This Dishwashing Services Agreement (the “Agreement”) is entered into by and between the University of Dayton, a non-profit Ohio corporation located at 300 College Park Ave., Dayton, Ohio 45469 (the “University”), and Rudy Flyer Dish-n-Dry, LLC, an Ohio limited liability company with its principal place of business at 123 Buckeye Way, Columbus, Ohio 43206 (“Rudy Flyer”), and is effective as of this 11th day of March, 2015 (the “Effective Date”).

More on the effective date

- The effective date can occur well *before* the services are actually performed
 - For example, the parties could contract *today* for services that will not begin until 2016
- In rarer cases, the parties could agree to an effective date *earlier* in time
 - For example, the parties could contract *today* for services that began earlier, to formalize a verbal understanding, to make clear who bears liability, etc.
- If signature block is dated, then signatures should be dated with date of signature

3. Recitals

- Recitals are used to explain those matters of fact which are necessary to make the transaction intelligible; that is, they set the stage
- They often begin with “whereas” (“given the fact that”)
- Typically they do not contain rights and obligations (*but they can*)
- Statement about consideration is often included at end

Recitals – a good example:

WHEREAS the University desires to secure back-up dishwashing services for its dining facilities during periods of peak use;

WHEREAS Rudy Flyer has experience providing dishwashing services to large universities in the western United States; and

WHEREAS Rudy Flyer has recently expanded its operations to include southwest Ohio;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

5. Body of the Contract

- The body of the contract is where “the deal” is. This is the heart of the contract.
- Items addressed should include:
 - The term (time period) of the agreement
 - Any renewals or extensions of the agreement
 - Obligations of the parties
 - Deliverables
 - Payment
 - Rights of the parties

- Termination rights
- Default provisions
 - Typically if a party is in default, that party is given an opportunity to “cure” (fix) the problem
- Unique provisions that may be related to the deal
 - Confidential provisions
 - Intellectual property rights
 - UD’s regulatory compliance obligations
 - Activities that could impact our mission

- Don't forget the "read the contract" rule: Does it make sense? Is it reasonable?

Death of Sole Resident. If you are the sole resident, upon your death you may terminate the Lease Contract without penalty with **at least 30 days written notice.** You will be liable for payment of rent until the latter of: (1) the termination date, or (2) until all possessions in the apartment are removed. You will be liable for all rent, charges, and damages to the apartment until it is vacated, and any removal and storage costs.

Confidential information means all information or material which is provided by the Disclosing party, including, without limitation, business plans, financial information and projections, data, research, patents, **trademarks**, copyrights, trade secrets, know-how,

6. General Provisions

~~Boilerplate~~ General Provisions modified to fit specific deal

- The terms at the end of a contract are not *boilerplate*, but rather general provisions every contract should have
- They should be tailored for the particular contract

- Liability
- Indemnification
- Assignment
- Insurance
- Dispute Resolution
- Governing Law
- Forum Selection
- Severability
- Headings
- Notices
- Integration / Entire Agreement
- Amendments
- Authorization
- Counterparts

Liability

- The state of being legally responsible for something
- The University wants the other party to be responsible for the actions it takes or does not take (its failings) related to the agreement

Liability – a bad example:

“In no event shall Rudy Flyer be liable for direct or indirect damages, special damages, consequential damages, loss of business or loss of opportunity with respect to its services under this Agreement.”

- Making it even-handed – that is, making it so that neither party is liable for such damages – would not fix the issue. The issue is that direct damages should not be excluded, period.

Liability – another bad example:

“With respect to the Services, in no event shall the liability of Rudy Flyer for any claim, including but not limited to Rudy Flyer's own negligence, exceed the fees it receives for the portion of the work giving rise to such liability. The University further agrees that Rudy Flyer shall not under any circumstances be liable for any special, consequential, incidental or exemplary damages or loss (nor any lost profits, taxes, interest, tax penalties, savings or business opportunity).”

