

Contracting 101

United Educators Roundtable

Thursday, April 29, 2010

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Speaker Biographies

Dana Scaduto has served as general counsel at Dickinson College in Carlisle, Pennsylvania, since 2002. Prior to joining Dickinson, she was in private practice with a firm in Harrisburg for 18 years, chaired its Education Practice Group, and served as outside counsel for several colleges in Central Pennsylvania. Scaduto is a member of the board of directors of the National Association of College and University Attorneys (NACUA), chairs its Membership and Member Services Committee, and is a frequent presenter at the organization's conferences and workshops. A graduate of Purdue University and the Indiana University School of Law, she is admitted to practice in Pennsylvania and is a member of the American, Pennsylvania, and Cumberland County Bar Associations.

Deborah C. Brown is the associate vice president for legal affairs and human resources at Stetson University College of Law, where she performs general legal work, including contract review. Before joining Stetson in 2005, Brown was the director of employee relations for the Walt Disney World Co. and, prior to that, counsel at the firm of Thompson, Sizemore & Gonzalez. Currently, she is chair of the editorial board for NACUA Notes a publication of the National Association of College and University Attorneys, and is a member of the United Educators Legal Advisory Committee. She has also served as vice chair of the NACUA Publications Committee (2007–2008), and on the NACUA Web Page and Legal Resources Committee (2008–2009). From 2004 through 2008, she was selected as one of Florida's Legal Elite by Florida Trend magazine, and Florida Super Lawyers magazine named her one of Florida's top attorneys in 2008–2009. Brown earned her bachelor's degree at Florida State University and her JD from Stetson College of Law. In 2003, she received the Outstanding Alumni Award from the Stetson University College of Law.

Alyssa Keehan (moderator) is risk management counsel at United Educators, where she advises educational institutions on premises liability issues involving contracts, security, and athletics. Keehan previously worked as a general liability claims attorney at United Educators, handling hundreds of claims against colleges and universities. Her experience also includes serving as the manager of business and legal issues for the National Association of Professional Insurance Agents. She also worked in legal positions at the Chicago Board of Education and the Office for Civil Rights, U.S. Department of Education. Keehan earned her BA in politics from Princeton University and JD from Loyola University of Chicago.

Roundtable Agenda

Why Written Contracts Are Important

- Understanding how contracts are created
- Promoting clarity between the institution and its contracting partners

How to Review Contracts for Common Terms and Conditions

- Identifying who should review contracts on campus

Reviewing a mock contract for potential issues

- Party names
- Date and term
- Payment terms
- Performance
- Modifications
- Indemnification and insurance
- Governing law
- Signature authority

Resources

Contracting Overview

- **Yale University**

Guide to Reviewing Business Agreements and Contracts at Yale and Other Reference Information

www.yale.edu/ppdev/GuideBusinessAgreementContracts.pdf

This guide, the result of a collaboration among Yale's offices of general counsel, procurement, controller, facilities, and grant and contract administration, is a primer on contracts, business agreements, and other official documents at the university. For each type of contract, the guide provides a definition followed by a list of questions administrators should consider when reviewing the particular type of agreement. The last quarter of the guide explains contract basics.

- **Princeton University**

Contracts FAQ

www.princeton.edu/contracting/contract-faqs/

These frequently asked questions (FAQs) address contracting basics and critical aspects of the institution's contracting policy, such as who has signature authority and whether form agreements are acceptable. The FAQ format presents contract information in a practical and concise manner.

- **Lehigh University**

Contract Basics Presentation

www.lehigh.edu/~inogc/documents/contract_basics_feb-2005_Num_1.pdf

This PowerPoint slide presentation was developed by Lehigh's general counsel's office to educate the institution's employees about contract fundamentals. The slides cover many important concepts including how contracts are created, the laws that govern contracts and terms that should be included in university contracts.

Policies

- **Catholic University of America**

Contract Policy

<http://policies.cua.edu/finance/finance/Contracts/Contract.cfm>

This is an example of a concise contract policy. It contains links to several helpful contract tools, such as an independent contractor review checklist, a memo on contract review, a business contract routing form, and a memo on the institution's contract review process.

- **Northeastern University**

Contract Review Policy

www.northeastern.edu/legal/pdfs/Contract_Review_Poli.pdf

This policy addresses the review process for the university's contracts and includes issues such as signature authority, legal review, and indemnification and insurance requirements.

- **Swarthmore College**

Contract Guidelines Statement

http://www.swarthmore.edu/Documents/administration/business_office/Swarthmore%20College%20Contract%20Guidelines%20-%20February%202010.pdf

This statement specifies the review, approval, and signature process for institution contracts. Other noteworthy features include a contract review checklist, definitions of common contracting terms, and mandatory clauses to include in all institution contracts and to exclude from all institution contracts.

