

Handbook of Business Contracts



Build Your Business...
Make a Difference!

Handbook of Business Contracts

You cannot shake hands with a clenched fist.
~ Golda Meir



JIAN Business Power Tools LLC
www.jian.com

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All that is necessary for evil to triumph is for good men to do nothing.

~ Edmund Burke

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Not copy protected...

but could you imagine starting or managing your business on a foundation of stolen property? May the fleas of 1,000 camels nibble on your _____ for eternity if you give *AgreementBuilder* away, sell it, or in any way use it or provide it to anyone in an inappropriate manner. We've put a lot of research, work, and refinement into this product to help you build and build and manage a successful business.

So do yourself a favor—if you have not paid for this software, please call 1- 800-346-5426 and order your own copy today!

This collection of business-related agreements is designed to help you create and enter into contracts that are understandable by all who read and sign them—contracts that are direct and to the point. We've collected more than 165 agreements and related documents, and stripped out the legalese, simplified the language, clarified the purpose and the terms, dates, names, items, and all of the other important information. During the development process, we had ample opportunity to test most of these agreements ourselves, so we know they work!

We also provide useful information on a variety of related, pertinent topics including:

- A “primer” on contract law
- State-of-the-art methods for settling disputes
- Advise on choosing and using a lawyer
- A step-by-step guide for evaluating contracts that others ask you to agree to and sign
- A glossary of legal terms (just in case you need it, but you won't!) We'll be using and publishing *AgreementBuilder* for a long time, and given that fact, we're certain to have lots of experiences for improvements.

Tell Us about Your Successes

Please keep us informed of your results, and tell us what you're doing—maybe we can help! It's important to us that you are successful with your business. If you have a suggestion, idea, complaint, comment, or success story—anything we can do to improve our products, services, or better run our company to help you, we'd like your input. Please feel free to call our toll-free comments line at 1-800-898-5426 and leave your message.

Your Input Is Appreciated

Best of luck in your business. We hope that *AgreementBuilder* will assist you. And, please make sure you let us know how you feel about the product. We are always interest in what you have to say about our products—good or bad. While we enjoy the good, it's more important that we are made aware of any problems you may have encountered. The only way that can happen is for you to take the time to tell us. We promise you that your input will be carefully evaluated.

Please Contact Us!

If you have ideas or anecdotes useful to others, please contact us and tell about it/them!

<http://www.jian.com/forms/feedback.html>

Thank you very much!

Welcome to JIAN

*Any fool can make things bigger, more complex, and more violent.
It takes a touch of genius - and a lot of courage -
to move in the opposite direction.*

~ Albert Einstein



What's a JIAN?

You might think of it this way: while a Black Belt is a master of the martial arts, a “Jian” (pronounced: jee'on) is *a master of every art*—the ultimate human with extraordinary acumen, power and resourcefulness. JIAN, the company, is a contemporary software publisher providing project-specific, expert knowledge in time-saving flexible packages that work easily with popular word-processing and spreadsheet programs.

Simplifying business

Our purpose at JIAN is to simplify business with tools to help you run with your ideas and build better companies—faster, easier and more economically. We started out with many combined skills that evolved into a business software development company. Over the past 20 years, we've learned a lot through our own hard-won experience what it takes to organize, build and promote a successful business.

This is all we do

Since 1988, we've focused only on developing time-saving software tools for important business projects. We've engineered valuable inside information and the best materials from a variety of sources into our software for building a business quickly and efficiently.

We address projects that are not usually within the scope of most business people's expertise. We provide a complete solution to management problems. Each JIAN package is a “do it yourself consulting kit” that includes all of the needed forms and documents you'll need, along with simple step-by-step instructions.

All JIAN packages are developed and refined by experts with successful, real-world business experience. We've gathered input from these specialists as well as commissioned accountants, consultants, lawyers and other experts for further guidance. Most of the people at JIAN as well as the consultants and independent contractors who work for JIAN are, or have been, owners of companies. Plus, we've incorporated feedback from thousands of customers over those 20 years into our products. Together, we engineered these materials, insights and experience into tools you can use.

More than electronic versions of the same old thing

In the process of converting these materials into software, we added state-of-the-art methods to harness the power of the computer. As entrepreneurs ourselves, we appreciate the blend of art and science needed to give you just the right amount of information in just the right format to get the job done.

We use our products to build our own company and we're succeeding because of it.

Thank you very much for choosing JIAN.

A handwritten signature in blue ink that reads "Burke Franklin". The signature is fluid and cursive, with a long, sweeping underline.

Burke Franklin, *Founder & CEO*

a-gree-ment – noun

- the act of agreeing or of coming to a mutual arrangement.
- the state of being in accord.
- an arrangement that is accepted by all parties to a transaction.
- a contract or other document delineating such an arrangement.
- unanimity of opinion; harmony in feeling: agreement among the members of the faculty.
- Grammar. correspondence in number, case, gender, person, or some other formal category between syntactically connected words, esp. between one or more subordinate words and the word or words upon which they depend; selection by one word of the matching formal subclass, or category, in another word syntactically construed with the first.
- Law. a. an expression of assent by two or more parties to the same object.
- b. the phraseology, written or oral, of an exchange of promises.
- settlement, treaty, pact.

Synonyms

Agreement, bargain, compact, contract all suggest a binding arrangement between two or more parties. Agreement ranges in meaning from mutual understanding to binding obligation. Bargain applies particularly to agreements about buying and selling but also to haggling over terms in an agreement. Contract is used especially in law and business for such agreements as are legally enforceable.

con-tract – noun

- an agreement between two or more parties for the doing or not doing of something specified.
- an agreement enforceable by law.
- the written form of such an agreement.
- the division of law dealing with contracts.
- Slang. an arrangement for a hired assassin to kill a specific person.

– adjective

- under contract; governed or arranged by special contract: a contract carrier.

– verb (used with object)

- to draw together or into smaller compass; draw the parts of together: to contract a muscle.
- to wrinkle: to contract the brows.
- to get or acquire, as by exposure to something contagious: to contract a disease.
- to incur, as a liability or obligation: to contract a debt.
- to settle or establish by agreement: to contract an alliance.
- to assign (a job, work, project, etc.) by contract: The publisher contracted the artwork.
- to enter into an agreement with: to contract a free-lancer to do the work.
- to enter into (friendship, acquaintance, etc.).

– verb (used without object)

- to become drawn together; become smaller; shrink: The pupils of his eyes contracted in the light.
- to enter into an agreement: to contract for snow removal.

– Verb phrase

- contract out, to hire an outside contractor to produce or do.

Welcome to Agreement Builder

Getting even throws everything out of balance.

~ Journalist, Joe Browne

Welcome to JIAN's update to our popular business contracts collection software. We first developed AgreementBuilder in 1992—long, long ago in the digital universe... we've used it ourselves as an integral component of our own business success. All along we have added refinements and new ideas so we could build a successful business as well as pass them along to you.

AgreementBuilder is more than a deal-making tool—it's a business education, a management tool, a legal guardian of your business, a collaboration workspace, and a lot more. The final result is a printed "contract" that you can use to manage your business as a money-making machine worthy as an inviting place to work.

This business contracts development system is designed to get you and your management team past writer's block and keep this important project moving. To make it easy for you to incorporate this product into your business, we've designed it with a number of built-in features to assist you. As you progress you will naturally edit, update and refine the text. If a particular passage or section doesn't make sense or doesn't seem to apply to your business, simply deselect or delete it.

We've deliberately made AgreementBuilder *overkill* for most businesses. That's good because you have plenty to work with—you'll think through many different possibilities for building your business. There's nothing "cutesy" or "full-of-fluff," and no blank pages leaving you with writer's block agonizing over what to say.

Also, as a business owner, you must familiarize yourself with the legal foundations. Basics about contracts, bargains, as well as forces beyond your control... AgreementBuilder lets you define, document and solidify your relationships with vendors, customers, and employees AgreementBuilder contains more than 100 templates that you can use to create legally binding contracts to help you build your business. We've organized the agreements into eight logical business-related categories, and provided pertinent information on each and every one: the what, who, why, when, and how of contracts! Each agreement also comes with detailed explanations to help you understand what you're doing, and step-by-step instructions on how to "fill-in the blanks" to complete contracts that fulfill your business requirements.

There are both a complete business contracts collection as well as this "Handbook of Business Contracts" to help you understand and put your agreements together. We're sure you will realize a tremendous value in using them, and the expert comments throughout each one should prove useful.

You will also gain many useful insights about contract law, how to select and when to consult with your attorney, what to look for in agreements that you're asked to sign, and the best ways to settle disputes. AgreementBuilder is the most comprehensive software product of its kind. We think it's the most useful tool available for your growing business' legal needs.

Optimized to make completion easy and fast

Since AgreementBuilder was first introduced, many competitors have tried to imitate it. We believe that we're both very fortunate that you found us before you bought from the other guys. No one can compete with the quality of our content (except perhaps an attorney you hire to produce a customer contract). Now, with our new high-performance Multi-user Interactive Document Assembly System (MIDAS), you have the latest content as well as the finest user interface. Plus, you can now collaborate over the Internet! Watch for our entire product suite to be integrated and updated with this technology.

Your contract must make sense...

and it must be designed in a way that expresses your commitment to managing your organization. This is a document that you will live with day in and day out. Think through your choices with an eye on the next three to five+ years and make sure that you can and will enforce these contracts as they are written.

Be sure also to read the first few chapters of this handbook before starting your to edit your sample contract. They're a brief reality check on writing sample contracts—years of wisdom crammed into a few pages. Then read, "[*How to Protect Your Business from Ruinous Litigation.*](#)" You'll become a smarter, more effective business person as you successfully complete this important project.

The context for making important choices

Some software products present you with a screen and some check boxes or radio buttons expecting you to make your decisions, out of context, then and there with the system taking over to produce your agreement. We think that is more difficult for you as well as a bit dangerous – at JIAN we look for “out of the checkbox” solutions and ideas that may actually work better for your company. First, you need to be shown the bigger picture, offered some choices and provided with thorough explanations before you commit your business to a certain choice. Therefore, we do not limit you to checkboxes and radio buttons, instead, we provide the entire sample contract where you can read the options and edit the text your way. Throughout, we provide expert comments explaining each choice and making suggestions to consider for each contract point within the context of your entire agreement and management desires.

Expert comments are in green:

To turn them Off/On, just click the bullhorn icon in the top menu.

Customizing Your Sample Contracts

As you read through the text, you will need to customize all items identified within the “[]” brackets with your own text, numbers and dates. To make sure you have filled in all the variables, use Word's Find function to locate any “[“containing an uncompleted variable. (Pull-down under Edit in the Word menu.)

You may format this document any way you like. We've used Word's “Styles and Formatting” capabilities to manage all of the formatting. Pull-down under Format (above) to “Styles and Formatting” and a window/menu will open on the right.

NOTICE:

We wish we could provide business contracts that are tailored exactly to *your* business. While this is not always possible, we feel that we've come extremely close and that these documents provide you with the head-start that you need to effectively manage your human resources. Nevertheless, we must make these disclaimers:

- 🚫 **Do Not Use These Documents "As-Is."**
- 🚫 **These Documents Are Not Legal Advice.**
- 🚫 **Read Them Thoroughly and Make All Appropriate Changes to Fit Your Requirements.**
- 🚫 **Have These Documents Reviewed & Approved by a Qualified Attorney at Law Before Using ANY of Them!**
- 🚫 **JIAN Accepts No Liability for the Effectiveness of these Documents for Your Purposes.**

Free Access to Attorneys, Accountants & Consultants in Your Area

We're building a network of business experts who are eager to help you when you need it. They can review your work, make suggestions, handle unique situations and introduce you to influential people. If you have particular legal issues, please also refer to our Consultants on our website – it's likely that several qualified business attorneys are nearby and can provide a more personal touch for the uniqueness of your business. On our website you can search by expertise and location, then e-mail or jump straight to their website. Although they are professionals and charge for their services, most offer an initial consultation free of charge. They're in your area and you can contact them directly. Look in our website under [Consultants](#).

Ongoing Update Service Keeps You Current

Things change, laws change, the world changes... new ideas come along all the time. When you register, you can access our website to get updates and changes... like new and improved documents. They can be downloaded directly to your computer. Look in our website under Updates.

Remember to bookmark our website:

<http://www.JIAN.com>

Please Tell Us About Your Results!

And tell us what you're doing—maybe we can help! It's important to us that you are successful with your business. We're always interested in what you have to say about our products—good or bad. While we enjoy the good, it's more important that we're made aware of any problems you may have encountered. If you have a suggestion, idea, complaint, comment, or success story—anything we can do to improve our products, services, or better run our company—we'd like your input.

Please feel free to call us: 530-267-6293.

Or, visit our website and [give us your suggestion](#) or [share your success story](#).

Important Legal Notice!

Whatever you cannot understand, you cannot possess.

~ Johann Wolfgang Von Goethe

Each of the agreements included in *AgreementBuilder* are intended to be illustrations only of the form of agreement that might apply in particular types of transactions. These agreements are not meant to be, nor do they constitute, legal or business advice, and the authors, editors and publishers (collectively referred to as the “**publishers**”) of these materials disclaim all warranties, representations, and responsibility for your use and reliance on these materials in any form. You explicitly understand and agree to each of the following:

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~ Henry Ward Beecher, 1813-1887, American Preacher, Orator, Writer

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Contributors

A friend is one to whom one may pour out all the contents of one's heart, chaff and grain together, knowing that the gentlest of hands will take and sift it, keep what is worth keeping and, with the breath of kindness, blow the rest away.

~ Arabian Proverb

We at JIAN extend our special thanks to Steven Lee, John McDonnell, and Colleen Hamilton, as well as to all of our in-house staff, in recognition of their outstanding efforts in producing this product. Without their immeasurable contributions, AgreementBuilder would not have been possible.

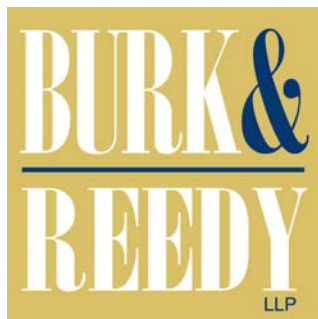
R. Michael Kasperzak, Jr.

R. Michael Kasperzak, Jr. is a commercial mediator who is President of Dispute Resolution Specialists, a Mountain View, California based provider of alternative dispute resolution services. The firm specializes in commercial mediation, and assists businesses and individuals in resolving a wide variety of disputes, including employment, real estate, personal injury, consumer, vendor, partnership dissolution, collection, bankruptcy and aviation. Mike also provides settlement conference and neutral evaluation services in those disputes where the parties may need a more assertive and directive facilitator.

If you want to arrange a mediation, have more questions about ADR, or if your company or professional organization would benefit from a presentation on ADR and mediation, Mike can be contacted at 415-948-5340 or at 1172 Morton Court, Mountain View, California 94040.

Winning Moves, Inc.

Winning Moves, Inc., an exciting game company, provided us with excerpts from JUDGE 'n' JURY, a legal game. These trial scripts appear throughout Section 2. The full-length trials are provided in the game on two hi-quality audio cassettes. Each trial is narrated by a mythical judge over an entertaining, sound effects dramatization of the facts. For more information about JUDGE 'n' JURY, call 508-887-0214.



Burk & Reedy, LLP, Attorneys

CORPORATE, TECHNOLOGY & INTERNATIONAL LAW

Washington, DC & Newport Beach, CA

www.burkreedy.com

We provide our clients with *business and strategic counseling*, identifying the long term ramifications of business relationships and structural alternatives in the context of legal considerations. Now that you have the form of agreement you want to use, isn't it important to know how to use it—and what it really means? That's where we can help.

AgreementBuilder Templates

*If you don't know what you want,
you won't recognize it when you get it.*

~ Unknown Author

The following is an alphabetical list of all the document templates provided in the Agreement *Builder*.

- Action by Incorporator
- Advertising Co-op
- Affiliate Operating Agreement
- Agreement Extension
- Articles of Incorporation
- Assignment ~ Accounts Receivable
- Assignment of Pre-Employment Works
- Background Research Release ~ Comprehensive
- Background Research Release ~ Simplified
- Bailment
- Beta Test Agreement
- Bill of Sale
- Business Assets Transfer
- Buy-Sell Agreement
- Cancel Order
- Cancel Order ~ Buyer Breach
- Cancel Order ~ Seller Breach
- Collection Agent Appointment
- Commercial Lease
- Commercial Sublease
- Confidentiality
- Confidentiality ~ 1 page
- Consignment Sale
- Consulting ~ Marketing Services
- Consulting Services
- Contract Assignment
- Copyright Assignment
- Corporate Bylaws
- Credit Purchase
- Custom Software Development
- Custom Software License
- Dealer Resale Agreement
- Debt Assignment
- Directors Consent ~ 1st Meeting
- Directors Consent ~ to Action Taken
- Distribution Agreement ~ Exclusive
- Distribution Agreement ~ Non-Exclusive
- Divorce Property Settlement
- Employee Invention Assignment
- Employee Non-Compete
- Employee Non-Disclosure
- Employee Stock Bonus
- Employment ~ Employee
- Employment ~ Executive
- Employment Continuation
- Employment Termination
- Equipment Lease
- Equipment Purchase
- Extended Service
- Extended Use License
- Finder's Fee ~ Investors
- Finder's Fee ~ Sale of Business
- General Partnership
- Hardware / Equipment Extended Maintenance
- Idea / Invention Submission
- Indemnity
- Independent Contractor
- International Distribution
- International License
- Internet Joint-Marketing
- IP Acquisition
- IP Purchase Letter
- Joint Development
- Joint Marketing

- Joint Venture
- Lease Assignment ~ Lessee
- Lease Assignment ~ Lessor
- Lease Guarantee
- Lease Modification
- Legal Representation ~ Contingency
- Legal Representation ~ Fee
- Letter of Intent ~ Binding
- Letter of Intent ~ Do Business
- Letter of Intent ~ Negotiate
- Letter of Intent ~ Non-Binding
- Letter of Intent ~ Purchase Business
- Letter of Intent ~ Sell Business Assets
- Limited Partnership
- LLC Action by Consent
- LLC Articles of Organization
- LLC Certificate of Units
- LLC Consent to Appointment as Registered Agent
- LLC Operating Agreement
- Mail List Exchange
- Mail List Rental
- Manufacturer's Representative
- Manufacturing ~ Exclusive
- Marketing Consulting
- Marketing Partnership
- Material Usage License
- Mutual Contract Termination
- Mutual Release
- National Account Manager
- Non-Disclosure ~ Deal
- Non-Disclosure ~ Employee
- Non-Disclosure ~ Formal
- Non-Disclosure ~ General
- Non-Disclosure ~ Mutual
- Non-Disclosure ~ Product Submission
- Non-Disclosure ~ Simple
- Notice of Intent to Repossess
- Notice of Past Due Invoice-1st
- Notice of Past Due Invoice-2nd
- Notice of Past Due Invoice-Final
- Notice of Rejection of Non-Conforming Goods
- OEM / Remarketing
- Partnership Assets & LLC Buyout
- Partnership Dissolution
- Patent Assignment
- Patent License
- Patent License Assignment
- Personal Injury Release
- Personal Loan Guarantee ~ Formal
- Personal Loan Guarantee ~ Short
- Power of Attorney
- Power of Attorney ~ Revocation
- Prenuptial ~ Formal
- Prenuptial ~ Simple
- Product License for Sale and/or Manufacture
- Professional-Services
- Promissory Note
- Promissory Note + Stock Conversion
- Purchase
- Referral Acknowledgment
- Release ~ Simple
- Represent Buyer
- Represent Seller
- Residential Lease
- Residential Sublease
- Retail Salesperson
- Retainer ~ Fee
- Sales Rep ~ Commission Only
- Sales Representative
- Sales Representative ~ Foreign
- Security ~ Formal
- Security ~ Simple
- Service
- Settlement Agreement & Release
- Severance
- Shareholder Buy-Sell
- Shareholder Consent
- Shareholder Proxy
- Small-Claims Court Worksheet
- Software Development ~ Work for Hire

- Software End-User License
- Software License
- Software Maintenance
- Software OEM Remarketing
- Software Source-Code Escrow
- Stock Redemption
- Sub-Contractor
- Sublease Guarantee
- Talent Model Release
- Technology Evaluation
- Testimonial Consent & Release
- Trademark Assignment
- Trademark License
- Value Added Reseller
- Web Referral Agreement
- Website Developer ~ Work For Hire
- Website Development ~ Work For Hire
- Website Reciprocal Link
- Work for Hire

Your Step x Step to Business Contracts System


The world makes way for the [person] who knows where s/he is going.

~ Ralph Waldo Emerson

The first contract was written hundreds of years ago, and it has been rewritten countless times since. Given this fact, it's hard to believe that attorneys continue to charge an arm and a leg to “draft” an age old agreement. They are very busy and would need to charge you their full rate—when you can get started on your own, then pay them for the essence of their expertise where you need it most. With AgreementBuilder, you will save considerable time, uncertainty, and money.

There is more included with AgreementBuilder than most business contracts software products. We help you with everything we can so you can build your business, build value at every step, inspire managers and employees alike, as well as be mentally prepared with the ideas and materials you need to build your business as you envision it. Remember, the world is set-up to help you – it's all around – this can be easy. Maybe even fun!

Business Contracts Checklist:

- 1) Install the software (it's all automatic, but we must start here!)
- 2) Put your shared files on a drive/server where you can access them from every computer you want.
- 3) Add other users (as desired) and provide access to your shared files.
- 4) Choose AgreementBuilder from then menu.
- 5) Check the box for the agreement(s) you want to include.
- 6) Open each Word document and edit to suit your business.
- 7) Utilize the narrative and expert comments to determine which approaches best suit your needs.
- 8) Review this Handbook.
- 9) Solicit input from your attorney – click the [little man] icon to request a consultant nearby.
- 10) Skim through the bonus publication, “How To Protect Your Business From Ruinous Litigation”
- 11) Visit www.jian.com and review the Business FAQs
- 12) Review other available documents and use as needed.
- 13) Click the  icon above/right and send us your success story!

Getting-Started Guide: Windows

*You couldn't get a conversation started...
everybody was talking to each other.*

~ Yogi Berra

System Requirements

Windows

AgreementBuilder is a Windows® /2000/XP/Vista compatible software application requiring::

- PC-Compatible Computer
- Windows 2000/ME/XP Operating System
- 256MB RAM
- 60MB Free hard disk space (About 200MB if you download the video)
- CD-ROM Drive
- MS Mouse or compatible pointing device

AgreementBuilder requires / works with:

- Microsoft® Word® 2000/XP/2003/2007 or later
- Microsoft Excel® 2000/XP/2003/2007 or later
- Or... Microsoft Office 2000/XP/2003/2007 or later

Headings

in bold in these instructions (like the heading above), match screen headings in AgreementBuilder.

Downloading Instructions

This presumes that you only have this manual so far and not the software!

- Click the link in the email sent to you.
(If the link is inactive, copy the link into your browser address window.)
- On the next page, click on just the 'filename' link...
- In the top "Save In:" window, select your desktop.
- When prompted to Open or Save, click Save.
- Please be patient for a few moments while the system downloads the software (it's about 13MB)
- Then double-click to install.
- The program will automatically replace any previous application, but leave your working files in place.

Installing From a CD

Before You Begin:

- Install the latest Windows and Office updates.
- Click your START button (on your desktop)
- Click “Windows Updates” (or visit www.microsoft.com – look for 'downloads') Follow the Microsoft instructions.
- Turn off all other programs before installing AgreementBuilder.
- Make sure one of these operating systems is running on your computer: Windows 2000/ XP/2003/Vista.
- Place the AgreementBuilder CD-ROM in your CD-ROM drive.

Installation Screens

Follow the on-screen installation instructions.

Read the **License Agreement**. You must agree to the terms of the license agreement to complete the installation.

- Click “I Agree;” then click “Next.”

Choose Destination Location

We strongly recommend that you allow AgreementBuilder to place your program files in the preset default locations. If you should need technical support, our support staff will be able to help you locate your files more readily. If you choose a different destination, please note it in your in the “NOTES” section of these instructions on the last page of this booklet.

Access your project from various locations

The default setting is for sharing your project. No one can access your projects unless you give them a username and a password. The AgreementBuilder license enables you to install the application on three machines for yourself – we presume: work, laptop and home.

We recommend keeping the shared mode to enable you to store your documents in a separate folder on a server (or a web-based server) – anywhere you want to put your files to enable yourself to work on them from different locations. If you want to enable collaborators, they will need their own copies of AgreementBuilder (we offer package deals on www.jian.com). You will find that it is very easy to add more users and tightly control their access. Click “Next”

This will take you to the Start Installation screen. To install AgreementBuilder:

- Click “Next.”

Installation time will vary with the speed of your processor, and your system configuration. An average installation takes about 6 minutes.

The next screen will tell you that your installation has been successful.

How To... Use the Software

*It's easy to sit up and take notice.
What is difficult is getting up and taking action.*

~ Al Batt, Humorist

We use the same system – MIDAS (our Multi-user Interactive Document Assembly System) to manage all of our products. This way, all of our products work the same way, plus you can share sections between them. Information entered into the next three Product Information screens will be used to complete recurring variables in your sample contract, and part of it will also be used to register your software.

Log In

The first time you log in, you can simply make up your username and password – just make sure they use at least six (6) characters (letters and numbers only – no special characters.)

Although it usually goes without saying... please make up something that will be easy for you to remember!

If you purchased AgreementBuilder from the JIAN website (www.JIAN.com), you will receive a serial number via email.

If you purchased AgreementBuilder on a CD, please enter the serial number on the added sticker.

Activation Required:

You may run AgreementBuilder seven (7) times before the system must access our website for activation. (The system will do it automatically when you are connected to the Internet.)

When you are done entering your log-in information, you will return to this screen where you must re-enter your Log-in Name and Password to get started for the first time.

Remember my Password

To support your sanity, from here on, the system will remember your Log-in Name and Password when you access from the same PC – just remember to **Remember my Password**

File Location

The system automatically creates a folder in your “Shared Documents” folder called “JIAN Documents.”

The screenshot shows the JIAN software login interface. At the top, it says "Welcome to JIAN" and provides a brief overview of the MIDAS system. Below this is a "PRIVATE" sign graphic. The main form contains the following elements:

- Username:** A text box containing "burkefranklin".
- Password:** A text box with masked characters "*****".
- Remember my Password:** A checked checkbox.
- File Location:** A text box containing "C:\Documents and Settings\Administrator\Desktop\Business Plan".
- Make Default Path:** An unchecked checkbox.
- Login Mode:** Two radio buttons: "All Access Full Control" (selected) and "Work locally on checked-out plans".

Buttons for "More Information", "Add User", "Change", "Cancel", and "Next" are positioned around the form.

The default path puts the projects you create into this folder. (Please do not delete this folder!)

This folder includes some Microsoft Access database files. It is best to create your first project here. If/when you want to move your project/plan to a web-based folder, you may easily drag & drop this folder to a new location which moves everything together to the new folder. In the future, login with the Shared Path set to the new folder.

Again, to support your sanity, from here on, the Default Path box to make your newly selected folder the new default folder for your plans / projects from now on.

Note: This is your data folder that can be shared with other users. When you login from other PCs, be sure that the Shared Path from each one points to exactly the same folder in the same system/server location. For more information of file sharing and collaboration scroll down to ‘Collaborating over a Network or Server’ on page 33.

Your Projects are Secure

No one can access your projects unless you give them a Username and a Password. You can store your documents in a separate folder on a server (or a web-based server) – anywhere you want to put your files to enable yourself to work on them from different locations. If you want to enable collaborators, they will need their own copies of AgreementBuilder (we offer package deals on www.jian.com). You will find that it is very easy to add more users and securely control their access.

To start a new agreement

If this is your first time using AgreementBuilder, then click “Start a New Project.” You will proceed to the next screen.

To open a current agreement

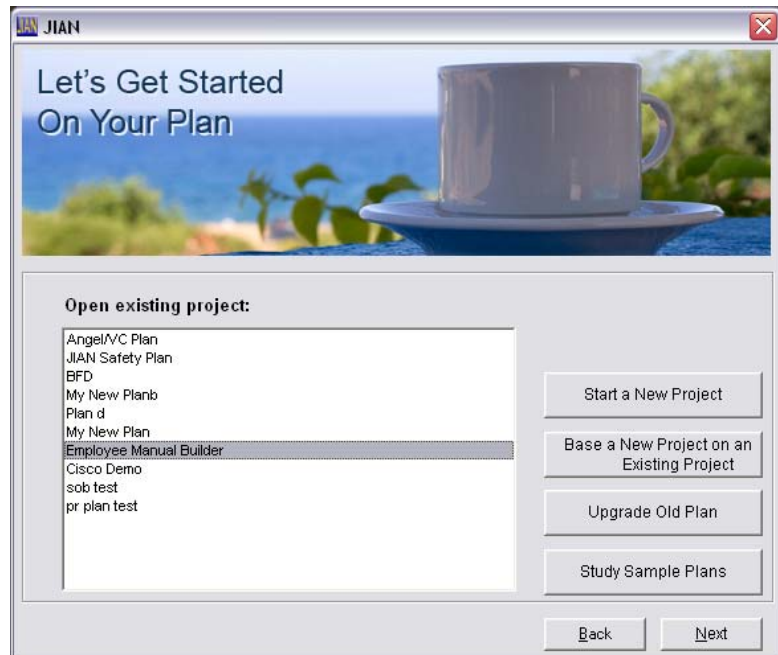
To get back to an agreement that you are currently working on, just click on the title of your project in the window and then click Next. The projects / plans listed will be for all of your current projects for the Username used when you logged in.

To create a new contract using a previous contract as a template

If you have developed a project and want to use it as a template for your new project, just click on the title of your project in the window and then click the “Base a New Project on an Existing Project.” The system makes a copy of the previous set of documents and will enable you to save them as a new project under a new name (it will not overwrite the previous documents).

To upgrade your sample contract(s) – Made from AgreementBuilder v3/4:

(Project sections created from earlier versions of AgreementBuilder or other sample contract software can easily be pasted into a new project, section by section.) Generally; however, you will want to start from scratch with this completely revised AgreementBuilder 5 business contracts system.



Choosing the right JIAN product and its components

We use the same MIDAS system to manage all of our Business Power Tools products.

Select Product:

First, select which product you want to use. (Each are sold separately.) In the upper window, you can see a pull-down menu that will offer some choices.

Select Base Plan:

Ignore this for now – this section is there to enable you to choose between sections of other JIAN products.



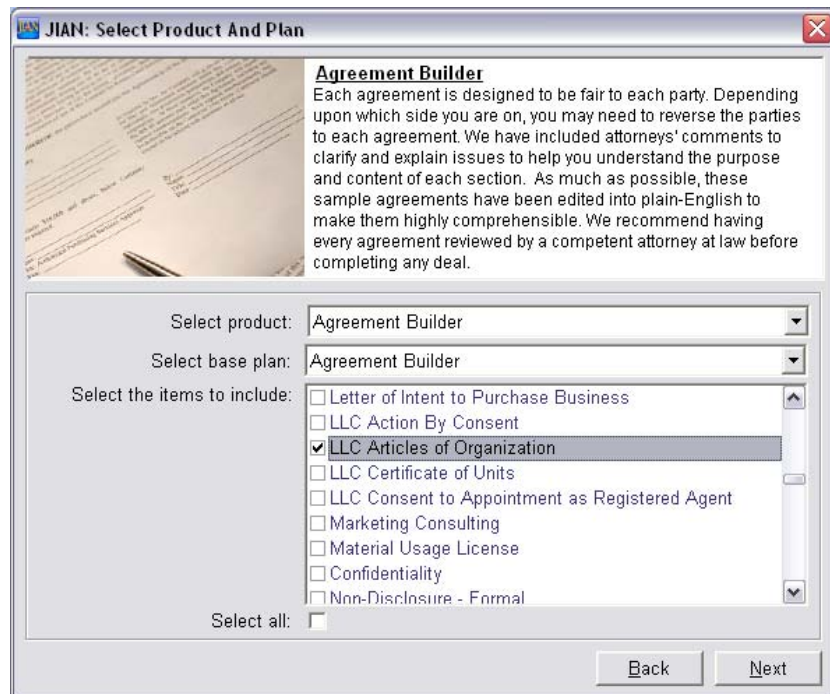
Select Items to Include:

Choose the sections you want to include initially, or choose all of them. Later you can always add more sections, start from a blank section, add documents from your own files, as well as choose from the many supplementary documents we have included.

Select All:

Or, choose all the parts – not really necessary when writing just one agreement, nevertheless, all of them will still appear as choices, just the one you choose will print.

Click **Next**.



User Information Form

What you enter here will be used throughout your project documents to replace recurring variables.

Be sure that [Company Legal Name] (e.g. JIAN Tools for Sales, Inc.) and [Company/Acronym] (a shorter name or acronym like: JIAN) are correct for your business.

If you do not change/fill in the variable(s), then your project will include the variable(s) as shown below.

Variables are tied to specific projects

Each set of variables is connected to a specific company. This same system can help you produce a business plan, legal contracts, stock options, a safety plan and more (these are additional products JIAN offers and must be purchased separately). In the event that you are writing multiple projects, you will likely want each project to use a different set of variables. If you have already started a project, then start another/new project, the variables will initially show what you had in the previous project – when you change them, they will remain specific to the new project. If you are using JIAN’s Business Power Tools to develop projects for multiple companies, please contact us for a “Consultants’ version.

Change Variables

If you pull-down under Options to Edit Variables while you are editing your project, you can change these variables on-the-fly. (You will need to close and reopen the current section for the variable change to take effect.)

JIAN: User Information Form

Supply/Edit the following information for use in creating your documents:

Plan Name:

About You: First Name: Last Name:

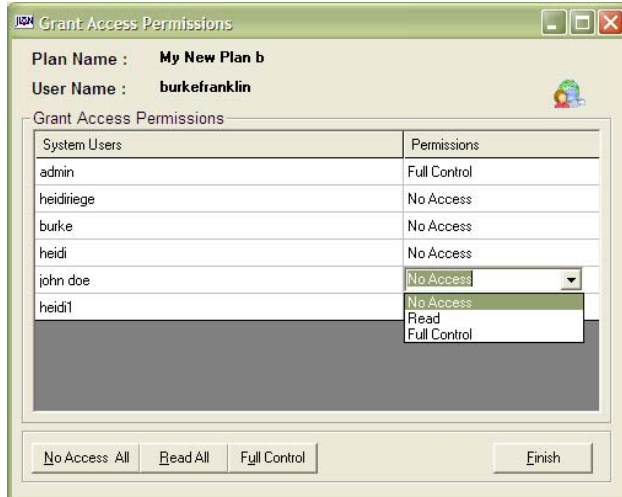
About your business:

Company Legal Name	<input type="text" value="[Company Legal Name]"/>
Company/Acronym	<input type="text" value="[Company]"/>
Address	<input type="text" value="[Address]"/>
City	<input type="text" value="[City]"/>
State	<input type="text" value="[State]"/>
Zip Code	<input type="text" value="[Postal Code]"/>
Telephone	<input type="text" value="[Telephone]"/>
WebSite Address	<input type="text" value="[Website]"/>
Owner/Founder	<input type="text" value="[Owner/Founder]"/>
Founder First Name	<input type="text" value="[Founder First Name]"/>
Founder Email	<input type="text" value="[Founder Email]"/>
Founder 2	<input type="text" value="[Founder 2]"/>
Founder 2 First Name	<input type="text" value="[Founder 2 First Name]"/>
Founder 2 Email	<input type="text" value="[Founder 2 Email]"/>
Year Started	<input type="text" value="[Year Started]"/>
Competitor 1	<input type="text" value="[Competitor 1]"/>
Competitor 2	<input type="text" value="[Competitor 2]"/>

Select Industry:

User Permissions

When you are starting your first project, this screen will appear after the User Information Form. You are “Admin” – Click on the down arrow and give yourself, “Full Control” (Full control... yes!) This means that you (and anyone else given full control) can access, read and change the documents.



Permissions for Each Project

You can add an unlimited number of users to your AgreementBuilder system. For each project you are working on, you must grant access to each user respectively. This way you can add all of the people you want to work with to the system (see Add Users below), but selectively grant access levels per each project you are working on...