Bad example made fair:

In no event shall the liability of Rudy Flyer for any claim include special, consequential, incidental or exemplary damages or loss; **provided, however, that such limitation shall not apply in instances of Rudy Flyer's gross negligence or willful misconduct. The University shall not under any circumstances be liable for any special, consequential, incidental or exemplary damages or loss, provided, however, that such limitation shall not apply in instances of the University's gross negligence or willful misconduct.**

*Added
to
protect
UD*

Indemnify

- To secure someone against legal responsibility for his or her actions
- Different from “hold harmless” (but often grouped with)
 - Indemnity deals with reimbursing someone for expenses associated with a 3rd-party going after them
 - “Hold harmless” is about a party promising not to seek reimbursement from the other party
- Like liability, the University wants these provisions to be fair and balanced

Indemnification – a bad example:

“The University shall indemnify and hold Agent harmless from and against all loss, damage, suits, liabilities, costs, expenses, and attorney's fees of every kind, nature, and description arising out of or in any way connected with this Agreement and any obligations under this Agreement, whether resulting from damage to property, injury or death to persons, defamation, discrimination, false arrest, or otherwise, unless due to Agent's gross negligence or willful misconduct.”

Bad example made fair (redlined):

“Each Party (the “Indemnifying Party”)~~The University~~ shall indemnify and hold the other Party (the “Indemnified Party”) ~~Agent~~ harmless from and against all loss, damage, suits, liabilities, costs, expenses, and attorney's fees of every kind, nature, and description arising out of or in any way connected with the Indemnifying Party’s~~this Agreement and any obligations under this Agreement, whether resulting from damage to property, injury or death to persons, defamation, discrimination, false arrest, or otherwise, unless due to Agent's gross negligence or willful misconduct.”~~

Bad example made fair (clean):

Each Party (the “Indemnifying Party”) shall indemnify and hold the other Party (the “Indemnified Party”) harmless from and against all loss, damage, suits, liabilities, costs, expenses, and attorney's fees of every kind, nature, and description arising out of or in any way connected with the Indemnifying Party’s obligations under this Agreement.

Assignment

- A typical provision:
“Neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned by any Party without the prior written consent of the other Party.”
- Often added to the above is:
“which consent shall not be unreasonably withheld.”

Assignment cont'd

- You might want to allow for assignments within the corporate family, or to an acquirer. If so, consider adding:

“provided, however, that a Party may (i) assign this Agreement to any entity that acquires all or substantially all of such Party's assets or its business that is the subject of this Agreement, or (ii) upon written notice to the other Party, assign this Agreement to any entity that is owned by such Party or such Party's parent.”

Insurance

- Depending on the type of contract – particularly for physical work/presence/access – insurance may be necessary, with proof provided by a certificate of insurance
- The University should be named as an “additional insured” on the other party’s policy
- The University requests \$1,000,000 per occurrence, and generally \$2,000,000 aggregate coverage
- Contact EHS/RM for more details

Dispute Resolution

- Some agreements might require that disputes be settled by means other than the courts
 - Mediation
 - Arbitration (could be binding or not)
- Whether these types of dispute resolution make sense depends on the contract; Legal Affairs can assist in assessing what approach to take
 - Arbitration might make sense for highly sensitive or highly technical matters
 - Mediation could be good step...or very time-consuming
 - Access to the courts might need to be carved out for certain relief

Governing Law

- We recommend **Ohio**
- There are consequences (beyond travel) with others states' laws
- International law should not be chosen
- Sample language:
 - “This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of Ohio, without regard to its conflict of laws rules.”

Forum Selection

- Forum selection (may not be applicable if contract requires binding arbitration):

“Any dispute arising from this Agreement shall be decided solely and exclusively by State or Federal courts located in Dayton, Ohio.”

- To make it even stronger, consider adding:

“Any party who unsuccessfully challenges the enforceability of this forum selection clause shall reimburse the prevailing party for its attorney’s fees, and the party prevailing in any such dispute shall be awarded its attorney’s fees.”

Severability

- If one provision is bad, it does not taint the whole deal
- Good language:
“If any provision of this Agreement is held illegal or unenforceable in a judicial proceeding, such provision shall be severed and shall be inoperative, and the remainder of this Agreement shall remain operative and binding on the Parties.”