Mock Contract

INFLATE-IT-ALL, INC.
10 PLASTIC 'N' AIR PLAZA,
PROVIDENCE, RI 02901

Standard Large Inflatable Fun Lab Contract

THIS AGREEMENT is by and between **Inflate-It-All, Inc.** (“**IIA**”), a Rhode Island corporation with a principal place of business at 10 Plastic 'N' Air Plaza, Providence, RI, and Halliwell Department of Chemistry (“the Department”), P.O. Box 341, Halliwell, CA, and is effective May 2009.

WHEREAS, the chair of Halliwell’s Chemistry Department, Ellen Irwin, PhD, needs to acquire an inflatable chemistry lab for Chemistry Open House, an event in honor of National Chemistry Week.

WHEREAS, **IIA** rents and sells inflatable labs.

NOW THEREFORE, the parties hereto agree and covenant as follows:

Payment

IIA agrees to rent 4 large fun labs to the Department of Chemistry for \$3,000 each, with \$12,000 plus tax due and payable within 10 business days of execution of this contract. Any delay in payment shall constitute cause for **IIA** to charge Halliwell 10% per day on the purchase price.

Performance

IIA promises to deliver the fun labs to the department, one each in May, June, July, and August 2010.

The department agrees to comply with all terms and provisions listed in the “Customer Obligations” section of **IIA**’s website, www.inflateitall/customerobligations.com.

Modifications

This agreement may be supplemented, amended, or modified only by **IIA**. No supplement, amendment, or modification of this agreement shall be binding unless it is in writing and signed by a representative of **IIA**.

Indemnification

IIA's liability under this contract shall in no event be greater than the amount paid it hereunder by the department for one large inflatable fun lab.

Governing Law

This agreement shall be interpreted under the laws of the State of Rhode Island. Any litigation under this agreement shall be resolved in the district courts of Providence County, Rhode Island.

Inflate-It-All, Inc.

George Irwin, Sales Manager

Date

Halliwell Department of Chemistry

Your name, Business Manager

Date

Improving Contracting on Campus

Part 1: A Layperson's Guide to Understanding Contract Basics *

Every year colleges and universities, through their administrators, faculty, and staff, enter into thousands of contracts that focus on a diverse array of activities, including outside services and supplies, facilities use, construction, copyright, and research. Yet, despite the prevalence of contracts on campus, many educational institutions have not educated staff about contracts or established a policy to guide employees responsible for contracting. The failure to understand contracts or a campus contracting policy can result in unexpected and sometimes serious liability for educational institutions and their employees who are involved in a contracting process.

Recently, United Educators studied more than 2,000 pending claims to identify the most preventable. Hundreds of these claims involved weak contracting practices by educational institutions, such as:

- Relying on an oral agreement when a written contract would have memorialized and clarified the rights and obligations of each party
- Behaving in a way that implies a contract when none exists
- Using a written agreement that lacks detail or includes ambiguous terms
- Entering into an agreement that cannot be performed as written or is onerous for the institution to perform
- Signing a form contract offered by a vendor that would put the institution at a disadvantage if a problem were to occur

Colleges and universities may avoid problems like these by helping nonlegal staff gain an understanding of contracts and by reviewing their institution's own contracting practices to ensure sound processes are in place.

Understanding Contract "Basics"

What is a contract?

A contract is an exchange of promises that the law will enforce. To create a legally enforceable contract, a promise must be given in exchange for consideration. Consideration is a promise to give something of value, such as a monetary payment, goods, or services. For example:

If the Rock Paper Scissors Company promises to provide XYZ University with 1,000 cases of paper, and in exchange XYZ promises to pay \$20,000 to Rock Paper Scissors, the two parties have created a contract. Each party's promise is given in exchange for consideration or something of value from the other party (\$20,000 in exchange for 1,000 cases of paper).

*Note that "Part 2: Allocating Contracting Risks Between Parties" will appear in the November 2006 Risk Research Bulletin.

The document that reflects a contract can take different forms and be referred to by different terms. For example, a letter, an agreement, a memorandum of understanding, a purchase order, a license, a ticket, and even an email can all be contracts if they reflect the parties' mutual assent to exchange promises.

To be enforceable, does a contract have to be in writing?

Not always. To many people the word *contract* connotes a document with lots of fine print, but that is only one type of contract—a written contract. A written document is not always necessary to create a contractual relationship. A “handshake deal” can also be enforceable. Courts have enforced contracts based on an oral exchange of promises or have recognized implied contracts from the behavior of the parties. The key to determining whether parties have formed an “oral contract” or an “implied contract” depends upon whether they can demonstrate a promise given in exchange for consideration.

Consider the following examples that highlight the problems involved with an oral contract and an implied contract:

An Exchange of Oral Promises:

Bernie Bridges, a representative of ABC College, tells the owner of Tip Top Trim, a local landscaping company, that the college will acquire property on Jan. 1 that will expand its campus by one-third. During this discussion, Bridges promises to pay Tip Top Trim one-third more for its services starting Jan. 1, and in exchange Tip Top Trim promises to perform the landscaping services for the entire campus through the end of the academic year.