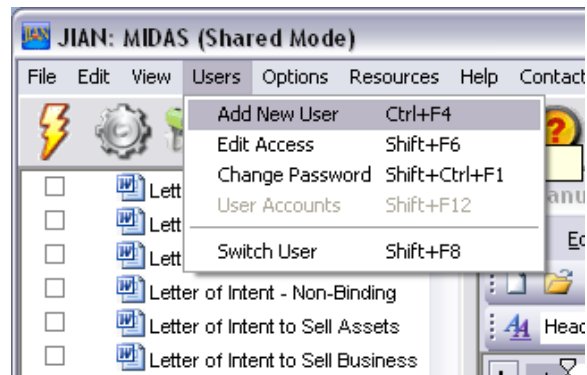
No Access means that the user cannot even see a listing of a project.

Read means they can look, but not edit.

Add Users

You may add as many additional users as you like. (They will each require their own licensed copy of AgreementBuilder.) When you add a user, s/he can be given access to all projects, local or shared. You'll need to enter them once while you are logged in the local mode + once while you are logged in the shared mode.

When a user is added in the local mode, they'll get access to local files only (no access to the shared area). Log-in to AgreementBuilder in 'Local' mode, click on "New User" on the log-in screen and add their name and password.



For adding a user in the shared mode you must log yourself in Shared mode, then click on "New User" on the log-in screen (or pull-down under Users to Add New User) and add their name and password.

To share projects

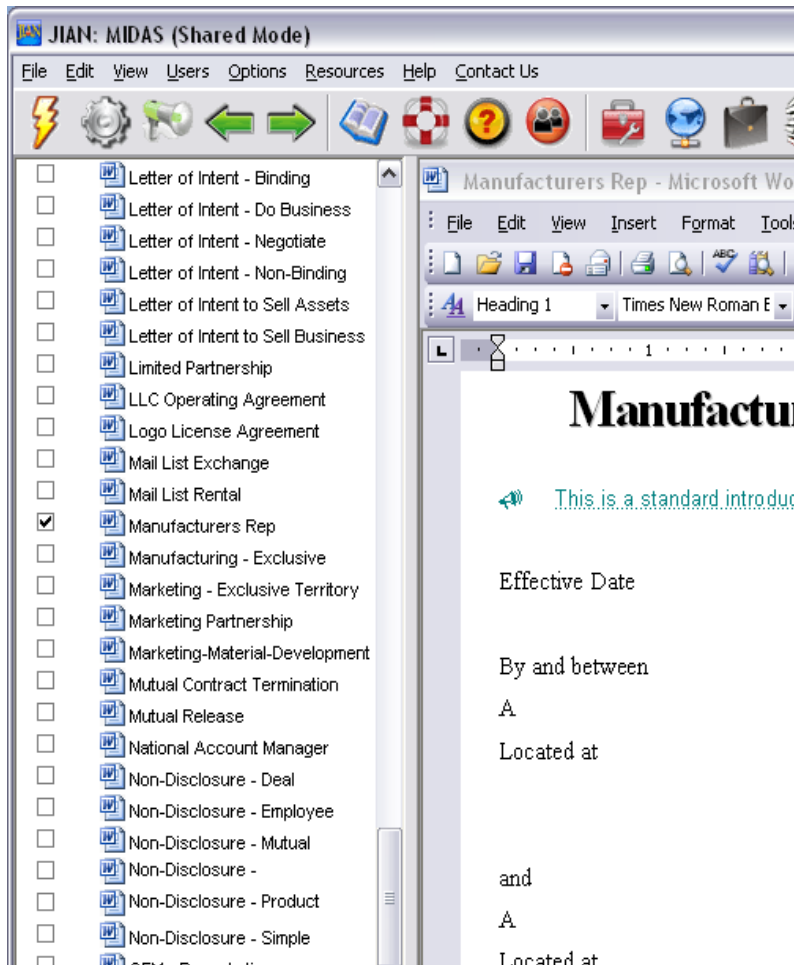
Others must log-in to their copies of AgreementBuilder using exactly the same login name and password as you have given them.

When you are finished adding users, open the project you wish to share. Then, pull-down under 'Users' to 'Edit Permissions.' There, you can control other users' access privileges for this project..

Access to each project is controlled separately

Even though many users may be added to your system, you must first login using the login name and password used to create a specific plan/project. Open that specific Plan/Project. Then, pull-down under Users to Edit Permissions – these permissions will apply only to that specific plan/project.

Starting a New Agreement



Screen Sections

The Index or Item List on the left side of your screen includes:

- *White Current Project Area*—the elements you've already selected
- *Dark Gray Masters Area*—more project elements, tools and files.

As you can see from the sections shown, we have designed AgreementBuilder to enable you to jump right to a section you may feel most compelled to work on. Likewise, your audience can jump right to the parts they most want to see. (Rather than forcing you to write a sample contract in a lock-step sequence, we have turned the process inside out and constructed it to enable you to work on your sample contract any way you like. The modularity will also appeal to your audience who will also likely jump around looking for what they want to read.)

Renaming an agreement

Right-click any of the section titles and you can rename, delete, set as active/inactive (same as checkbox), or add another element.

Increasing your work area

You can enlarge the window for working on your project several ways:

- **Maximize** — use the Maximize button in the far upper right corner of the AgreementBuilder program window (not the Word or Excel window, please.)
- **Hide Item List** — Pull down under View to “Hide Item List.” The item list disappears, and the working area fills the space.
- **Partially Hide Item List** — Click and drag the vertical separator bar between the menu and the working area to the right. A double arrow will appear.

Print a preview

If you want to print a hard copy to review, there are several options.

1) To print just the active section you are working on, in the Word window, either click the printer icon or pull-down under File to print and you will print just the section you have open.

2) To print the entire project, first notice which sections have a . Make sure that all sections that you want to print have a next to them, then pull-down under File at the upper left of your screen (just under the JIAN logo) and click on Assemble Plan Preview. In the Word window, either click the printer icon or pull-down under File to print and you will print the entire project.

Note: While you can turn the expert comments off/on with the above ‘bullhorn’ button, they will not print unless you click ‘ Hidden text’ (pull-down under Tools to Options, then click the Print tab).

Do not edit the preview...

A Plan Preview actually exports all of the sample contract sections, assembles them and creates a new Word document that is now exported outside of the AgreementBuilder application. Keep your hard copy, but close this preview and proceed to edit by double-clicking section by section. You can print again and again, and again finally when you want to save a final copy (which will be editable using Word, but outside of AgreementBuilder).

Writing Your Contract

Better three hours too soon, than one minute too late.

~ William Shakespeare: 16th-17th century English poet and playwright

Using AgreementBuilder to write your sample contract is very easy – as you will see, much has already been written for you. As you work through AgreementBuilder, your challenge will be to complete the sections applicable to your business, consider new ideas and how they might apply and add value to your business, and delete sections that do not apply.

Also, to make this process easy, we use native Microsoft Word (in fact it is your own copy!). Hopefully you are familiar with this application. From here, there are three things to do next:

- Open
- Edit
- Assemble & Print

1. Open

Just double-click any of the titles of documents on the left and they will open in MS Word on the right.

For the narrative portion of your sample contract, this opens Word in the right-side window, with the document in Word. As the document opens, the screen may flash very briefly. This is the system replacing variables with the information you entered previously for your business.

We use Microsoft Word’s built-in “Styles & Formatting”

Every line of text is governed by a Style (pull-down under Format to Styles and Formatting). The nice thing about Styles is that you can change the format of the text in one place and it changes to match everywhere else—wherever that style is used. In the word documents you will see several kinds of text:

*Quotes appear in blue and are characters that will print.
These are intended for you to insert a quote of your own
usually some kind of relevant comment to make a point.*

Headings & Body text appear as black text

The headings are different styles, depending on the section’s level within the agreement. Until you have saved your final version, the styles applied to the different types of text are protected, as they are necessary to assemble and paginate your final agreement. You can make formatting and style changes in your final “assembled and saved” document.

Paragraph text is named ‘Body.’ We recommend using at least 11 point type. You can change text within a paragraph like underline, **bold** or *italics* without affecting the entire Body style. Highlight the entire

paragraph, change its formatting, and Body text throughout changes to match your formatting changes.

CAUTION: The Table of Contents uses Heading1 and Heading2—the big section heading and the blue subheadings (like “Writing Your sample contract” and “1. Open” above, respectively). While you may change the formatting of these heading styles, be careful when you add another heading or change one of these. You may inadvertently alter the way your Table of Contents is compiled.

2. Editing the Narrative

To customize your sample contract, you’ll need to open each agreement element and edit it to suit your particular business situation.

Variables that you will need to customize for your business are inside [square brackets]. You can read and edit as you go, or you can move directly from variable to variable by clicking the forward and back buttons in the toolbar (inside red box).



Jump from variable to variable:

Using the forward/back buttons will highlight the entire variable with all its options. To keep a portion of the variable options: click once in the document to deselect the text, then click and drag across portions you want to delete, and

Press “Backspace,” leaving words or phrases you want to use.

To completely replace the options provided with your own words: while the variable is still highlighted, simply start typing. The entire variable, including brackets, will be replaced with what you type.

Save Your Work as You Go! (Please!)

When you have been working in an agreement element or any of the supplementary tools, be sure to click “Yes” to save your work. Even if you have only opened an element to review it, the variables that have been replaced will be retained. (The only place this does not apply is just after you “Save Assembled Plan As...”).

When you finish editing an agreement element, click the blue diskette icon in the Word toolbar or pull-down under file to Save.

Warning: Use only ‘Save’ to save your work. The system will automatically manage the filing of your documents. If you “Save As” and save a page somewhere else in your computer or network, the AgreementBuilder system will not know where to look for it in the future.

When you double-click on another section to edit, the system will automatically save your edits, put away the file, then open the new section.

Click “Yes” when it asks if you want to save your work.

Otherwise, the element will revert to the original version and all your work will be gone. Ugh!

Edit each agreement element and each supplementary tool you’re including in your sample contract.

Be sure to save your changes.

3. Assemble & Print

After you've edited and customized all the elements of your sample contract, you're ready to assemble a preview of your entire narrative. Once you have completed your sample contract and performed a file "Save Assembled Plan As..." saving the document with a new name, these functions become accessible again.

Review the order of your sample contract – does the sequence best build your case?

Review the check boxes – which sections do you need right now for this purpose?

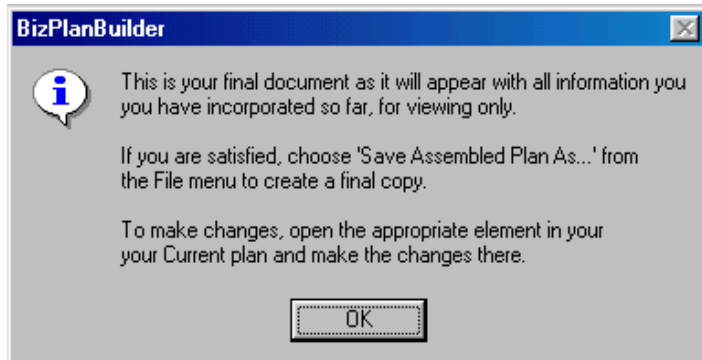
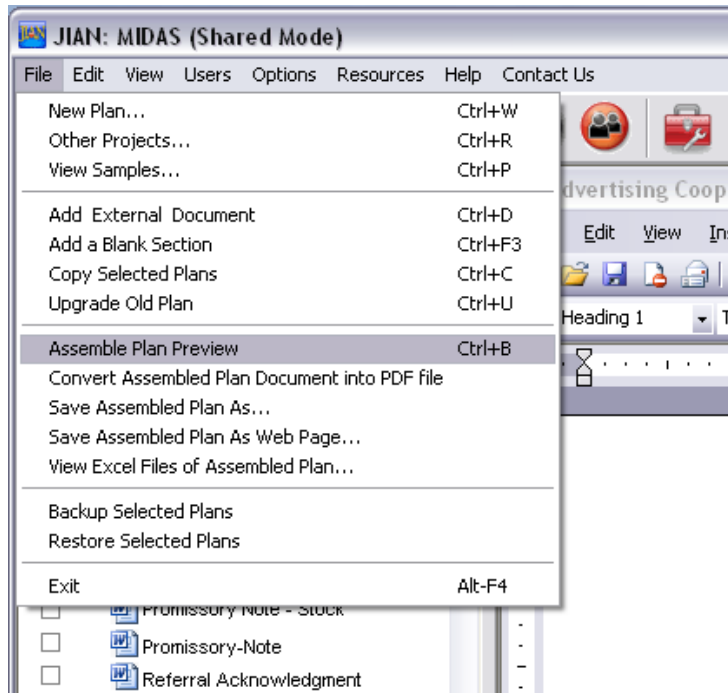


Either click this icon:

Or Pull down under File to "Assemble Plan Preview."

This dialog box will appear:

Your sample contract then assembles for your final review. If you want to change the order of some of the elements, or modify some of the text, be sure you close the assembled preview (without saving changes) and go into the elements themselves to revise. This way, your changes are stored permanently in your sample contract. Once you've made all your changes, reassemble the Plan Preview and make your final review.



NOTE: It takes a while for the larger agreement narratives to assemble due to the length of these documents. If you have selected a large number of supplementary tools, the process may take a little longer as well.

Printing Your Contract

Print your sample contract from your Saved Assembled Plan.

For all other elements, when you have the file you want to print, open in your program window, use the File > Print command in the menu bar for Word or Excel within the AgreementBuilder program window. This will be the lower menu bar that you see just to the right of the Index/Item List area.

Saving Your Finalized Contract



When you are satisfied with your changes, in the File menu, select “Save Assembled Plan As...” Or click this icon... When you assemble your sample contract, it is *exported* and saved in the folder called “JIAN Documents” in your “Shared Documents” folder.

This is an active Word document which you can edit with Word; however....

Once you have saved your sample contract in this manner, any changes you make in this exported version **WILL NOT BE REFLECTED IN YOUR SAMPLE CONTRACT DOCUMENTS**. This is now a static agreement that you would use to print copies for distribution to employees; send to a consultant to review; save to .pdf or HTML for posting on your website, etc. When you want to make subsequent changes, it is best to do so in the original plan elements, then reassemble the next iteration of your plan.

Back-Up Your Files



Losing your work sucks. Part of our BS minimization philosophy includes helping you to make sure that you do your work only once. To make a back-up copy of your sample contract, either pull-down under the File menu and let go on Back-Up or click the icon (left) at the top of your screen.

The best way to move a plan from one PC/server to another is to use Copy/Move. The Backup/Restore is built to make a backup (then restore) on the *same* PC in case the current plan is corrupted or is to be rolled back to the previous saved version.

Another method is to simply copy the entire “JIAN Documents” folder in your ‘My Documents’ folder to another disk/server or burn it to a CD. To restore a lost file or crashed disk, you can then simply replace it, in its entirety into its original location.

Add an External Document

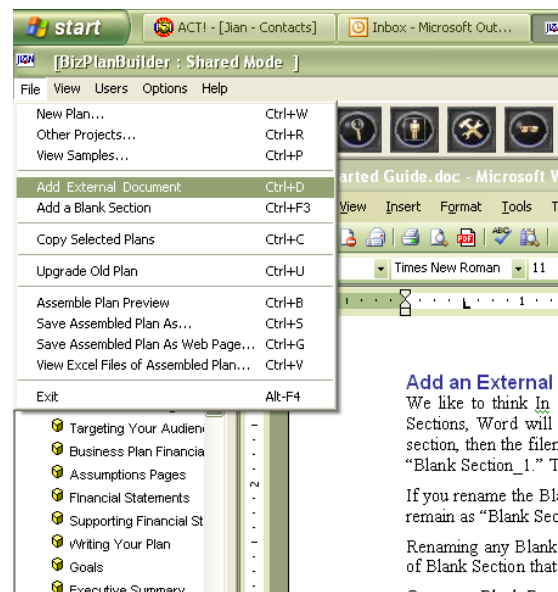
If you have a documents that you want to include with your sample contract, it is easy to click and browse for the file you want. Just pull-down under File to “Add External Document.” A familiar Windows browse window will open enabling you to look through your system (and network) for a document to add to your agreement. When you find it, click on it, then click on ‘Open.’

Initially, it will be added to the bottom of the white navigation on the left. Use drag & drop to move it into the sequence where you want it in your sample contract.

Add a Blank Section

You can add an unlimited number of Blank Sections. (One more step down in the above menu.) As you add Blank Sections, Word will give each one an incremental filename name. For example, if you add one blank section, then the filename will be “Blank Section.” If you add another blank section, the filename will be “Blank Section_1.” The next will be “Blank Section_2.”

If you rename the Blank Section or any other document (right-click -> Rename), the word filename will



remain as “Blank Section_1,” the system does not change the filename of any document.

Collaborating Over a Network or Server

Let’s say that you want to share your document (even with your own ‘other’ computers), and you need to put a copy of your sample contract into another folder on your system, network, Zip disk, memory stick, etc. Since we include the database records for your sample contract variables, other users, their permissions, etc., you must move the entire folder – not just extract a single agreement file.

This is easy because you can simply drag & drop the entire folder to wherever you want to keep it. All you need to do next is to point AgreementBuilder to the new file location.

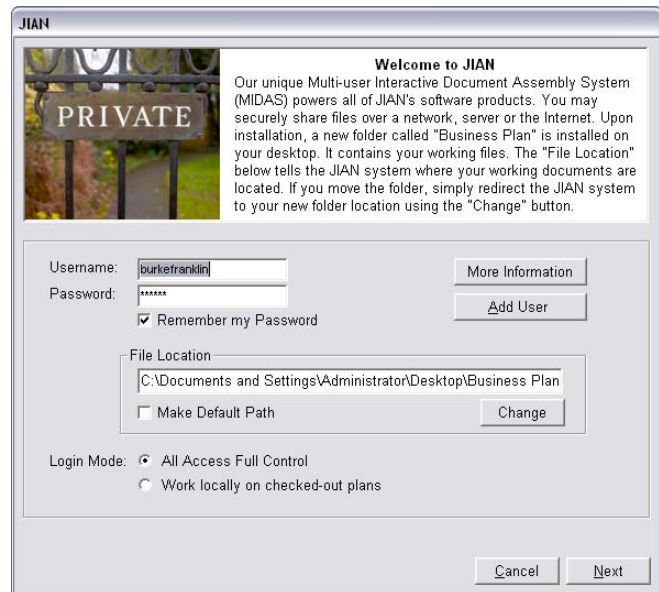
Point AgreementBuilder to your new file location:

When you log in to your sample contract, you can tell the JIAN system where the data files are located.

In the File Location window, you will see the address of your JIAN Data files – the documents that compose your sample contract. These will likely be in your ‘My Documents’ folder under “JIAN Files.” (Likely because you may have installed them elsewhere during installation – browse for them there.)

Click the Change button to browse your system (or network) for the “JIAN Datafiles” folder. Click just on the “JIAN Datafiles” folder – not anything within the folder.

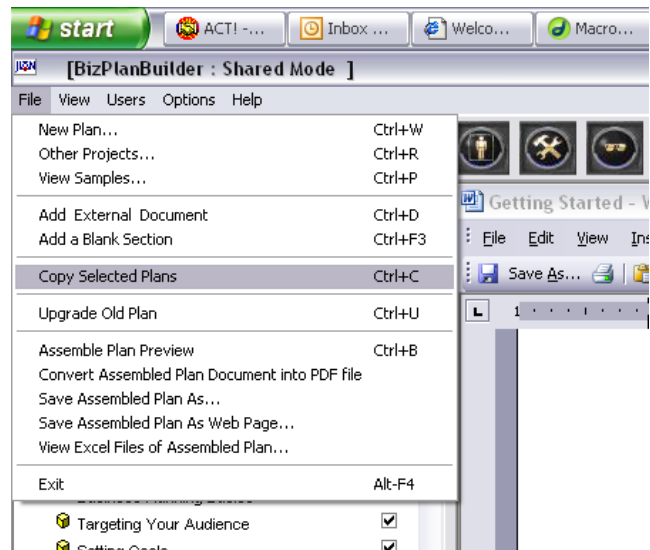
Make Default Path to set the JIAN system to automatically return to this same folder location the next time you login.



Another way to do this

You may also move the folder using the JIAN MIDAS system to help you... First, login with the path pointing to the default folder (or possibly the ‘BusinessPlan’ folder on your desktop).

- Pull-down under File to Copy Selected Plans.
- You will see a list of plans/projects in the currently active folder. (The one you logged into when you started this session with AgreementBuilder)
- Check the boxes for the projects you want to copy, then browse for the folder location to where you want to move your project(s)/plan(s).
- Click Copy.



Your project(s), plus the necessary system files will all be copied and moved together to the new location.

Before you delete the desktop “BusinessPlan” folder, first try connecting to the new folder location by logging in again with the path set to the new folder location. If you are able to log in successfully, then the “BusinessPlan” folder on the desktop can be safely removed.

Check-Out & Check-In

Ordinarily, while you are working on a section of your sample contract, if another user opens that section, they will be notified that they can Read-Only until you have completed your editing [for the moment] and have subsequently closed that section.

Now, let’s say that you want to take a section (or several sections) with you for editing elsewhere or later for private editing – for example, on your laptop on a business trip...

We recommend backing up your files first.

Pull-down under Options to Check-Out documents to temporarily remove them from the system.

(The documents will appear as Read-Only to other authorized users until you check them back in.)

Check-In returns the files to the active, shared project file.

It will overwrite the existing file.

To retrieve your Checked-Out file(s) for private editing

The checked-out file(s) go into a local folder with the same title on the same PC.

(For example, if you have “Plan A” created by UserA on your shared server, the checked out files will appear in “Plan A” under UserA in your local folder.)

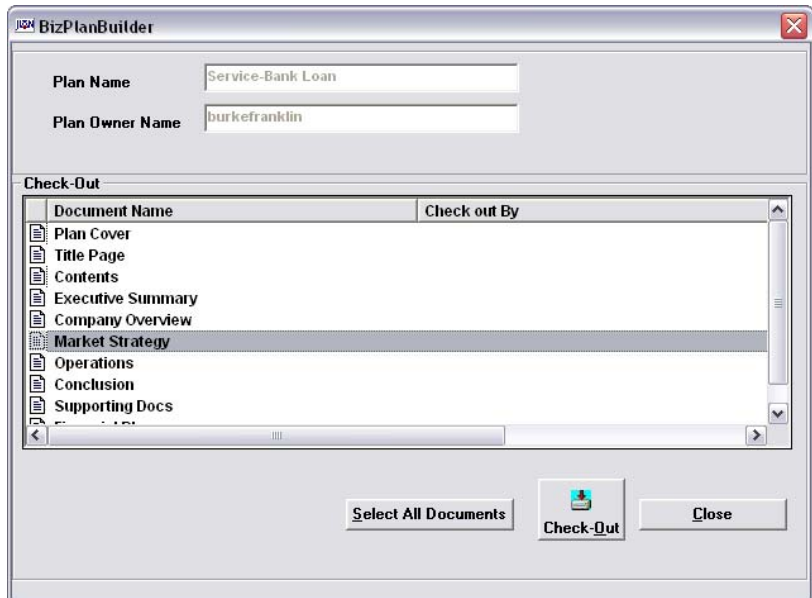
- Make sure you have a copy of AgreementBuilder installed on your laptop or other PC.
- Add your *same* Login name and password to your copy of AgreementBuilder installed on your laptop or other PC.
- Copy the file(s) in your local folder under your Login Name to your laptop or other PC.

If there is no user by name UserA in your local PC the system will give error “No User Found.”

To Check-In your previously checked-out file(s)

Be sure to first copy the revised file(s) from your laptop or other PC back to the local folder on the original PC. (You can use Back-Up to browse for the local folder.)

To check in the file back to the server, you must first open “Plan A” on the original server, then the Check-In option will be enabled, and you can simply click Check-In to copy the revised file(s) back into the master plan.



Troubleshooting

The difference between perseverance and obstinacy is that one often comes from a strong will, and the other from a strong won't.

~ 19th Century Cleric, Henry Ward Beecher

Update Windows & Office

Please be sure you have all of the latest Windows and Office Service Packs installed... this makes a world of difference! They are available *FREE* from Microsoft.

- Click your START button (on your desktop)
- Click "Windows Updates" (or visit www.microsoft.com – look for 'downloads')
- Follow the Microsoft instructions.

Norton Utilities / Anti-Virus

You may need to disable Norton before installing AgreementBuilder. (Best to remove AgreementBuilder, temporarily deactivate Norton...Reinstall AgreementBuilder.)

Online Technical Support FAQs

For late-breaking technical support tips and trick, please refer to www.jian.com.

Look for “Support” in the menu, then select AgreementBuilder.

User Notes & Reminders

As you open elements, you may notice a slight screen flash. This is the engine locating and replacing recurring variables with the information you entered as you were installing AgreementBuilder. In some files, you may be able to watch as, for instance JIAN or JIAN Tools For Sales Inc. are replaced by the short company name and the legal name, respectively, that you provided.

When You Finish:

After you have “Save Assembled Plan As...” if you are finished working with AgreementBuilder for the time being, be sure you click the AgreementBuilder program close box in the far upper right corner of the program window (DO NOT click the close box for Word or Excel at this stage).

CAUTION:

If you mistakenly close Word instead, and it asks if you want to save changes at this point, click “Yes.” You have already saved your plan to the new folder, along with any other elements and tools you selected for your plan.

Getting-Started Guide: Macintosh



The great thing is that Apple's DNA hasn't changed.

~ Steve Jobs

Templates Only — Edit & Print

The Mac version is a collection of Word and Excel templates that contain the very same content as the PC program. Unlike the Windows-based program with its document assembly system, we have taken the content and formatted it directly into complete word-processing and spreadsheet templates for you—documents that you can easily edit using Word & Excel. Your download will include a folder containing the documents neatly organized within sub-folders, with an “About” page to introduce the JIAN business tool you have chosen.

No Windows-like Application

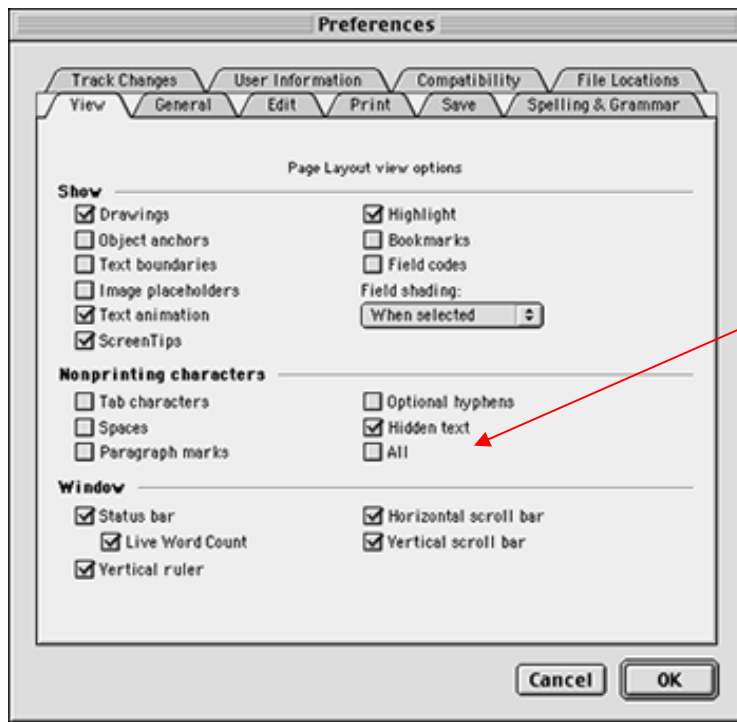
Although the Windows “wizard” is not there, the financials calculate just the same way as the PC financials. The text is fully editable—we have already assembled the documents for you for editing in Word. We wanted to offer a version of AgreementBuilder for Mac customers, but R&D on Apple products is astronomical and is not in our current budget based upon the percentage of customers we have that use the Mac platform. We hope to have a cross-platform product out within the next 6 months that is collaborative for all of our users. We will honor our 6 month free upgrade to you at the time that product becomes available... Please send us a copy of your email receipt (or just email us and we will look you up) when you see a newer version of the product on this site. Thank you for understanding.

You will need this free decompression software.

Please download a copy of “[Unstuffit](#)” which will enable you to immediately and automatically decompress the JIAN files downloaded.

- Macintosh OS 9 or 10, Jaguar, Tiger, Leopard
- Power PC® processor
- 32MB RAM, (200MB or more recommended if you want to download the video)
- 24MB hard disk space
- CD-ROM drive, 4x or faster
- 24-bit/true-color display
- Mac MS Office 2001, 2004 OR Mac MS Excel & Word 2001, 2004 or newer
- Requires full Office installation, and may not offer full functionality in some system configurations.

Expert Comments Throughout



We have added expert comments to help you understand what to do and why. These appear as green text between the paragraphs that you will edit.

If you cannot see them, please pull-down under Edit to Preferences.

Click on the View tab (as shown).

Click on the Hidden text box.

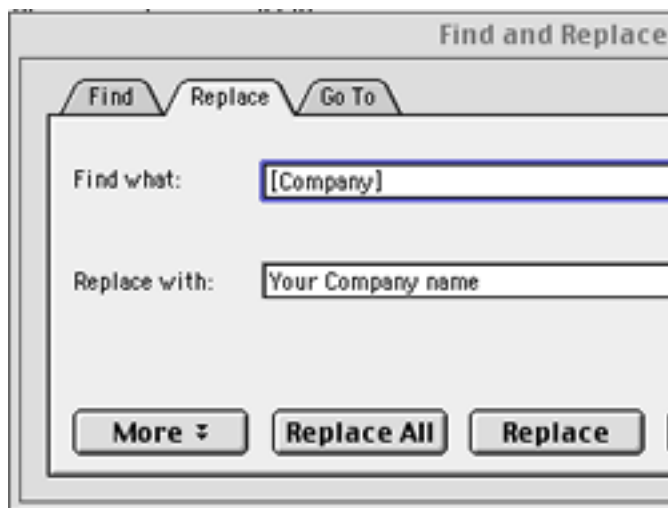
Click on the Print tab, repeat this procedure if you [don't] want to print the expert comments as well.

Click OK.

Be sure to look in the additional folders where you will find 40+ forms and memos useful for many everyday HR functions.

Customizing & Editing Your sample contract

You can customize your plan for your industry in just a few seconds.



The first thing you likely will want to do is insert your company name throughout your plan.

In Word, pull-down under Edit to Replace.

Type in '[Company]' in the upper box, then type in your company name as you want it to appear throughout your plan. (Although our company is officially 'JIAN Tools For Sales, Inc.,' we would use just 'JIAN' here.

When you click OK, your company name will automatically replace '[Company]' throughout your plan.

Go ahead and edit the sample contract

template to suit your business.

Collaborating Over a Server

*Mindfulness is sexy, it is touchy-feely.
As an art, it is the ability to consciously navigate yourself through life,
around or through any experience elegantly and safely.*

~ Debbie & Carlos Rosas

AgreementBuilder incorporates a multi-user capability enabling you to share your active working files with others on your management team or workgroup. Even if you want to share files with yourself (say, between your office, laptop and home computers), this is an excellent feature.

Here are the steps:

- Establish a Server
- Add Users (Collaborators)
- Share Files

First, make sure that your Windows File-Sharing is enabled

Select the folder in which you have stored your plan to share.

Right-click the folder. (Make sure File-Sharing is active with the boxes checked like in the image below:)

Add Users

Each Document (Sample contract, Business Plan, Marketing Plan, Safety Plan, etc.) requires its own list of approved collaborators.

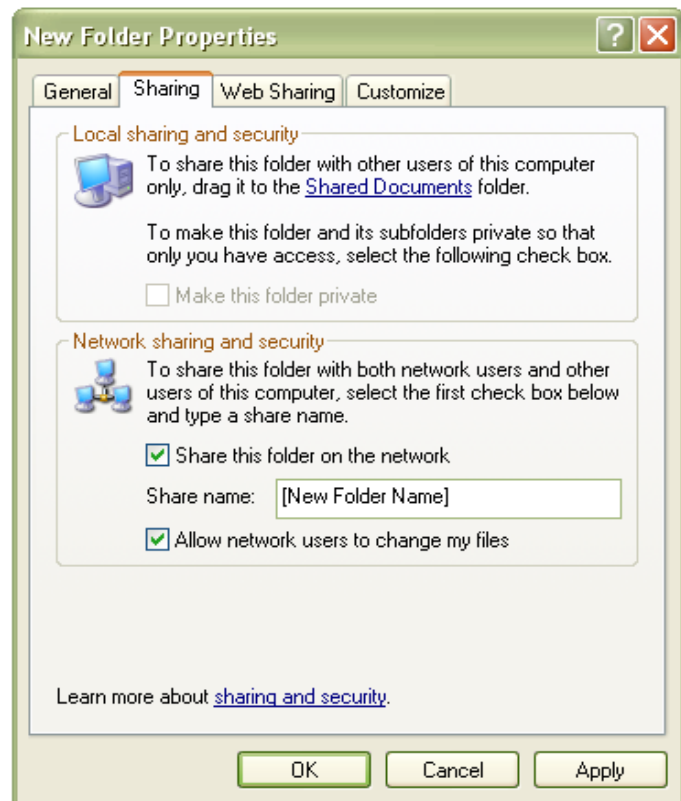
You can add as many collaborators as you deem sane.

(We use Access to make this easy.)

Share files

Communicate to your collaborators their designated usernames and passwords, as well as the path to the data files.

They will click on the Change button when they log in to the JIAN system and point their AgreementBuilder to the shared folder containing the active data files you established when you created your sample contract.



Collaborating over the Internet

If your company operates has an online files server, and you want to use it for file-sharing, please ask your system administrator to “map the drive to your desktop.” This way, you can easily browse to find the drive as if it were your “C:” drive, etc., then open and access the folder where you will share your sample contract files.

- 1) **If you do not have an online file-server...**
We recommend using [IBackup \(www.ibackup.com\)](http://www.ibackup.com)
(You can get 500MB online and accessible from anywhere/anytime for about \$10/month)
- 2) Sign-up for one of their “Workgroup Plans” as these will enable file-sharing, collaboration, back-up, etc. over the Internet.
- 3) Download their “IDrive” software and install it to automatically map their web-based “disk-drive” to your desktop.
- 4) Drag your “JIAN Datafiles” folder onto the IDrive.
- 5) Log-in to AgreementBuilder
- 6) Click the ‘Change’ button...
- 7) Browse for your new IBackup drive which should now appear on your desktop
(Start → My Computer → Drive on I Drive (I:) → JIAN Datafiles)
- 8) Click: Make Default Path
- 9) Communicate to your collaborators that they must visit IBackup and follow steps 2, 4-8.
- 10) (You will need to provide them with your IBackup log-in and password.)

Introduction

*"The strongest human instinct is to impart information,
The second strongest is to resist it."*

~ Writer, Kenneth Grahame

Words of Caution

Reading this manual and/or using AgreementBuilder does not make you an attorney (maybe you could play one on TV...). The purpose of this software product is to assist you in the preparation of business agreements. Once you have finished creating your agreement, you should have it reviewed and approved by an attorney to ensure that it meets your particular needs, as well as to ensure that it conforms to all state and local laws.

Do not use these documents without consulting an attorney.

JIAN does not represent or guarantee that these documents are appropriate for your needs, or satisfy any provision of federal, state or local law. By using AgreementBuilder, you agree to indemnify and hold JIAN harmless for any claim or liability arising from use of this product. JIAN accepts no liability for the effectiveness of these documents for your purposes.

Finding an Attorney

Shopping for an attorney may take a certain amount of persistence. Some attorneys may be disparaging regarding your AgreementBuilder documents. That's because they may have their own contract templates which they'd prefer to use, rather than review yours. They might attempt to sell you additional services, often at a high cost, that you don't generally need. The following section, "Working with Your Attorney" provides practical information and suggestions on how to find, hire, pay, and use attorneys. JIAN also provides our customers with access to the JIAN Professional Advisors (JPA) Network, a group of business professionals who use JIAN products and can provide assistance and advice. Among the professionals are attorneys in a number of states who will be happy to review your contract(s) for a reasonable fee. AgreementBuilder customers can obtain information on the JPA Network by calling 1-800-346-JIAN (5426). If you have a modem, you can access the JPA Network by dialing into our bulletin board at 650-254-5600.

AgreementBuilder provides standard legal agreements for use in a wide variety of situations. While these agreements are useful and educational, you will undoubtedly encounter situations where the complexity of an agreement, or the risk of liability exposure, requires that you act prudently and seek the assistance of an attorney. Not only can attorneys guide you through the gauntlet of legal issues in a particular situation, they can act as your business partner and help you select the appropriate legal and business position for your personal or business goals.