Severability cont'd

- If there is concern that the key provision of the deal could be severed – with the parties stuck with an unwelcome contract – then add:
“provided that the fundamental terms and conditions of this Agreement (including, without limitation, the obligation to provide dishwashing services) remain legal and enforceable.”

Headings

- Often there is a provision that says something like:
 - “Headings. Descriptive headings are for convenience only and shall not control or affect the meaning or construction of any provision of this Agreement.”
- This helps underscore the basic principle that substance trumps form; terms control over title.

Notices

- The notices section:
 - Should identify the contact people for the contract
 - Should say *how* notices required by the contract – for example, notices to terminate or renew – are to be delivered (and when they're considered delivered)
 - May provide a means of updating the contact information

Integration / Entire Agreement / Merger

- To make clear that the written contract covers everything; any prior discussions or understandings not in the contract do not matter
- Good language:
 - “This Agreement supersedes all prior agreements between the parties with respect to its subject matter and constitutes a complete and exclusive statement of the terms of the agreement between the parties with respect to its subject matter.”

Amendments

- Standard language:
“This Agreement may be amended only by a written document signed by the Parties.”
- Would an email amendment ever be desired? If so, consider making the above language less specific:
“This Agreement may be amended by mutual written agreement of the Parties.”

Authorization

- Could be simply:

“The parties state that the signatories executing this Agreement have the authority to bind each party as set forth in this Agreement.”
- Or could be a little more spelled out:

“Rudy Flyer has the authority to enter into this Agreement. The execution, delivery and performance of this agreement has been duly and validly authorized.”

Counterparts

- Since parties are rarely in the same location to sign at the same time
- Sample language:
 - “This Agreement may be executed in counterparts and such counterpart signatures, taken together and whether provided as an original, by facsimile or .pdf, shall constitute one (1) fully executed agreement.”
- If sending original, send two (so each party ends up with full original)

7. Signature Block

Signature Block

- Usually begins with language such as,
“The Parties agree to the terms and conditions of this Agreement as set forth above.”
- Then each Party should have space to sign, with each signatory’s name spelled out and title identified:

The University of Dayton

Daniel J. Curran

Its President

Rudy Flyer Dish Wash-n-Dry LLC

Don Donoher

Its Chief Executive Officer

8. Exhibits

Exhibits (if any)

- If the contract has exhibits, make sure there is clear language in the contract itself that makes them part of the agreement
- One place to do this is in the “entire agreement” clause, such as:

“This Agreement (including any exhibits and schedules hereto) constitutes the entire agreement among the parties regarding the subject matter of this Agreement.”

Terms to Avoid

Terms to Avoid*

- Evergreen clauses
 - Automatic renewals for the length of the agreement (absent a contrary notice by either party)
- Unilateral renewals
- Right-of-first-refusal or right-to-match clauses
 - The right of a person or organization to take advantage of a transaction before it is open to other parties, *or* to match the offer of another party (and force the contract)

* These are terms to avoid *generally*; note that, on occasion, there may be a business reason to allow for some of these terms

Terms to Avoid, cont'd

- One-sided or very uneven indemnification provisions
- One-sided or very uneven liability provisions
- Exclusivity
- Unlimited assignment rights
- Transfer of intellectual property
- Governing law/venue other than Ohio
- Terms the other party can unilaterally change without notice (such as terms on website)

Useful Tools

Technological Tools

- Automatic numbering in Word
- Page numbers
- Tracked changes can be useful
- Beware: If you're revising the draft several times, you may wish to send draft back as a .pdf rather than a native Word document (otherwise metadata will show up)
- When the contract is ready to be signed, send a .pdf that's "not editable"

Practical Tools

- Stay organized! Know which draft is current
- Clearly mark drafts as drafts
 - Consider using Word's watermark feature
- Date the drafts
- Mark the final version as “Execution” version
- Use staples, paperclips
- Avoid sending just the signature page

Contractual Tools

- Initialing small changes if modifying the electronic document is cumbersome
 - Not ideal
 - If the signatory is someone other than the initialer, then add a sentence at signature line along lines of, “I agree to all changes approved and initialed by XYZ.”