On Dec. 22 Bridges is fired, and his replacement, unaware of the oral contract with Tip Top Trim, retains Over the Hedge to provide the landscaping services for the new portion of the campus. Tip Top Trim sues the college for breach of contract. The college refutes the existence of any contract, but Tip Top Trim produces statements from its owner and Bridges that confirm the oral agreement. The college has nothing to contradict Tip Top Trim's evidence.

Tip Top Trim has a good chance of proving it had formed an oral contract with the college based upon the promises exchanged by the owner and Bernie Bridges, the prior representative of the college.

Behavior That Implies a Contract:

For the last 10 years, ABC College has had a handshake deal with Tip Top Trim to provide landscaping services for the entire campus. The college's director of buildings and grounds tells Tip Top Trim's owner that the institution will be expanding its campus by nearly a third in the coming year.

Tip Top Trim hires new employees, purchases additional equipment, and after the campus expansion, provides landscaping services for the new sections of the campus. For nearly a year, the college continues to pay Tip Top Trim its original fee and does not increase its payments. Tip Top Trim sues the college for breach of contract and seeks payment for the additional services provided. The company also seeks recovery of the costs required to hire employees and purchase equipment to service the entire campus in the event the college does not continue to retain Tip Top Trim's services.

Here, a court may determine that the college and Tip Top Trim had an implied contract. In trying to reach a fair result, a court can infer the existence of a contract from the parties' behavior. In doing so, it would consider the college's history of retaining the company without a written contract, the actions the company took in anticipation of the increased campus size, and the college's acceptance of Tip Top Trim's performance of landscaping services for the new portion of campus.

Even though neither arrangement between the college and Tip Top Trim involves a written exchange of promises, the college may still be obligated as if a written contract exists. Also, because neither an oral nor an implied contract involves a written document, the specific terms are vulnerable to the subjective and often faded memories of the representatives who negotiate these contracts. And if the

representative has left the institution, those recollections would be even more tenuous and might be lost forever. Also, because the college has no record of these contractual agreements, it cannot point to a writing that clarifies or refutes another party's claims about the terms of the exchanged promises. Had the college required a written contract, the college's disputes with Tip Top Trim might have been avoided.

Is a written contract preferable?

Almost always. There's wisdom in the adage, "Get it in writing." A written contract has many advantages. It formalizes the promises exchanged between parties and details other terms affecting the performance of each promise, such as start and end dates and payment schedules. A written contract also ensures that each party understands what it is required to do under the contract. A written contract details each party's rights in the event one of them fails to perform, prematurely terminates, or otherwise breaches the contract. Finally, a written contract provides tangible proof of the parties' agreement. Because a well-drafted written contract provides clear guidance on all aspects of the parties' agreement, it can reduce and sometimes eliminate the need for parties to dispute or litigate the contract.

An informal handshake deal may seem less complicated and more trusting than a written contract. However, if a dispute arises between parties, that handshake will not provide any guidance on the exchanged promises or the rights and obligations of each party. A well-worded written contract saves an institution time, energy, and money that will be required to resolve misunderstandings about the terms or even the existence of a contract. When possible, an institution should strive to commit contractual agreements to writing.

Will a written contract guarantee that the parties will avoid contract disputes?

No. A dissatisfied party can always challenge the terms of a written contract. However, a well-drafted contract that accurately reflects the promises, rights, and obligations of each of the contracting parties provides the parties and, if necessary, a court with a road map for resolving these challenges. Yet, not all written contracts are well drafted. When an institution enters into a poorly written contract, problems can also ensue.

Common problems with written contracts are that they lack detail, omit important terms, are ambiguous, or cannot be performed as written. These problems are compounded when the institutional representative does not review the contract before signing it, reviews the contract but does not fully understand its terms, or reviews and ignores questionable terms because of the perceived benefits the contract will bestow upon the institution. For example:

Professor Oscar Optimistic and Learning Adventures, Inc., a well-reputed, national organization focused on outdoor leadership training, have been talking about a joint venture by which the university would establish a leadership program and the company would provide the outdoor training component to enrolled students. Learning Adventures is interested in gaining exposure to a wider audience of trainees who can then promote the training to others. Optimistic and the university believe the program will successfully attract future leaders as students to the university and improve its reputation.

Adventure Learning presents the professor with a contract that requires the university to enroll a minimum of 150 students in the program annually. The contract provides that failing to meet this requirement will result in a \$15,000 penalty and the contract's termination. While initially concerned about the penalty, Optimistic quickly concludes that the positive appeal of the leadership program is likely to attract a large number of students and signs the contract. In the first year of the program, only 75 students enroll.