“Hey, I Need a Lawyer!”

As you know, there are attorneys around every corner who are ready and willing to serve your needs, usually for a substantial amount of money. The best way to find an attorney is to ask your friends and business colleagues for referrals. You can also call the local bar association for a list of local attorneys who practice in a particular area of the law. If you belong to a trade association or other organized group, you may be able to attend special conferences put on by local attorneys who you can approach with your questions. Also, you can call your local library for copies of national or local listings of attorneys. In short, there are many ways to find attorneys.

Hiring an Attorney

Finding attorneys is the easiest part of the process. Finding the right attorney for your needs takes some effort. When you seek the assistance of an attorney, there are several factors or priorities to consider. The first consideration is to find someone who has the expertise you need. You can save time and money working with an attorney who is skilled in the legal and business issues you face. For example, if you are setting up a distribution deal to distribute your product, you don't want a career personal injury lawyer negotiating the deal or drafting the documents. Instead, if you work with an experienced, business-savvy attorney who has drafted and negotiated distribution agreements, you not only receive solid legal advice, but also business insight. The experienced attorney will be able guide you through issues such as what royalty provisions, if any, are proper for your deal. So look for an attorney who has the exact experience required for your situation and/or an attorney who understands your industry.

*People are getting smarter nowadays; they are letting lawyers,
instead of their conscience, be their guide.*

~ Will Rogers

Your second factor in hiring an attorney is to find one who is willing to work within an agreeable fee structure. Attorneys may offer many types of fee structures. You can pay attorneys at an hourly or fixed rate or a combination of both. Some attorneys will ask that you pay an up-front, nonrefundable retainer fee to engage the attorney. Today, many transactional attorneys are willing to work for a fixed rate or set a fee limit for business transactions. Litigation attorneys, on the other hand, will almost always require hourly or contingency fees, depending on the type of case and on whether they will represent a plaintiff or a defendant. Use your negotiation skills to work out an appropriate fee structure. Not only can you get a better deal, but you will be able to see your attorney in action at the same time. The third factor to consider in hiring an attorney is to find someone you can trust. Chances are you will be relying on the attorney to help you make important decisions, so choose an attorney whose skill, intelligence and integrity you can rely on. The fourth factor in hiring an attorney is to select an attorney who you like as a person. It may seem odd that this would be a lower priority than the others, but extremely likable people don't always make good attorneys. For example, Perry Mason always won in court, but he sure wasn't the life of the party. Obviously, it is important that you get along with your attorney, but it is more important to select an attorney for his or her skill, experience and cost. After all, hiring an attorney is a business decision, not a popularity contest.

The Interview

You should meet with each potential attorney to get some perspective about the attorney's experience, skill, cost and personality. Most attorneys will meet with you free of charge for a first interview. Make an appointment, have some questions ready, and then rate the attorney against others you have interviewed. Weigh all of the factors, some of which (like cost) may be more important than others, and make your decision. The attorney will then ask you to sign a Legal Services Agreement to formalize the relationship. We have provided sample Legal Services Agreements in *AgreementBuilder*, so take a look at these to get a better understanding of the types of provisions included in these kinds of agreements.

Using Your Attorney

Once you sign the Legal Services Agreement, you have an attorney. Remember, your attorney is legally obligated to keep all of his or her correspondence and conversations with you confidential, unless you indicate that you're going to commit a crime of some sort. Also, your attorney must act in the best interests of the client and must zealously pursue those interests. A few attorneys think that this gives them the right to go out there and argue every legal issue until they are blue in the face and the client is out of money. Good attorneys consider cost, time and effect when deciding upon a particular course of action. Also, they should consult with you and let you make the ultimate decision on which action to take. A good principle to follow is that when you use an attorney, don't let the attorney use you. You probably purchased *AgreementBuilder* for this very reason. Attorney's fees can add up quickly, so it helps a great deal to keep on top of all the work for which you are billed. Request itemized billing statements and don't be afraid to question unreasonable charges. You are the boss, so be strict yet reasonable. When you want to discuss issues with your lawyer, you should write out a list of questions before making a call or having a meeting in person. This can help you to clarify your thoughts and can reduce the amount of time spent fumbling through ambiguous (and costly) conversations. Also, take notes during such conversations, either during or after the conversation. Keep a file of all notes, correspondence and other relevant documents so you can refresh your memory regarding a particular issue. That way, you won't have to call your attorney to ask a question that you've asked before.

Using *AgreementBuilder* in conjunction with your lawyer will be a great timesaver as well. You can create your own legal agreements and, if necessary, have your lawyer review them. Moreover, *AgreementBuilder* educates you on the meaning of many types of legal provisions, so you will easily understand issues that you would otherwise have to pay a lawyer to explain.

Concluding Thoughts

Remember that *AgreementBuilder* is not a "virtual lawyer" but a guide. Use it for educational as well as legal purposes, but always consult an attorney with your questions. We at JIAN hope that *AgreementBuilder* can augment any attorney-client relationship you have.

AgreementBuilder provides you with more than 100 legal documents, many of which exceed 10 pages in length. Due to the limited amount of space available in this reference guide, we are not able to include printouts of the templates. (To do so would have required an estimated 2,000 pages—quite a heavy load, as well as a lot of trees!) We have included a detailed description of what you will see on your computer screen when you open up an *AgreementBuilder* template with your word processor, as well as illustrations of a sample template (see pages 12 and 13).

Using the Templates

What we hope ever to do with ease, we must learn first to do with diligence.

~ Samuel Johnson

What's in a Template?

Each of the templates in *AgreementBuilder* has two main parts:

1. A cover memo, which we designed so that anyone who picks up the contract can quickly and easily find out the important facts—who the contract is between, the contract's effective date and subject matter, and the terms of the contract.
2. The contract itself, which includes comments that explain the purpose of certain sections and assist you in customizing the template for your specific need.

Customizing the Templates

AgreementBuilder's templates are designed to be accessed through and used with your word processor. Refer to the *AgreementBuilder Getting Started* booklet for instructions on how to open the templates with your specific word processor. Once you have opened (and if necessary, converted) the template you want, use your word processor's Search (or Find) function to look for the place-holding characters [x]. Following each [x] we have placed in parenthesis a description of the text you need to insert. When inserting the text specific to your agreement, remember to replace both the [x] and the description. The most common instance will be: [Month Day, Year]. Replace all of this text with the appropriate date. Below are “before” and “after” versions of a typical paragraph; the text printed in purple denotes the information that is to be customized (in the “before” example) or was customized (in the “after” example).

Before Customization:

This Agreement is made on [Month Day, Year], by and between [Name of the Borrower] (“Borrower”), residing at [Borrower's full address], and [Name of the Lender] (“Lender”), under the following provisions. The parties agree as follows:

After Customization:

This Agreement is made on June 1, 2006 by and between Bob Smith (“Borrower”), residing at 122 Main Street, Anytown, California, and Mary Jones (“Lender”), under the following provisions. The parties agree as follows:

The JIAN Advisor

All of the templates provide you with comments, written by the attorneys who prepared these documents,

that explain the purpose of the sections and provide helpful hints to guide you in customizing the contract to your specific needs. These comments, which we refer to as the “JIAN Advisor” describe the section that follows the comment. They always begin with [], and appear on your computer screen in either colored, italicized, or roman type, depending on your word-processor and computer screen. Following is an example of a comment followed by the paragraph discussed in the comment.

This Agreement is made on [Month Day, Year], by and between [the name of the Borrower] (“Borrower”), residing at [Borrower’s full address], and [the name of the Lender] (“Lender”), under the following provisions. The parties agree as follows:

Note: Some word-processor’s allow you to search for paragraph “styles.” If your word processing program has this feature, you may be able to search for the “comments” style and delete all of the comments globally. We recommend that you do not change any of the remaining text in the contracts, except as suggested in the comments, without consulting an attorney!

Printing Your Agreements

Contrary to popular belief, there are no legal statutes demanding that your contracts be printed on “legal” paper in extra small type, or in a courier font. In most cases, these documents have been formatted to provide for 1-inch top and bottom margins and 1.25-inch left and right margins on a standard 8.5- inch by 11-inch page. On the PC, with the exception of the ASCII version, we have selected a variation of the font “Times” appropriate for use with your computer; on the Macintosh, the font is set to Palatino. The font has been set to a very legible 12-point type size. You may change the font, font size, margins or paper size using the page formatting commands for your word processor. Print the final contract as you would any document you prepared yourself. You can even print the documents in larger type for those who have difficulty reading small type.

Signing Your Contracts

Before you sign any of the contracts you prepare with Agreement*Builder* be sure you:

- Read through the document carefully (does it say what you really want it to say).
- Delete the commentary following each of the paragraphs (without having deleted any of the paragraphs).
- Have an attorney review it to make sure your contract is legal and meets all currently applicable state and federal laws.

Contract Basics

The whole duty of government is to prevent crime and to preserve contracts.

~ Lord Melbourne

In law, the definition of *agreement* is “a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances.” In plain English, an agreement is simply a mutual assent, or a promise, between two or more parties to do something. Although often used as a synonym for *contract*, agreement is a much broader term. Furthermore, while all contracts are agreements, not all agreements are contracts; and not all contracts are legally binding or enforceable. Since all of the agreements in AgreementBuilder, if used properly, are legally binding contracts, the terms agreement and contract are used interchangeably within this product. The following discussion clarifies the purpose, intent, and types of contracts, and attempts to demystify contract law, so that you can better understand, prepare, and commit to agreements that meet and protect your business needs.

What is a Contract?

A contract is a legally binding agreement between two or more parties who make one or more promises to each other. The law requires a party who makes a contractual promise to keep that promise. If the party who makes the promise breaks (or breaches) that promise, the other party or parties involved in the promise have legal solutions (or remedies) to the breach. A good contract clearly lists the terms of the agreement, that is, exactly what promises the parties are making to each other.

Judge ‘n’ Jury™ Trial #84

Harborside Inn is sued for missing instruments. The Muddy Rudders Blues Band performs every Fourth of July, on the porch of the Harborside Inn. At 11 p.m. on the eve before the show, band members unloaded their instruments in the foyer, assured by the innkeeper that the chef—baking breads for tomorrow’s breakfast—would be the last to leave and would secure the doors when she left. The next morning, the band discovered their saxophone and two guitars missing. Police investigated. None of the door locks had been tampered with, suggesting that the chef had forgotten to lock the front door. So the musicians brought suit against Harborside for the value of the instruments as well as for the cost of a show they could no longer perform.

Harborside’s chef testified she had indeed locked the door. Perhaps some guests staying at the inn stole the instruments, she said, and perhaps the guests were the band itself.

The band’s attorney replied: “There was no sign of forcing the locks. The instruments were delivered into Harborside’s exclusive possession and the innkeeper assured the band that the building would be secured. Thus, a bailment existed. A bailment is an entrustment. The bailee—Harborside Inn—was negligent. And the right of the bailors—The Muddy Rudders—to recover has been established.”

Does the band have the right to recover the value of the stolen instruments? If so, decide for the Plaintiff, if not decide for the Defendant.

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Types of Contracts

Verbal vs. Written Agreements

Contracts can be either verbal or written, although to be enforceable most contracts must be in writing. Since the content of verbal agreements is often subject to dispute, it’s always better to have a written contract. An example of a verbal agreement is as follows: “I agree to cut your lawn for \$25, and you agree to pay me \$25 if I cut your lawn. Once I cut your lawn, you owe me \$25.” Obviously, the terms of this agreement are simple enough that they do not have to be written down. “The Statute of Frauds” on page XXX provides detailed information about when and what types of contracts need to be in writing.

Bilateral vs. Unilateral Agreements

Regardless of whether agreements are verbal or written, contracts are either *bilateral* (the contract affects or is undertaken by both parties equally, and is binding on both parties) or *unilateral* (the contract affects or obligates only one of the parties involved). A bilateral contract is created when both parties promise to do something. Because both parties undertake a promise, a bilateral contract has two rights, and two duties. For example, Bob promises to sell his car to Sarah for \$5,000, and Sarah promises to buy the car for that price. Bob has a right to \$5,000; and Sarah has a right to buy the car. Bob also has a duty to sell the car to Sarah, and Sarah has a duty to pay \$5,000 to Bob for the car. A unilateral contract is created when one party promises to do something if the other party also does something, and the other party accepts by doing that which was requested. Because only one party makes a promise, a unilateral contract has only one right and one duty for the party who makes the promise. For example, David promises to pay Sally \$250 if she drives his car from San Francisco to Los Angeles. While she is not obligated to take the car, he is obligated to pay her if she delivers the car. Note that most unilateral contracts become bilateral contracts once the accepting party commences performance of the requested action. For example, as soon as Sally takes the car from David she has commenced performance and a bilateral contract is formed.

Validity & Enforceability of Contracts

In order for a contract to be enforceable, it must be valid. Contracts are valid if they meet the following criteria.

- There is mutual assent.
- Each party involved in the contract either gets or gives up something (referred to as consideration).
- There are no defenses to the contract’s creation. Each of these criteria is discussed in detail in the sections that follow. Contracts that are unenforceable (and not valid) include:

- Contracts where the promise is illegal in nature, for example, a contract to steal a car. These are considered void (or voidable) contracts, and have no legal effect—ever.
- Contracts that are impacted or superseded by defenses (or laws) not discussed in the contract itself, for example, a statute of limitations that sets a maximum time period for the enforceability of certain agreements.

Contracts that appear to be valid may in fact be invalid if they can be found to be voidable. A voidable contract, such as a contract entered into by a minor, or by a mentally ill person, can either be avoided or ratified, depending on the circumstances of the contract.

In addition, contracts that deal with the sale of goods by or between merchants are subject to a set of special laws known as the Uniform Commercial Code (U.C.C.). See “Buying and Selling Goods and Services” in Section 3 for a detailed discussion of the U.C.C.

Elements of a Contract

*Promises are the uniquely human way of ordering the future,
making it predictable and reliable to the extent that this is humanly possible.*

~ Hannah Arendt

Contracts are composed of three elements: mutual assent, consideration, and defenses. These three elements are basic and necessary for the existence of a valid contract that is legally binding on the parties.

Mutual Assent

In order to have a contract, mutual assent, also referred to as a “meeting of the minds,” is needed. Mutual assent is a conscious approval of facts already known, and it requires one party (the Offeror) to make an offer and the other party (the Offeree) to accept that offer.

The Offer

An offer gives power of acceptance to the Offeree. However, in order for words to be considered an offer, those words must create a reasonable expectation in the Offeree that the Offeror does in fact want to make a contract on the terms offered. What, then, constitutes reasonable expectation? Most courts apply an objective theory of contract interpretation which asks what a “reasonable person” would have understood or believed under the circumstances, as opposed to what the Offeror and Offeree actually believed. For example, Sandra offers to sell Jim her 1955 Thunderbird, a rare car, for \$5,000. Even though Sandra was only kidding—the car is worth much more—if a reasonable person would have viewed the words as a serious offer, the fact that Sandra was kidding doesn’t matter. As such, Jim can accept the offer and purchase the car for \$5,000, unless Sandra terminates the offer before Jim accepts. In order to create reasonable expectation, there must be an *intent* to form a present contract, the *content* of the offer must list the essential terms, and a *communication* must be made to the Offeree.

Intent

In order to have a contract, there must be a clear promise or commitment, not merely preliminary negotiations or future intent of an offer. For example, “Are you interested in my car” or “I’d like to get \$5,000 for my car” are probably preliminary negotiations, and are not actual offers. Therefore, they cannot be accepted as offers. In determining whether an offer was intended, use the following objective test: Ask yourself whether a reasonable person would have thought that an offer had been made. You should consider the following:

1. **Language.** The specific words used may indicate an offer. Although phrases such as “I offer” or “I promise” are clear expressions of an offer, they are not required in an offer. Language that indicates an invitation such as “I am asking \$5,000 for my car,” or “I quote \$5,000 for my car,” or “I would sell my car for \$5,000” satisfy the language requirement of an offer.
2. **Surrounding circumstances.** The circumstances surrounding the communication also assist in

determining whether it was an offer. Great importance is given to whether the Offeree believed the Offeror was communicating an offer. Thus, while the offer to sell the rare 1955 Thunderbird for \$5,000 may have been in jest, if, given the circumstances, it appeared that it was a real offer, it may be treated as one.

3. **The relationship and former practice of the parties.** If the particular type of communication that took place has been treated as an offer in the past, it is likely that it will be treated as an offer again.

4. **Method of communication.** Solicitations are usually not offers but are invitations for offers. An example would be an advertisement promoting a television for \$200. If you want to buy the television, you offer to purchase it and the seller can either accept or reject your offer. Compare that example to the following advertisement: “\$1 for a 19-inch color television, Model Kpx 2200. First come, first served.” Since there is nothing left to negotiate, this is an offer and the first person accepting it has a contract to buy the television for \$1.

5. **Industry custom.** Whatever is typical in the industry will be considered in determining whether there is an offer.

6. **Specificity of terms related to intention.** The more specific the communication, the more likely it will be seen as an offer. If the communication calls for a simple yes or no, as opposed to calling for more questions, it is likely to be considered an offer.

Content

In general, the terms of the offer must be specific. If enough of the essential terms of the contract are present in the offer, then a contract with those terms would be enforced. Conversely, a contract with indefinite terms would not be enforced. For example, if an employer promised his employee a “fair share of the profits,” the employee would get nothing because the amount due the employee is a matter of pure conjecture.

Traditionally, in order to enforce a contract, courts required that the contract include all of the following items:

- Subject matter
- Identity of the Offeree
- Price
- Time of payment or delivery
- Quantity
- Nature of the work to be performed (if applicable)

More recently, and under the U.C.C., however, so long as the parties intended to make a contract, “reasonable” terms are implied to fill many, though not all, omissions. For example, if goods are involved and both of the parties are merchants, but the price of the goods is omitted, a reasonable price will be used (based on trade journals, open market prices, etc.). Often, the parties to an agreement are not precise in setting out the terms of their contracts because they don’t want to take the time or trouble, they are reluctant to raise difficult issues for fear that the deal may fall through, they do not foresee the problem that later arises, or they simply are not lawyers. Whenever writing a contract, you should:

1. **Clearly identify the Offeree.** It should be clear that the Offeror intended to create the power of

acceptance in that person or group of persons. For example, in the example of the advertisement selling the television for \$1, the “first come, first served” language eliminates any identification issues, since the offer is there for the first person that shows up to accept it.

2. Clearly identify the subject matter. Requirements differ depending on the nature of the subject matter. In real estate transactions, the offer must identify the land as well as the price terms. Contracts involving the sale of goods should specify the quantity offered, though with respect to “requirements” and “output” contracts, quantity is generally not required. In employment contracts, the length of the employment must be stated. If it is not, then the contract can be terminated by either party at will.

3. Clearly specify price and time provisions. If these terms are not included in the written agreement and you do not indicate an intent to the contrary, they will be inferred. Unless the parties indicate at the time of contracting that they do not want a contract unless they specifically agree to a price, a reasonable price will be implied. The law will also imply a reasonable time for performance. For example, if you hire a contractor to build your house but do not indicate when he needs to complete the work, a court will imply some reasonable amount of time, for example, one year.

Also, in certain circumstances, a term may be added to a contract. For example, in an agreement for the sale of goods where nothing is mentioned about warranties, a warranty of merchantability may be implied by law, meaning that the seller guarantees that the goods sold are fit for the intended use of that particular good, and that they are of average quality.

4. Avoid vague terms. This is particularly relevant when dealing with lease renewal cases. Typically, a lessor wants out of a lease because he or she wants to sell the leased property. Often, a lease will include a renewal option with a provision to agree on future rent. This provision is, however, too indefinite. Not only is there no obligation to agree, but it is confusing trying to figure out what the parties intended. On the other hand, a provision where the rental rate in a lease renewal option is to be “agreed on according to business conditions at the time of renewal” would be sufficiently definite.

The difference between these two examples is that in the latter case, the rent was less important than the right to renew, and the rent could easily be fixed by a local real estate expert under the terms given (i.e., a going rate). The best way to avoid the problem altogether is to tie renewal options to some standard, for example, the consumer price index (C.P.I.), local property values, or even more simply, fair market value.

Communication

For there to be an effective offer, the Offeror must communicate the offer to the Offeree, *and*, a reasonable person would have to believe that the communication was authorized and intended to create the power of acceptance in the Offeree. For example, you type on your computer but do not distribute the following: “I am offering for sale my blue 1990 Ford Aerostar Van, 20,000 miles, \$8,000 cash.” While you are out to lunch, you pass by a Ford dealer and learn that your van is worth \$12,000. During my lunch break, I pass by your desk and read your computer screen. When you get back from lunch, I hand you a check for \$8,000. Clearly, you did not intend to communicate this offer; as such I have no right to accept it. The communication—typing words on a computer screen—was not intended to create the power of acceptance, and is therefore not an offer.

Termination of Offer

Termination of the offer is also referred to as termination of the power of acceptance. In order to accept an offer, you need to ask whether that offer is still valid. There are a number of ways an offer can terminate, including revocation, lapse, rejection, death or incapacity.

1. **Termination or revocation.** Since the Offeror completely controls the power of acceptance, he or she can always terminate the offer, no matter how unreasonable it may seem. Once the offer is revoked, the Offeree can no longer accept it. If the Offeror says nothing, then the offer will stay open for a reasonable time. This is determined by commercial circumstances, which means looking at the subject matter. For example, if nothing is said about the duration of an offer to sell a specific shipment of bananas, the duration will be brief. Compare that to an offer to sell diamonds, which will stay open much longer. There are some limitations on the Offeror's power to revoke. In the case where the Offeror promises to hold the offer open for a specific period of time, it nevertheless may be revoked at any time except: A. When the Offeror gives the Offeree an option (which is, in itself, a contract) that makes an offer irrevocable for an agreed upon period of time.

B. When the Offeree changes his or her position based on a promise from the Offeror to keep the offer open. In this case, the Offeree may argue what's called promissory estoppel. For example, I offer to sell you my bike and I promise to keep the offer open for one week so you can try to sell your bike first. If two days later you sell your bike, I cannot then terminate my offer. Clearly, your reliance on my promise and the subsequent sale of your bike was reasonable and foreseeable to me. I am therefore obligated to sell you my bike at the offered price. C. When the offer is classified under the Uniform Commercial Code as a Merchant's Firm Offer (U.C.C. 205). If goods are involved and the Offeror is a merchant and says in a writing signed by him that the offer will stay open for a specified period, then it is irrevocable during that period. If no time is stated, then the offer is irrevocable for a reasonable period not to exceed three months. Of course, what is deemed reasonable will depend upon the nature of the goods involved.

2. **Rejection or refusal.** If an Offeree rejects or refuses an offer, then the offer is terminated. For example, if I offer you my car for \$5,000 and you say you don't want it, you cannot later accept the offer since your initial rejection effectively terminated the offer. If you make a new offer or a counteroffer, that is considered to be an offer in itself, not an acceptance of my original offer. Acceptance that modifies an original offer is a rejection of that offer and terminates the power of acceptance; therefore, any subsequent acceptance of the original offer is not enforceable. Although a counteroffer is generally considered a rejection of the offer, if the Offeree demonstrates an intention to keep the offer open while presenting a counteroffer, the original offer will remain open. For example: "We are considering your offer of \$2,000, but while we are doing so, would you consider taking \$1,800." In addition, anything that suggests a reconsideration of the original offer is a revival of that offer. For example: "We cannot reduce the quantity or we cannot book your order at present at that price."

3. Destruction of subject matter, death or incapacity. The destruction of the subject matter before acceptance terminates an offer. Also, no offer ever survives the death, insanity, or incapacity of the Offeror or the Offeree.

4. **Subsequent illegality.** If an offer is made that later becomes illegal, the offer is automatically revoked. For example, if you offer to sell me an automatic gun and soon thereafter Congress passes a law making automatic weapons illegal. The offer to sell me the gun is invalidated because of the new law.

Judge 'n' Jury™ Trial #76

Muffet sues Tuffet Magazines for failure to disclose information

Ms. Marjorie Muffet ordered 10 magazine subscriptions from Tuffet Magazines. She agreed to make

payment in 30 monthly installments. When the bill arrived, Muffet didn't see any of the required disclosures by the Truth in Lending Act, required by federal law to be printed on the bill. The Act requires that whenever a consumer contracts to pay for goods on credit in more than four installments, the person offering the credit—in this case, Tuffet Magazines—must disclose lending information such as any extra finance charges. Muffet sued for failure to disclose information. Muffet's attorney argued that even though Tuffet Magazines had not included a finance charge, they could add one indirectly by increasing the subscription price. Even if Tuffet didn't engage in such unscrupulous practices, she argued, the publications service must disclose all lending information.

Tuffet Magazines countered that the act did not apply. Why not? The service neither charges a fee for installment payments, nor would increase its price in the next three years. Therefore there was nothing to disclose.

Did the Truth in Lending Act apply to this sale? If you believe so, vote for the Plaintiff, Ms. Muffet. If not, vote for the Defendant, Tuffet Magazines.

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5. **Lapse.** If no time period for the offer is specified, it lapses after a reasonable period. What is reasonable will depend on the circumstances. An offer made in a face-to-face meeting expires at the end of that meeting unless it is specifically said that the offer is still open. Similarly, offers relating to subject matter that undergo rapid price fluctuations will shorten the reasonable time that the offers remain open. Otherwise, the specific facts and nature of the bargain will determine a reasonable time for the offer to remain open.

Acceptance

In order for an offer to become a contract, it must be accepted by the Offeree. Generally, to be effective, an acceptance must be a voluntary, present, unequivocal, unconditional consent to each and every term of the offer. Also, acceptance must be communicated to the Offeror in a reasonable manner.

Method of Acceptance

The Offeror may restrict the methods of acceptance. For example, the Offeror can require that the acceptance be delivered via Federal Express. If an exclusive method of acceptance is prescribed, the Offeree must comply with that method.

Who May Accept

The party to whom the offer was made may accept the offer. In the event the Offeree assigns his or her power of acceptance, that assignee may also accept the offer.

Timing — The Mailbox Rule: Contracts by Correspondence

An acceptance is effective as soon as it is sent to the Offeror in a commercially reasonable mode. What is reasonable depends on how the offer was sent. Generally, the mails, fax, Federal Express, and the like are considered to be reasonable methods of correspondence. A homing pigeon would not be considered commercially reasonable. Interestingly, the Offeror bears the risk of loss. For example, if I accept your offer to sell me your car by mailing my acceptance and it gets lost, we still have a deal, and you must sell me your car, assuming I can prove that I mailed an acceptance. To avoid this sort of problem, the Offeror should say in the offer that an acceptance is not effective unless and until acceptance is received.

A revocation of an offer, on the other hand, is effective (in most states) when received by the Offeree (as opposed to the acceptance of an offer which is effective when sent). Thus, a revocation received after an

acceptance is sent is ineffective. For example, on January 1, you offer to sell me your car for \$5,000. On January 14, you mail a revocation of the offer to me. On January 15, I mail my acceptance to you. Later that day, I receive your rejection. In most states, we would have a contract since I sent my acceptance before I received your revocation. In some states, however, such as California, North Dakota, South Dakota, and Montana, a revocation is effective when sent. In these states, we would not have a binding contract since you sent out your revocation before I sent my acceptance.

Counteroffers: The Single Opportunity Doctrine

When the Offeree accepts an offer with a new or “counteroffer,” the original offer is rejected. This is because the acceptance must be unequivocal, and any words or conduct which serve to refuse, qualify or modify the original offer amount to a rejection of that offer. For example, if I offer to sell you my house for \$10,000, and you say you will pay \$9,000, this is a counteroffer that rejects my original offer. However, if I reply that I cannot reduce my price, my original offer is revived, and you can accept it. Also, if your offer of \$9,000 had been phrased as an inquiry, for example, “Would you consider \$9,000?” then my original offer would still be valid, because an inquiry is not considered a counteroffer.

Note that if both the Offeree and the Offeror are merchants and the subject matter is goods, then the single opportunity doctrine does not apply, and the U.C.C. takes over. See “Buying and Selling Goods and Services” in Section 3 for a detailed discussion of the U.C.C. as it relates to contracts.

Acceptance—The Unilateral Mode

For unilateral contracts (that is, an agreement in which the Offeree can only accept an offer by performing an act), notice of acceptance usually is not required. There are, however, two exceptions. The first is where the Offeror expressly requests notice of acceptance. The second is where the Offeror would otherwise be unable to determine if the act was performed. In this case, the Offeree must give notice to the Offeror within a reasonable time after performing the accepting act.

In unilateral contracts, a promise not to revoke the offer will be implied (in contrast to the general rule that an Offeror can take back an offer at any time prior to its acceptance). By performing the act requested, you create a “de facto” option such that the Offeror cannot revoke the offer.

Consideration

Consideration is composed of bargain and value. Only agreements that have consideration are enforceable. It is the reason or material cause of a contract. Consideration means that there are mutual promises such that each party either gets something or gives up something. There must be some benefit to the person making the promise (Promisor) and some detriment or change in position on the part of the person accepting the promise (Promisee). If one of the parties has not promised to do something or foregoes doing something, that party will not be able to enforce the agreement.

For example: Joe agrees to paint Mary’s house for \$500. Mary’s promise is to pay Joe \$500. She is giving up money and getting a freshly painted house. Joe’s promise is to paint the house. He is getting \$500 and giving up his time to paint the house. If Joe paints the house and Mary refuses to pay him, Joe can enforce Mary’s promise in court. If Joe refuses to paint the house, Mary can hire another painter, and if it costs more than \$500, she can go to court. She would receive any amounts she paid over and above the \$500.

Bargain

In a bargain, each party must incur some legal liability before gaining a legal right. In the example above, by agreeing to paint the house, Joe has incurred a legal liability, as has Mary by agreeing to pay Joe.

Equality of the bargain is not necessary. If the agreement is bilateral, all you need is an exchange of promises.

If the agreement is unilateral, the exchange of performance for a promise is sufficient consideration, so long as the Offeror is making a conscious attempt to induce the Offeree to act. For example, a reward is offered for the capture of an escaped convict. Joe captures the convict and turns her over to the police, later learning of and then requesting the reward. A true case, the court ruled that since he didn't know about the reward when he captured the convict, his actions weren't induced by it; therefore, he didn't supply the necessary consideration. To be induced by an offer, you must have knowledge of that offer.

Past or moral consideration is not considered to be sufficient consideration either. For example, an employer promises to pay an employee a lifelong pension, but does not subject this promise to any conditions, such as continued employment. Because there is no bargain, this promise is not an enforceable agreement.

Value

Value, the other half of consideration, is exclusively based on whether a party offered to perform a promise (which they otherwise would not have assumed) because there was a bargain. The economics or adequacy of the bargain are not important so long as there is an assumption of a new legal obligation. Consider the following example. A mother says to her son: "Save \$1,000 and I'll take you to Hawaii for Christmas." This might be construed as an intention to give a gift, but if the mother did not make this offer (an offer of a trip for the act of saving \$1,000), the son would not have to save the money. This bargain has value because the son did something that he had no legal obligation to do, and the only reason he did it was because his mother promised to take him to Hawaii if he did so. In contrast, a bargain between a mother who promises a trip to her 16-year old son if he doesn't drink alcohol for one year has no value. Since the son is a minor, he is already under a legal obligation not to drink; therefore, there is no consideration, and the mother is not obligated to take her son to Hawaii.

Economic adequacy is an issue for consideration for the following exceptions:

When a fiduciary relationship (or a relationship of trust) exists between the two parties, the value of the bargain is considered (for example, when one of the partners in a partnership buys out the other partner for significantly less than what that partner's interest was worth).

Where a confidential relationship exists such that there is trust on one side and dominion on the other, fairness will be considered.

When there is token consideration, and the transaction is really a disguised gift, there is no consideration. For example, I offer to sell you my mansion for \$1. Clearly, I am trying to give you a gift; therefore, you would not be able to argue that we had a contract.

When the consideration is clearly worthless, which may be a valid defense to enforcement.

Other than these four exceptions, so long as there is some legal detriment and some change in legal position, consideration exists.

Want of Consideration

Want of consideration means that there is no consideration, or there is illusory consideration, for one of the parties involved in the agreement.

Illusory Consideration

The following is an example of an illusory promise: “If I decide to order five cases of tuna, you will accept and ship within ten days and give me a 5% discount.” I then put in an order for five cases of tuna. Nothing in this bargain forces anyone to do anything. Since I haven’t made any promises, there is no contractual obligation on my part; therefore, you may refuse to fill my order. There is no contract because there is want of consideration. However, full performance of the undertaking (that is, shipping five cases of tuna within 10 days), creates a contract. Full performance cures the defect, and creates consideration; partial performance does not. If you only send me one case of tuna, we still don’t have a contract, although I am liable for the fair market value of the case if I keep it.

Another type of illusory promise is one that provides for future agreement about certain essential terms. Since this is an agreement to agree, it is illusory with respect to both parties, and is therefore unenforceable. The exception to this is an agreement dealing with the sale of goods, which is governed by the U.C.C. Under the U.C.C., parties may omit price, and time and place of performance. However, term and quantity (except for output and requirements contracts) must be set forth, unless there are previous dealings between the parties such that there is an established customary quantity and term.

No Consideration—Pre-existing Legal Duty

If a party does or promises to do what he or she is already legally obligated to do or refrains or promises to refrain from doing something which he or she is not legally entitled to do, there is no consideration because there is no detriment or change in position. A promise to do that which you have previously promised has no value.

For example, I agree to work on your fishing boat for the summer for \$1,000 per week. A month later, I inform you that I won’t do any work unless you pay me \$2,000 per week. Since you are unable to get any replacement workers, you agree to my terms. However, at the end of the summer you pay me at the \$1,000 per week rate. Assuming this takes place in a jurisdiction that still recognizes the preexisting duty rule, I would not be able to get the additional money since those sums were for the same work that I had agreed to do under the original contract. Accordingly, the modification would be void of consideration.

However, in a number of states, the preexisting duty rule has been largely rejected by the courts, and in others, like New York, there are statutes which provide that so long as the agreement is in writing and signed, then consideration is not necessary.

A major exception to the pre-existing duty rule exists when the original contract is canceled. If, with respect to the fishing example above, the original contract had been canceled before entering into the new agreement, the later agreement would be enforceable. Other exceptions to the preexisting legal duty rule follow.

1. Disputed Debts. Where the amount you owe me is disputed (the subject of a good faith excuse over the amount owed, time for payment, etc.) my promise to accept a lesser amount than I claim is due me and your promise to pay a greater amount than you admit is owed is enforceable as a “compromise” agreement (called an executory accord).

2. Extension Agreements. Agreements that extend other agreements are always binding since the debtor is liable for additional interest. This additional liability is the debtor’s consideration for the extension.

3. Hardship. If the Promisor encounters extreme hardship that imposes burdens that were not foreseeable at the time the contract was entered into, performance of the contract may be excused. Furthermore, if the

Promisor requests a modification, for example an increase in price, a promise by the other party to pay that price would be enforceable. At issue is whether the excuse or change is “fair and equitable.” For example, you agree to dig a well in my back yard for \$5,000, a job that you estimate will take you and your two-person crew a week to complete. A few days into the job, you discover an unknown sewer line and you are forced to move the well. If you request a price increase and I agree, the increased price will be enforceable since it is fair. Of course, I don’t have to agree to a modification and can hold you to the original contract.

4. The U.C.C. Where one or more of the parties are merchants and goods are involved, the U.C.C. applies. It repeals the pre-existing duty requirement if the party seeking the modification does so in good faith. (The other party is not obligated to agree to the modification). In general, however, where the U.C.C. does not apply, and where there is a pre-existing legal duty and one or both of the parties seeks a change, there must be a concession on both sides or the changes will not be enforceable.

Gratuitous Promises

Gratuitous promises are generally not enforceable because there is no consideration. For example, Uncle Bob says to his nephew “I’ll give you \$5,000 on your 21st birthday.” This is an unenforceable gift: there is no contract because the nephew doesn’t agree to do anything. You have to get something for your promise, otherwise it is gratuitous.