Contractual Tools, cont'd

- Rider
 - Definition: A condition or proviso added to something already said or decreed
 - Not ideal
 - Better to have the actual body of the agreement say what it needs to
 - But common for certain types of agreements
 - Be sure to include introductory “trump card” language

Example rider intro:

“This Rider to the **[insert name of Agreement]** (Agreement) effective March 11, 2015, is attached to and made part of the Agreement. All capitalized terms used in this Rider shall have the definitions as set forth in the Agreement. The provisions of this Rider shall replace and supersede any conflicting provision contained in the Agreement, but only to the extent of such inconsistency.”

Legal (and Other) Review

What Contracts *Should* Be Reviewed by Legal?

- Joint Ventures/Partnerships
- Contracts involving the development, licensing or transfer of intellectual property
- Contracts with governmental entities
- Contracts with non-U.S. entities or persons
- Exclusive arrangements
- The lease, sale or transfer of real estate

Legal Review Cont'd

- Long-term contracts
- Contracts involving significant commitments by the University or significant risk
- Contracts that may be inconsistent with the University's character and purpose as a Catholic-sponsored institution, or that may be at odds with University policy

Legal Review Cont'd

- The length, complexity or dollar value of a contract is not alone determinative as to whether it requires legal review
- If in doubt, consult Legal Affairs

It's Not Just Legal....

- Other units you may need to consult with:
 - Purchasing
 - UDiT
 - Facilities
 - EHS / RM
 - Human Resources

Common Questions

Common Questions

- Who can sign?
 - Consult the University’s “Policy on Authority to Formulate and Sign Contracts”
 - Individuals who have signature authority:
 - President
 - Generally VPs and Deans
 - Some direct reports of VPs and Deans
 - Some departments – because of their function – have more people with signature authority (e.g., Purchasing, UDiT, UDRI)
- Legal Affairs can point you to the right person

Up to certain
\$ amounts

Common Questions, cont'd

- Why are some terms Capitalized?
 - Because they are defined terms by the contract
- Why are some whole provisions CAPITALIZED?
 - “Conspicuousness” required for certain terms (limitations of liability, indemnification) in certain types of contracts (U.C.C.)
 - Some states might require certain other provisions to be conspicuous (*e.g.*, Illinois and automatic renewals for consumer products)

Common Questions, cont'd

- When is a notary needed?
 - Generally, for some real estate matters (particularly when interest in the land is created), estate-related matters & patent assignments

Common Questions, cont'd

- Who tracks obligations and dates under the contract?
 - The unit entering the contract
- Who keeps a copy of the final signed contract?
 - The unit should, but they should also send a copy to Legal Affairs

Checklist

Checklist

- Were you provided a draft by the other party? If so, have you read the contract?
 - Does it reflect “the deal” fully and accurately?
 - Is it balanced and fair?
 - Is it a good business decision for the University?
 - Does it contain the recommended contract terms?
 - What about undesirable terms?
- Have you consulted with Legal Affairs? (Not necessary for all contracts, but they’re always willing to help.)

Checklist cont'd

- Depending on the contract – have you consulted with Purchasing, Udit (software), Facilities Management (construction), EHS/RM (insurance), or HR (employees, non-employees with access)?
- Do you know who's going to sign the contract? Has that person been fully briefed?
- Once the contract is fully executed, send copy to Legal Affairs at legalaffairs@udayton.edu or CAMPUS MAIL +1660.
- Manage the obligations under the contract.

Questions?

Resources & Contact Information

“Contract Guidance & Review” information available online:

<http://www.udayton.edu/legalaffairs/contract-guidance-and-review/index.php>

Contact us:

- Mary Ann Poirier, x9-4333, mpoirier1@udayton.edu
- Lisa Sandner, x9-4333, lsandner1@udayton.edu
- Matt Willenbrink, x9-3469, mathew.willenbrink@udri.udayton.edu
- General email: legalaffairs@udayton.edu