Learning Adventures terminates the contract and demands the \$15,000 penalty. The professor is shocked that the company would take this action. Optimistic claims, on behalf of the university, that he employed all reasonable efforts to meet the contract's enrollment minimum and refuses to pay the penalty.

In this case, Optimistic did not seriously consider how to best protect the university if the contract could not be performed. Rather, he placed undue emphasis on the likelihood that Learning Adventures' good reputation and services would attract students and the opportunity that the joint venture would benefit and improve the reputation of the university. To avoid entering into a contract that contains unfavorable terms, the institution's representative must ensure that the contract's language conforms with prior discussions, ask about the terms that disadvantage the institution, and seek the assistance of legal counsel when the contract is difficult to understand or appears unfair.

Who should sign a contract on behalf of the institution?

Generally, a written contract is not effective until the parties sign it. A signature indicates that the signing party agrees to and is bound by the contract's terms. When confronted with a contract dispute, courts routinely examine a contract for signatures and generally regard a party's signature as proof that the party understands and agrees to its terms even if the party did not actually read, understand, or fully agree with it.

As an entity, an educational institution cannot itself sign the contract. Rather, institutions are bound to written contracts when they are signed by an individual who has been authorized to act on its behalf. Typically, high-level administrators have that authorization. To increase the ease of doing business with outside contractors, top decision makers can also delegate that authority to other staff throughout the institution. Given the importance of this responsibility, colleges and universities must balance the need to ensure that contracts receive the appropriate level of review before they are signed against the need to increase the institution's ability to transact business in a timely and flexible manner. After carefully balancing these interests, each institution then needs to clearly identify those positions on campus that it authorizes to sign contracts.

What happens if an employee signs a contract without authority?

The results of an unauthorized signature on an agreement can have unfavorable consequences for both the institution and the signer.

Only those employees "with authority" should sign an institution's contracts. However, if an employee signs a contract without authority, in many instances the institution still will be bound to perform the agreement. If the other contracting party reasonably believes that the employee has authority to sign or enter into the contract, then the employee's "apparent authority" will bind the institution. Consider the following:

After serving as an outside computer consultant to the local university, the institution hired Charlie Cheatum to coordinate the updating of the university's computer system. Cheatum's position did not have authority to sign contracts. Nonetheless, he signed a contract that obligated the institution to purchase computer equipment from Farmer and the Dell Computers for a total cost of \$75,000. Cheatum regularly made similar purchases from Farmer and the Dell when he was an outside consultant for the university. Also, the university has not issued a policy or any other communication informing vendors, suppliers, and service providers such as the computer company that he was not authorized to sign the contract.

The college could be required to accept and pay for the computers if it was reasonable for Farmer and the Dell Computers to believe that Cheatum had authority to sign the agreement. A contracting policy that is well publicized and clearly identifies those positions on campus authorized to sign contracts is one way to provide important information to potential contractors.

Even though a court may require the university to perform the contract, unauthorized signers act at their own peril. For example:

The university first became aware that Charlie had signed the contract without authority when Farmer and the Dell sued it for breach of contract. The university terminated Charlie's employment for acting outside the scope of his employment and for the misuse of university funds, and then filed suit to hold him personally liable for the contract.

Institutions can view employees' unauthorized actions as taken outside the scope of their job responsibilities and may even be able to hold employees personally liable. To provide clear guidance, an institution's contracting policy can address both who has authority to sign agreements and the consequences to employees for signing contracts without authority.

Improving Contracting Practices on Campus

Colleges and universities can undertake the following strategies to improve their campus contracting practices and reduce the likelihood that they will encounter contract-related problems.

1. Establish a Campus Contracting Policy

A policy that requires written contracts is of paramount importance to improving campus contracting processes. The policy should also include a consistent practice of contract review and signing by authorized employees only.

- *Perform Contract Reviews*

Campus policies typically require that every contract to which the institution is a party receive an appropriate level of review before it is signed. The employee who negotiates the contract may be the best person to perform the review because he or she can evaluate the accuracy of the promises contained in the contract. A contract review may also be reserved for higher level officials depending on the value of the contract or the type of business relationship that is contemplated. At the same time, it is important to understand that many contracts that do not involve large amounts of money can still present a large liability exposure for the institution. An institution may want to establish other criteria to trigger a heightened review of a contract. For example, an institution may require legal counsel to review all contracts that are nonroutine, extend over one year, or involve substantial complexity or liability exposure.

Many institutions find it helpful to use a checklist with a step-by-step guide for reviewing contracts. A checklist can be particularly useful when two or more employees are responsible for reviewing and signing a contract. The completed checklist details the steps that the contract reviewer undertook before it goes to the authorized people for signing. The guidance provided by a campus contracting policy or a contract review checklist or both can ensure that all institutional agreements are reviewed by the most appropriate persons before the institution agrees to them.