Judge ‘n’ Jury™ Trial #75

Parts Is Parts is charged with making false statements. In Wisconsin, a statute prohibits sellers from making false and deceptive statements to the public. Parts Is Parts auto supply store is known for accepting battery trade-ins. Oftentimes, the store recharges used batteries and resells them to the public. One customer, assured by a salesman he was getting a battery “good as new,” received a reconditioned one instead. Thinking he had purchased a new battery, he complained to Parts Is Parts who refused to exchange the one they sold him. Livid, the customer informed the attorney general—the watchdog of consumer protection—who, in turn, filed suit against Parts Is Parts for making false statements to the public. The State argued that the salesperson misled the customer since the battery wasn’t new as believed and therefore a false statement had been made to a member of the public. The attorney for Parts Is Parts defended by arguing that not only were the salesmen’s statements not deceptive, they were not made to the public. One individual customer had been spoken to by one employee. Based on the statute, is Parts and Parts guilty of making false and deceptive statements to the public? Copyright 1995 by Winning Moves, Inc. All Rights Reserved.

Failure of Consideration

Failure of consideration implies that the original consideration has since become worthless or ceased to exist, possibly due to neglect, refusal, or failure of one of the parties to perform. For example, I agree to buy your car for \$5,000 and you agree to sell it to me. We sign an agreement and you deliver the car to me, but I say I changed my mind. You no longer have to sell me the car, although I may have to pay you damages since I am in breach of the contract.

A Substitute for Consideration: Promissory Estoppel

Promissory estoppel is a theory of civil liability for breaking contracts, as opposed to traditional legal or contractual liability. In general, if there is no valuable consideration, there is no legal contract, but if there

is a substitute for consideration such as promissory estoppel, the promise might be partially enforceable.

In order to assert promissory estoppel, the Promisee (the person to whom the promise was made and who relied on the promise) has to prove that it was foreseeable that he or she would rely on the promise in question, and that the Promisor (the person who made the promise) caused that reliance. There also must be failure to perform on the part of the Promisor, which causes the Promisee to somehow be worse off. Damages are measured by the out of pocket expenses lost in reliance, unless there is substantial reliance in which case full enforcement of the promise may be permitted.

For example, I live in New York and am currently employed by a retail clothing store. You own and operate a retail clothing chain in southern California and, on May 1, you offer me a job at my current salary if I can start by June 1. I accept your offer, quit my job, pack up my belongings, and move to California. I show up at work on June 1 and you say that you're sorry but you've hired someone else. Although there is no contract per se, I should be able to sue you under the theory of promissory estoppel. Clearly, it was foreseeable to you that I would rely on your job offer, which in fact caused me to quit my job and move. Minimally, I should be able to recover my moving expenses; furthermore, because there was "substantial" reliance on my part, I might be able to get full enforcement, which would either require you to hire me or pay me an equivalent salary until I found other suitable employment.

The rule of thumb here is to be very careful when you make a promise to someone. Even if there is no written agreement and no consideration, you may be bound to your promise if the person to whom you made the promise relied upon that promise and will be worse off if it is not enforced.

Defenses

A defense to a contract is an assertion that the contract is invalid or unenforceable. Even where an agreement is supported by consideration or a suitable substitute such as promissory estoppel, certain contract rights may be unenforceable because of a defense to the contract's formation or because there is a defect in one of the parties capacity to contract. The effect of a defense is to make the contract unenforceable. For example, if I can show that you defrauded me into entering a contract to sell you my house, then I have a valid defense and I may elect not to sell you my house without being liable for breach of contract. Defenses to contracts or to a contract's formation include the Statute of Frauds, misunderstandings, mistakes, public policy, lack of consent, and fraud.

The Statute of Frauds

The Statute of Frauds requires that certain types of contracts be in writing in order to be enforceable. These include:

- Contracts for the sale of goods priced at \$500 or more.
- Contracts for the sale of land or interests in property, including leases.
- Contracts which cannot, by their terms, be performed within a year from the date of contract formation.
- Contracts to guaranty the debt of another.

One of the main reasons for this requirement is to provide evidence of the contract's existence. Failure to conform with the Statute of Frauds makes a contract voidable. In addition, contracts that need to be in writing must also meet the following requirements:

1. They must provide enough detail to enable the parties to the contract (and any court if legal action results) to clearly determine what the parties were referring to when they made the contract.
2. They must clearly list the essential terms of the agreement, including the names of the contracting parties, the subject matter of the contract, the terms and conditions, and the consideration.
3. They must be signed by the party against whom enforcement is sought. (The signature requirement is liberally construed to include a rubber stamp or even letterhead.)

Under the U.C.C., a written contract does not need to contain all of the essential terms, and it is not ineffective simply because it omits or incorrectly states a term. However, if the quantity is misstated, the contract is only enforceable for the stated quantity. Also under the U.C.C., if both parties are merchants, a written confirmation sent by one to the other binds both parties unless the other sends a written objection within 10 days after receiving the confirmation.

The Statute of Frauds defense must be asserted in a timely manner; otherwise it is waived. What is timely will vary depending on the circumstances. Also, if gross injustice would result, then you cannot assert the Statute of Frauds defense.

Misunderstandings

Misunderstandings in contracts occur when the language used is ambiguous. Language in a contract is ambiguous when it is reasonably capable of being understood in more than one sense. Examples of ambiguity are as follows.

- A non-compete clause provides that the seller will not compete with the buyer for school photography within the county. Does “school” include colleges and universities?
- A non-compete clause provides that an employee will not compete within “five city blocks.” Is four blocks north and two blocks east okay, because you would have to walk six blocks to get from one to the other.
- A contract calling for “all domestic water piping and rainwater piping installed above finished ceiling must be insulated.” Must all water piping be insulated or just that above the ceilings?

Be careful to avoid ambiguity in your contracts. When good arguments can be made for either of two meanings of a term in a contract, the ambiguity or misunderstanding can be used as a defense.

Mistakes

A mistake is some unintentional act, omission or error arising from ignorance, surprise, imposition or misplaced confidence. There are numerous kinds of mistakes, each of which may be used as a defense to a contract.

Mutual Mistakes

A mutual mistake occurs when the parties have a common intention, but it is induced by a common or mutual mistake. Relief for a mutual mistake varies, but, in general, if the mistake relates to an essential part of the agreement, the contract may be rescinded.

For example, Bob agrees to sell Joe a cow for \$80 which both believed to be sterile. Immediately before Bob was to deliver the cow to Joe, he discovered that she was pregnant and therefore worth over \$1,000. Since a barren cow is substantially different than a breeding one, there is no contract. The parties were mistaken as to what kind of transaction they had entered into. The general rule here is that a mutual

mistake relating to a basic assumption on which the contract was made provides a basis for rescission of the contract. However, if both parties are conscious that a pertinent fact may or may not be true and make their agreement at the risk of that possibility, there would be no mutual mistake.

A mutual mistake that does not effect the heart of the bargain cannot be used as a defense to the contract; therefore, a contract exists.

Unilateral Mistakes

A unilateral mistake is a mistake by only one party to an agreement. It is generally not a basis for relief by rescission or reformation of the contract. Furthermore, errors in business judgment do not constitute unilateral mistake. An error in business judgment occurs where you assume you can do something for \$x, but it turns out that you exercised bad judgment because it will cost more than \$x. If the non-mistaken party knew or ought to have appreciated the mistake, for example if there is a mechanical miscalculation of a series of numbers, then the contract is voidable by the mistaken party. A mechanical miscalculation occurs where you add things up incorrectly.

Errors of Third Party Intermediaries

Where third parties, such as Western Union, make an error, the rules are identical to those for mechanical miscalculation. Additionally, the third party may be liable for negligence or breach of the contract to transmit.

Concealment

Concealment is the withholding of something which one knows and is obligated to reveal. When the parties to a contract are dealing at arms length (which means that each stands upon the strict letter of his or her rights, and conducts business in a formal manner), mere non-disclosure of concealed defects does not render one party liable to the other, and cannot be used as a defense to a contract.

For example, Sam purchased a house from William which he later found out was infested by termites. William knew about the termites but didn't tell Sam, because he was under no duty to disclose the defect. Therefore, there was no liability. However, if William had gone beyond "bare nondisclosure" and knowingly misrepresented material facts by telling "half-truths" such as "I've never seen a termite in the house," Sam may rescind the contract. The difference occurs when someone says or does something that he or she should have more fully explained in order to avoid deceiving the other party. William's statement that he hadn't seen any termites created a duty to disclose the fact that there were termites. In states where there is no affirmative disclosure requirement, the key is not to open your mouth in the first place. If there is a disclosure requirement, you have no choice but to disclose defects.

Misrepresentation

A misrepresentation is an untrue statement of fact. Misrepresentation is grounds for rescinding a contract if you can show that the misrepresentation was made with the knowledge that it was misleading or deceiving, and that it was relevant to the contract.

Public Policy Defenses

Public policy is defined as community common sense and common conscience. Courts may refuse to enforce contracts that violate law or public policy.

Illegality

For a contract to be void because it is against public policy, it must be a contract to do an illegal act, such as one in which a public official is bribed, or it must involve a contract contemplating fraudulent bidding

on a public contract.

Substantive Unconscionability

Courts may refuse to enforce contracts that are one-sided bargains, often referred to as contracts of adhesion, if by the terms of the agreement one party seeks to take advantage of the other. For example, where a party seeks to disclaim liability for a hazardous activity like dynamite blasting, the court may allow a defense making the contract voidable, or, it may merely blue pencil (that is, delete) the term. Other examples of unconscionability include: disclaimers of implied warranties, waiver of the statute of limitations, waiver of defenses, and clauses in a lease that would excuse a landlord. Generally, the relative bargaining powers of the parties, economic justification, and the degree of resulting injury will be looked at to determine whether or not to enforce or delete the term in question.

Standard Form Contracts

With respect to standard form contracts (such as rental car agreements), courts are less likely to uphold the contract when the party using the standardized contract has disproportionate economic power and, as a consequence, there is no opportunity to bargain over terms (take it or leave it); or when one party is completely or at least relatively unfamiliar with the terms of the agreement.

Disclaimers

A disclaimer in a contract is a clause that attempts to control one party's liability by reducing the number of situations in which that party can be in breach. The outcome of a disclaimer often depends on the particular circumstances. Generally, you shouldn't try to hide something in your agreements as these disclaimers may be unenforceable.

For example, Mary checks her \$1,000 fur coat which is in a plain brown box for \$.10 at a baggage claim. The fur was allegedly given away to another customer by mistake. The claim ticket contained a clause in big, red letters limiting liability to \$25. Since the intent of the agreement was to safely store packages and since Mary may not have read the disclaimer, the baggage claim company would be responsible for the full \$1,000 loss. The outcome would probably have been different had the notice been given verbally at the counter.

In a second example, ten days after taking delivery of his new car Bob is injured in an accident caused by the failure of the steering mechanism. In small print, buried on the back of the purchase contract, was a clause limiting implied warranty liability to defective parts and not to personal injury. For numerous reasons, the disclaimer is void. Since there are only a few car manufacturers and all offer essentially the same terms, if a person wants a car, he or she must accept those terms. There is a gross disparity such that the consumer must either take the contract "as is" or forgo the car. Another reason the disclaimer would be void is due to the fact that the language was in small print and Bob didn't read it, and even if he had, if he didn't understand the provision it would not be enforceable.

Time Limitation Clauses

In general, time limitation clauses limit the performance by one party within the period of time specified in the contract. Failure to do what is required by the time specified is a breach of the contract. Contracts for the sale of goods must give way to the U.C.C. provision allowing a buyer reasonable time after he or she discovers (or should have discovered) a defect in the goods to notify the seller of the defect. Reasonable time is the length of time as may fairly, properly, and reasonably be allowed or required, with regard to the nature of the act or duty, the subject matter, and the attending circumstances. For example, you sell me an electric travel adapter/converter that only can be used overseas and state that any claims

must be made within ten days of purchase. Since it is clear that I may not use the product for some time, a reasonable period would be substituted, in this case something longer than ten days.

Infant's Contracts and Mental Incapacity

Contracts entered into by minors, and by persons of mental incapacity, are voidable by the minor if he or she asserts infancy as a defense. Voidable means that the minor can elect to either affirm or avoid performance of the contract. If affirmed, the terms of the contract are binding. Where the contract is for "necessities," the minor must either return the items contracted for or pay the lesser of the amount agreed upon or the fair market value.

Intoxicated Persons

Modern courts allow individuals temporarily incapacitated due to drugs or alcohol to assert the intoxication as a defense. For the defense to be effective, the intoxicated party must be so drugged or intoxicated that he or she does not understand the nature or the consequences of the contract, and the other party must have known or have reason to know of the intoxication.

Lack of Consent: "Either you brains or your signature are going on this contract..."

(line from "The Godfather") Since acceptance of an offer must be a voluntary, present, unequivocal, unconditional consent to each and every term of the offer, threatening to use or using mental or physical force to gain consent makes an agreement voidable.

Economic duress as a "lack of consent" defense is allowed only if it involves wrongful conduct. For example, if you run out of gas in the middle of a desert and I offer to give you a gallon of gas for \$1,000, while this is unconscionable, it is not duress since I have neither caused nor aggravated your problem. As such, if I gave you the gas, you would owe me the \$1,000. Another true example occurred under the duress of World War II. Amen agrees to pay Stephanapolis \$2,000 when the war is over in exchange for present payment of \$25 worth of Greek Drachmas. When the agreement was made, Amen was in dire straits and in desperate need of money. After the war, he refused to pay, claiming that he entered into the unequal bargain because of duress. This was not a valid defense because the other contracting party, Stephanapolis, was not the one exerting the duress. Also, lack of consent can be used as a defense, and makes an agreement voidable when certain offensive tactics, referred to as coercion or over-persuasion, are used.

Fraud

Fraud is the cause of an error bearing on a material part of a contract, created or continued in deceit, with the aim to obtain some unjust advantage or to cause an inconvenience or loss to the other party. In other words, it's a lie! Fraud *in the factum* is any strategy taken by one party that denies the other party of the knowledge that a contract exists. For example, I ask you to sign a birthday card, but it's really a contract. Since you thought you were signing a birthday card, which I knew was a contract, there is no contract.

Fraud *in the inducement* exists when you are aware that there is a contract but the contract is voidable due to the fact that you gave your consent but had a false impression of the terms or obligations. For example, you agree to buy my car which I tell you has 5,000 miles, when, in fact, it has 105,000 miles. Again, no contract.

Fraud *in the execution* exists when one party trusts another to reduce an agreement to a written contract and then signs it without first reading it, not knowing that the written contract differs from the original verbal agreement. Such a contract is voidable.

Contractual Conditions

*One must know when to blend force with a maneuver,
a blow with an agreement.*

~ Leon Trotsky

The area of contractual conditions can be very confusing, even for lawyers. However, conditions are an important element in contracts, so we have included the following discussion to give you an overview. A condition is a contractual clause, the objective of which is to suspend, rescind, or modify the principal obligation of the contract. Conditions fix the time or order of performance or specify the circumstances under which duties become (or cease to be) current legal obligations. In other words, a condition is an event, not certain to occur, which, unless excused, must occur before performance under a contract becomes due. Failure to perform an unconditional promise is a breach of contract. Failure to satisfy a condition is not a breach of the contract, but it does discharge the liability of the Promisor.

For example, I agree to buy your house for \$100,000, and you promise to sell me your house for \$100,000 if I get financing. If I don't get the financing, you do not have to sell me the house and I don't have to buy it. The financing requirement is a condition. In contracts, words such as "provided," "if," "when," and "unless" indicate a condition to performance.

Conditions Precedent

A condition precedent is an act or event that must happen before the contract becomes effective and binding on the parties. The financing condition above is a condition precedent. A common form of condition precedent is one of satisfaction; for example, I will pay you for painting my house if it meets my satisfaction or I will hire you to build the house provided that the architect approves of your design. Note that in these satisfaction cases, the parties must act in good faith. They cannot say they aren't satisfied just because they don't like you.

With respect to conditions of satisfaction, if the work is of a mechanical quality (like painting a house), then the test of satisfaction is one of a reasonable person. In other words, if you paint my home and I say I don't like it but most people would, I would still have to pay you. However, if you painted my portrait, this would be personal, and the only requirement is for me to make my decision in good faith.

Judge 'n' Jury™ Trial #86

Hardy is sued by Laurel for failure to deliver.

Laurel negotiated to buy Hardy's mobile home. Laurel paid the \$4,000 purchase price, and received a bill

of sale as well as assurance that the title would be delivered soon. Laurel prepared for the trailer's removal by doffing the foundation blocks, causing the home to rest on the wheels of its chassis, and disconnecting the gas and electric services. He then told Hardy he would haul the trailer from his property a week later. The day before removal, however, a hurricane destroyed the mobile home. Laurel demanded his money back, arguing that the goods were never delivered. He sued on the ground that when the mobile home was destroyed, the risk of loss was on Hardy. Risk of loss is on the seller until he makes a "tender of delivery," Laurel's lawyer argued.

Hardy's attorney countered that his client disconnected the electricity and gas prior to its destruction, and nothing remained for Hardy to do as a prerequisite to Laurel taking possession of the home. Therefore, tender of delivery had indeed been made. If you agree, rule for Defendant Hardy. If not, rule for Plaintiff Laurel. *Copyright 1995 by Winning Moves, Inc. All Rights Reserved.*

Condition Subsequent

A condition subsequent discharges an existing contractual duty. For example, I will cut your grass tomorrow unless it rains, or I will buy your house if the bank lends me the money. The most common situation involving a condition subsequent is an insurance claim. The insurer is under an obligation to indemnify the insured for any loss, provided that the insured files a claim within thirty days of that loss. Failure to file the claim within thirty days discharges the insurer's obligation to pay that claim.

The Excuse of Conditions

Contract duties subject to conditions become obligations to perform only when all conditions are either satisfied or excused. Conditions can be excused because of prevention, waiver, or estoppel.

Prevention

Any active and wrongful interference by the party with the advantage of the condition that prevents the other party from fulfilling the condition will excuse the other party's performance. For example, I contract with your delivery company to deliver flowers using my company truck. The contract states that I will pay you on the condition that you complete delivery within 24 hours. I then puncture the truck's tires, preventing you from using it, and preventing you from meeting the condition of the contract. This wrongful interference will excuse the condition, and I will still have to pay you for delivering the flowers even if it takes longer than 24 hours.

Waiver

Waiver is the voluntary, intentional relinquishment of a known right. The waiver of a condition occurs as a result of words or conduct by the Promisee after he knows the contingency has not been satisfied, and may be express or through conduct. In the example above, 24 hours goes by and you haven't delivered the flowers; if I agree to accept delivery at a later time (assume I do not puncture the truck's tires), I would be waiving the condition.

Estoppel

(Webster: "the barring of a person, in a legal proceeding, from making allegations or denials which are contrary to either a previous statement or act by that person or a previous adjudication") Estoppel as an excuse results when words or conduct occur prior to the time for satisfying the condition that cause the other party to reasonably believe the condition is excused. In the example above, if I remarked that my truck wasn't working, you could assume that you didn't have to make the delivery within the time period specified.

The Effect of Breach on Conditions

Breach of condition is breach of contract. Even though certain conditions of a contract may not require performance to start until a future date, parties that agree to the conditional contract cannot refuse to perform the future condition without being in breach of contract.

Anticipatory Repudiation: I Won't Perform

Anticipatory Repudiation is the right of one party to a contract to sue for breach before the date set for performance when the other party conveys his or her intention not to perform. For example, I hire you to cut my grass next Sunday and agree to pay you \$20. On Saturday, I tell you that I won't pay you if you cut my grass. Since my future duty was to pay you \$20, and I have clearly stated that I won't pay you that money, I have breached by anticipatory repudiation. You can now sue me for the \$20.

Voluntary Disablement: I Can't Perform

Breach by voluntary disablement is any voluntary act by a party with a future duty that results in that party's future ability to perform. Breach by voluntary disablement means you cannot perform. For example, if I agree to sell you my house but then sell it to another person, I would be in breach on the day I sold that the house to that third party. You could bring an immediate cause of action and all conditions would be excused. The court would accelerate my duty to convey the house to you. However, this specific performance (forcing me to sell you the house) would not be available if the new buyer bought the house in good faith (without knowledge of our agreement). In that case, you would have no choice but to seek monetary damages and sue me for breach by voluntary disablement.

Third Parties

*No man was ever endowed with a right without being
at the same time saddled with a responsibility.*

~ Gerald W. Johnson

A third party is any person or party who was neither the Offeror nor the Offeree when the contract was formed, but who may have rights under that contract. There are three types of third parties:

- Intended beneficiary—a third party who is specifically referred to in the terms of the contract.
- Assignee of rights—a third party who, although not referred to in the original agreement, was subsequently transferred a promise by one of the original parties.
- Delegate of duties—a third party who assumes the duties of one of the original parties to the agreement.

Intended Beneficiaries

A third-party beneficiary contract is a contract between two or more parties, the performance of which is intended to directly benefit a third party. This intention gives the intended third-party beneficiary a right to file suit for breach of contract by any of the original contracting parties, if the third-party's rights have vested.

Rights vest if and when the third party has knowledge of the agreement and he or she: (1) changes position in reliance upon the agreement; (2) files a complaint initiating a cause of action against the Promisor; or, (3) expressly consents to receive the performance of the Promisor at the request of either the Promisor or the Promisee. The third party beneficiary cannot prevent changes to the agreement unless his rights have vested. If his or her rights have not vested, the Promisor and Promisee may rescind or modify the contract.

Assignee of Rights

An assignee of rights is a party that was not intended in the original agreement, but is assigned rights in the contract by an assignor who is one of the original parties to the contract.

The Effect of a Valid Assignment

Subject to certain rules, an assignment immediately extinguishes the assignor's right to receive performance from the obligor and confers the exclusive right to that performance, along with a personal cause of action to enforce that right, on the assignee. Assignment creates legal rights in the third party but does not release the assignor from liability under the original contract.

Requirements for a Good Assignment: In order for an assignment to be good, it must be a present

assignment, and it must be a total divestment. The assignor must have the intent to act right here and right now. (You cannot create a present assignment next week.) The assignor must sufficiently identify the subject matter such that the assignee knows what he is receiving. There must either be an economic relationship or something specific to assign for the assignment to be good. For example, a farmer may assign the proceeds of a crop not yet planted only if he has an economic relationship with the assignee. Certain types of contracts are not assignable, since assignments may not materially alter the obligor's (that is, the party to the contract who is not the assignor) duty. Personal service contracts are not assignable because any attempt to assign the right to receive services is by its very nature a material alteration of the obligor's duty. (A personal services contract is one where the personal characteristics, needs or personality of the assignor are so dominant that forcing the obligor to perform for a stranger would materially alter the original agreement, for example, attorney/client and doctor/patient contracts.) Output and requirements contracts also are not assignable. Assignments varying time or place of performance are no good, not even if the variation is insignificant.

Third Parties

Contracts that Prohibit Assignment When the original agreement prohibits an assignment, a subsequent assignment is not necessarily inoperable. If the third party is unaware that the assignment violated the terms of the contract, and took the assignment in good faith, he or she is referred to as a bona fide purchaser, and the assignment is operable. You can eliminate any concerns about assignment including those relating to bona fide purchaser by including, in the original contract, a rescission clause or a clause that declares that if one of the parties assigns, then all of the obligor's duties are discharged.

Defenses

An obligor can raise certain defenses to defeat his obligation to an assignee. The assignee is subject to any defense or setoff that the obligor could have asserted against the assignor. The assignee is fully vulnerable to counterclaims even though the breach arose after assignment and notice to the obligor. If you make an assignment, notice of that assignment must be given to the Obligor. Unless and until he receives such notice, he may continue to deal with the assignor, not the assignee.

Delegate of Duties

A Delegate of duties is a third party who assumes certain duties from the Delegor, and performs these duties for the Promisee or obligee. For example, I own a lawn service and I contract with Bob to cut his lawn. I then delegate those duties to you. I am the Delegor, you are the Delegate and Bob is the obligor. To effectively delegate contractual duties, the Delegor must sufficiently identify the duties that the Delegate is authorized to perform, and the Delegate must promise the Delegor that he will perform those duties. A delegation is null and void if there is any language in the original contract that does not permit the transfer of duties. If the nature of the obligations are personal, then the changes are material and the delegation will not be operative, because you cannot delegate personal duties. Thus anything involving taste, skill, personality or reputation of the obligor may not be delegated. For example, a painter could not delegate his agreement to do a portrait. However, if the change is merely "mechanical" and can be objectively ascertainable as to quality and quantity, then it is not personal and can be delegated. For example, collecting garbage is mechanical and could be delegated. If the Delegate breaches or performs obligations in a less than suitable manner, the obligee can elect to either bring an action against the Delegate under his or her status as a third party beneficiary or proceed directly against the original Delegor. If the obligee elects to go after the Delegor, the Delegor may involve the Delegate; however, the Delegor remains personally liable to the obligee for the performance of all of the contractual duties.

Breach of Contract & Available Remedies

Madly passionate people rarely make good on their madly passionate promises.

~ Quentin Crisp

Breach of contract is the failure of a party, without legal excuse, to perform any promise that forms the whole or part of a contract. The impact of a breach depends on the gravity of the breach, which itself depends on the facts of each case. Breaches are classified as being either material (major) or immaterial (minor).

Material Breach

A material breach is a substantial and significant breach which goes to the essence of the bargain. Material breach excuses the non-breaching party from further performance under the contract and gives the non-breaching party the right to sue for damages. The non-breaching party has a duty to “mitigate” (that is, minimize the damages caused by the breach), which varies depending on the subject matter.

For example: I enter into a one year lease to rent an apartment from you, but I move out after two months. Before you can sue me, you must try to lease the apartment again, and any money you receive from that lease for the period I am obligated to you is deducted from whatever I owe you. Thus I am only responsible for the difference, if any, between my rent and the new rent plus any expenses you incur in leasing the apartment again.

If the non-breaching party fails to mitigate, the breacher’s damages are reduced by an amount equal to the loss which could have been avoided. If the subject matter is unique, then there is generally nothing that the non-breaching party can do to mitigate the damages. For example, if the contract is for personal services, you must attempt to resell those services, but you do not have to take work of a substantially different character or at a substantially lower rate of pay, nor are you required to go to a substantially different location. Note that any expenses incurred in mitigating are recoverable.

Immaterial Breach

An immaterial (or minor) breach is the opposite of a material breach in that it is not substantial or significant. In a minor breach, the non-breaching party usually gains the substantial benefit of the contract despite the breaching party’s lack of complete or defective performance. For example, I contract with you to buy 10,000 cases of tuna fish, but I only receive 9,999 cases. This is an immaterial breach because I received most of what I contracted for, and I am therefore obligated to keep my end of the bargain. Immaterial breach gives the non-breaching party a right to damages, but does not excuse performance of the contract.

Judge 'n' Jury™ Trial #80

Stanley Jobs is sued for breach of contract. Stanley Jobs developed and marketed computer software that controlled feeding programs for dairy cattle. He worked for the Cowabunga Company. His contract stated that Jobs, after termination, wouldn't engage for two years in the business of developing computer software, or in any business that competed with Cowabunga. It's called a "noncompetition provision." Jobs did leave the Cowabunga Company, and took a higher-paying job developing software for Harriette's Hen House. Cowabunga sued for an injunction to enforce the noncompetition provision. The company's lawyer stated that Jobs had breached a contract. Jobs' attorney countered that such a restrictive contract was nonbinding. Cowabunga had no legitimate interest to protect with respect to egg-laying software. Therefore, the contract was too broad because it went beyond software for dairy feeding programs. Should an injunction be granted? If you believe so, vote for the Plaintiff, Cowabunga. If not, vote for Jobs. *Copyright 1995 by Winning Moves, Inc. All Rights Reserved.*

Breach of Contract & Available Remedies

Remedies for Breach

A remedy is a means by which a right is enforced, or the violation of a right is prevented, redressed, or compensated. Remedies for breach of contract are compensatory awards, that is, damages compensate the non-breaching party for the injury sustained and nothing more. The intent of compensatory damages is to restore the non-breaching party to the position he or she was in prior to the breach. There are three types of compensatory damages available as legal remedies: expectation, reliance and restitution. They exist for making the non-breaching party whole, and, in each case, the amount varies depending on the circumstances.

Expectation or Benefit of the Bargain

The most commonly administered remedy for breach of contract is expectation. Expectation is the difference between what was promised or expected and what was actually delivered, and may include lost profits. The following four conditions must be met for remedy based on expectation or benefit of the bargain.

1. The non-breaching party seeking the damages must show that the damages sought are the result of the breach.
2. Of those damages, only the foreseeable consequential damages are recoverable. These damages need not have been actually foreseen, so long as they should have been foreseen by a party with reasonable experience and intelligence. General damages are those resulting from losses foreseeable to a reasonable person. Special damages arise from losses not foreseeable.
3. Of those amounts, the non-breaching party can only recover unavoidable amounts (that is, those amounts that cannot be recovered by mitigation) and any incidental damages resulting from the costs of mitigation.
4. Of those amounts, he can only recover that which can be computed to a fairly certain dollar amount. Speculative damages are not permitted. Therefore, only nominal damages will be awarded if damages are speculative.

Reliance

Where you change your position because you relied on the promise of another party, you may have a right

to remedy based on reliance, even though no benefit has been conferred on the party who made the promise. Again, the purpose of this remedy is to put the non-breaching party back into the position he or she would have been in had they not relied on the promise, and damages will not include recovery for lost profits.

Restitution

Restitution serves to compensate one party for conferring an “unjust enrichment” on another, even though there may be no contract, and the enriched party did not request the services rendered. These “quasi” contracts are imposed by the courts to prevent injustices where no other remedy is available. For example, a doctor performs necessary emergency surgery on an accident victim in the middle of the highway. Where he had no other remedy, the doctor would be able to recover the value of the services provided.

Restitution is the least generous type of remedy because compensation is not recovered based on the terms of the contract, but on fair market value of the goods or services conferred.

Specific Performance: An Equitable Remedy

A non-breaching party has standing “in equity” if the legal remedy is inadequate. For example, if damages are speculative, or the goods contracted for are special, the legal remedy is usually inadequate. Equitable remedy, however, is not a right at law, and therefore, the most common form of equitable relief is substitutional (money) rather than specific (delivery of the specific goods). Specific performance may be granted where special and peculiar reasons exist such that it is impossible for the injured party to obtain adequate relief by way of damages in an action at law. The doctrine of specific performance is that if money damages would be an inadequate compensation for the breach of the agreement, the breaching party will be compelled to perform specifically what he or she agreed to do. If the exact fulfillment of an agreement is not practical, the performance need only be substantial, and not literal.

Breach of Contract and Available Remedies

With respect to personal services contracts, specific performance is generally difficult to enforce because you cannot compel people to work if they don’t want to, and it’s difficult to judge and enforce the quality of services rendered. As such specific performance will generally not be an available remedy for breach of personal services contracts.

Limitation on Damages

In most cases, people breach their contracts because they can get a better deal elsewhere. Contract law is concerned with compensating the non-breaching party, not with punishing the Breacher. Because of this, punitive or exemplary damages (damages that are awarded to punish the Breacher) are rarely awarded in breach of contract. The huge awards you hear about involve negligence, not breach of contract. The recent verdict against McDonalds, for example, where a patron won a multimillion dollar lawsuit for excessively hot coffee that burned her is a case in point. She claimed that McDonalds was negligent, and, therefore, acted unreasonably. Many contracts contain provisions that specify the amount or limit of damages for breach. In any event, damages for breach of contract are awarded based on the foreseeability of the damage and the degree of certainty with which the damage can be proved.

Foreseeability

When a contract is breached, the non-breaching party generally can recover only those damages that were foreseeable. Foreseeable damages are any losses that the party in breach had reason to know of when the contract was made. For example, Joe Miner owns a mill and the mill shaft breaks. Joe contracts Bob to deliver a replacement shaft overnight. Bob delays delivering the shaft, which results in the mill being shut

down longer than expected. Joe sues Bob for profits lost during the additional shutdown period. These lost profits will not be awarded since the damages were too remote; they didn't arise naturally and were not in the contemplation of the parties. If Joe had told Bob when he ordered the new mill shaft that it was imperative that he have it the next day or else his mill would be out of operation, then the outcome might be different since both parties would have been aware of the special circumstances.

Certainty

In most cases, damages must be proven with a degree of certainty. For example, Doug agreed to build a drive-in theater for Penny and have it completed by June 1. The theater wasn't finished until September 1, and as a result of the delay, Penny lost all of the profits she would have earned had the theater opened for the summer. Penny sued Doug for these lost profits, but since the business was not in operation, lost profits were too speculative and, therefore, not recoverable. Lost profits must be capable of being ascertained with a degree of certainty to be recoverable. Penny could have hired another contractor to complete the theater. In that case, she could have sued Doug for the difference between the contract price and the cover price. Ideally, she would have anticipated the potential for a delay and included a liquidated damages provision.

Judge 'n' Jury™ Trial #87

Slapstick Homes is sued by Laurel for failure to deliver. Laurel, still in need of a home, negotiated to buy a mobile home from Slapstick Homes, Inc. Laurel paid the \$8,000 purchase price, and received a bill of sale as well as assurance that the title would be delivered along with the home. The home was ready to go, but Laurel delayed taking delivery for a week until his site was ready. In the meantime, another hurricane swept the area and flipped the mobile home on its side. Laurel again demanded his money back, arguing that his mobile home was never delivered. Laurel's lawyer argued that risk of loss is on the merchant until he makes a delivery. Slapstick's attorney countered that nothing remained for Slapstick to do as a prerequisite to Laurel taking possession of the home. Therefore, tender of delivery had been made. If you agree, decide in favor of Defendant Slapstick. If not, decide for Plaintiff Laurel. *Copyright 1995 by Winning Moves, Inc. All Rights Reserved.*

Liquidated Damages & Penalties

Liquidated damages and penalties are those provided for in a contractual provision that expressly stipulates the amount of damages to be recovered by either party for a breach of the agreement by the other. Liquidated damages must be set at an amount which is reasonable with respect to the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. The purpose of stipulating damages / penalties in a contract is to fix the amount to be paid in lieu of performance and to secure performance.

In pre-estimating damages, the situation that existed when the contract was entered into is important. The pre-estimated amount must be a reasonable forecast of just compensation, and it must be for the type of harm that is incapable or very difficult to otherwise measure. In the example above, if drive-in theaters usually earn \$500 per day in profits and that amount was included in the original agreement, it would have been a legitimate liquidated damages clause. "Blunderbuss" clauses in which a single sum is provided for any breach, regardless of its nature, are usually invalid. (A blunderbuss is a firearm intended to shoot objects at close quarters without exact aim.) Also, under the U.C.C. any term that fixes unreasonably large liquidated damages is void as a penalty.

Conducting Business Affairs

*Deals are my art form. Other people paint beautifully on canvas or write wonderful poetry. I like making deals, preferably big deals.
That's how I get my kicks.*

~ Donald Trump

This discussion provides you with information about how to set up and maintain your business. We have included the following documents to aid you in conducting your business affairs:

- Articles of Incorporation
- Business Assets Transfer Agreement
- Buy-Sell Agreement
- Bylaws
- Finder for Sale of Business
- Finder's Fee (Lehman Formula)
- General Partnership
- General Power of Attorney
- Legal Services Contingency Fee
- Legal Services Fee Agreement
- Legal Services Retainer
- Letter of Intent for Negotiation and Information Exchange
- Letter of Intent for Sale of Business
- Letter of Intent to Sell Business Assets
- Limited Partnership
- Partnership Dissolution
- Revocation of Power of Attorney
- Stock Redemption

Read the following pages if you'd like more information about establishing and operating a business.

Ownership Forms

When you are planning to start a business, one of the first things you need to decide is the type of entity you want to use to structure and subsequently operate your business. It is important to make this decision, and comply with the legal formalities relating to that entity, before you actually begin to operate your business. You must decide between a sole proprietorship, a general or limited partnership, a corporation, or a limited liability company. Each of these has advantages and disadvantages, and you should discuss each with an attorney and an accountant before making your final decision. These professionals can clarify the tax treatment afforded each as well as other entity specific matters such as ease of financing, payment of taxes, keeping your accounting records, risk of personal liability, and the "owner's" control over the business. Note that depending on the particular entity you elect to use, there may be numerous federal, state, and local forms that need to be completed.

Sole Proprietorship

The sole proprietorship is the easiest and most common way to do business. A sole proprietorship is a business entity with a single owner who owns the business and its assets. For all purposes, the business is the owner, and it has no existence outside of that owner. It is the least regulated business structure. Unlike other types of businesses, you don't need a lawyer to start a sole proprietorship. You do need to register the name of your sole proprietorship if it is not identical to your name. Also, many states require you to register your business name with a "doing business as" certificate. Thus if John Smith owns a business called John's Dive Shop, he should register it as John Smith d/b/a John's Dive Shop. In addition to these registration requirements, each state has its own licensing formalities, though a business license is fairly easy to obtain. It may also be necessary to register with local, state and federal tax authorities for certain ID numbers and other tax matters. You should contact your local and state tax authorities to find out what specific requirements effect your business.