- *Establish Who Has Authority to Sign Contracts*

Colleges and universities take different approaches when conferring contract signing authority upon employees. Institutions that want to promote a centralized contracting process will limit signature authority to a few people on campus, such as trustees, officers, or deans. However, that limitation can delay the signing process until after the small circle of signers completes other work priorities. To increase the speed of the contracting process and ease of doing business, institutions can expand the signing authority to a broader range of employees, including department heads and other lower level administrators, such as managers, directors, and supervisors. Institutions that employ the less-centralized approach may want to establish a tier of signers based on the contract's monetary value. For example, a policy could provide that supervisors

can sign contracts involving an amount less than \$2,000, department heads can sign contracts up to \$5,000, and a trustee or officer must sign contracts involving amounts over \$5,000.

2. Develop Model Forms for Routine Contracts

Consider working with local or in-house counsel to develop form or model agreements for those types of contracts that are most common on your campus and then require the use of those forms. Examples of contracts for which educational institutions often develop forms include purchase orders, facilities use agreements, professional services or consulting contracts, and simple copyright licenses.

3. Create a Central Repository for Contracts

Institutions can manage their contractual commitments by developing a central repository for all pending agreements. Depending upon its size and the number of contracts, an institution could establish a single, central repository or a system of repositories broken down by college or department. Also, many institutions use contract management software to create and maintain a repository so that the institution can effectively track and monitor the performance, expiration, and renewal terms of its contracts. These software programs can also house the contract document as well as related items, such as documents referenced in the contract, side agreements, and information about the employees who are responsible for a particular contract.

Depending on the number of pending contracts, some institutions find it useful to appoint a contract manager to oversee the repository and take responsibility for monitoring the implementation of contracts. The manager can keep a watchful eye on both the institution's and the outside vendor's compliance with their respective obligations under the contract.

4. Educate Representatives About Contracts and Campus Policy

Educating institutional representatives involved in the contracting process about basic contract principles and the institution's policy is key to reducing contract-related claims. Many employees are intimidated by contracts and think, "I'm not a lawyer so I can't be expected to read or understand the language in a contract." Yet, these employees often are the most knowledgeable about the contract's subject matter and core promises. Moreover, contracts are interpreted based on the plain meaning of the language used to describe the exchanged promises, rights, and obligations of each party. If institutions can demystify basic contracts for employees who negotiate, review, and sign contracts, and inform them about the guidance and other resources contained in the campus contracting policy, the quality of the institution's contracting process is likely to improve.

Ideally, institutional representatives who are closer to and better understand a contract's subject matter can supplement any specialized review performed by legal counsel or other experts. To educate employees on campus contracting, institutions can use training seminars conducted by local or in-house legal counsel, create a contracts section on the institution's website, or write and distribute articles outlining critical information for employees to understand about contracts and the campus policy.

A Final Word

Many claims and unexpected liabilities are avoidable through clear campus contracting policies and procedures. An institution that takes the time to implement good contracting practices is more likely to be bound to written contracts that have been reviewed for favorable language and the less likely to face contractual problems.

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Resources

Articles

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www.nacua.org/fileStreamer/default.asp?file=/outline/docs/viii_contracts/viii-06-06-2.doc.)

Contracting Policies

Arizona State University

www.asu.edu/counsel/manual/index.html

George Washington University

<http://my.gwu.edu/files/policies/SigningofContractsandAgreements1.pdf>

Hofstra University

www.hofstra.edu/pdf/ORSP_ContractExecutionPolicy.pdf

Maricopa Community Colleges

www.maricopa.edu/legal/blc/index.htm

Seton Hall University

<http://admin.shu.edu/complianceprogram/ContractDocs/ContractsPolicy.htm>

University of North Carolina at Charlotte

www.legal.uncc.edu/contract.html

University of Texas

www.utsystem.edu/ogc/smallcontracts/contractreview.cfm

University of Tulsa

www.utulsa.edu/research/PPG/contractreviewpolicy.html

Yale University

www.yale.edu/ppdev/GuideBusinessAgreementContracts.pdf

Contract Review Checklists

Contracting Basics, Arizona State University

www.asu.edu/counsel/brief/contractbasics.html

Contract Checklist, University of North Carolina at Charlotte

www.legal.uncc.edu/contract.html

Contract Review Checklist, Seton Hall University

<http://admin.shu.edu/complianceprogram/ContractDocs/ContractsPolicy.htm>

(Go to listing in left-hand margin and click on "Contract Review Checklist")

Guidelines for Written Contracts, Maricopa Community Colleges

www.maricopa.edu/legal/blc/guidelines.htm

We welcome your suggestions regarding issues you would like UE to address. Please contact us at risk@ue.org.

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A Guide for Reviewing Contracts

A careful review of any contract is important before an institution signs and agrees to legally enforceable promises, rights and obligations. (For more detailed information about contracting, see the “Resources” section below.) This guide highlights common contracting issues and can help promote consistent reviews by staff who are not lawyers. It is best suited for routine contracts involving the purchase of goods and services or the normal use of facilities and equipment. The guide is not intended to serve as a comprehensive listing of all potential contracting considerations. Contracts that would likely be beyond the scope of this guide include those involving complex transactions or specialized areas of law, such as construction, real estate, software licenses, technology transfers, finance and investment, or employment. Before using the guide, consult the institution’s contracting policy to ensure this tool is consistent with the terms of the policy and appropriate for it.

Using the Guide

1. Complete an initial read through of the contract with an understanding that the institution will be bound by all terms contained in the contract and anything discussed with the other party that is not in the contract likely will not be enforceable. Helpful questions to consider as you read the contract include:
 - a. Do I understand what I’ve just read?
 - b. Is the language consistent with the institution’s intent?
 - c. Can the institution perform as written?
2. Use section A below to note all language or contract terms that may not reflect the parties’ intent.
3. Complete the remaining portions of this checklist.
4. Review all section A notes and checklist answers. **Answers appearing in a shaded box as well as any language or contract terms noted in section A have the potential to place the institution at risk.** Address any concerns in one of the following ways:
 - a. Seek further clarification to resolve the issue.
 - b. Negotiate or suggest more favorable language.
 - c. Determine—preferably with the assistance of legal counsel, the risk manager, or a senior business officer—that the institution can reasonably accept the potential negative consequences of leaving the current language “as is.”

A. Initial “Read Through” Notes

Read the contract carefully and identify anything that seems ambiguous or may not reflect the intent of the parties. List those sentences here.

1. _____
2. _____
3. _____
4. _____
5. _____

Continue this list on a separate sheet if necessary.

B. Person Reviewing the Contract

All written contracts an institution is considering entering into should, at a minimum, be reviewed by the person who is best situated to evaluate whether the contract’s language reflects the parties’ intent. Typically, this person is not a lawyer, but is knowledgeable about the contract’s subject matter and integrally involved with its performance. Supplemental review by legal counsel or other affected campus personnel may be required.

	Yes	No	Don’t Know
1. Is one of these correct:			
a. Is the person completing this guide knowledgeable about the subject matter of the agreement?			
b. Did the person knowledgeable about the subject matter of the contract review and approve the contract before forwarding it to the person completing this guide?			
c. Has the person completing this guide consulted with the person knowledgeable about the subject matter of this contract?			

C. Core Contract Terms

The contract’s core terms should be clear, accurate, and easy to understand. These terms include those that identify or address the parties and their respective promises, rights, and obligations as well as the duration of the agreement, modifications, remedies for nonperformance, and dispute resolution.

	Yes	No	Don't Know
1. Parties			
a. Does the contract correctly and accurately identify the parties?			
b. Does the contract accurately identify each party's legal status or type of entity (corporation, company, governmental entity, and so forth)?			
c. Can the other party assign the contract to another entity that is not identified in the contract?			
2. Promises, Rights, and Obligations			
a. Is the purpose of the contract described completely and accurately?			
b. If the contract involves the payment of money, is the payment amount promised under the contract correct?			
c. If the contract involves goods, services, or the use of facilities or equipment, is the description of the goods, services, facilities, or equipment promised under the contract complete and correct (for example, quantity, size, type, time and place of delivery, and standards of quality)?			
d. Does the contract refer to any promise, standard, or other term that is reflected in documents, websites, or other resources that are not contained in or attached to the contract?			
e. Have all documents, websites, or other resources referenced in the contract been reviewed to confirm that they are consistent with the contract's terms?			
3. Duration			
a. Is the duration of the contract—that is, the beginning and end of the contract's term—correct?			
b. Are all other dates concerning performance milestones correct?			
c. Can the institution perform its promises within the contract's duration and performance milestones?			
d. Does the contract's term automatically renew?			
e. Is the institution comfortable with the manner in which the contract renews?			

	Yes	No	Don't Know
4. Modifications			
a. Have the parties agreed that they can modify the terms of the contract?			
b. Can either party modify the terms through unilateral action?			
c. Can the parties modify the terms by mutual consent?			
d. Does the contract state that a writing signed by the parties is required to show their mutual consent to modifications?			
5. Remedies for Nonperformance			
a. Does the contract state that a breach of its terms entitles the nonbreaching party to one or more of the following: automatic damages, accelerated payments, injunctive relief, or penalties?			
b. Does the contract clearly state the circumstances, if any, under which either party can terminate the agreement before the end of its term?			
c. Does the contract require written notice of a party's intent to terminate the contract before the end of its term?			
d. Does the contract allow either party to terminate the contract for cause?			
e. Does the contract clearly define the circumstances that can prompt a for-cause termination?			
f. Does the contract allow either party to terminate the contract without cause or for convenience?			
g. Does the contract allow either party to terminate the contract due to acts of God or other extraordinary circumstances that cannot be controlled by the parties (that is, a <i>force majeure</i> provision)?			
h. Does the contract allow a breaching party the opportunity to cure or correct its breach within a reasonable time frame?			
6. Dispute Resolution			
a. Does the contract require binding arbitration to resolve disagreements or claims arising out of it?			
b. Does the contract permit the use of voluntary, nonbinding mediation to resolve disagreements or claims arising out of it?			
c. When a dispute arises, are the contract's terms to be interpreted under the laws of a state different from the state in which the institution is located?			