While a sole proprietorship may be the easiest way to go, you should keep in mind that the owner is personally liable for all of the debts and legal judgments for damages arising from the operation of the business. This unlimited liability is the reason why many business choose to incorporate.

Partnership

A partnership is an association of two or more entities to carry on as co-owners of a business for profit. A partnership may be comprised of individuals, corporations, other partnerships, or any combination of these entities. Each partner contributes something to the partnership; this may be in the form of money, property or labor. In return for its contribution, that partner shares in the profits and losses of the partnership. While you are not legally required to have a written partnership agreement, we highly recommend that you use one. Except for the simplest of partnerships, you should consult with an attorney before signing a partnership agreement. Furthermore, you should not start doing business with a partner until you have completed your partnership agreement since an agreement may be implied by your actions, and you may not like those implications. In addition, believe it or not, a partnership may be created even when neither of the parties intended to create one. A person will be treated as a partner if he or she receives a share of the profits in a business, unless those profits were received in payment for a debt, wages, rent, interest on a loan, or for the sale of a business.

There are two basic types of partners, active and inactive. General partners are active in the partnership, and are responsible for the partnership itself. On the other hand, inactive or limited partners are, for the most part, silent. In addition to their respective levels of activity, the major difference between general and limited partners is that a general partner has unlimited liability for the partnership's liabilities, while a limited partner's liability is limited to the value of its investment in the partnership. Thus, if both a general partner and a limited partner each invest \$5,000 in a limited partnership (as soon as there is one limited partner in a partnership, that partnership is limited) and that partnership goes belly up and owes money to its creditors, those creditors can go after the general partner, but the limited partner won't be responsible. He or she may lose their investment, but doesn't have to worry about having to pay out additional monies. If you are set on using a partnership, but want to limit your liability as a general partner, you may wish to consider incorporating that general partner. While it is possible to have a partnership between corporations or individuals and corporations, as the entity gets more complicated, you should speak to an attorney.

Corporation

One of the major benefits and reasons why individuals incorporate is to limit personal liability. Because corporations are distinct legal entities, a corporation can own property, enter into contracts, and sue (as well as be sued). A shareholder is an owner of the corporation and shares in the profits. Shareholders do not manage the corporation, though they do elect the corporation's directors. Individuals as well as other corporations can be shareholders. Shareholders, like limited partners in a limited partnership, are only liable to the extent of their investment in the corporation. The directors of a corporation, who may be shareholders as well, are responsible for making major business decisions of the corporation, including appointing the officers. The officers, who may be shareholders and/or directors as well, manage the day-to-day activities of the corporation. Most states allow the same person to act as the president, vice president, secretary and treasurer, as well as the sole director of a corporation; however, some states may require you to have at least two directors. You should check out your state's requirements. Although officers and directors cannot generally be held liable for the activities of the corporation, there are situations where a court may "pierce the corporate veil." In such a case, the officers and directors would be personally liable. Although this doesn't happen very often, you may want to consider D&O (directors and officers) insurance. For the most part, however, so long as you operate your corporation honestly and are adequately capitalized, you should not have to worry about being held personally liable.

If you elect to incorporate, you must complete articles of incorporation, which vary from state to state, and you should complete corporate bylaws. Both of these forms are included in *AgreementBuilder*. You should also keep corporate minutes and maintain separate bank accounts for your business. Much of this is referred to as adhering to corporate formalities which is very important if you want to make sure that you maintain your corporate status. To learn more about what you need to do as a corporation, speak to your lawyer. Your state's Secretary of State can provide additional corporate information.

"C" and "S" Corporations

The majority of corporations are C corporations. These corporations pay a tax on any corporate profits. Thus if a corporation has earnings and distributes those earnings to its stockholders, there is double taxation; both the corporation and the individual taxholder are taxed. One way to avoid the problem of double taxation is to make an S corporation election. S corporations are not taxed; rather, the shareholders of the corporation are taxed on any profits the corporation may have earned. Before choosing this type of entity, you should be aware of a number of restrictions that effect S corporations. There is a limit of 35 shareholders, no corporations, partnerships, or nonresident aliens can be shareholders, only one class of stock can be issued, and the business cannot be a subsidiary of another company. While most states permit S corporation status, you should verify that yours does, in fact, permit it. As with C corporations, you are not required to use the services of an attorney in incorporating your business. However it is a good idea to have an attorney review your articles of incorporation before filing. Your attorney can make sure that you haven't missed any important information that might cause your corporate charter to be later invalidated.

Limited Liability Corporation

A limited liability corporation (LLC) is a hybrid of a corporation and a partnership. While it is a relatively new entity, it is already available in most states. An LLC provides the same limited liability for its owners as a limited partnership gives its limited partners and corporations give its stockholders. However, the LLC provides some additional benefits that neither limited partnerships nor corporations have to offer. If two individuals form a partnership, either both are general partners and therefore personally liable or one

is a general partner and the other is a limited. While the limited partner is not personally liable, he or she cannot actively participate in the operations of the partnership. In an LLC, both partners are afforded limited liability. If those same two parties form an S corporation, with each owning 50% of the stock, each must report 50% of the corporation's profit or loss on its tax return. With an LLC not only are the principals free from personal liability, but those partners or owners have more flexibility in allocating profit and loss.

Managing Your Corporation

Shareholders' agreements are a fairly standard method for managing and controlling the structure of a small business corporation. A shareholder agreement may be entered into for any legal purpose by two or more shareholders of a corporation, whether or not those parties represent a minority, majority or all of the shareholders.

The corporation itself should always be made a party to the shareholder agreement in case it has to be enforced against the corporation. Furthermore, any stock subject to a shareholder agreement should have an endorsement placed on it so that any transferees will have constructive notice of the agreement. This is important since if the transferee doesn't have knowledge of the agreement, she probably won't be bound by it.

You can use a shareholders' agreement for any of the following: the election or removal of directors, setting up rules for the issuance of dividends, setting up procedures to be followed in the event of a dissolution of the corporation, establishing methods to resolve deadlocks, and giving veto powers to certain shareholders in particular circumstances. The agreement may also provide for certain restrictions regarding the voting rights of shareholders such that the shareholder must vote as provided for in the agreement.

The most prevalent use of shareholders' agreements is to impose restrictions on the transfer or disposition of stock by the shareholders of closely held corporations. This particular shareholders' agreement is referred to as a Buy- Sell Agreement, and it should be used there are only a few shareholders. It restricts the sale or other transfer of shares of stock and provides for a shareholder's interest to be purchased by either the corporation or the other shareholders under certain circumstances such as death or disability. The terms of the document may be revised to reflect agreements between the shareholders on issues such as payment terms and determination of value. If, for example, you and your business partner each own 50% of your company's stock, and he wants out of the business, without an enforceable Buy-Sell Agreement, he could sell it to anyone, and that party would be your new partner. Buy-Sell Agreements can restrict the sale or transfer of stock. The other major use for these agreements is to control voting rights. Because of the complexity of Buy-Sell Agreements, it is essential that, prior to execution, you consult with an attorney.

Selling or Transferring Your Business or Its Assets

The agreements we have provided should not be used without the advise and direction of an attorney. As you will see, the purchase of all or part of a business can be riddled with problems, and unless you have had a great deal of experience with these matters, you should consult an attorney.

The agreements provided here are for use in purchasing or selling all or part of a business. Note that where the principal business is the sale of goods, the sale of all or part of that business is subject to the Bulk Transfers Act under Article 6 of the Uniform Commercial Code (U.C.C.). In addition, the Internal

Revenue Code has numerous provisions dealing with such transfers. Again, because the tax effects of such transactions may be significant, we suggest that you consult an attorney and an accountant before completing transactions of this nature. In addition to federal laws, local license laws and other regulations are likely to impact such transactions.

If you are selling all or part of the assets of your partnership or sole proprietorship, you should use a Business Assets Transfer Agreement. It's fairly simple to buy a sole proprietorship since one person owns the business, and all of that business' assets are in that person's name. Depending on the partnership agreement, buying a business from a partnership will probably require consent of all of the partners; other than that, the transaction is fairly straight forward as well. When you are buying or selling a sole proprietorship or a partnership, you should be clear as to whether you are taking or transferring the liabilities of the business, or just the assets.

With respect to corporations, you can either use a Business Assets Transfer Agreement, which would leave the seller still owning the corporation less the assets you purchased, or you can sell/buy the corporate entity itself (the stock). In most cases, a buyer will be better off buying (part of) the assets of a corporation, rather than the stock since an asset purchase helps the buyer avoid existing liabilities of the business, provides important tax advantages, allows leeway in what assets are purchased, and gives the buyer an opportunity to get a higher tax basis for the corporation's depreciable assets such that if the buyer later sells those assets, there is less of taxable gain.

You should be aware that in rare cases, the buyer of a business' assets may be subject to some liabilities incurred by the old company. "Successor liability", especially in the area of products liability, may impose liability on the new company where much of the management is the same, the business' location hasn't changed, the seller quickly stopped its business operation then dissolved, and the purchasing company assumed certain liabilities of the seller. The buyer of a business should seek an Indemnity Agreement (see "Protecting or Transferring Assets" later on in this reference guide) so that if this issue arises, the seller will cover any damages, assuming you can find him and he still has assets.

A Non-Disclosure Agreement is included in the section titled "Protecting or Transferring Assets." We suggest that you use this agreement before sharing any confidential or proprietary information with another party.

Articles of Incorporation

Articles of Incorporation make a corporation legal. Without them, your corporation does not exist. Every state requires that you file your Articles of Incorporation before you start transacting business. The Articles contain numerous provisions including: the purposes for which the corporation is being organized, capitalization, number of shares authorized, name and address of registered agent. In some states, the Articles may provide for indemnification of the officers, directors, and employees of the corporation.

Why/When should you use them?

You have no choice. You must file your Articles of Incorporation if you want to establish your business as a corporate entity, and you must file them before you start doing business. If you do not, you will be personally responsible for all of the liabilities of the business.

Who should use them?

Any business that wants to do business in a particular state as a corporation must first file Articles of

Incorporation. Once your business is incorporated in one state, you will still need to qualify to do business in any other states where you will be conducting business.

How should you use them?

They are fairly simple to complete. However, there are differences from state to state. For example, some states, including California, allow you to include indemnification provisions, while others do not. One area you should be aware of is the number of shares authorized. A number of states, including Delaware, impose a tax on corporations based on the number of shares authorized.

Important Tips

If you elect to incorporate, in addition to Articles of Incorporation, which vary from state to state, you should complete corporate bylaws. You should also keep corporate minutes and maintain separate bank accounts for your business. Much of this is referred to as “adhering to corporate formalities,” which is very important if you want to make sure that you maintain your corporate status. To learn more about what you need to do as a corporation, speak to your lawyer. Your state’s Secretary of State can provide additional corporate information as well.

Business Assets Transfer Agreement

A Business Assets Transfer Agreement is a contract between the seller of a business or its assets and the individual or entity purchasing those assets and, possibly, assuming all or part of the liabilities as well. The sale may involve a transfer of all or part of the assets and/or liabilities of the seller.

Why/When should you use it?

Whenever you buy or sell the assets of a business, you should use this agreement because it sets forth the exact terms of the transaction. By using this agreement, the parties clearly identify the exact assets and liabilities being transferred. Furthermore, the agreement provides remedies in the event one of the parties defaults, and identifies numerous other issues that might arise in the sale of a business.

Do not use this agreement for the purchase or sale of the business entity itself; in the event that the entity is a corporation, this agreement is not appropriate for the sale of the stock of the corporation. You could, however, use this agreement to transfer the assets and liabilities of the corporation, leaving a shell with the selling stockholders.

From the seller’s perspective, it’s almost always better to sell the corporate stock than to have the corporation sell its assets. However, for tax and liability reasons, buyers prefer to buy the corporation’s assets. Not surprisingly, then, an overwhelming majority of businesses are sold on an asset-sale basis using this type of agreement.

Who should use it?

This agreement should be used by any seller transferring title to any of the assets or liabilities of its business, as well as any buyer purchasing the assets or assuming the liabilities of a business. A corporation, partnership, sole proprietorship or individual can be a party to this agreement on either side of the transaction.

How should you use it?

This agreement should be used freely whenever assets or liabilities are transferred from one entity to another.

Important Tips

Consult an attorney and as well as an accountant for anything but the simplest of transactions as there are major tax consequences in the transfer of appreciated and depreciated assets, capital items, and other concerns. You may want to execute a Non-Disclosure and Non-Circumvention Agreement prior to entering into negotiations for the sale or purchase of the assets. This will protect the selling party in the event that the transaction is not completed.

Sales agreements generally contain numerous warranties and representations by the seller and even a few by the buyer. Review them carefully to make sure that they aren't too open-ended. It's always best to add the words "to the best of my knowledge," rather than making broad representations.

Buy-Sell Agreement

A Buy-Sell Agreement is an agreement between the shareholders of a corporation in which the shareholders place restrictions on the sale or other transfer of their shares of stock and decide upon a method for the corporation or the other shareholders to purchase another shareholder's interest in certain circumstances. The terms of the document may be revised to reflect agreements between the shareholders on issues such as payment terms and determination of value.

Why/When should you use it?

The Buy-Sell Agreement is intended for use by the shareholders of a closely held corporation and the corporation. You should use a Buy-Sell Agreement to prevent other shareholders from selling their interests to unknown third parties and to provide a mechanism for purchasing the shares of a shareholder under certain circumstances, such as the death or incapacity of a shareholder.

Who should use it?

All present and future shareholders of a closely-held corporation should use this agreement.

How should you use it?

Upon formation of the corporation, the shareholders should enter into the agreement. Any time new shareholders are added, they should be required to join the agreement.

Important Tips

Many disputes arise over how to value shares of closely held corporations. Make sure you spell out the method of valuation clearly. It is essential that prior to executing the document, you consult with an attorney who specializes in corporate and contract law in your state.

Bylaws

Bylaws are regulations, rules or laws adopted by a corporation regarding its internal governance. Bylaws define the rights and obligations of the corporation's officers, directors and shareholders. They state specific rules regarding routine corporate matters such as the time and place for the annual meeting of the shareholders, how much notice regarding that meeting needs to be given, and quorum requirements. Bylaws may also provide for special meetings as well as what the shareholders can do by written consent without holding a formal meeting. Bylaws may include authorization regarding corporate signatories, the fiscal year, and amendment of the bylaws.

Why/When should you use them?

After you file your Articles of Incorporation and elect your first board of directors, you should adopt your

bylaws. Although officers and directors won't generally be held liable for the activities of the corporation, if you don't adhere to the "corporate formalities" such as having regular meetings and using bylaws, there is a possibility that your "corporate veil" will be pierced. In that case, you and your officers/directors will be personally responsible for the corporation's obligations. Since one of the main reasons you incorporated was probably to void personal liability, it makes sense to take care of the few corporate formalities that will ensure your limited liability.

Who should use them?

All corporations should have bylaws.

How should you use them?

In just a few states, the incorporators are required to adopt bylaws; in others, the Directors adopt them; in some states, either way is okay. When the incorporators adopt the bylaws, they should be signed by those individuals. On the other hand, if the Directors adopt them, you should so state in the minutes of the first director's meeting, or in the absence of a meeting, by written consent of the directors.

Important Tips

While many companies never adopt bylaws, you should take the time and get it done now. AgreementBuilder's Bylaws are fairly straightforward, with only a few inserts. However, each state has its own peculiarities regarding certain provisions included in your bylaws. As such you might want your attorney to briefly review these and suggest any necessary additions or deletions.

Finder for Sale of Business Agreement

Often, when a company wants to sell its business, "finders" offer to use their best efforts to locate potential purchasers. This agreement sets forth the specific understanding between the selling business and the finder or broker. As drafted, the agreement is company-oriented in that it is non-exclusive (you can use more than one finder). Furthermore, the finder's fee is not earned unless and until the sale is consummated.

Why/When should you use it?

Whenever you retain a finder to locate a buyer for your business or are retained as a finder, you should use this agreement. It should be executed before the finder begins searching for a buyer. It is extremely important that the parties understand and appreciate their "deal." For example, if not clearly stated in the agreement, a finder who delivers a ready, willing, and able buyer for your company, but to whom you decide not to sell to for whatever reason, might still be entitled to a commission.

Who should use it?

Both the business who retains a finder or broker to locate a buyer for its business and that finder should use this agreement.

How should you use it?

If you own or represent a business for sale, and a finder presents you with an agreement, have your attorney review it before signing. As drafted, this agreement will protect your interests, but a version given to you by a finder may not.

Important Tips

If you do grant an exclusive right to locate a buyer to the finder, make sure to set a cutoff date, after which you can use other finders. You may wish to include an addendum with any businesses or

individuals you are currently negotiating with so that the finder cannot later say he brought that party to you.

Finder's Fee (Lehman Formula) Agreement

A Finder's Fee Agreement is an agreement used when a third party is used to bring two parties together. In many respects the third party is like a broker, but there is an element of exclusivity missing. The finder does not represent either party; rather, he puts the two parties together for the purpose of conducting the transaction. Typically, a finder's fee would be paid when this third party helps a business raise money or where he identifies a business for his "client" company to acquire.

Why/When should you use it?

It is very important for the intermediary to have a Finder's Fee Agreement executed prior to bringing two parties together. Without an agreement, it would be unclear as to whether he was to receive a fee and what that fee was.

Who should use it?

Anyone bringing two parties together for any number of purposes including: Financing, acquisitions, buying or selling a business, etc.

How should you use it?

It can be used in the format presented in the template or it can be modified so as to be part of a letter, called a letter agreement.

Important Tips

Certain terms need to be defined: for example, completion of the transaction so that confusion is avoided vis-a-vis when payment is due.

General Partnership Agreement

A General Partnership Agreement is an agreement between two or more parties to enter into a business relationship. The partners can be individuals, corporations or even other partnerships, though you will probably be creating a partnership between two individuals. In a General Partnership all of the partners are general partners, as opposed to limited partners. The difference between a general and a limited partner is that a general partner is responsible for all of the debts and liabilities of the partnership and he can legally bind the partnership. A limited partner, on the other hand, is only liable to the extent of his investment in the partnership and cannot legally bind the partnership. Note that if you are actively involved in the day to day management of a partnership, legally you will be treated as a general partner. Limited partnerships are good to use where you have someone who is a partner but is only investing in the business, not actively running it.

Why/When should you use it?

If possible, you should complete the agreement before starting the partnership. This is because it becomes more and more difficult to agree to an organizational document after the business has commenced. Also, the partners relative bargaining power may change once the business is started. It is important to use this agreement because it sets forth the rights and obligations of the Partners. Most importantly, however, it states how the profits (losses) will be distributed, how much each partner owns, the initial capital invested by each of the Partners, who will be managing the business and compensation matters. As you can see,

these are all items that need to be addressed in any venture and thus it is especially important where partners putting money into the business that they know their status and that of the other partners.

Who should use it?

The general partners in a general partnership should use this agreement.

How should you use it?

Use it very carefully. You should make sure that everything agreed to in the agreement is what you want. Otherwise, after the agreement is signed, it will probably be too late.

Important Tips

You should strongly consider having an attorney review this Partnership Agreement before signing it. It is an agreement that is very important and may affect you for a long time to come. This advice applies whether you are presented with a Partnership Agreement or if you are preparing one yourself. Make sure that the name you have selected for your Partnership is available. If it is, you need to register it so that no one else uses it. Also you may want to register any trademarks to be used in your Partnership.

It is very important for the Partners in a General Partnership to recognize that they have fiduciary obligations to their fellow partners. That means that they must act honestly and in good faith when dealing with one another. You may wish to have both an attorney and an accountant review your Partnership Agreement. There are a number of provisions included here that we specifically suggest you review with your attorney and or accountant. This is not meant to be an exclusive list of provisions as there are other issues that should be discussed with professionals.

General Power of Attorney

A Power of Attorney is designed to let you give someone the power to act on your behalf (for example, in your absence or should you become incapacitated.) This agreement is a General Power of Attorney, and gives the Attorney-In-Fact all of your rights and powers. Basically, anything you can do with your signature, he can now do, including: borrowing money, writing checks, buying and selling real estate, etc. In all of these matters, you are legally responsible for these actions.

Why/When should you use it?

Simply, you should use a Power of Attorney, when certain that your financial and/or business affairs need to be taken care of and you will be unable to perform these functions personally. Also, you should use a Power of Attorney when you are going to be out of the country and you need someone to transact business or handle your personal affairs on your behalf. If you are going to be incapacitated, you may want to appoint an Attorney-In-Fact, if, for example, you are going into the hospital due to a serious illness.

Who should use it?

Anyone who needs a third party to transact their financial and/or business affairs in their absence or incapacitation.

How should you use it?

You should be extremely careful when granting another person a general Power of Attorney. You are basically giving that person the right to do anything on your behalf. He can sign checks, buy and sell real estate, borrow money, you name it. Thus you should make sure you have complete faith and trust in the Attorney-In-Fact, and, even then, think again.

Important Tips

Unless you need to give the Attorney-In-Fact a general power of attorney, you may want to consider giving him a Limited Power of Attorney. In this way, you are limiting his ability to act on your behalf to areas where you have specifically granted authorization.

Legal Services Contingency Fee Agreement

In a Contingency Fee Agreement, an attorney agrees to represent a client for a percentage of the client's recovery. If there is no recovery, the attorney doesn't get paid. Usually the attorney will front costs such as filing fees and will bear the loss of those costs if there is no recovery. The standard percentages an attorney will request are (1) 25% if recovery is obtained before the filing of a lawsuit; (2) 33% if recovery is obtained after the filing of a lawsuit but before a trial or arbitration; and (3) 45% if the recovery is made after a trial or arbitration.

Why/When should you use it?

The only time contingency arrangements are used is when someone has a claim against someone else. The attorney will assess the merits of the individual's claims and decide whether to take the risk of accepting the case on a contingency basis. Contingency fee arrangements are fantastic if you need a lawyer to pursue your claim and you don't have the money to pay the attorney an hourly or fixed fee. The attorney runs the risk of not making any money so the attorney has good reason to aggressively pursue your claim.

Who should use it?

Anyone with a legal claim against someone else may want to consider a contingency fee arrangement with an attorney. Remember, contingency fee arrangements are only possible when there is a chance for financial recovery as in a personal injury case.

How should you use it?

Review this agreement to understand the basic terms of a contingency fee agreement. Your attorney will undoubtedly come up with his or her own agreement. However, if you understand what is entailed in a contingency fee relationship, you may be better off when it comes down to trying to negotiate better terms (such as lower percentages) with your lawyer.

Important Tips

Make sure to have your attorney provide you with a general assessment of the merits of your case. Watch out for slacker attorneys—if you have a weak case, the attorney may avoid spending time on it. Communicate with your attorney and keep up-to-date on what is happening. Take the time to review the “Working with Your Attorney” in Section 1 of this reference guide as well as the other attorney's fee agreements in this section.

Legal Services Fee Agreement

A Legal Services Fee Agreement is an agreement in which a client agrees to hire an attorney to provide certain legal services for a fee. The fee can be fixed or hourly. The services to be provided should be spelled-out in detail to avoid confusion.

Why/When should you use it?

You would want to enter a fixed or hourly fee agreement in certain types of legal matters. For example, in

a real estate lease transaction your attorney may provide services for a flat fee because the attorney may estimate how much time the transaction will take. In contrast, a defense litigator who defends you in a lawsuit will want an hourly fee because the attorney cannot estimate the amount of time the case will take. Retainer agreements and contingency fee arrangements are used in different contexts. Take a look at those agreements to get a better idea.

Who should use it?

As a client, you should have a fee agreement in place at the start of the attorney-client relationship.

How should you use it?

Use this agreement to understand the basic terms of an attorney fee agreement. Your attorney will undoubtedly have a similar agreement for you to sign. Often these agreements are in the form of a letter, so don't be confused if your attorney asks you to sign a letter agreement.

Important Tips

There are numerous laws that apply to attorney's fee agreements. Many states require that almost all attorney's fee agreements be in writing. Also, the attorney may be required to state whether the services to be provided are covered by error and omissions insurance. Call your local state bar office and ask them what must be included in an attorney's fee agreement. Finally, take time to look at the "Working with Your Attorney" in Section 1 of this reference guide as well as the other attorney's fee agreements in this section.

Legal Services Retainer Agreement

A retainer agreement is an agreement in which an attorney agrees to provide ordinary business legal services at a fixed monthly rate. The agreement does not cover extraordinary legal matters such as lawsuits. In this type of legal services agreement the payment to the attorney is non refundable and is made to secure the attorney's availability to provide ordinary business legal services such as giving a client an overview of how to fire an employee without violating the employees rights.

Why/When should you use it?

You should use this type of Legal Services Agreement if you want to have a lawyer on call to answer your questions and you want to pay a fixed rate. This can be an ideal and inexpensive method of getting legal advice when you know you will have consistent need for legal advice.

Who should use it?

Small businesses should consider this type of legal services arrangement.

How should you use it?

If you think this type of legal services arrangement will suit your needs, ask your lawyer to provide you with a Retainer Agreement for your review.

Important Tips

Make sure to negotiate a fair arrangement. Also, take a look at the "Working with Your Attorney" in Section 1 of this reference guide as well as the other attorney's fee agreements in this section.

Letter of Intent for Negotiation & Information Exchange

This is a letter of intent, as opposed to a binding contract, between two parties who are currently

negotiating a possible business deal and agree to continue these negotiations. The transaction can encompass anything from an acquisition or merger to developing computer programs. The Letter of intent sets forth a number of ground rules for the negotiations, a review process to identify unsettled items, and a commitment by one or both of the parties not to enter into negotiations with others to complete a similar transaction so long as these negotiations continue. If successful, the parties intend to execute a binding agreement.

Why/When should you use it?

This Letter of intent notes that preliminary negotiations or discussions have already occurred and have been productive, and encourages continued negotiations. While it is nonbinding with respect to certain specific business points under negotiation, there are a few items, including the confidentiality of certain proprietary information and reimbursement for certain costs, that are legally binding on the parties. When parties are not ready to reach a final agreement but want to continue their negotiations on a more formal basis, this letter of intent should be used.

Who should use it?

Where it is foreseeable that additional negotiations will be taking place, any business in negotiation with another regarding a potential business deal, should use this agreement.

How should you use it?

Other than the provisions dealing with the costs and expenses of negotiation, the exchange and protection of information, and concurrent negotiations, neither party should agree to anything until a final contract is drawn up.

Important Tips

This Letter of intent is intended to protect both parties from any claims by the other that it incurred any legal commitment relating to the business deal in question. **USE IT!**

Letter of Intent for Sale of Business

This is a letter of intent to acquire a business. If you do not understand the difference between acquiring a business and acquiring the business' assets, you should review the discussion at the beginning of this section. Generally, a letter of intent is something less than a contract, but it is more than mere words.

There are many advantages to using a letter of intent: it forces the parties to define certain terms of the acquisition before spending a lot of money on a final agreement; when it comes time to prepare the final agreement, the parties may be “morally” bound by the Letter of intent; and it may help the Buyer get financing for the acquisition. The main disadvantages of a letter of intent is that it may give rise to the argument that an enforceable contract has been created. While you can draft your letters of intent such that they are not enforceable contracts, this doesn't prevent the other part from litigating the matter. If you elect to use a Letter of intent, it should include the following information: a statement regarding the exact nature of the transaction, acquisition of stock or assets or merger; a statement setting forth the consideration (purchase price) for the business; a statement regarding the timing of the consideration—will it all be paid at closing, on a deferred payment basis, or other; and a statement of substantial conditions to the closing, such as board approval, satisfactory audit of financial statements, etc. Lastly, the letter of intent should clearly state that neither party deems the Letter a legally binding document.

The form letter provided in *AgreementBuilder* is written from the Buyer's perspective. As such many of

the provisions are biased in favor of the Buyer. If you are selling your business, you can make changes to the letter of intent so that it better suits your interests.

While the letter of intent itself is not written to bind either Buyer or Seller, there are some provisions that provide for costs to be paid in the event that the transaction is not completed. Those provisions apply whether or not the sale is completed. You may also want to make the seller to agree not to negotiate with other buyers for a specified period. Such a provision would be binding.

Why/When should you use it?

This type of letter of intent lets you set out your basic understanding regarding the acquisition of a business without having to go through the time and expense of preparing more thorough and final documents. As such you should use this agreement as the first step in the acquisition process. It is appropriate to use a letter of intent once you have reached a preliminary agreement regarding the acquisition of a business. While it is not binding as drafted, it provides some level of comfort regarding the completion of the deal. In other words, it's better than nothing. Because of the ease of writing a letter of intent, you should always use one before going through the time and expense of retaining an attorney to prepare (or review) a purchase agreement.

Who should use it?

When both the Buyer and the Seller are corporations, you should use this letter of intent. If one or both of you are not incorporated, you can modify the agreement to satisfy your needs.

How should you use it?

Since it is not binding, you don't have to include everything in the agreement. Much of the minutia can be left for the final agreements. However, to the extent that you get it out of the way now, it's one less thing to worry about later.

Important Tips

If you are the Seller, make sure to carefully rewrite this letter of intent so that it reflects interests. You may want to have your attorney review any Letters of Intent you use before executing them. As stated above, while they are generally not binding, you should make sure that you aren't signing something that you will later regret.

Letter of Intent to Sell Business Assets

This is a letter of intent to sell all or most of the assets of a manufacturing business. If you do not understand the difference between selling a business itself and selling the business' assets, you should review the discussion on "Conducting Business Affairs" at the beginning of this section. Generally, a letter of intent is something less than a contract, but something more than mere words. It is used to set forth exactly which assets will be sold. Because it helps you settle many of the preliminary issues involved in the purchase of a business' assets, you won't have to renegotiate those items later. Lastly, the letter of intent provides a solid foundation for you or your attorney to prepare the final agreements.

The specific agreement provided in *AgreementBuilder* is written from the Buyer's perspective. As such many of the provisions are biased in favor of the Buyer. If you are selling your Business' assets, you can make changes to the letter of intent so that it better suits your interests as a seller. While the letter of intent itself is not written to bind either Buyer or Seller, there are some provisions that provide for costs to be paid in the event that the transaction is not completed. Those provisions apply whether or not the sale is

completed. With a few changes, the entire agreement can be made binding.

Why/When should you use it?

This type of letter of intent lets you set out your basic understanding regarding the sale/purchase of the assets of a business without having to go through the time and expense of preparing more thorough and final documents. As such you should use this agreement as the first step in the acquisition process. It is appropriate to use a letter of intent once you have reached a preliminary agreement regarding the sale of most or all of the assets of a business. While it is not binding as drafted, it provides some level of comfort regarding the completion of the deal. In other words, it's better than nothing.

Because of the ease of writing a letter of intent, you should always use one before going through the time and expense of retaining an attorney to prepare (or review) a purchase agreement.

Who should use it?

When both the Buyer and the Seller are corporations, you should use this letter of intent. If one or both of you are not incorporated, you can modify the agreement to satisfy your needs.

How should you use it?

Since it is not binding, you don't have to include everything in the agreement. Much of the minutia can be left for the final agreements. However, to the extent that you get it out of the way now, it's one less thing to worry about later.

Important Tips

If you are the Seller, make sure to carefully rewrite this letter of intent so that it reflects your point of view. You may want to have your attorney review any Letters of Intent you use before executing them. As stated above, while they are generally not binding, you should make sure that you aren't signing something that you will later regret.

Limited Partnership Agreement

A Limited Partnership Agreement is an agreement between one or more general partners who manage the business of the partnership and one or more limited partners who contribute capital and share in the profits. Limited partners, unlike general partners who are personally liable for the partnership's obligations, take no part in managing the business and are only liable for partnership obligations to the extent of their contributions in the partnership.

Why/When should you use it?

While you are not required to use a written Partnership Agreement, we highly recommend the thoughtful use of a detailed Limited Partnership Agreement such as the one provided in *AgreementBuilder*. Among other things, it sets forth exactly how each of the partners will share in the profits and losses of the partnership.

You should have your Partnership Agreement completed and executed before you start doing business with partners since an agreement may be implied from your actions. That may not sound so bad, but you may not like the implications of that agreement.

Who should use it?

Any entity (partnership, individual or corporation) who enters into a limited partnership with another entity should execute this agreement.

How should you use it?

You should have an attorney review your Partnership Agreement before you sign it.

Important Tips

As with all of your agreements, there are many benefits to working out the details of a written partnership agreement. If any of the partners are contributing property or services (as opposed to cash) to the partnership, you should consult an accountant. She will be able to guide you through many of the tax issues involved in the taxation of partnerships and explain how you should treat these non-cash contributions.

While there are a number of basic things that you will always include in your limited partnership agreements, you can add as much as you want regarding management responsibilities, limits on specific partners' authority, buying out your partners, and almost anything else you can imagine.

Partnership Dissolution Agreement

A Partnership Dissolution Agreement is designed to dissolve an existing General Partnership.

Why/When should you use it?

You should use this agreement to dissolve a Partnership. It makes your actions legally binding on the Partners (once they sign the agreement).

Who should use it?

The partners in a partnership should use this agreement. How should you use it? Use it carefully. You should pay close attention to the agreement, especially Exhibit A which sets forth the specific terms of the Dissolution, such as how the assets of the partnership are to be distributed, and how the liabilities of the business are to be handled. The partners need to reach an agreement on these issues before the Partnership can be dissolved.

Important Tips

In most circumstances, we recommend that you use an attorney to review this agreement. Make sure that you are clear as to who gets what; this agreement is your last and only chance. If you make a mistake or forget something, you may be out of luck.

Revocation of Power of Attorney

A Revocation of Power of Attorney is designed to revoke a previously established power of attorney.

Why/When should you use it?

You should use it because you no longer want the Attorney-In-Fact to be able to act on your behalf, or you no longer require the services of the Attorney-In-Fact.

Who should use it?

Anyone who has executed a Power of Attorney and thereby given another person his power of attorney should use this agreement once he can perform those services himself and no longer needs the Attorney-In-Fact.

How should you use it?

You should use it as soon as you are able to resume acting on your own behalf. You can always sign another Power of Attorney if it later becomes necessary.

Important Tips

The next time you need to execute a Power of Attorney, consider limiting the scope of the grant so that you don't need to later revoke that Power of Attorney. For example, rather than saying that the Attorney-In-Fact can do "any and all acts which I could do if personally present," insert limiting or specific language such as "to register my 1994 Ford Mustang, Vehicle Identification #ABS12345678 on or before Jan 3, 1996."

Stock Redemption Agreement

A Stock Redemption Agreement is an agreement among the shareholders of a corporation and the corporation itself in which the parties agree to purchase the shares of stock owned by a shareholder in certain situations. These situations arise when that shareholder dies, becomes disabled, retires, abandons his or her shares, resigns from a corporate office, and in other situations, where the shareholder can no longer function for the benefit of the corporation.

Why/When should you use it?

A Stock Redemption Agreement should be used when a corporation is owned by relatively few shareholders, the majority of whom want the corporation to be controlled by the active shareholders. These types of agreements can benefit the corporation as well because the provisions of this agreement require that shareholders who can't contribute to the success of the corporation, either because of disability or otherwise, must redeem their stock (that is, sell it to the corporation or the remaining shareholders).

Who should use it?

All the shareholders of a small corporation would be parties to this agreement.

How should you use it?

The shareholders will have to agree on the terms of this contract. A shareholder meeting will probably have to be convened and the shareholders will vote to adopt this agreement. Because the corporation is a party, the Board of Directors of the corporation will most likely have to have a similar vote at a formal directors meeting.

Important Tips

Stock redemption agreements are usually used along with other special shareholder-oriented agreements. Definitely consult an attorney if you think your corporation could use this type of agreement.

Managing Employees & Contractors

The employer generally gets the employees he deserves.

~ Walter Gilbey

People are the heart and soul of most businesses. Not surprisingly, employment-related legal issues are quite important and range across a variety of topics from employment contracts to employee benefits programs. The agreements in this section offer an overview of the types of agreements a business would use when dealing with employees, consultants and independent contractors. We have included the following agreements to help you manage your employer-employee relationships effectively:

- Consulting
- Employee Non-Disclosure
- Employee Stock Bonus Plan
- Employee's Acknowledgment of
- Employer's Rights in Work
- Product
- Employment (Formal)
- Employment (Simple)
- Employment Continuation
- Employment Termination &
- Severance
- Incentive Stock Option Agreement
- Independent Contractor
- Retail Salesperson
- Salesperson
- Work for Hire Agreement

Read the following pages if you'd like more information about managing employees.

Who to Hire

Before you decide to enter into an employment relationship, you should decide which form of employment relationship is most appropriate for your business needs. Businesses have the option of hiring employees, independent contractors and consultants. Employers need to balance their business goals with the financial constraints and legal obligations imposed by each of these relationships. For example, a business should consider the financial and tax obligations of hiring an employee as opposed to an independent contractor. If the business hires an employee, not only are the employee's wages to be considered, but also worker's compensation insurance, unemployment insurance, Social Security contributions, and other employee benefits like vacation and holiday pay. Also, the administrative aspects involved in hiring an employee, such as maintaining payroll records, will have to be considered. Before you make any hiring decision, be sure to determine your needs and understand the obligations involved in a particular type of employment relationship.

Hiring Employees

If you decide to hire an employee instead of an independent contractor, you should consider if it is

appropriate to have a formal written employment agreement. Most states view employment arrangements as “at-will” meaning that either party is not obligated to the other for any fixed term of employment unless there is a written agreement to the contrary or, in some special cases, if there is a long employment history between the parties. A written employment contract is not necessary to have a formal employer / employee relationship. An oral agreement can be a valid contract provided there is evidence of mutual agreement to employ and be employed, and of the nature and extent of the employees duties, compensation, and term of employment. Written agreements can be quite useful to both the company and the employee because they spell out the details of the relationship. They can set forth the hours and place of employment, the duration of the employment relationship, compensation and bonus programs, property rights, grounds for termination, and confidentiality requirements. For example, if the employee will be given access to valuable trade secrets, the employer may want the employee to sign a non-disclosure agreement or an employment agreement with a non-disclosure provision. Or, if the employee will play a key role in the success of the business, a bonus arrangement may be included in a written employment contract. In another example, the business may not want to make any severance payment for certain types of employment terminations, or for any employment terminations. All of these considerations can be incorporated into a written employment agreement.

You have probably heard or read about many wrongful termination lawsuits filed against employers. Written agreements can be very helpful in protecting businesses from wrongful termination liability because they can establish clearcut grounds for termination of the employment relationship. Responsible employers will incorporate grounds for termination not only in their written agreements but also in sample contracts distributed to employees at the start of the working relationship. Sample contracts are not only useful in protecting employers from liability by establishing procedures and grounds for termination, but also are great tools for handling all aspects of the employer / employee relationship. If you are interested in putting together a sample contract, we encourage you to use JIAN’s *EmployeeManualMaker*. Businesses that desire to attract and keep valuable employees may want to consider special benefit plans such as an incentive stock option plan or an employee stock bonus plan. Sample agreements of these types of benefit packages are included in *AgreementBuilder* to provide you with a basic understanding of the relevant legal language. You should take note, however, that there are a myriad of legal considerations involved in these types of benefit packages. If you are contemplating any type of benefit program that utilizes the equity of your business, as these plans do, you must consult a qualified attorney and/or benefits consultant.

Independent Contractors

If the business decides to hire independent contractors instead of employees, there are other legal considerations to keep in mind. First and foremost is that the IRS may classify independent contractors as employees and, as a consequence, the business may have to pay all employment-related taxes for the individual plus additional penalties. There are many factors the IRS considers in making such an evaluation, some of which are somewhat ambiguous. For example, an independent contractor may be classified as an employee if the...

- (1) employer has control of how and when the contractor performs his or her duties;
- (2) contractor works full time instead of part time;
- (3) contractor cannot hire and supervise his or her own employees;

- (4) contractor cannot lose money on a particular assignment;
- (5) employer furnishes tools or equipment;
- (6) contractor is paid by the hour instead of by the job;
- (7) contractor can be dismissed without cause as in an “at-will” relationship;
- (8) employer provides training to the contractor;
- (9) contractor does not offer his or her services to the general public;
- (10) contractor’s work is a substantial part of the businesses operations;
- (11) contractor’s hours are determined by the employer;
- (12) contractor does not bill for services;
- (13) contractor is not reimbursed for costs;
- (14) contractor is required to submit progress reports;
- (15) contractor personally performs all of the work;
- (16) all work is performed at the employer’s location; and
- (17) contractor has a continuing relationship with the employer.

If you are not sure whether your independent contractor could be classified as an employee, you can use these factors as a guide and discuss the issue with your attorney. In any case, if you have a written agreement with an independent contractor you can help to establish the independent nature of the working relationship. Not only can this document help you to avoid having the individual classified as an employee, but it will also help you to establish the obligations and expectations of the engagement. If a business hires an independent contractor to create or develop products, then the business needs to have an agreement with the independent contractor that spells out who is to own the rights to the product. Without a written agreement to the contrary, the independent contractor may own all rights associated to the work product created during the employment relationship. For example, if a software development company engages an independent contract programmer to write a 3-D graphics software engine, the company would want to own all the rights to the software. The company can protect itself by having a written agreement which defines ownership. The Independent Contractor’s Agreement included in this section will give you a better understanding of how the independent contractor relationship should be established.

Consultants

Also in this section is a Consulting Agreement. This agreement can be changed to meet the requirements of most types of consulting arrangements. It will provide you with a solid understanding of the terms to consider when engaging a consultant.

Things to Remember

The agreements in this section are a good overview of the types of employment-related agreements a business should use. Of course, there are a multitude of issues to consider when you are hiring an employee or contracting with an independent contractor or consultant. Make sure you understand these issues when deciding upon the language for your written agreement. Also, if you have or will have employees, consider using an sample contract which can help manage your relationship with employees and protect you and your business from legal challenges by your past and present employees.

Consulting Agreement

This agreement covers the relationship between a company that wants some or all of its promotional, marketing and sales functions performed by a third party (or parties) and the consultant who locates and retains the third party (parties) to perform those functions.

Who should use it?

Both the consultant providing the types of services described above and the client company receiving those services should use this agreement.

Why/When should you use it?

It is important to use this agreement so that issues of compensation, exclusivity, rights and relationship of the parties, and contract term be clearly laid out in advance. Without an agreement, the consultant is unable to perform his or her duties because he cannot rely on his or her client. And the client, on the other hand, will not be able to rely on the consultant. You should use this agreement anytime you are retained as a consultant or retain a consultant to find third parties to provide promotional, marketing and sales services. Use it whether or not these services are in addition to identical services provided in-house or by other third parties. This agreement is appropriate where the company wants a single entity or entities to perform its promotional, marketing and sales functions. While the consultant may find a number of companies to perform these functions, each one must provide selling services at a minimum, and, if desired, promotional and marketing services as well. Because of the way this agreement is drafted, it is not intended where third parties are retained to do promotional and/or marketing services without also providing sales services. In other words, it is okay to use it where the company provides sales services exclusively, but it cannot be used where sales services are not provided. The reason for this is that the contractor is paid based on what is sold, as opposed to marketing or promotional services provided.

How should you use it?

Be careful using this agreement. It is drafted to be an exclusive arrangement. The consultant is obligated to use his or her best efforts to provide the services contracted for in the agreement; if the consultant does nothing, his or her client may have a *cause of action* against him. The client should be careful as well, because by granting an exclusive contract to this contractor, he is putting a great deal of faith in the contractor. Make sure to check out the contractor first. Is this the person or company you want performing these services for you? While the company gets to individually approve of and contract with the sales professionals, the company is limited to those the consultant finds.

Important Tips

Make sure to read “Why/When should you use it?” above. It explains that it

is appropriate to use this agreement where sales services are provided exclusively, but it may not be used where sales services are not provided.

Recommendations: Execute a Non-Disclosure and Non-Circumvention Agreement for additional protection.

Employee Non-Disclosure Agreement

It is an agreement between the Company who owns or is providing certain proprietary, non-public information and the employee who receives that information. This agreement prohibits the employee from disclosing the information to third parties and from using that information other than in the scope of his

employment. This agreement is designed to establish harmonious relationships between you and (potential) employees and to protect your company, ideas, assets and competitive position from inappropriate use of your confidential information.

Why/When should you use it?

Anytime you hire a new employee, or, if you are seeing this agreement for the first time now, you should have all of your current employees sign a copy of this agreement as soon as possible. The use of this agreement may protect your ideas from being used by other parties. While it does not guarantee that the information you have provided won't be freely disseminated, it affords you some protection.

Who should use it?

Use the agreement freely; it is better to err on the side of using the agreement than not using it.

How should you use it?

You should use this agreement when you want to protect your company from inappropriate use of proprietary information. You should enter into an agreement, along with an Employment Agreement, at the beginning of employment, so that all parties understand the nature and scope of their rights and duties.

Important Tips

Make sure to execute the agreement before you disclose any confidential or proprietary information to anyone. Once you have made the disclosure, it may be too late to ask the other party to complete the agreement.

Employee Stock Bonus Plan & Agreement

Employee Stock Bonus Plan and Agreement are documents used in a specific type of employee incentive special compensation program. This program is designed to allow key employees to purchase stock from their corporate employer at a discount of not less than 85% of the fair market value of the stock. The employees also get a tax break when they sell the stock in the future.

Why/When should you use it?

This type of employee incentive program is used to attract and keep talented employees. You should use an Employee Stock Bonus Plan and Agreement when you want to provide an incentive compensation plan and this type of program meets your tax needs.

Who should use it?

Corporate employers who wish to attract and keep talented employees.

How should you use it?

There are many requirements to consider when establishing any type of employee incentive compensation plan. You should consult with your attorney, your accountant, or a benefits consultant if you are contemplating some type of employee incentive compensation plan. Use this agreement to get a general understanding of how an Employee Stock Bonus Plan works.

Important Tips

There are different tax consequences to the employer and employee depending upon the type of incentive compensation plan you use. When you consult you lawyer, accountant or benefits consultant, you should ask for a clear explanation of the types of plans and their consequences.

Employee's Acknowledgment of Employer's Rights in Work Product

An Employee's Acknowledgment of Employer's Rights in Work Product is an agreement in which an employee relinquishes all of his or her rights in a work product that he or she generates during the scope of employment. You will note that the Acknowledgment also contains an assignment of rights as reassurance that the employer will retain all rights in work product.

Why/When should you use it?

As an employer you will generally want to retain all rights in work product produced by employees. For example, if you hire employees to develop an on-line, 3-D graphics engine then that will be the focus of a future on-line shopping business, you want to be sure to own all rights in that graphics engine.

Who should use it?

Employers who hire employees to develop intellectual property should have employees sign this Acknowledgment or a modified version.

How should you use it?

Employers who want to utilize this Acknowledgment may find that some employees won't agree to all of the terms. Adjust the terms so that they are agreeable to both sides.

Important Tips

Leave the assignment provision in this agreement. There may be situations where the intellectual property created by an employee would not be considered a work made for hire, meaning the rights in the employee's work product would be owned by the employee instead of the employer. The assignment provision acts as a safeguard for the employer by treating the Acknowledgment as an assignment as well.

Employment Agreement

An Employment Agreement is a contract in which an employer and an employee set the terms of their relationship. It covers matters such as duration, termination, compensation, non-disclosure, place of employment and expense reimbursement.

Why/When should you use it?

Generally, employment relationships not covered by a written contract are "at-will" meaning that neither party has any confirmed obligation to the other. The employment contract solidifies the employer-employee relationship by spelling out what the parties should expect from each other. There may be times when an employer or an employee desires to have the employment relationship defined in writing. An example of such a situation would be when an employee leaves the security of one job for a new job which promises an equity stake in the business.

Who should use it?

Employers and employees can use this document or construct their own. Usually employment agreements are used when employers hire high level or key employees.

How should you use it?

You should use this agreement when you want to solidify the terms of an employer-employee relationship. Basically, you should enter into an agreement at the beginning of employment so that all parties understand the nature and scope of their rights and duties. Review this agreement to understand the types of terms. You can draft your own terms and include them in the appropriate section.

Important Tips

Consider all the possible terms your employment agreement could include. Be prepared to drop terms that you don't find important but demand that important terms be stated clearly and kept in the agreement.

Employment Agreement (Short Version)

This agreement is a bare bones employment agreement which establishes a basic employment relationship. It provides general terms such as duration of employment, salary, grounds for termination, and an arbitration clause.

Why/When should you use it?

This short-form employment agreement provides a quick and easy written contract without getting too particular and cumbersome. This agreement should be used when the parties desire to have a written agreement but do not require extensive terms to define the employment relationship.

Who should use it?

Employers and employees who do not require an extensive agreement but who desire a written agreement would use this form.

How should you use it?

The main goal of using this agreement is to have a written record of the employment relationship. You can make modifications to this form or use it "as-is" by filling in the blanks.

Important Tips

If you are signing an employment agreement to have a written record of the employment relationship, you should make the effort to set forth important terms. If you do not require that everything be spelled out clearly, still make sure that the terms of the agreement would not somehow work against you in the future.

Employment Continuation Agreement

An Employment Continuation Agreement is an agreement in which an employer and an employee agree to extend the term of employment beyond the employment period previously established in a separate employment agreement. The terms of that separate employment agreement are incorporated into this agreement.

Why/When should you use it?

You should use this agreement if you have entered into a written employment agreement which is due to expire but you would like the employment relationship to continue for an extended period and under the same terms. The Employment Continuation Agreement can be entered into either before or after the original employment agreement expires. However, you should enter into the Continuation Agreement before the expiration of the original agreement to make sure the terms of the original agreement legally apply throughout the employment relationship. For example, if your employment agreement states that you can only be fired for cause and that agreement has expired, it is possible that your employer could fire you for any reason because without a written agreement you could be considered an at-will employee.

Who should use it?

This agreement should be used by employers and employees who have entered into written employment contracts which are due to expire but the parties desire to continue the relationship.

How should you use it?

Make sure to reference the original employment agreement in the Employment Continuation Agreement and include that original agreement as an attachment.

Important Tips

If you want to change certain terms in your original employment agreement you can do so in this Employment Continuation Agreement. You can incorporate by reference all of the terms of the original agreement then modify those terms or add new terms in the is agreement. It is an opportunity for renegotiating an existing employment contract.

Employment Termination & Severance Agreement

An Employment Termination and Severance Agreement is an agreement in which an employer and an employee agree to terminate the employment relationship, release each other from liability to the other, and establish a severance payment scheme. Basically, this agreement terminates the employment relationship.

Why/When should you use it?

Employers would want to use this agreement because in it the employee agrees to keep private the company's confidential information and releases his or her claims against the employer. For example, if there has been some problem during the employment relationship, such as sexual harassment allegations, the employer may want a written release to limit its liability exposure. Employees should use this type of agreement to insure that their ex-employer will be bound to comply with the financial aspects of the termination such as severance payments and maintenance of health insurance for a certain period following termination.

Who should use it?

This agreement or a modified version should be used by employers and employees who will be terminating an employment relationship but who need assurances from each other regarding continuing obligations.

How should you use it?

This agreement should be used when you will be ending an employment relationship and you would like certain continuing matters like severance payments, to be set down in writing. You can use this agreement or modify it to fit your particular needs.

Important Tips

If you are using this agreement for more of a release than a severance agreement, you should consult your attorney about the appropriate language for the release. Some states require specific language in the release in order for the release to be completely effective.

Incentive Stock Option Agreement

An Incentive Stock Option Agreement is an agreement in which an employer and an employee agree to allow the employee to participate in a special type of employee incentive compensation program called an Incentive Stock Option plan. In this agreement, the employee can purchase stock from the corporate employer at large discounts and also get a tax break when they are given the option and when they sell the stock at later time. (For a comprehensive toolkit for building your own Employee Incentive Stock Option

program, visit www.JIAN.com)

Why/When should you use it?

Incentive Stock Option Agreements are used in conjunction with Incentive Stock Option Plans. This type of incentive compensation program is used to attract and keep talented employees. Also, if the Incentive Stock Option Plan is structured correctly, both the employer and the employee can get a tax break.

Who should use it?

Corporate employers who wish to attract and keep talented employees.

How should you use it?

There are lots of issues involved in establishing Incentive Stock Option Plans. We have included it for educational purposes only. It is imperative that you consult with your attorney, your accountant, or a benefits consultant if you are interested in establishing an Incentive Stock Option Plan and entering into an Incentive Stock Option Agreement with your employees.

Important Tips

There are different tax consequences to the employer and employee depending upon the type of incentive compensation plan you use. When you consult you lawyer, accountant or benefits consultant, you should ask for a clear explanation of the types of plans and their consequences.

Independent Contractor

An Independent Contractor's Agreement is a contract between an individual and an employer agree to establish an employment relationship on a contract as opposed to a hired basis. The agreement establishes that the independent contract will be in control of how the work is to be performed. Remember, control over how and when work will be performed is a factor considered by the IRS when determining if someone is an employee or independent contractor.

Why/When should you use it?

You should use it to establish the basic understanding between the employer and the independent contractor. If there are particular aspects of that relationship that are not addressed in this agreement, you can try and draft them yourself. For example, if the independent contractor will be given confidential information you may want to add a non-disclosure provision.

Who should use it?

Employers and independent contractors should use this agreement or a modified version, especially if the details of the relationship are complex.

How should you use it?

If you are entering into an independent contract employment relationship you should consider using this agreement or a modified version. As an employer, you may want to use this agreement to establish a paper trail indicating that the relationship is not a hire. Use the agreement "as-is" and fill in the missing terms or add your own provisions.

Important Tips

If the independent contractor employment relationship is complex, it is always better to have a detailed agreement, so take the time to think through the terms, especially if there will be liability exposure to either the employer or the independent contractor. Take a look at the discussion on "Managing Employees

and Contractors” to get a better understanding of the independent contractor employment relationship.

Retail Salesperson

A Salesperson Master Commission Agreement is a contract in which an employer establishes a salesperson’s compensation, including base salary and commission. While there are numerous types of commission agreements, this one is designed for use in a retail sales situation where the salesperson receives a commission on items sold by him or her.

Why/When should you use it?

Encouraging the salesperson to sell product by offering commission is the basis of almost all sales relationships.

Who should use it?

While this agreement is designed for the retail environment, it can be changed to accommodate other sales relationships. Employers and salespeople alike can get some ideas on how to structure their commission arrangement by reviewing this agreement.

How should you use it?

Use this agreement or a modified version if you will be entering into a commission-based retail employment relationship. Review this agreement to get an idea of its structure and the issues addressed. Then write the issues you may confront in your commission-based employment relationship and draft a structured agreement similar to this one.

Important Tips

Commission structures come in all shapes and sizes. If you will be employed in a commission-based employment relationship, make sure to watch out for commission programs based on unrealistic sales quotas. Also, beware of provisions which allow the employer to adjust commission rates at any time.

Salesperson

This agreement is a contract for the employment of a salesperson who is to sell in an assigned territory and will be compensated on a commission basis. It sets forth the sales person’s duties, compensation and the obligations of the employer.

Why/When should you use it?

A while back, we were sued by a former employee. Someone we thought was a friend. Over what? He thought we owed him more money than we did. But several years ago we didn't use the right contract to spell out our deal. How dumb was that? After all, we were friends. Don't laugh. This agreement is representative of a traditional commission-based sales arrangement in which profit potential motivates the salesperson to sell product. It also establishes a time limit for how long after the salesperson leaves your firm that they should be entitled to commissions.

Who should use it?

Employers who traditionally hire pure commission salespeople would use this agreement or a modified version, particularly in an effort to protect their customer base. You will note that the agreement contains a term which prohibits the salesperson from soliciting customers of the employer for a certain period after

the end of the employment relationship.

How should you use it?

This agreement or a modified version can be used in industries where commission-only relationships are the norm. In some industries base salaries are provided as well as commissions. Basically, you should use this agreement or a modified version if your industry norm is to hire salespeople on pure commission. Use this agreement verbatim or modify its terms to meet the needs of your employment relationship.

Important Tips

This agreement contains financial provisions which should be clearly understood. For example, “net sales” is defined as gross sales less returns and allowances. “Net sales” could be defined in a number of ways, each of which could mean a great deal of money to the salesperson or the employer. So take the time to think through the practical effect of the financial provisions — it could mean a lot of money.

Work for Hire Agreement

When a company uses an outside contractor to provide services which result in a specific product, it is appropriate to use a Work For Hire Agreement to define the relationship and set forth rights relating to that product. The agreement sets forth the terms and conditions, including scheduling and fees involved in creating the work for hire (prototype production, instruction manuals, etc.).

Why/When should you use it?

It is very important to use this agreement not only because it sets forth exactly what the contractor will be doing for the client, but how much the contractor will be paid, when the product is to be completed, etc. Most importantly, the agreement sets forth ownership of the product being created. A contractor should use this agreement whenever its services are contracted for to create a specific product. It is not necessary to use this agreement where the consultant/contractor is merely providing advisory services and no real tangible product is involved. A client of a contractor should use this agreement whenever it uses an outside consultant to create a specific product. Again, it is not necessary to use this agreement where you are retaining a contractor to provide advisory or other services and they are not creating a tangible product.

Who should use it?

Any contractor retained to create a Work For Hire as well as any company who retains a consultant/contractor to create a Work For Hire.

How should you use it?

You should be very careful to review all of the terms of this agreement. In addition, great care should be taken in completing the attachments (or exhibits) to the agreement which provide for fees, scheduling and a definition of the specific Work For Hire to be created.

Important Tips

You may wish to use other agreements along with this Work for Hire Agreement, including Non-Disclosure and Non-Circumvention and Independent Contractor agreements.

Buying & Selling Goods & Services

There are very honest people who do not think that they have had a bargain unless they have cheated a merchant.

~ Anatole France

This section provides you with the agreements you will need to effectively buy and sell goods and services. While written contracts may not always be required, we suggest that you use them whenever possible to avoid problems down the road. A little time spent now can save you a lot of time, money and heartache. We have included the following contracts to help you document your agreements to buy and sell goods and services:

- Bailment
- Bill of Sale
- Consign Merchandise
- Contract to Sell Goods
- Custom Non-Software Design/
- Development Agreement
- Custom Software Development
- Equipment Lease
- Equipment Purchase
- Exclusive Authorization to Represent
- Buyer
- Exclusive Authorization to Represent
- Seller
- Extended Service
- Hardware Maintenance
- Sales
- Service
- Software Maintenance

Read the following pages if you'd like more information about buying and selling goods and services.

Sale of Goods

A contract for the sale of goods may be made in any way that suffices to show an agreement, including conduct by both parties. There are different rules that apply to for the sale of goods, and either one or both of the parties to that agreement are merchants. A merchant is anyone who makes a livelihood buying or selling the particular goods contracted for or says she does. The Uniform Commercial Code, which applies to such situations, has been enacted in every state except Louisiana.

Written vs. Oral Agreements

There are several types of contracts that must be in writing to be enforceable, including any contract for the sale of goods over \$500. However, if both of the parties are merchants, the U.C.C. says that where one party sends the other a written confirmation of an oral agreement within a reasonable time after that

agreement was made, and the merchant receiving that confirmation does not object within ten days of receipt, the agreement will be enforceable. Thus if I orally agree to sell you \$100,000 worth of computers, and you send me a confirmation stating “this memorandum is to confirm our oral agreement of January 1, 2004, that you agree to send me 100 IBM 486 SX 33 computers on or before March 1, 2004, for the price of \$100,000,” that confirmation serves as a legally binding contract unless I send you a written objection within 10 days. Because of the implications of these confirmations, you should make absolutely sure that the terms of any writings of this type that you may send or receive are 100% accurate. Although the U.C.C. will allow you to enforce your oral agreement in this situation, you should still put all of your agreements in writing. The reason for this is that oral agreements afford little protection in the event of a dispute. In the example above, for example, it is unclear what size hard drive comes in the computer, or if a monitor is included, and if so what type. Note that certain oral agreements to sell goods valued over \$500 are enforceable. Where a seller delivers goods to a buyer, and he accepts them, there is a contract. Also where goods are specifically manufactured for the buyer and are not suitable for sale to others, that buyer will be able to enforce the agreement.

With respect to contracts for the sale of goods under \$500, there is no writing requirement though you will have to prove that there was an agreement, and, of course, the easiest way to do this is to have a written contract.

Contents of a Written Contract

The U.C.C. is fairly lenient as to what is required of a written contract. Although a formal contract is preferred, the U.C.C. simply requires a written memorandum or memorandums evidencing a sale of goods. While a single agreement or memorandum will do, there may be more than one writing which, when taken together, contain all of the essential terms. The memorandum(s) must be signed or at least authenticated by the party claiming there was no contract and it must specify a quantity.

Gap-Fillers

If two merchants intend to make a contract for the sale of goods, and they leave one or more terms open, such a contract does not fail for indefiniteness. Terms relating to price, time and place of payment or delivery, the general quality of goods or any particular warranties may all be omitted because they can be supplied by the U.C.C. As you can see, the U.C.C. implies “reasonable” terms to fill many, though not all, omissions.

Scope of Contracts

Contracts for the sale of goods need not be complex documents. In fact they should be easy to understand, and need only contain the date of the agreement, the name and address of the buyer and seller, a description of the goods being sold, the price or other consideration being paid, and the signatures of the parties. You should also include payment terms, insurance, delivery, and other important provisions so as to avoid any potential conflicts.

Warranties

A warranty is a guarantee that a particular item will be of a certain quality or have certain attributes, and, believe it or not, you may be warranting your product even if you don’t know it. Under the U.C.C., there are four types of warranties: express warranties, the warranty of title and against infringement, the implied warranty of merchantability, and the implied warranty of fitness for a particular purpose. These warranties impose obligations on sellers of goods; therefore, both buyers and sellers should be aware of

these obligations. *Express warranties* are created when a seller makes a promise or statement regarding goods, and the buyer relies on that statement. Any statement of fact or promise that describes goods will create an express warranty, and you don't need to say "I warranty" or "I guarantee" to create such a warranty. Statements relating to the value of the goods or the seller's opinion regarding those goods will not create an express warranty. For example, "Ford cars are better", or "You will love this car" are not express warranties. However, where a seller claims that "this automobile is in top mechanical condition," that does, in fact, create an express warranty. You can negate any express warranties by including explicit language in your agreements that you are selling the goods "as is" and are disclaiming any express or implied warranties of merchantability or fitness.

With a *warranty of title*, the seller warrants that the title transferred is good and that there are no liens or encumbrances of which the buyer is unaware. The title warranty can be disclaimed, but only by specific language. In addition to the warranty of title, a merchant seller also warrants that the goods are free of any patent, trademark, copyright or similar claim. Note, however, that a buyer who furnishes specifications for specific goods to a seller must hold the seller harmless against any claims regarding patent, trademark, or copyright infringement.

In every sale by a merchant who deals in goods of the kind sold, there is an *implied warranty of merchantability*; in general this means that the goods are fit for the ordinary purposes for which such goods are used. It also means that the item is adequately contained, packaged and labeled as the contract or usage of trade may require, and that the item is within fair, average quality of the description given. Note that the serving of food or drink on the premises is a sale of goods subject to the warranty of merchantability. As with all implied warranty cases, the seller is responsible even if he did not know of the defect or could not have discovered the problem. By including language such as "as is" or "with all faults," a seller can effectively disclaim all implied warranties. With respect to the implied warranty of merchantability, if a seller doesn't use such language, then in order to disclaim the warranty, he must specifically mention merchantability in the disclaimer, and, in the case of a written contract, must make the disclaimer conspicuous (either underline it or put it in bold). Furthermore, while you can disclaim this warranty orally, it is best to put it writing.

The *implied warranty of fitness* for a particular purpose arises whenever any seller, merchant or not, knows or has reason to know the particular purpose for which the goods are to be used, and the buyer relies on that seller's skill and judgment to select those goods. A particular purpose differs from the ordinary purpose (warranty of merchantability) in that it contemplates the specific use for which the item is purchased. For example, seller is an attorney who, in his spare time, does aviation stunts in his personal airplane. He sells that airplane to a buyer who is a novice pilot. While the buyer is trying to execute a 360 degree loop, the engine malfunctions, and the plane crashes. The engine would not have malfunctioned under normal use. There was a breach of the warranty of fitness for a particular purpose if the seller had reason to know that the buyer was relying on him to provide a suitable stunt airplane. If, on the other hand, seller is also a novice pilot, there would probably not be a breach because the element of selection based on seller's skill is not present. In both cases, there would not be a breach of the warranty of merchantability since the seller is not a merchant who deals airplanes. A seller can disclaim the warranty for a particular purpose by a conspicuous writing in the contract. Unlike the warranty of merchantability, the warranty of fitness cannot be disclaimed orally; it must be in writing. While warranty disclaimers do not always need to be in writing, to be safe we suggest that you include them in you contracts and put them in writing. Furthermore, you should not give an express warranty, and then try to disclaim it, even if that disclaimer is in writing. Frequently, a buyer will claim that the seller made oral warranties before the

written contract was signed. One possible way to avoid this problem is to always include an integration clause in your contracts. (Note that we have included this provision in most of the agreements in *AgreementBuilder*.) An integration clause says the written contract is the final and sole expression of the agreement between the parties, and that nothing said or agreed to prior to the signing of the contract is part of that agreement.

Lastly, we recommend that you consult an attorney in determining which warranties should be disclaimed and the best way to do it since the rules are fairly technical. In addition to your state's laws, there are federal regulations pursuant to the Magnuson-Moss Warranty Act which covers consumer products. The Act sets forth numerous written warranty requirements; thus, if you are selling consumer products and are offering a written warranty, you should speak to an attorney or, at a minimum, review the requirements of the Act.

Reducing Time for Bringing Action

An action for the breach of any contract for the sale of goods must be brought within four years after the cause of action accrues (when the breach occurs). In the original agreement, the parties may reduce this period of limitation to not less than one year; however, they may not extend it beyond four years.

Risk of Loss or Damage to Goods

In general, if the seller is a merchant, risk of loss passes to the buyer only upon her taking physical possession of the goods. For example, a merchant seller in New York sells goods to a buyer who is supposed to pick them up. The risk of loss does not pass to that buyer until she actually takes possession of the goods. On the other hand, if the seller is not a merchant, risk of loss passes to the buyer upon tender of delivery. For example, seller, a non-merchant, sells goods to buyer on Friday afternoon. Buyer agrees to pick up the goods on Monday at noon but never shows. At 2:00 p.m. a fire destroys the goods. Since seller tendered delivery at noon when he had the goods ready for Buyer, risk of loss falls on the buyer. Therefore, even though he never took possession of the goods and they were destroyed, buyer still has to pay for them.

With respect to carrier cases where the contract requires the seller to ship the goods by carrier but does not require him to deliver them to a specific place, risk of loss passes to the buyer as soon as the goods are delivered to the carrier. For example, a New York seller sells 500 computers to a California buyer, F.O.B. (Freight On Board) New York. The contract states that shipment should be by carrier but does not specifically require seller to tender them in California. Since the risk passes to the buyer as soon as the goods are placed in the possession of the carrier, if they are damaged in transit, the buyer will bear the loss. Of course a buyer of goods may draft his contracts so as to avoid this problem. Note that unless it is otherwise stated in the contract, F.O.B. New York would not only mean that the buyer bears the risk of loss, but the cost of transport as well.

If the contract requires the seller to deliver the goods to a particular place, the risk of loss does not pass to the buyer until the goods are tendered to the buyer at that destination. Thus, in the above example, if the contract had said F.O.B. buyer's warehouse California, risk of loss during transit to buyer's warehouse would have been on the seller. Furthermore, unless otherwise agreed to in the contract, seller would also be responsible for shipping costs.

F.A.S. is a maritime term which requires the seller to place the goods alongside a vessel. The buyer then bears the cost and risk of loading and shipment. In situations where goods are held by a third party bailee and are not to be shipped or even moved as part of the contract, risk passes to the buyer when one of the

following occurs: The buyer receives a negotiable document of title covering the goods; the bailee acknowledges the buyer's rights to the goods; or a reasonable period of time lapses such that the buyer can notify the bailee of his right to the goods after buyer receives a nonnegotiable document of title or otherwise gives written direction to the bailee to deliver the goods.

Personal Service Contracts

"It is not because things are difficult that we do not dare; it is because we do not dare that they dare difficult."

~ Philosopher, Seneca

Contracts for the provision of services do not have to be in writing unless they cannot be performed within a year. Thus if you go to court and say we had a two year independent contractor's agreement, you better have a written contract, or the judge will throw you out of court. Of course, even if the contract term is for less than one year, it is best to have a written agreement. Where nothing is said regarding the term of employment or service in a written or oral agreement, that employment will be "at will." This means that either party may terminate the relationship at any time, subject to state employment laws.

Consignment

In a consignment relationship, a consignor leaves item(s) with a consignee, who agrees to pay the consignor any proceeds from the sale of the item(s) less a consignment commission. In most cases, the consignee is not under an obligation to sell those item(s) and may, at any time, return them to the consignor. Frequently, problems arise with consignments, including payment after the item is sold, the condition of unsold item(s), and responsibility for insurance. Often, you avoid these problems by drafting a good consignment contract which should include payment schedules, liability for loss or damage and consignee's responsibility for maintaining insurance, if any.

Artist-Gallery Consignment

A number of states have adopted special artist-gallery consignment laws which deal with a number of these problems. Because of the large number of consignments involving art work, the following states have enacted special laws: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin.

While each state's version is unique, many share basic provisions. When an artist leaves her artwork with a gallery, unless she is paid in full before or upon delivery, there is a presumption that a consignment is created. The artwork itself along with any proceeds from the sale of the artwork is held in trust on behalf of the artist. Basically, this means that the consignee/art dealer is responsible for any loss, theft or damage occurring to the consigned art work or proceeds. Most of the statutes impose these obligations even if there is a loss that could not have been avoided by the highest degree of care. Thus, if you leave art with a dealer, and lightning strikes destroying your art or any proceeds, the dealer is responsible for the loss and

must pay you. You should be aware, however, that every state defines art differently. Thus while some of the statutes include craftwork which they may define as those items made with clay, fiber, wood, metal, plastic, or glass, others do not include such crafts in their definition of art. As such, you should make sure to have a good contract whenever you consign merchandise unless you are sure that there is an applicable statute. Even if there is, it doesn't hurt to have a written agreement.

In fact many of the artist-gallery statutes require artist and dealer to have a written agreement which sets forth the value of the artwork, a minimum selling price and the dealer's fee or percentage. Also, most of these statutes protect the artwork from any claims made by creditor's of the art dealer, including a trustee in bankruptcy. Traditionally, this was a big problem in that if you consigned something, and the consignee owed money to a creditor or went bankrupt, you might have lost your goods.

Bailment

A Bailment Agreement documents the delivery of goods from one person (Bailer) to another (Bailee). The Bailment may either be for the benefit of the Bailee, the Bailor or both. The Bailee keeps the goods in trust to carry out some purpose, and thereafter either redelivers the goods to the Bailor or otherwise disposes of those goods in line with the purpose of the trust. While there are many different types of bailments (for example you lend your car to a friend to go to the store) most involve the storage of goods. As such, AgreementBuilder's Bailment Agreement is exclusively for the storage of property.

Why/When should you use it?

You should use this agreement anytime you accept goods from another for money or anytime you leave goods with another for storage. It is important to use this agreement so that the Bailor a receipt for his goods. The Bailee should use this agreement because it sets a fee and establishes the terms of the bailment.

Who should use it?

If you are leaving your property with another party, you should use this agreement to document the bailment. If you are accepting property for other parties you should also use this agreement.

How should you use it?

Make sure you adequately describe the property in the agreement.

Important Tips

This agreement is not meant to be used by pawnbrokers.

Bill of Sale

A Bill of Sale is a receipt for both the Buyer and Seller of any goods (chattels) or personal property. It says that the sale has been consummated, and the item delivered. By verifying that the Buyer has obtained legal title to the property from Seller, it operates as a "title" to those items.

Why/When should you use it?

You should use this agreement anytime you buy or sell goods or personal property, whether it be a new or used television, car or sewing machine. If you pay (or sell) with cash, the Bill of Sale is evidence of the transaction. Even if you pay (or sell) by check or credit, it is a good idea to use a Bill of Sale so that there is no misunderstanding regarding the transaction.

Who should use it?

A small business owner or anyone else selling property. If you are buying goods or property, it is a good idea to get a Bill of Sale; it is your way of proving that you paid for the item in question.

How should you use it?

You can either use the Bill of Sale with or without warranties. With warranties means that the seller is warranting that it has the authority to transfer legal title to the buyer and that there are no outstanding debts or liabilities relating to the property. With warranties may also provide that the property is in good working order. Without warranties, means that the Seller is selling “as is.” Here the Buyer is taking it with defects, if any.