	Yes	No	Don't Know
d. When a dispute arises, does the contract require it to be litigated in a state different from the state in which the institution is located?			
e. Does the contract impose a time frame within which the institution must file a legal claim or sue for a breach of contract that is shorter than the state's statute of limitations for contract claims or lawsuits?			
f. Does the contract require the institution to pay for attorney fees, court costs, or other litigation expenses of the other party in the event of a dispute?			

D. Responsibility for Third-Party Injuries

Every written contract should address how the parties will share or allocate responsibility for third-party claims arising out of the parties' actions under the contract. Additionally, insurance is important proof of a contracting party's ability to pay for third-party claims. The institution should require, and be particularly attentive to, both risk allocation and proof of insurance provisions in its contracts.

	Yes	No	Don't Know
1. Risk Allocation Between the Parties			
a. Does the contract contain a risk allocation provision (e.g., an indemnification, hold harmless, or waiver or release of liability clause)?			
b. Is the risk allocation provision clearly written and easy to understand?			
c. Does the contract contain (choose one of the following):			
i. A one-sided or broad risk allocation provision that requires the institution to assume full responsibility and pay for all claims arising out of the contract, including claims caused by the other party's negligence?			
ii. An intermediate provision that requires the institution to assume responsibility for losses caused by the joint negligence of both parties?			
iii. A limited or mutual provision that requires each party to remain responsible for losses caused by its own negligence?			
d. Does the risk allocation provision require the institution to assume responsibility for the other party's negligent acts or to pay claims that the institution did not cause?			

	Yes	No	Don't Know
e. Is the risk allocation provision consistent with the institution's contracting policies?			
f. Does the contract place a monetary limit on the amount of liability assumed by the other party?			
2. Insurance Requirements			
a. Has the other party requested or required the institution to carry certain lines or amounts of insurance?			
b. Has the institution requested or required the other party to carry certain lines and amounts insurance?			
c. Are the insurance limits requested or required of the contracting parties adequate for the potential exposures presented by the contract?			
d. Does the contract require the other party to provide certificates of insurance to the institution before the contract is signed?			
e. Does the contract require the other party to name the institution as an "additional insured" through an endorsement to the other party's insurance policies that are required by the contract?			
f. Does the contract state that the other party's insurance will provide primary coverage for claims arising out of the contract?			
g. Has the institution obtained verification prior to signing the contract that the other party has met all insurance requirements?			

E. Signature

The persons signing the contract on behalf of the institution and the other party must each have authority to bind their respective party to the contract. The institution's representative should seek proof of signing authority from the other party's representative.

	Yes	No	Don't Know
a. Does the person signing the contract on behalf of the institution have authority to commit the institution to the contract?			
b. Are the name and title of the person signing the contract on behalf of the institution correct?			
c. Has the person signing the contract on behalf of the other party provided proof of his authority to commit the other party to the contract?			
d. Are the name and title of the person signing the contract on behalf of the other party correct?			

F. General Appearance

Written contracts should not contain any errors, particularly those that have the potential to change the terms of the agreement or create ambiguities about them. Staff members who review contracts for the institution should identify any suspected errors for correction before the contract is signed.

	Yes	No	Don't Know
a. Are the spelling, formatting, grammar, and punctuation used in the contract all correct?			
b. Have any errors or mistakes been identified and corrected?			
c. Is the general appearance of the contract professional and accurate?			

Conclusion

Your contract review is complete. Remember to review any notes you made in section A and the checked answers in the guide's remaining sections. Because of potential risk to the institution, we recommend additional discussion with legal counsel, the risk manager, or a senior business officer about these items using the guidelines on page 1 at step 4.

Resources

- ["Improving Contracting on Campus: Part 1: A Layperson's Guide to Understanding Contract Basics," Risk Research Bulletin, October 2006](#)
- ["Improving Contracting on Campus: Part 2: Allocating Risks Between Parties," Risk Research Bulletin, December 2006](#)

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United Educators

Two Wisconsin Circle, Fourth Floor
Chevy Chase, MD 20815
phone/301.907.4908
fax/301.907.4830
www.ue.org



Contracting 101

Web Conference
April 29, 2010



Introduction and Speakers



Dana Scaduto
Dickinson College



Deborah C. Brown
Stetson University College of Law



Alyssa Keehan
United Educators

Contracts—Why should we care?