Important Tips

Be careful when selling something—even though you say nothing about a warranty or you attempt to disclaim certain warranties, you might end up getting stuck.

Consign Merchandise Agreement

An agreement to Consign Merchandise is, quite simply, an agreement between the owner of a particular item or items and the entity which will take possession of that item or items for the purpose of selling it. When a seller takes merchandise on consignment, he is agreeing to try to sell that item, but if he does not, the owner of the merchandise agrees to take it back.

Why/When should you use it?

You should use this agreement because it establishes the relationship and obligations of the store owner and the consignee. It establishes a minimum purchase price, duration, and, most importantly, the seller’s fee. Like other agreements, it is important to use in that a written agreement is better than an oral one.

A consignee should use it anytime he leaves merchandise, whether it be greeting cards, a painting or a car, with a third party for the purpose of selling that item(s). Likewise, anytime a seller takes possession of merchandise from another party for the purpose of selling that merchandise, this agreement should be used.

Who should use it?

Anyone taking possession of merchandise on consignment and anyone leaving merchandise with another party on consignment.

How should you use it?

Use it freely whenever a consignment takes place. It is a straightforward agreement to document a fairly simple transaction.

Important Tips

In addition to executing this agreement, Consignee should get a receipt from Seller for any merchandise left with Seller on Consignment. Likewise, if and when the merchandise is returned to the consignee, Seller should get a receipt. This is important; otherwise the party in possession of the item(s) might argue that the item(s) was never returned to him.

Contract to Sell Goods

A Contract to Sell Goods is an agreement between a seller and a buyer to make a current transfer of

personal property. It's like a Bill of Sale in that it is a receipt for the item(s) purchased, but unlike a Bill of Sale, the seller warrants that he owns the item(s) and that there are no encumbrances. Unlike a Sales Agreement which anticipates completion of the transaction some time in the future, a Contract to Sell Goods is used to evidence a current sale.

Why/When should you use it?

You should use this agreement anytime there is an agreement between a buyer and seller to transfer personal property now, as opposed to some time in the future. A Contract to Sell Goods protects you in the event that another party owns the property or if there are any encumbrances. Generally, it is not necessary to use it for small purchases. You wouldn't use this agreement to sell a book; you would use a Bill of Sale.

Who should use it?

Both the seller and buyer of personal property should use this agreement.

How should you use it?

It is a simple agreement, but make sure to adequately describe the property being transferred.

Important Tips

If you are transferring the property in the future, you should use AgreementBuilder's Sales Agreement.

Custom Non-Software Design/Development

This is an agreement for use by individuals or companies doing custom development work, such as Agency or Design firms. It outlines working and billing policies regarding the production of promotional materials and placement of advertisements.

Why/When should you use it?

You should use a Custom Non-Software Design/Development Agreement whenever you engage a designer to perform custom design services or, if you are a designer, whenever you engage a new client. As with most agreements, it is very important for the parties to define the nature and scope of their relationship. This is especially true in the custom development area where the services to be provided by the designer must meet a production schedule and must be performed in cooperation with the client.

Who should use it?

Designers and their customers should use this agreement.

How should you use it?

This agreement is set up to cover a series of projects. You should tailor this agreement to fit the needs of your custom design and development relationships. For example, if only one project will be performed, the details of that project, such as milestones, can be included as specific terms in this agreement.

Important Tips

There are quite a few terms in this agreement concerning financial issues. Be careful to use only the financial terms that are relevant to your transaction.

Custom Software Design/Development

A Custom Software Development Agreement is a contract between a client and the software company/developer it contracts with to provide programming services and software development. The

agreement anticipates that the developer will create a customized computer software program (and user manual) for the client. The client acquires all ownership rights, subject to a license, in the developer's work product.

Why/When should you use it?

There are a number of reasons to use this agreement, the most important of which include making clear who owns the work product, how it will be paid for, delivery dates, and payment terms. Anytime you contract to perform or contract with another company to perform customized software development you should use this agreement. You should execute it before development work commences. In fact, this particular agreement anticipates execution even before specifications are established; it provides that if the parties don't agree on a price once the specifications are agreed upon, customer must pay the developer a preset fee for creating the final specifications.

Who should use it?

Both the company providing customized software development and the client needing these services should use this agreement.

How should you use it?

It's a fairly simple agreement (as agreements go), but it forces you to consider a number of issues that will affect the deal. Make sure to consider all of these issues. The first step in the agreement is its execution. Then the parties meet to discuss the project requirements. The developer then creates a set of project specifications which the client can then approve or modify. Once final agreement is reached on the specifications, the developer sets a price. If the client does not then approve that price, the agreement terminates and the client may have to pay the developer a fee for creating the final specifications.

Important Tips

Always check out your developer's references before signing the contract. This agreement anticipates internal use of the software only. The parties should expand the agreement (basically by eliminating the license provision) if wider distribution is anticipated. In that case the developer may wish to provide for royalties.

Equipment Lease

This is an agreement between the owner or lessor of certain equipment and the lessee of that equipment. It is not drafted to be used by the manufacturer of the equipment, but rather by the third party who buys the equipment and subsequently leases it to the lessee.

Why/When should you use it?

You should use a Commercial Lease Agreement whenever you lease any type of equipment. To be enforceable, a lease for more than a year must be in writing. If your lease is for something less than a full year, however, it's still a good idea to put it in writing.

Who should use it?

The owner of equipment or his agent as well as the lessee should use an Equipment Lease Agreement.

How should you use it?

Negotiate the terms of your lease before you sign it. You may want to take a look at the discussion titled "Structuring Real Estate Transactions." It provides a lease checklist intended to aid businesses (as well as individuals) negotiate favorable real property lease terms. Although it is not intended to provide

information for the leasing of equipment, you find some of it informative.

Important Tips

Don't just sign a lease when a lessor hands it to you. You may not like what you see, and this is your last chance to negotiate. If you are the lessor, make sure that everything you want your lessee to agree to is included in the lease. Because the equipment lessor in this Equipment Lease Agreement is not the manufacturer of the equipment itself, the agreement contains certain warranty disclaimers. Of course the manufacturer would still be liable. Make sure that if you are leasing directly from the manufacturer, that your agreement does not disclaim warranties.

Equipment Purchase Agreement

An Equipment Purchase Agreement is the agreement to be used when an individual or company purchases equipment or a piece of equipment from a dealer or manufacturer. It sets forth their terms and conditions of the sale: price, delivery, warranty, training, etc.

Why/When should you use it?

You should use this agreement anytime you sell or purchase a piece of equipment such as a copy machine, mainframe computer, or other similar type of equipment. You should use it so that the duties of the dealer and customer are clearly set forth before the equipment is delivered so that there is no debate as to the items described above.

Who should use it?

Both the seller and buyer of equipment.

How should you use it?

Use it freely, but with care to include all of the elements of your agreement.

Important Tips

This agreement provides for a Purchase Money Security Interest by the seller. If you sell large amounts of equipment (or merchandise for that matter), you can become a secured creditor. If you take a security interest in the items you sell on credit and then file the Uniform Commercial Code Financing Statement with the appropriate public office, you have the right to take back or seize that property if the customer doesn't pay its debt. A further advantage to being a secured creditor is that in the event the customer files for bankruptcy, you will come before general or unsecured creditors in terms of getting all or part of what you're due. The buyer should carefully review the warranties contained in this agreement, as many are limited in scope and duration.

Exclusive Authorization To Represent Buyer

This is an agreement used when a representative or broker is retained to handle the purchase of a single item or conduct a single transaction on behalf of a buyer. The buyer is agreeing to retain this broker only and no one else; it is an exclusive agreement, as opposed to a non-exclusive agreement.

Why/When should you use it?

This agreement should be used anytime you hire someone or are hired to locate and purchase a piece of property, whether it be real property (a home or office), personal property (a car, boat, or computer), intellectual property (a patent or trademark) or a business. You should use it because it protects your rights as a buyer (or broker). It establishes a relationship between the buyer and the broker whereby the

broker is given the authority to act on behalf of the buyer. Furthermore, it establishes certain parameters and guidelines pursuant to which the broker is authorized to act.

Who should use it?

The buyer who retains the services of a broker or intermediary as well as the broker himself.

How should you use it?

It is best to execute the agreement before the broker begins acting on the buyer's behalf.

Important Tips

Since this is an exclusive arrangement, you may not use any other brokers for the duration of the agreement. If you do and you buy through one, you may still be obligated to pay the other. Furthermore, if the buyer finds and purchases the property on his or her own, he may still be obligated to pay the broker his or her fee. For an ongoing representative relationship, see the "Sales Representative Agreement" or "Manufacturer's Representative Agreement."

Exclusive Authorization To Represent Seller

This is an agreement used when a representative or broker is retained to handle the sale of a single item or conduct a single transaction on behalf of a seller. The Seller is agreeing to retain this Broker only and no one else; it is an exclusive agreement, as opposed to a non-exclusive agreement.

Why/When should you use it?

You should use this agreement anytime you retain someone or are retained to sell a piece of property, whether it be real property (a home or office for example), personal property (a car, boat, or computer for example.), intellectual property (a patent or trademark, for example) or a business. You should use it because it protects your rights as a Seller (or Broker). It establishes a relationship between Seller and Broker whereby the Broker is given the authority to act on behalf of the Seller. Furthermore, it establishes certain parameters and guidelines pursuant to which the Broker is authorized to act.

Who should use it?

The Seller who retains the services of a broker/intermediary as well as the Broker himself.

How should you use it?

It is best to execute the agreement before the Broker begins acting on the Seller's behalf.

Important Tips

Since this is an exclusive arrangement, you cannot use any other brokers for the duration of the agreement. If you do and you sell through one, you may still be obligated to pay the other. Furthermore, if Seller sells the property on his/her own, he may still be obligated to pay the Broker the fee. For an ongoing representative relationship, see the "Sales Representative Agreement" or "Manufacturer's Representative Agreement."

Extended Service Agreement

An Extended Service Agreement is an optional extension of the normal manufacturer's warranty, often used for marketing and competitive positioning purposes. If the product is highly reliable and unlikely to fail during a certain period beyond that which the manufacturer warrants it, it is relatively safe to offer this extension. It makes your customers feel more confident in the product and compelled to purchase it

from you—it is virtually a cost-free incentive and an advantage over competitors.

Why/When should you use it?

Anytime you manufacture goods and wish to offer an Extended Warranty providing for replacement of covered products as a result of manufacturing defects, you should use this agreement. If you are confident that your product(s) are reliable, then this extension can only help you. For the buyer of warranted goods, the Extended Service Agreement provides the satisfaction of knowing that certain repairs will be covered for the duration of the extension. For the manufacturer, an Extended Warranty shows that you stand behind your products. Such a stance ought to enhance your competitive position, especially if marketed correctly.

Who should use it?

The manufacturer of any number of products should use this agreement.

How should you use it?

You should implement a marketing program that calls attention to the fact that you are offering this extended service program.

Important Tips

The manufacturer should carefully review the section in the agreement template on "What This Repair Agreement Does Not Cover." Make sure that everything you don't want included is specifically excluded.

Hardware Maintenance Agreement

A Hardware Maintenance Agreement is an agreement between a computer maintenance company and a lessee or purchaser of computer equipment. Often, the computer maintenance company will be the same company that sold or leased the computer. In this agreement, the maintenance company agrees to maintain and service the computer equipment over a period of time for specified fees. This agreement is very similar to the Service Agreement that appears later on in this section, but we've included it because of its specific application in the computer maintenance context.

Why/When should you use it?

You should consider using this type of agreement when you purchase expensive computer equipment or a computer system. As with any service and maintenance agreement, the main reason to enter into a hardware maintenance agreement is to protect against potentially devastating computer failures. By entering into this agreement, a purchaser or lessee knows that the maintenance company will be there to provide service and maintenance for a specified rate. Also, if the computer equipment is leased, the lessor will often require the lessee to enter into a service and maintenance agreement to insure that their interest in the equipment is protected.

Who should use it?

Purchasers, sellers, lessees and lessors of computer equipment would use this type of agreement.

How should you use it?

The parties to this agreement will have to specify the equipment covered and the charges for service and maintenance.

Important Tips

There are alternative warranty provisions in this agreement, one alternative for use in commercial

transactions, and the other for consumer transactions. These two alternatives are included because the U.C.C. treats warranty provisions differently depending on whether the purchaser is a merchant or a person. Refer to the discussion at the beginning of this section for more details on this issue.

Sales Agreement

A Sales Agreement is an agreement between a seller and a buyer to transfer personal property. Basically, it's a promise by a seller to sell a specific item or items of personal property for a specified price pursuant to specified terms to a buyer who, in turn, agrees to buy that item(s) pursuant to that price and terms. A Sales Agreement anticipates that the transaction will be completed some time in the future. At a specified time when the seller delivers the item(s) to the buyer, the buyer is required to pay the him the agreed upon price.

Why/When should you use it?

Anytime there is an agreement between a buyer and seller to transfer personal property some time in the future (i.e., not today), they should use this agreement. Generally, it is not necessary to use it for small purchases. You wouldn't use a Sales Agreement to sell a book, but you would use one to sell a car. It obligates the parties to the agreement to complete the transaction. Unless the sale is completed at the time you agree to buy or sell the item(s) in question, there is nothing obligating either party to finalize that transaction. If a buyer makes an offer, there isn't a contract until the seller accepts that offer. Once accepted there is an agreement, and you should use this contract to document that agreement.

Who should use it?

Both the seller and buyer of personal property should use this agreement.

How should you use it?

It is a simple agreement, but make sure to adequately describe the property being transferred.

Important Tips

You may wish to execute *AgreementBuilder's* Bill of Sale once payment is made. If you are transferring the property now, as opposed to in the future, you should use *AgreementBuilder's* Contract to Sell Goods.

Service Agreement

A Service Agreement is an agreement in which a business hires a service company to provide maintenance and repair services of equipment such as computers. Often these agreements are used in conjunction with an equipment lease in which the leasing company or another company provides maintenance and repair services as part of the arrangement. However, you don't have to lease equipment to enter into this type of agreement. For example, you could hire a computer specialist to maintain and repair your office computers which your company owns.

Why/When should you use it?

You should use this agreement as a type of equipment insurance. It is better to understand what services you will be provided and what you will have to pay for those services before your equipment breaks down. If your use of equipment is a necessity for your business, you would want to have an established relationship with a servicing company.

Who should use it?

Businesses with important equipment needs should consider entering into a servicing relationship using

this type of agreement.

How should you use it?

Usually service companies will want you to use their form agreement. Use this agreement to understand the basics of a service agreement or use this agreement with certain modifications.

Important Tips

As always, make sure to negotiate the terms of any service agreement. Also, double check the list of equipment you want to be serviced and include that list as an attachment to the agreement.

Software Maintenance Agreement

This is an agreement between a software supplier and a licensee or buyer in which the supplier agrees to provide maintenance of the software for a specified period of time. Basically, this agreement is an insurance policy for commercial software.

Why/When should you use it?

A software purchaser or licensee would enter into this agreement to obtain protection against software problems after any warranty period has expired. This agreement may be used in conjunction with a Commercial Software Licensing Agreement, also included in *AgreementBuilder*.

Who should use it?

Customers who purchase commercial software from resellers or sales representatives should consider using this type of agreement.

How should you use it?

As noted above, this agreement should be used in conjunction with a Commercial Software Licensing Agreement. In fact, the recitals in this agreement refer to a license or purchase agreement. You need to make sure the maintenance objectives are sufficient or you can add your own terms which better define such obligations.

Important Tips

In the “Warranty Provisions” section of this contract, the warranty provisions of the related licensing or purchasing agreement are incorporated by reference. You may want to spell out such warranties in this agreement, and maybe change them in some fashion. After all, this is an agreement for services, not for products.

Building Sales & Marketing Relationships

We grew up founding our dreams on the infinite promise of American advertising. I still believe that one can learn to play the piano by mail and that mud will give you a perfect complexion.

~ Zelda Fitzgerald

Practically every small business is market driven. Since sales and marketing is probably the most dynamic part of your business, programs in these areas will change frequently and rapidly. While you may know the importance of marketing—packaging, pricing, and promotion—and sales, you may not know the importance of the legal agreements that document these relationships. Ordinarily, each sales agreement is unique from those you’ve used before, and each marketing agreement reflects a new opportunity in an untested media source. Also, since sales and marketing can be rather unpredictable, it is important to draft agreements that take into account all conceivable scenarios. *AgreementBuilder* makes this process as predictable as possible by providing you with instructions along with detailed sales and marketing agreements including:

- Advertising Cooperative
- Co-Marketing
- Dealer Resale
- Exclusive Distribution
- Foreign Sales Representative
- General Licensing
- International Distribution
- International Licensing
- Sales Representative
- Mailing List Exchange
- Mailing List Rental
- Manufacturer’s Representative
- Non-Exclusive Distribution
- (Short Version)
- OEM/Remarketing
- Product Licensing

Read the following pages if you’d like more information about sales and marketing.

Sales

“You can’t live with ‘em and you can’t live without ‘em.” By their nature, salespeople are creative, an invaluable characteristic when negotiating a deal for your company, but an annoyance when negotiating their commission or payment with you.

Establish Performance-based Packages

You must clearly establish expectations for your in-house salespeople and contractors. You should try to cover all possible variables in your contracts. You can optimize sales performance and minimize costs by tying the commissions and discounts in your sales agreements directly to sales performance. Much like a performance based compensation plan you would set up for an employee, you can make a salesperson's commission or the discount to a retailer variable based upon their sales performance. This means that if your company's sales are high, you can expect to pay a higher commission, and, conversely, if sales are low, you can expect to pay a lower commission.

The same holds true for a Dealer Resale Agreement. Note, however, that pursuant to the Robinson-Patman Act of 1936, you can vary the level of discount offered to retailers based upon the volume they sell as long as you are consistent with like dealers or retailers. The Act prohibits price discrimination by manufacturers and wholesalers in dealing with other business firms. In particular, the law is designed to protect independent retailers in their fight against large chains.

Precautionary Notes

In a number of states, certain sales agreements, for example Dealer Resale, may be subject to dealership or business opportunity laws. These laws protect small business people and dealers from termination of dealership appointments without good cause. All that is needed to trigger their provisions is a small investment by the dealer. Where a dealer makes an investment, whether it be in advertising or promotion, these laws make it particularly difficult for a supplier to terminate its agreement with that dealer and may further provide the dealer with remedies that are not within the apparent scope of the contract itself.

Where a supplier agrees to meet a dealer's "requirements," such a requirements clause may be enforceable against the dealer if the supplier offers substantial services or invests in significant advertising and promotion. Such contractual provisions will be interpreted according to your state's competition laws.

Be Consistent

Be as consistent as possible with like vendors or partners. By using your agreements whenever possible, you can avoid having to decipher hidden acronyms and abbreviated programs. Furthermore, you should have a better understanding of your agreement. By being consistent with your sales agreements, you also cut down on the administration time and therefore the cost spent calculating commissions or payments.

Watch Out

Dealers may attempt to get creative with their contracts, negotiating for such things as "seed units," "promotional units" or "evaluation units." Whatever they may call these products, they are yours, and the dealer is trying to get them for free.

Marketing

Beware of Abbreviated Programs and Small Percentage Points Marketing people, like salespeople are creative. They are so creative that they develop a new name for a program that is actually an older program in disguise. Some examples of abbreviated programs are "MDF," an abbreviation for Marketing Development Funds, "RAD" for Reseller Account Development Program, or "RMF" for Reseller Marketing Funds. Fundamentally, all of these are discounts taken off your cost of goods sold to help fund the marketing of your products, *sometimes*. We say sometimes because you should be clear in your agreements where the money is being spent. Unless you document in your agreement the specific placement and frequency of advertising regarding your product or service, the money can end up in a

general marketing fund used to run ads that never feature or even mention your product. Each of these abbreviated programs can carry an non-intimidating small percentage point ranging from 1% to 4.5% of sales. Be careful as these small percentage points will start adding up and will eat into

your profits.

Do the Math!

Be sure you understand and are comfortable with any cost associated with your agreement. Work out the highest possible risk based on your forecasted sales performance. Multiply the total percentage of all programs by the forecasted revenue and decide if it's worth the cost associated with the sales. It requires a bit of work, but it's worth the effort to avoid surprising fees later.

Be Consistent

Be as consistent as possible with like vendors or partners. By using your agreements whenever possible, you can avoid having to decipher hidden acronyms and abbreviated programs. Furthermore, you will better understand your agreements.

Precautionary Notes

In certain marketing arrangements such as OEM/Remarketing, a number of states regulate a supplier or primary vendor's right to terminate an arrangement with a distributor or remarketer depending on the circumstances of the termination and the nature of the business arrangement. To avoid this and other problems, you should make sure that your agreements ensure that delivery and volume commitments are set at appropriate levels.

Advertising Cooperative Agreement

An Advertising Cooperative Agreement is an agreement between the vendor or producer of certain products and the end seller of those products who, in addition to selling, is actively engaged in marketing and promoting those products. The agreement provides that a marketing promotional allowance will accrue for seller's use based on a fixed percentage of its total purchases from vendor. Those monies are then used to promote vendor's products.

Why/When should you use it?

You should use it so that there is a clear understanding between the parties as to exactly how much and how monies will accrue for promotional purposes. Because the agreement requires the vendor's approval for any particular promotions which exceed a predetermined amount, it affords the vendor certain protection. You should use it any time you enter into a marketing alliance relationship where a vendor pays an end seller or other party to promote its products based on the amount of purchases that end seller makes from the vendor.

Who should use it?

Where some type of advertising cooperative arrangement is anticipated, both the end seller and the producer or vendor of products should use this agreement.

How should you use it?

You should complete the agreement prior to agreeing to commence accruing for the program. Since it is a fairly straightforward agreement, you shouldn't have much trouble using it. Make sure, however, to thoroughly think through the Cap Amount, and other terms that may affect your business.

Important Tips

Watch the term of the agreement. If you are a vendor and plan on doing a lot of your own advertising, you may not want to agree indefinitely to having someone else take care of this important aspect of your business (unless, of course, that vendor is responsible for most of your sales). Be careful regarding remaining balances. Make sure you understand what happens where the vendor spends more money on advertising and promotion than has accrued.

Co-Marketing Agreement

A Co-Marketing Agreement is exactly what it sounds like. It is an agreement between two or more companies which have similar or complementary products or services and want to work cooperatively to realize opportunities for those products or services. The agreement addresses numerous issues affecting the co-marketing relationship including: specific marketing functions like assessing market needs and potential customers; promotional efforts such as joint seminars, public relations events, press releases, and joint participation in trade shows; joint training of your respective work forces; and sales referrals and presentations.

Why/When should you use it?

You should use a Co-Marketing Agreement whenever you agree to co-market your products or services with another company. As with all of your agreements, you should use this contract to avoid any misunderstandings regarding the nature of your co-marketing arrangement. It is a fairly easy agreement to understand so you don't have any excuses. In addition, it is important to use this agreement because it contains certain confidentiality provisions as well as restrictions regarding the use of your trademarks by your co-marketing partner(s). Try to have the agreement signed before you actually begin co-marketing.

Who should use it?

Where two companies want to work cooperatively to realize opportunities for their respective products and/or services, such that they desire to "co-market" themselves, they should use a Co-Marketing Agreement.

How should you use it?

Since the agreement is fairly easy to use, you should use it freely with any potential co-marketers. To the extent that the agreement imposes certain obligations on you and you are unclear as to the effect of those obligations, you may wish to consult an attorney.

Important Tips

If you are providing confidential or proprietary information to your comarketing partner(s) but have either not gotten to the point where you are both ready to sign this agreement or you do not plan on using it, you should use a Non-Disclosure Agreement. Furthermore, you may never even enter into a Co-Marketing Agreement. The Non-Disclosure may prohibit the other party from disclosing the information you disclose.

Dealer Resale Agreement

A Dealer Resale Agreement is a contract between the manufacturer or producer of certain goods and the reseller of those goods. The agreement sets forth the rights and obligations of those parties.

Why/When should you use it?

It is especially important to use the agreement if you are a manufacturer or producer of goods because it sets forth the terms under which a reseller can sell your goods. It covers many of the aspects of a sale such as payment and delivery terms, warranties, etc. As these are all items which should be discussed by a Producer and its Reseller, this agreement should be used. Generally, the agreement is used with products such as consumer electronics, automobiles, or other items that are available in limited situations. There is a degree of exclusivity in the use of a Dealer Resale Agreement—it's not the kind of agreement a candy company would use with each of the stores that sold its candy bars; it is however, the kind of agreement that ought to be used where the product is more expensive and requires special knowledge or expertise to sell like a computer or stereo.

Who should use it?

The manufacturer or producer of goods such as those described above should execute this agreement whenever it appoints a Reseller for its products.

How should you use it?

You should use it carefully. There are many provisions that require you to insert dates. Be careful to review them and establish times that fit within your company's policies.

Important Tips

If the company will be providing confidential information or trade secrets to Reseller, it may want to consider having Reseller execute a Non-Disclosure and Non-Circumvention Agreement. There are a number of inserts in this agreement relating to periods of time. In many cases, there is only one amount of time in the brackets. This is the standard amount of time provided for in these types of agreements. However, in most cases, you may shorten or lengthen the time periods.

Exclusive Distribution Agreement

An Exclusive Distribution Agreement is a contract between the supplier (manufacturer, owner, producer) of certain products and the distributor who actually distributes those products to authorized dealers or others who then sell them to their end-users. Because of the exclusivity of the relationship, the agreement will generally contain numerous marketing commitments by the distributor to the supplier, including assurances that it will use its best efforts to promote the sale of the products, and a guarantee that it will deal only with authorized dealers. It may also provide that Distributor must maintain minimum inventory quantities and purchase minimum monthly quotas. Often, the Distributor will agree to train and support its authorized dealers and train and maintain a minimum number of sales and technical staff.

Why/When should you use it?

Because of the complexity of distributorship relationships and the number of issues that need to be discussed whenever you name or are named an exclusive distributor, it is imperative that you use this agreement. Furthermore, since both parties are making major commitments to each other, you need to protect yourself. You should use this agreement—and that means completing the contract and making sure you both sign it—before you actually start supplying or distributing the products. From the distributor's perspective, you will be spending a lot of money marketing the products, and you don't want the supplier to suddenly say he doesn't want to work with you. From the supplier's point of view, you don't want the distributor to use less than best efforts to distribute your products, and you don't want to have to worry about where your products are sold. In short, there are a multitude of reasons why you

should get the agreement completed before you start doing business together.

Who should use it?

Any business that is supplying a single distributor with its products for distribution. Whether you are the manufacturer or owner of a certain product or line of products, you need this agreement. Any distributor who is given the exclusive right to distribute a product or line of products should use this agreement.

How should you use it?

As with all of your agreements, you should use it carefully. In most cases, you should have an attorney review the agreement before you sign it. That is because it is fairly complex, and while we have tried to explain things as thoroughly as possible, there may be areas that remain unclear to you. Although there aren't too many blanks to fill in considering the length of the document, there are a number of choices you will need to make; think first.

Important Tips

If you are a supplier, consider using a non-exclusive distribution agreement. You can always grant an exclusive to a particular territory. If you use this agreement, you are betting your business' success (to the extent that the products being supplied are your only products) on one distributor's ability to get those products to market. Depending on the nature of the product(s), it may be in the supplier's interest to make this agreement "at will," that is terminable by either party upon short notice. While this provides the parties with the ability to quickly adapt to changing market needs, it may make your relationship less reliable in the long run. Probably a better way to provide for termination is to establish quotas; in the event that distributor doesn't meet these quotas, supplier may terminate the relationship. The supplier should make sure that he protects his trademarks. AgreementBuilder provides a fairly comprehensive set of terms regarding distributor's use of those trademarks.

Foreign Sales Representative Agreement

A Foreign Sales Representative Agreement is an agreement used by a business to appoint its foreign sales representatives. The agreement sets forth the status of the sales representative as either exclusive or non-exclusive, designates the representative's sales territory, and indicates the products he is authorized to sell.

Why/When should you use it?

Anytime you appoint a foreign sales representative or are appointed as a foreign sales representative, you should use this agreement. It should be executed before the representative begins acting on the company's behalf. You should use this agreement because it sets forth the rights and obligations of both parties. Imagine if you appointed sales representatives verbally—you would have little or no control over the territory the representative sold to, it would be difficult to establish and maintain quotas, and, most importantly, it might be difficult to terminate the appointment. For many of the same reasons, it is in the best interest of the sales representative to have an agreement with the business. Among other things, the agreement sets forth the representative's commission rate.

Who should use it?

Any company who uses independent sales representatives outside the United States, or any such foreign representative should use this agreement.

How should you use it?

As with all of your agreements, use it with care. Make sure to review the entire agreement.

Important Tips

If you are appointing a sales representative for territories inside the United States, you should use AgreementBuilder's Independent Sales Representative Agreement. You may want to modify some of the agreement's provisions. For example, one section of the agreement permits termination of the agreement by either party without cause upon ninety days notice—while this benefits the company, it may not be in the sales representative's best interest.

Product License

A General Licensing Agreement licenses or permits another party (the licensee) to use some item or items of property belonging to or controlled by the licensor, such as software, intellectual property (patents, copyrights, trademarks), or a proprietary machine. The license may grant either exclusive or non-exclusive rights, and it may limit the licensee's use of the property both in scope and area. The license may permit some or all of the following: to use in any manner, copy, modify, improve, manufacture, market, distribute, export, import, sublicense and otherwise commercially export in any manner. In return for licensing the property, the licensee may, amongst other things, pay the licensor royalties, or it may give him stock, cash, or any combination of the above.

Why/When should you use it?

Anytime you license or are licensed property of the type anticipated by this agreement, you should execute a licensing agreement. In fact, it's hard to imagine a situation where the owner of property within the scope of this type of agreement would not want to put the deal in writing. On the other side, the licensee should use this agreement to make clear its legal right to use the property.

Who should use it?

Both the licensor and the licensee should use this agreement when they enter into an agreement to license property.

How should you use it?

You should leave this agreement as intact as possible, making sure to define any and all uses and limitations of the license.

Important Tips

If you will be licensing the property outside of the country, use AgreementBuilder's International Licensing Agreement. Although trademarks, copyrights and patents may fall within the scope of this agreement, if the license is solely to license that intellectual property and nothing else, you should use AgreementBuilder's agreements specifically treating those areas (Assignment of Trademark, Assignment of Copyright, and Assignment of Patented Invention).

The licensor should check out the fitness and suitability of the licensee before granting any trademark rights. The licensor must be confident that the licensee will use licensor's property appropriately, and that it will continue to pay for its use. If you are permanently assigning as opposed to licensing all of your rights to the property for all territories, you may want to simply transfer or sell the property.

International Distribution Agreement

An International Distribution Agreement is a contract between the supplier (manufacturer, owner, producer) of certain products and the distributor who actually distributes those products outside the United States. It is an exclusive agreement to the extent that the distributor is granted the exclusive rights to distribute the product(s) in the specific territory described in the agreement. It also includes assurances that the distributor will use its best efforts to promote the sale of the product(s).

Why/When should you use it?

Because of the complexity of distributorship relationships and the number of issues that need to be discussed whenever you name or are named a distributor, you should use this agreement. You should use this agreement—and that means completing the contract and making sure you both sign it—before you actually start supplying or distributing the products. From the distributor’s perspective, you will be spending a lot of money marketing the products, and you don’t want the supplier to suddenly say he doesn’t want to work with you. From the supplier’s point of view, you don’t want the distributor to use less than best efforts to distribute your products, and you don’t want to have to worry about where your products are sold. In short, there are a multitude of reasons why you should get the agreement completed before you start doing business together. A supplier should complete one of these agreements for each of its international distributors. You should use the standard Distribution Agreement (there are exclusive and non-exclusive versions included in *AgreementBuilder*) for each distributor appointed within the United States.

Who should use it?

Any business that is supplying a distributor with its products for international distribution. Whether you are the manufacturer or owner of a certain product or line of products, you need to use this agreement. Any distributor who is given the right to distribute a product or line of products outside the United States should use this agreement.

How should you use it?

As with all of your agreements, you should use it carefully. In most cases, you should have an attorney review the agreement before you sign it. That is because it is fairly complex, and while we have tried to explain things as thoroughly as possible, there may be areas that remain unclear to you. Although there aren’t too many blanks to fill in considering the length of the document, there are a number of choices you will need to make; think first.

Important Tips

Be careful to check out your distributors before you contract with one to distribute your product(s). Depending on the nature of the product(s), it may be in the supplier’s interest to make this agreement “at will,” that is terminable by either party upon short notice. While this provides the parties with the ability to quickly adapt to changing market needs, it may make your relationship less reliable in the long run. Probably a better way to provide for termination is to establish quotas; in the event that distributor doesn’t meet these quotas, supplier may terminate the relationship. The supplier should make sure that he protects his trademarks. *AgreementBuilder* provides a fairly comprehensive set of terms regarding distributor’s use of those trademarks. Make sure to clearly identify the territory that each distributor will have responsible for.

International Licensing Agreement

Other than being for use with international companies intending to license your property for use abroad, this agreement is almost identical to *AgreementBuilder's* General Licensing Agreement. An International Licensing Agreement licenses or permits another party (the licensee) to use some item or items of property belonging to or controlled by the licensor, such as software, intellectual property (patents, copyrights, trademarks), or a proprietary machine. The license may grant either exclusive or non-exclusive rights, and it may limit the licensee's use of the property both in scope and area. The license may permit some or all of the following: to use in any manner, copy, modify, improve, manufacture, market, distribute, export, import, sublicense and otherwise commercially export in any manner. In return for licensing the property, the licensee may, amongst other things, pay the licensor royalties, or it may give him stock, cash, or any combination of the above.

Why/When should you use it?

Anytime you license or are licensed property of the type anticipated by this agreement for use outside the United States, you should execute a licensing agreement. In fact, it's hard to imagine a situation where the owner of property within the scope of this type of agreement would not want to put the deal in writing. On the other side, the licensee should use this agreement to make clear its legal right to use the property.

Who should use it?

Both the licensor and the licensee should use this agreement when they enter into an agreement to license property. It is intended for use by a licensee located outside the United States.

How should you use it?

You should leave this agreement as intact as possible, making sure to define any and all uses and limitations of the license.

Important Tips

If you will be licensing the property for use inside of the United States, use *AgreementBuilder's* General Licensing Agreement. Although trademarks, copyrights and patents may fall within the scope of this agreement, if the license is solely to license that intellectual property and nothing else, you should use *AgreementBuilder's* agreements specifically treating those areas (Assignment of Trademark, Assignment of Copyright, and Assignment of Patented Invention). The licensor should check out the fitness and suitability of the licensee before granting any trademark rights. The licensor must be confident that the licensee will use licensor's property appropriately, and that it will continue to pay for its use. If you are permanently assigning as opposed to licensing all of your rights to the property for all territories, you may want to simply transfer or sell the property.

Mailing List Exchange Agreement

A Mailing List Exchange Agreement is a contract between one owner or provider of a mailing list and another owner or provider of a mailing list. It describes the lists and includes the terms and conditions for their use. Basically, the only difference between this and a Mailing List Rental Agreement is that the user pays for the latter. With an exchange, the parties exchange lists. Of course, you may still want to charge (or have to pay) a rental fee depending on the nature of the transaction. For example, if your list has 100,000 names and will be used multiple times, it may command more than the 20,000 name list to be used only once.

Why/When should you use it?

If you are exchanging mailing lists, it is essential that you document the exchange. The agreement allows you to contractually bind the user to specific use(s) of the list. Without a binding agreement, nothing prevents the user from using the list over and over again, despite the fact that you only wanted it used once. Get it in writing! If you own mailing lists, you should use this agreement anytime you exchange your list with another party. Since the agreement describes the list, it provides some protection in the event that you don't get what you bargained for.

Who should use it?

The owners of mailing lists who exchange their lists should use this agreement.

How should you use it?

It is a very simple agreement, but you should be careful to be as specific as possible regarding the description of the list and its use.

Important Tips

This is an agreement, not a promotion; don't make the list sound better than it is. Make sure you clearly state how the list is to be used, the number of times it can be used and for what purpose it can be used.

Mailing List Rental Agreement

A Mailing List Rental Agreement is a contract between the owner or provider of a mailing list and the user of that list. It describes the list and includes the terms and conditions for its use. It also states the fee for renting the list.

Why/When should you use it?