- A record of an educational institution's dealings
- A frequent source of liability

- I. Why Written Contracts Are Important
- II. How to Review Contracts for Common Terms and Conditions



Why Written
Contracts Are
Important

5

Why Written Contracts Are Important

Scenario—Is there a contract?

- *A theater is disposing of lighting equipment that a professor needs.*
- *The professor tells a student that he will reimburse him for transportation and meal expenses if the student will bring the equipment to the institution.*
- *The student agrees and rents a van to haul the equipment.*
- *While en route, the student hits another car.*
- *The driver and passenger of the car sue both the student and the institution.*

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What is a contract?

- An exchange of promises where each party promises to give something of value to the other. Also referred to as “offer,” “acceptance,” and “consideration.”

7

What is a contract?

- **Promise #1 (Offer):** The professor tells the student, “If you agree to transport the equipment to the institution, I will reimburse your transportation costs.”
- **Promise #2 (Acceptance):** The student says, “Yes.”
- **Consideration:** A mutual exchange of something of value (e.g., transportation costs in exchange for transporting the equipment). Need consideration to be legally enforceable.

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What is a contract?



What is a contract?



What is a contract?



What is a contract?



Written Contracts...

- ✓ Provide clarity
- ✓ Avoid disputes
- ✓ Reduce litigation costs



How to Review Contracts for Common Terms and Conditions

Who should review contracts?

- ✓ Those most familiar with the contract's subject matter
- ✓ Legal counsel, risk manager or business officer, and procurement
- ✓ Affected departments

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Key questions for contract reviewers:

- ✓ Do I understand the contract's language?
- ✓ Are there typos?
- ✓ What am I getting?
- ✓ What am I paying?
- ✓ What happens if something goes bad (e.g., cancellation, nonperformance, injury)?

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What to do with bad or unfavorable language?



✓ Negotiate

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Mock Contract

Standard Large Inflatable Fun Lab Contract

*THIS AGREEMENT is by and between **Inflate-It-All, Inc.** (“**IIA**”), a Rhode Island corporation with a principal place of business at 10 Plastic 'N Air Plaza, Providence, RI, and Halliwell Department of Chemistry (“*the Department*”), P.O. Box 341, Halliwell, CA, and is effective May 2010.*

WHEREAS, the chair of Halliwell’s Chemistry Department, Ellen Irwin, PhD, needs to acquire an inflatable chemistry lab for Chemistry Open House, an event in honor of National Chemistry Week.

*WHEREAS, **IIA** rents and sells inflatable labs.*

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Mock Contract***Payment***

IIA agrees to rent 4 large fun labs to the Department of Chemistry for \$3,000 each, with \$12,000 plus tax due and payable within 10 business days of execution of this contract. Any delay in payment shall constitute cause for IIA to charge Halliwell 10% per day on the purchase price.

Mock Contract***Performance***

IIA promises to deliver the fun labs to the Department one each in May, June, July, and August 2010.

The Department agrees to comply with all terms and provisions listed in the “Customer Obligations” section of IIA’s website www.inflateitall/customerobligations.com.

Mock Contract***Modifications***

*This agreement may be supplemented, amended, or modified only by **IIA**. No supplement, amendment, or modification of this agreement shall be binding unless it is in writing and signed by a representative of **IIA**.*

Mock Contract***Indemnification***

***IIA**'s liability under this contract shall in no event be greater than the amount paid it hereunder by the Department for one large inflatable fun lab.*

Mock Contract

Governing Law

This agreement shall be interpreted under the laws of the State of Rhode Island. Any litigation under this agreement shall be resolved in the district courts of Providence County, Rhode Island.

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Signature Authority

- Who should have it?
 - Limit to a few on a campus



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Signature Authority

- What happens if you sign without it?
 - Void or unenforceable



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Signature Authority

- What happens if the parties start performance *before* signing the contract?
 - Acceptance

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Recap of today's program

- Get it in writing
- Read your written contracts
- Keep the following principles in mind when reviewing your written contracts:
 - Does the language make sense?
 - Does the language describe:
 - *What I'm getting*
 - *What I'm paying*
 - *What happens if something goes wrong*

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Recap of today's program

When reviewing the contract, pay attention to:

- Party names
- Dates
- Payment terms
- Descriptions of each party's obligations or performance
- Terms or conditions incorporated via reference such as a website

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Recap of today's program

When reviewing the contract, pay attention to:

- Which party has the power to modify the contract
- Indemnification and insurance requirements
- What state's laws will govern the contract
- Signature authority

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To call in a question,
press “*1” on your phone



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Education's Own Insurance Company.



United Educators

Two Wisconsin Circle, Fourth Floor
Chevy Chase, MD 20815
phone/301.907.4908
fax/301.907.4830
www.ue.org

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For more information, visit our website at www.UE.org or call us at (301) 907-4908.



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