If you are renting your mailing list, it is essential that you document the rental. Obviously, it is important to state the consideration being paid to use your list, but more importantly the agreement allows you to contractually bind the renter to specific use(s) of the list. Without a binding agreement, nothing prevents the user renter from using the list over and over again, despite the fact that you only wanted it used once. Get it in writing! If you own mailing lists, you should use this agreement anytime you are renting your list to another party. If you are renting a list, it's also a good idea to get an agreement. Since the agreement describes the list you will be renting, it provides some protection in the event that you don't get what you bargained for.

Who should use it?

Both the owner of a mailing list who is renting that list or the party getting the list should use this agreement.

How should you use it?

It is a very simple agreement, but you should be careful to be as specific as possible regarding the description of the list and its use.

Important Tips

This is an agreement, not a promotional; don't make the list sound better than it is. Make sure you clearly state how the list is to be used, both the number of times it can be used and what it can be used for.

Manufacturer's Representative Agreement

A Manufacturer's Representative Agreement is a contract between a manufacturer of goods and a company or individual in which the company or individual agrees to act as the manufacturer's agent in the sale of the manufacturer's product in a specific geographic area.

Why/When should you use it?

Companies often rely on an independent sales representative to represent their products to customers. Some companies have a national network of sales representatives who act as the company's sales force. Manufacturer's representatives serve a similar purpose: they promote the company's products, primarily to resellers. You should use a Manufacturer's Representative Agreement when you decide to engage an individual or entity to market and sell your products or product line.

Who should use it?

Companies that have a need to promote their products to resellers should use this agreement.

How should you use it?

The company and the manufacturer's representative can negotiate the terms of this agreement, such as the geographic area to be covered by the representative, and then enter into the agreement.

Important Tips

You should review the Sales Representative Agreement, which is similar to this agreement. Decide which agreement best suits your needs.

Non-Exclusive Distribution Agreement

A Non-Exclusive Distribution Agreement is a contract between the supplier (manufacturer, owner, producer) of certain products and the distributor who actually distributes those products to authorized dealers or others who then sell them to their end-users. The agreement will generally contain numerous marketing commitments by the distributor to the supplier, including assurances that it will use its best efforts to promote the sale of the products, and a guarantee that it will deal only with authorized dealers. It may also provide that Distributor must maintain minimum inventory quantities and purchase minimum monthly quotas. Often, the Distributor will agree to train and support its authorized dealers and train and maintain a minimum number of sales and technical staff.

Why/When should you use it?

Because of the complexity of distributorship relationships and the number of issues that need to be discussed whenever you name or are named a distributor, you should use this agreement. You should use this agreement—and that means completing the contract and making sure you both sign it—before you actually start supplying or distributing the products. From the distributor's perspective, you will be spending a lot of money marketing the products, and you don't want the supplier to suddenly say he doesn't want to work with you. From the supplier's point of view, you don't want the distributor to use less than best efforts to distribute your products, and you don't want to have to worry about where your products are sold. In short, there are a multitude of reasons why you should get the agreement completed before you start doing business together. A supplier should complete one of these agreements for each of its distributors.

Who should use it?

Any business that is supplying a distributor with its products for distribution. Whether you are the

manufacturer or owner of a certain product or line of products, you need to use this agreement. Any distributor who is given the right to distribute a product or line of products should use this agreement.

How should you use it?

As with all of your agreements, you should use it carefully. In most cases, you should have an attorney review the agreement before you sign it. That is because it is fairly complex, and while we have tried to explain things as thoroughly as possible, there may be areas that remain unclear to you. Although there aren't too many blanks to fill in considering the length of the document, there are a number of choices you will need to make; think first.

Important Tips

Be careful to check out your distributors before you contract with one to distribute your product(s). Depending on the nature of the product(s), it may be in the supplier's interest to make this agreement "at will," that is terminable by either party upon short notice. While this provides the parties with the ability to quickly adapt to changing market needs, it may make your relationship less reliable in the long run. Probably a better way to provide for termination is to establish quotas; in the event that distributor doesn't meet these quotas, supplier may terminate the relationship. The supplier should make sure that he protects his trademarks. AgreementBuilder provides a fairly comprehensive set of terms regarding distributor's use of those trademarks. Make sure to clearly identify the territory for which each distributor will be responsible.

Non-Exclusive Distribution Agreement (Short Version)

This is a **very** abbreviated version of the Non-Exclusive Distribution Agreement. It is a contract between the supplier (manufacturer, owner, producer) of certain products and the distributor who actually distributes those products. The long form includes a number of provisions not contained in this agreement including: the granting of exclusive territories and numerous marketing commitments by the distributor to the supplier, including assurances that it will use best efforts to promote the sale of the products. The long form may require Distributor to maintain minimum inventory quantities and purchase minimum monthly quotas, and it may require the distributor to train and support its authorized dealers and train and maintain a minimum number of sales and technical staff.

Now that we've told you what this agreement doesn't contain, we'll let you know what it does say. It makes clear that the distributor and supplier are independent contractors with respect, not employee/employer, that distributor must make regular reports to supplier regarding its distribution of supplier's products, and it provides for the confidentiality of certain information between the two parties. It also limits distribution to authorized dealers.

Why/When should you use it?

It is important to have some type of written contract to support and enforce the relationship between supplier and distributor. Because of the complexity of distributorship relationships and the number of issues that need to be discussed whenever you name or are named a distributor, you might want to use the long form. However, if you feel that such a long agreement would be overkill, you may want to use this. You should use this agreement—and that means completing the contract and making sure you both sign it—before you actually start supplying or distributing the products. From the distributor's perspective, you may be spending a lot of money marketing the products, and you don't want the supplier to suddenly say he doesn't want to work with you. A supplier should complete one of these agreements for each of its

distributors.

Who should use it?

Any business that is supplying a distributor with its products for distribution. Whether you are the manufacturer or owner of a certain product or line of products, you need to use this agreement. Any distributor who is given the right to distribute a product or line of products should use this agreement.

How should you use it?

As with all of your agreements, you should use it carefully. In most cases, you should have an attorney review the agreement before you sign it. While this is a fairly simple document, it may not address numerous issues that are vital to your business.

Important Tips

Be careful to check out your distributors before you contract with one to distribute your product(s). Depending on the nature of the product(s), it may be in the supplier's interest to make this agreement "at will," that is terminable by either party upon short notice. While this provides the parties with the ability to quickly adapt to changing market needs, it may make your relationship less reliable in the long run. Make sure to clearly identify the territory that each distributor will have responsible for.

OEM / Remarketing Agreement

An OEM/Remarketing Agreement is a contract between a supplier of certain computer equipment and programs (basic operating systems, application software, tools and utilities) and an original equipment manufacturer (OEM). The supplier provides computer equipment and/or software to the OEM/Remarketer who then combines these products with its own or a third party's hardware and/or software in order to offer a combined product directly to the end-user. The agreement deals with two types of software: operating software for the supplier's hardware (Type 1) and related application software, utilities and tools (Type 2). Type 1 is provided to end-users as a built-in part of the hardware, whereas Type 2 programs may be modified and supplemented buy the OEM/Remarketer after evaluation and testing. Because of these differences, the parties have differing rights and obligations depending on the type; the agreement reflects these differences. The agreement sets forth both the supplier's and the OEM/remarketer's rights and obligations and risks, and it identifies a payment structure.

Why/When should you use it?

Although the agreement is fairly straightforward, it covers a lot of ground. It would be a bad idea to try to enter into an OEM/remarketing arrangement without an agreement. As stated above, it sets forth the parties' rights, obligations, and risks, and it is extremely important to do this clearly and with evidence of an agreement. Anytime a supplier provides computer equipment or software programs to an OEM who will combine these with other equipment and/or software programs so as to create OEM products which it will market to end-users, an OEM/Remarketing Agreement should be used. You should sign the agreement before either party begins performing any of its obligations.

Who should use it?

The supplier/manufacturer of computer equipment or producer of software programs including basic operating systems, application software, tools and utilities and the original equipment manufacturer (OEM)/remarketer who combines these products with its own or a third party's hardware for sale to end-users should use this agreement.

How should you use it?

Use this agreement as you would use any other. Make sure you read and understand each and every section. Furthermore, if you have any questions, you may wish to consult an attorney.

Important Tips

You should be particularly careful to set delivery and volume commitments at suitable levels. Depending on the nature of the deal and the particulars of the termination, a number of states regulate a supplier's ability to terminate relationships with its remarketers and distributors. You should check the particular law in your state before such a termination.

Product Licensing Agreement

A Product Licensing Agreement is a contract between the owner of a product or line of products and the individual or company to whom the Owner grants the right to manufacture and distribute that product or line. The license may be exclusive or non-exclusive, and it may or may not designate a specific territory.

Why/When should you use it?

It is important to use a Product Licensing Agreement so that the terms of the license are clear. Without a definitive agreement, the parties might not have the same understanding regarding the exclusivity (or non-exclusivity) of the agreement, territorial restrictions, along with a host of other issues affecting the arrangement. Any time you enter into a licensing arrangement, you should use this agreement. While it is somewhat lengthy, you should be able to customize it to your specific needs.

Who should use it?

The licensee who licenses to sell and distribute a product owed by the licensor, as well as the licensor itself should use this agreement.

How should you use it?

Because of the significance and value of any license and the legal obligations being assumed or transferred, it is essential that you thoroughly review the Product Licensing Agreement. Furthermore, you ought to consult an attorney.

Important Tips

Make sure to specifically identify the territory. Be clear as to what parts of the license are exclusive and which are nonexclusive.

Sales Representative

A Sales Representative Agreement is an agreement used by a business to appoint its sales representatives. The agreement sets forth the status of the sales representative as either exclusive or non-exclusive, designates the representative's sales territory, and indicates the products he is authorized to sell.

Why/When should you use it?

Anytime you appoint an independent sales representative or are appointed an independent sales representative, you should use this agreement. It should be executed before the representative begins acting on the company's behalf. You should use this agreement because it clearly states the nature of the relationship between the representative and the company (that of independent contractors), and it sets forth the rights and obligations of both parties. Imagine if you appointed sales representatives orally—you would have little or no control over the territory the representative sold to, it would be difficult to

establish and maintain quotas, and, most importantly, it might be difficult to terminate the appointment. For many of the same reasons, it is in the best interest of the sales representative to have an agreement with the business. Among other things, the agreement sets forth the Representative's commission rate.

Who should use it?

Any company who uses independent sales representatives in the United States, or any such representative in this country should use this agreement.

How should you use it?

As with all of your agreements, use it with care. Make sure to review the entire agreement.

Important Tips

If you are appointing a sales representative for territories outside the United States, you should use AgreementBuilder's Foreign Sales Representative Agreement. You may want to modify some of the agreement's provisions. For example, one section of the agreement permits termination of the agreement by either party without cause upon thirty days notice—while this benefits the company, it probably isn't in the sales representative's best interest.

Structuring Real Estate Transactions

Ultimately property rights and personal rights are the same thing.

~ Calvin Coolidge

The agreements provided here will enable you to conduct simple real estate transactions. If you are leasing property, your landlord will almost certainly present you with a commercial lease. Nevertheless, a careful review of our commercial lease agreement along with this discussion on the following pages will help you more thoroughly understand and better negotiate your real estate transactions. The agreements listed below are included in *AgreementBuilder* to assist you.

Read the following pages if you'd like more information about real estate transactions:

- Commercial Lease
- Commercial Sublease
- Lease Assignment by Lessee
- Lease Assignment by Lessor
- Lease Guaranty
- Lease Modification
- Residential Lease
- Residential Sublease
- Sublease Guaranty

Lease Agreements

A lease is an agreement between a landlord, also referred to as the lessor, and a tenant, also referred to as the lessee. You may have heard the expression “rental agreement” before; this is the same as a lease.

Written or Oral

Leases can be written or oral, though leases for more than a year must be in writing to be enforceable. While you may prefer short term month-to-month leases, we still recommend that you put it in writing so as to avoid the potential for disputes. Although a written lease will not eliminate disputes, it will definitely lessen their possibility and frequency. Furthermore, as with your other agreements, the more you discuss now, the more comprehensive you make your agreements, the less likely a dispute will arise.

Lease Checklist

1. **Negotiate favorable terms.** Most landlords use standard form leases, and despite what the landlord may say, you can negotiate the terms of that lease. Furthermore, this is the only chance you will get. At a minimum, you should request the same treatment as the landlord. For example, if the lease calls for attorney's fees in case you breach the lease, you should request that the landlord pay your attorney's fees in the event that the landlord breaches the lease.

2. **Make sure the proper party signs.** The owner of the property should sign the lease. Because you are laying out a lot of money, you should be absolutely sure that the party executing the lease on behalf of the

landlord has the proper authority. If you have any doubts, ask to see the deed or a title insurance policy. If a partnership owns the property, a general partner should sign the lease, and if a corporation owns it, a corporate officer should sign. Where a rental agent is signing, you might want to request a letter from the owner that the agent does, in fact, have authority to execute leases on behalf of the owner. When you are dealing with well established real estate management companies, you probably don't have to worry.

3. Consider Incorporating. If you are a sole proprietorship, you will be personally liable for the lease. One way to avoid personal liability is to incorporate your business. Often, however, a landlord will still ask for a personal guarantee. If the landlord is stuck on the idea, ask for a cap on the guarantee. In other words, guarantee a limited period, for example, two months. Alternatively, ask the landlord to release you from the guarantee if you pay your rent on time for an agreed upon period.

4. Describe the leased premises. Spell out in exact detail the space to be rented, including parking and storage, being careful not to leave out common areas and access. Furthermore, if there are common areas, the lease should state who maintains those areas. If you keep unusual hours, the lease should provide after hours access. With respect to computing total square footage, make sure you understand how square footage is measured, from the inside or outside walls. **5.** Clearly state lease starting and ending dates. This is especially important where the space is being constructed or repaired. In these cases, you should include a provision in case the premises are not ready when promised. Liquidated damages provisions fix damages for each day of delay and are fairly common in these circumstances. The reason for setting this amount in advance is that it might otherwise be speculative, and courts don't like to award speculative damages.

6. Include an option to renew. An option to renew gives you the security of knowing you can stay if you want to without forcing you to renew. This flexibility is very important to some businesses. Often, however, you may be paying for the option so in those cases you should be sure that you need it. Options can set forth the price upon renewal or leave it open. Your best bet is to set it now since rentals rarely decrease. If they do decrease, you don't have to exercise the option. **7.** Include the right of first refusal to expand. If the adjoining office or store becomes available, you may want to lease that space. You should include a right of first refusal in your lease so that you guarantee yourself that opportunity.

8. Understand your rent structure. For fairly obvious reasons, one of the most important items in your lease is the cost of the space or rent. Rent is either gross, such that the tenant pays a flat monthly fee, net (and there are three types of net leases), or percentage. With a standard net lease, the tenant pays a base rental fee plus some or all of the real estate taxes. With a net-net lease, the tenant pays a base rental fee plus real estate taxes and the landlord's insurance. With a net-net-net (also referred to as triple net), the tenant pays a base rental fee plus his share of operating costs, including taxes, insurance, repairs, and maintenance; generally, this share is based on that tenant's percentage of the total space. If the tenant is leasing 5,000 square feet of a 50,000 square foot office, then the tenant is responsible for 10% of the total operating costs. You may want to negotiate a cap on operating costs; otherwise you might get stuck with a huge increase and have no recourse.

The last type of lease which is fairly common in the retail market is the percentage lease which is calculated by adding a base rent to a percentage of your business' gross income. With respect to all three forms, annual increases may be either built in preset amounts or calculated using some type of index, the C.P.I. (Consumer Price Index) for example.

9. Negotiate your security deposit. Generally, landlords will ask for the last month's rent plus 1/2 to a

full times the monthly rent. If you want your security deposit held in an interest bearing account or by a third party in trust for you, you should provide for this in your lease. Most states require the landlord to keep residential lease deposits in interest bearing accounts on behalf of the tenant, but a similar requirement is not imposed on commercial landlords.

10. Provide for the cost of improvements. In the event that remodeling or other improvements are required, you must decide who will bear the expense. Furthermore, the lease should set forth whether or not you will need to restore the space to its original condition when the lease ends. As you might imagine, this can get expensive. If the landlord has agreed to make improvements, make sure the lease states the exact nature and extent of those improvements. Generally, any improvements become the property of the landlord, so if you want to keep anything, make sure you get it into the lease.

With respect to any improvements to be completed by the landlord, once you agree on what will be done, include drawings and specifications as exhibits to the lease so there is no ambiguity as to what was promised. Furthermore, you should add the following language to your lease: “Prior to the commencement of the lease term, Landlord will, at its sole expense, make the improvements more fully described in Exhibit A. These improvements will be done in a workmanlike manner and comply with all local, state and federal laws regarding such improvements.” You should be as specific as possible regarding the materials being used. As to improvements by the tenant, make sure the lease gives you permission. Furthermore, since the lease will probably require you to get the landlord’s approval, it is best to submit any proposed plans before signing the lease. Also, list any items that you may want to remove in a separate exhibit to the lease. For example, an air conditioning system.

11. Review compliance with the Federal Americans with Disabilities Act (ADA). Both tenant and landlord are responsible for making premises accessible to the disabled. Make sure there’s a clause which makes any compliance the landlord’s responsibility, and that those charges are not passed on to you.

12. Restrict the landlord’s ability to prevent transfer (assignment and sublease). Because only a few states impose a reasonableness requirement on a landlord with respect to consent for transfer, we suggest that you include in your lease a clause stating that the landlord cannot unreasonable withhold consent to a transfer.

13. Get approval for signage before signing the lease. This way you don’t have to worry about the landlord not liking your signs.

14. Give yourself an out. Try to negotiate an option to cancel your lease if certain income levels are not met or if the building is damaged in a fire or flood.

15. Provide for alternative dispute resolution. Both mediation and arbitration are cheaper, faster and easier than using the courts.

16. Provide for the right to withhold rent. You might want to consider including a clause in the lease that allows you to withhold rent if the landlord does or fails to do certain things. For example, “if within ten days written notice by tenant, landlord fails to cure a default that has the effect of materially effecting tenant’s business, tenant shall be entitled to reasonable abatement of rent for the default period and may withhold all rent until the default is cured.”

17. Make sure your lease identifies who pays for what. Some tenants require special water or electrical hookups; the lease should state who will be providing these services and bearing the cost. The lease should be clear regarding the costs and responsibilities as to existing utilities as well.

18. **Make absolutely sure that every item that the landlord has agreed to is included in the lease.** This is particularly important where the lease term exceeds a year since to be enforceable such leases must be in writing.

19. Last, but certainly not least, carefully **read the fine print.**

Types of Tenancies

Term Tenancies

Term tenancies last for a specified period of time (a fixed or computable number of years, months, etc.). All of the lease agreements in *AgreementBuilder* provide for fixed period tenancies though you can easily modify them to reflect a periodic tenancy.

Periodic Tenancies

Periodic tenancies continue from period to period (i.e. month to month, quarter to quarter, year to year). They are automatically renewed at the end of a period for an additional period until terminated by proper notice. Many states have established guidelines for terminating periodic tenancies: Most end the tenancy at the completion of the “natural” lease period, thus in a month-to-month tenancy that started on the first of the month, the tenancy ends at the end of the month (unless, of course, both parties agree otherwise). For a tenancy from year-to-year, six months’ notice is generally required to terminate the tenancy. For tenancies lasting less than a year, notice a full period in advance of the period in question is required (for example, for a month-to-month tenancy, a full month’s notice is required). Furthermore, states vary as to the timing of that notice: Most states say that if you give notice on June 15 for a month-to-month lease running from the first of the month, then the lease will terminate on July 30. Others say 30 days from the date notice is given, here July 15. Generally, in order to terminate a periodic tenancy, notice must be in writing and, it must be delivered to the other party or deposited at his residence or place of business. In the event that you do not sign a lease or you do but fail to fix the term of the tenancy, a periodic tenancy automatically arises. The specific period of that tenancy (month, quarter, year) is based upon either an express understanding between the parties or an implied understanding based upon the payment of rent. If, for example, you pay your rent monthly and there is no lease term specified, this will give rise to a month-to-month lease.

Tenancy-at-Will

A tenancy-at-will results from a specific understanding between the landlord and his tenant that either party may terminate the tenancy at any time. Unless they expressly agree to a tenancy-at-will, however, the regular payment of rent, such as monthly or quarterly, will create a periodic tenancy. A tenancy-at-will may be terminated by either party without notice. Furthermore, a tenancy-at-will will be terminated if either the landlord or the tenant dies, if the tenant attempts to assign his tenancy, if the landlord transfers his interest in the property, or if the landlord executes a term lease for that same property with a third party.

Tenancy-at-Sufferance

When a term tenancy ends but the tenant remains in possession of the property, a tenancy-at-sufferance arises. In this situation, the tenant is still liable for rent, and no notice is required to end the tenancy. Implied Warranty of Habitability Although the implied warranty of habitability is rarely applied to commercial leases, many states apply it to residential tenancies. If a local housing code exists, then it sets

the standard for habitability; otherwise, the standard is whether the conditions are reasonably suitable for human residence. If the warranty is violated, then depending on the state, one or more of the following remedies may be available: The tenant may do any of the following: move out and terminate the lease; make the repairs and deduct those costs from future rents (a few states put limitations on this remedy); reduce or abate the rent to reflect the fair market value of the property with the defects; or remain in possession, pay full rent, and sue the landlord for damages.

Tenant's Liability for Damages

Liability to the Landlord

Generally, the tenant's liability to the landlord for damages to the leased property will be covered in the lease; however, if it is not, the tenant is still liable for any intentional or negligent destructive acts. Unless the lease provides otherwise, the tenant does not have a duty to make any substantial repairs. However, the tenant has a duty to keep the premises wind and water tight. For example, the tenant must repair broken windows or a leaking roof. If the tenant does not make those repairs, liability is incurred for any resultant damages, but never for the cost of the repair.

Interestingly, a tenant is also responsible to the landlord for ameliorative waste. This is a change in the nature or character of the leased premises. Unless the landlord otherwise agrees, a tenant must return the leased premises in the same nature and character as received. If, for example, you lease a five room commercial office, you cannot change the property to residential or change the number or location of the rooms. If you do make such changes, you will be liable for the cost of restoration. Some states will allow tenants to make changes in the character of the leased premises if the value of those premises has decreased and the tenant's change will increase their value, the change is performed by a long term tenant (for example, a tenant who has been leasing from the landlord for 25 years), and the change reflects a change in the nature and character of the neighborhood.

If the lease calls for a tenant to keep the premises in good repair, generally he or she won't be liable for normal wear and tear; however, if the lease indicates that normal wear and tear is included, a tenant may have to bear those costs. In any case, the tenant will be responsible for any damage or defect not the result of ordinary wear and tear, including damage caused by third parties or acts of God. Furthermore, if the premises are completely destroyed, and the tenant has made a promise to repair, he or she will have to pay for reconstruction.

Liability to Third Persons

Even if the lease says that the landlord has a duty to keep the premises in good repair, the tenant is still responsible for injuries to third parties. If you are a tenant, therefore, you have responsibility for keeping the premises in good repair.

Termination of Tenant's Duties

There are a number of circumstances where a tenant will no longer be responsible for its duties pursuant to the lease.

Surrender

The tenant no longer has to pay rent once the leased property is effectively conveyed back (surrendered) to the landlord. This occurs when the landlord and the tenant agree that the lease will end. If the

unexpired term on the lease is more than a year, the surrender must be in writing to be enforceable. Breach of the Covenant of Quiet Enjoyment This covenant or promise is implied into all landlord-tenant relationships, and it implies that the landlord will not interfere with the tenant's right to possess the leased property. If the landlord invades the tenant's right to possession, the tenant may either assert his or her rights and retake possession or terminate the lease relationship, in which case rent no longer has to be paid. Constructive eviction or breach of implied warranty may also give the tenant the right to terminate the lease.

Abandonment by Tenant

In the past if a tenant unjustifiably abandons the property, the landlord could simply do nothing and continue to collect rent from the tenant. Most states now require the landlord to make reasonable efforts to mitigate damages by reletting to a new tenant. Generally, these states even require the landlord to take affirmative steps such as advertising the space. If the landlord fails to take reasonable steps to lease the property, his recovery against the original tenant will be reduced.

If the landlord accepts the abandonment or surrender of the property, then the tenant is relieved from further liability. However, the mere fact that the landlord enters the property after abandonment, makes repairs, takes back the keys, and offers to relet the property, does not constitute an acceptance of the surrender.

Condemnation

A condemnation occurs when, for example, the government forces you to sell your property so it can build a highway. In the event of a condemnation where 100% of the property for the balance of the lease is taken, the lease is terminated, and the tenant no longer has to pay rent. If, however, the taking is for less than the remaining lease term or only part of the property is taken, then the lease is not terminated, and the tenant must still pay rent. In any case, the tenant will get his fair share of the condemnation award.

Destruction of the Premises

Most, but not all, states relieve a tenant from his obligation to pay rent where that tenant leases part of an improvement and that improvement is destroyed. What this means is that if you rent an office in a building and that office is destroyed through no fault of your own, you no longer have to pay rent. On the other hand, if you rent the land and build an office building which is destroyed, you still have to pay the rent.

Breach

In some states, the failure to pay rent, does not allow the landlord to terminate the lease. It merely gives the landlord a cause of action for damages. However, most states have enacted unlawful detainer statutes which allow a landlord to terminate a lease where the tenant fails to pay rent. On the other hand, if your lease requires the landlord to redecorate, but he or she refuses to do so, you can sue, but you cannot terminate the lease.

The Hold-Over Doctrine

When a tenant no longer has a right to be in possession of the leased property, the landlord can either treat this hold-over tenant as a trespasser and evict, or bind the tenant to a new periodic tenancy. If the landlord creates a periodic tenancy, the terms and conditions of the old lease will apply. Where the original term was for a year or more, a year-to-year tenancy will result. Furthermore, if, prior to the termination of the original lease, the landlord notifies the tenant that occupancy after termination will be at a higher rent, the tenant must pay that rent even if he or she objects. Many states give the landlord double rent in hold-over

situations where the tenant does not have a bona fide belief that justifies the hold-over, and the landlord has made a written demand to the tenant to vacate.

Assignment & Sublease

Although you might think you want to stay where you are for the duration of your lease, your business might increase such that you need more space, or things might slow down and you may want to share your space with another tenant or move out altogether. No matter what, you always want the ability to transfer (assign or sublet) all or part of your lease. Many people believe that an assignment, as opposed to a sublease, relieves a tenant from liability under a lease. This is not true. The main difference between a sublease and an assignment is that the former is a transfer by a tenant of less than all of his leasehold interests, for example three of the four remaining years on the lease, whereas the latter is a transfer of all of the tenant's interests. Therefore, in order for a transfer to be an assignment, it must be for the entire balance of the lease term, and the terms of the transfer must be identical to those of the underlying lease, with one exception; the tenant may reserve a right of reentry (termination) if the original assigned lease is breached. Thus, the assignment would say "To company A for the balance of the lease term. However, should company A fail to pay its rent, the right to reenter and reclaim the premises is reserved."

If possible, you should assign, as opposed to sublease, so that the landlord has a legal relationship with the assignee. Take, for example, the situation where a transferee does not pay his rent. If you sublet the property, the landlord has no relationship with the new party so the landlord would have to come after you, and you would then have to go after the third party. If, on the other hand, this was an assignment, the landlord could go after this third party directly. Of course, you will still be liable to the landlord whether you assign or sublet. Although it is always better to have an assignment so that the assignee is directly liable to the landlord for all of the covenants in the lease, if an assignment is not feasible, make sure that the assignee/transferee expressly assumes the performance of all covenants contained in the original lease. In both cases, the assignee will be liable to perform those covenants. In most cases, you will need your landlord's consent to the transfer, though this varies depending on your original lease. Assuming your lease has a non-assignment clause, if you transfer (assign or sublet), the transfer is voidable, not void. That means that the landlord can either take steps to avoid the transfer, or, if the landlord can prove damage, he or she can sue you. If the transferee pays the landlord rent, and the landlord accepts that rent, then the landlord waives the right to avoid the transfer.

Modifying Your Lease

Use *AgreementBuilder's* lease modification agreement to ensure that any changes or modifications to your lease are enforceable.

Commercial Lease?

This is an agreement between the landlord or lessor of commercial property and the tenant or lessee of that property.

Why/When should you use it?

To be enforceable, a lease for more than a year must be in writing. If your lease is for something less than a full year, however, it's still a good idea to put it in writing. You should use a Commercial Lease whenever you lease commercial property. A residential lease would be used where the property being leased was for residential, as opposed to business purposes.

Who should use it?

The owner of commercial property or her agent as well as the tenant should use a Commercial Lease.

How should you use it?

Negotiate the terms of your lease before you sign it. We suggest that you carefully read the preceding discussion titled “Structuring Real Estate Transactions.” It provides a lease checklist intended to aid businesses (as well as individuals) negotiate favorable lease terms.

Important Tips

Don’t just sign a lease when a landlord hands it to you. You may not like what you see, and this is your last chance to negotiate. If you are a landlord, make sure that everything you want your tenant to agree to is included in the lease. Although the tenant may not agree, it probably doesn’t hurt to ask.

Commercial Sublease

In a commercial lease, a landlord or lessor of commercial property leases property to a tenant or lessee (T1). In a commercial sublease, that tenant becomes a landlord, or lessor, of that property, subleasing it to a new lessee/ tenant (the subtenant) (T2). Not only is the T1 (now landlord) still legally bound to all of the terms and conditions of the original lease (referred to as the master lease), but since there is no relationship between T2 and the original landlord, if T2 doesn’t pay or otherwise breaches the lease, T1 has the burden of taking action, legal or otherwise against T2, not the landlord. The landlord only has recourse against T1, not T2.

Why/When should you use it?

To be enforceable, a sublease for more than a year must be in writing. Even if your lease is for something less than a full year, you should still put it in writing. You should use a Commercial Sublease whenever you sublease commercial property. A residential sublease would be used where the property being leased was for residential, as opposed to business purposes.

Who should use it?

The tenant of commercial property who wants to sublet all or part of its space should use a Commercial Sublease.

How should you use it?

Negotiate the terms of your lease before you sign it. We suggest that you carefully read the preceding discussion titled “Structuring Real Estate Transactions.” It provides a lease checklist intended to aid businesses (as well as individuals) negotiate favorable lease terms.

Important Tips

Most master leases require the landlord’s approval before a tenant is permitted to sublease. AgreementBuilder’s Sublease includes a separate form for the landlord to complete. Make sure you either get the landlord’s approval before executing a sublease or make the sublease expressly conditioned on obtaining the landlord’s approval.

A subtenant shouldn’t just sign a sublease when it is handed to them. Remember, this is the last chance to negotiate. If possible, try to use AgreementBuilder’s Lease Assignment. If the landlord approves, this makes T1’s life a lot easier. With an assignment, as opposed to a sublease, T2 is directly responsible to the original landlord. Although T1 is still liable to the landlord if T2 breaches, the landlord can still take action against T2 directly, something not doable in a sublease situation. Unless the landlord cancels the

master lease, T1 remains responsible to the landlord until that lease expires.

Lease Assignment by Lessee

This agreement is an assignment by a lessee of his or her interest in a lease. It provides that the assignment is to be under the same terms and conditions as the master lease and that the assignee specifically assumes each and every obligation of the lease.

Why/When should you use it?

Anytime you assign your lease to a third party, you should use this agreement. To be enforceable, an assignment of more than one year must be in writing. Furthermore, you should use this agreement as evidence of the assignment even if it's for less than a year.

Who should use it?

A lessor who is transferring its entire interest in a lease should use this Lease Assignment.

How should you use it?

Since the lessor's consent is generally required before a lessee can assign his lease, this agreement includes a separate provision for the lessor's consent to the assignment. You should either get them signed at the same time, or get the landlord to sign its consent first.

Important Tips

If possible, you should try to get your landlord to release you from the lease altogether because even if you assign the lease, you will still be responsible if the assignee defaults. Understand the difference between a sublease and an assignment. A sublease is a transfer of less than all of a tenant's interests, for example three of the four remaining years on the lease, whereas an assignment is a transfer of all of the tenant's interests. Therefore, in order for a transfer to be an assignment, it must be for the entire balance of the lease term, and the terms of the transfer must be identical to those of the underlying lease. It is to your advantage to assign, if possible, so that the landlord has a legal relationship with the assignee.

Lease Assignment by Lessor

When the lessor of leased property sells this property, the Assignment of Lease assigns the lease to the buyer. That buyer is then entitled to all rights and remedies, including rents due on the lease; basically, the buyer takes the place of the original lessor.

Why/When should you use it?

Anytime you buy or sell property that is currently being leased, you should use an Assignment of Lease. Although a real property grant will generally take with it the seller's rights and remedies as landlord, it is still a good idea to complete this assignment.

Who should use it?

Either the buyer or seller of leased property.

How should you use it?

Before you execute this assignment, you should obtain a signed estoppel certificate from each tenant. This is a formality.

Important Tips

Generally, the sale of leased property does not end the lease. But in some leases, either one or both parties

may have reserved the right to cancel the lease if the property is sold. You should review your lease(s) to see if a sale of the property will cause a termination of the lease.

Lease Guaranty

A Lease Guaranty (guarantee) is an agreement whereby a third party (Guarantor) guarantee's payment of a lease. If the Tenant/Lessee doesn't pay the Lessor, then the guarantor will be responsible for payment.

Why/When should you use it?

You should use a guaranty because it will protect you in the event that the Lessee doesn't pay you. You should use it anytime you lease real or personal property and have any doubt about the financial wherewithal of the Lessee.

Who should use it?

Anyone who leases real or personal property should consider using a Lease Guaranty.

How should you use it?

Make the guaranty a condition of leasing the property. You can require this guaranty.

Important Tips

Always do a credit check before leasing property, and if the results are less than satisfactory, make sure you get a guarantee from a solid third party. If you are leasing to a corporation, remember that if the corporation goes under, you will have nothing to go after in the absence of a lease guaranty. A personal guaranty is just a form of a Lease Guaranty, but is usually included with the master lease agreement. The Personal Guaranty is usually provided by the partners of a partnership or officers of a corporation.

Lease Modification Agreement

A Lease Modification Agreement is an addendum to a real property lease between landlord and tenant. It is a form agreement in that you describe the change to the lease that you are agreeing to. For example, you could use this agreement to amend the lease to allow pets or the use of a parking space.

Why/When should you use it?

Anytime you modify, change or amend your lease in any way, you should use this agreement. The Modification Agreement is the best way to make sure those changes have legal effect.

Who should use it?

Both landlord and tenant have an interest in using this agreement.

How should you use it?

As it is extremely brief and easy to use, you won't need to explain it; just describe the modification and have your tenant/landlord sign it.

Important Tips

Make sure that if you use this agreement and it conflicts or differs in any way from the lease itself, that you are comfortable with the changes. If there are any conflicts, this later agreement will prevail.

Residential Lease

This is an agreement between the landlord or lessor of residential property and the tenant or lessee of that

property.

Why/When should you use it?

You should use a Residential Lease whenever you lease residential property. A Commercial Lease would be used where the property being leased was for business, as opposed to residential purposes. To be enforceable, a lease for more than a year must be in writing. If your lease is for something less than a full year, however, it's still a good idea to put it in writing.

Who should use it?

The owner of residential property or her agent as well as the tenant should use a Residential Lease.

How should you use it?

Negotiate the terms of your lease before you sign it. We suggest that you carefully read the preceding discussion titled "Structuring Real Estate Transactions." It provides a lease checklist intended to aid individuals negotiate favorable lease terms.

Important Tips

Note that a few states, including New York, require that residential leases be written in "plain language." In other words, if you are leasing residential property, make sure that you don't include legalese or other obscure language or the lease may be unenforceable. Don't just sign a lease when a landlord hands it to you. You may not like what you see, and this is your last chance to negotiate. If you are a landlord, make sure that everything you want your tenant to agree to is included in the lease. Although the tenant may not agree, it probably doesn't hurt to ask.

Residential Sublease

In a Residential Lease, a landlord or lessor of residential property leases property to a tenant or lessee (T1). In a Residential Sublease, that tenant becomes a landlord, or lessor, of that property, subleasing it to a new lessee/ tenant (the subtenant) (T2).

Not only is the T1 (now landlord) still legally bound to all of the terms and conditions of the original lease (referred to as the master lease), but since there is no relationship between T2 and the original landlord, if T2 doesn't pay or otherwise breaches the lease, T1 has the burden of taking action, legal or otherwise against T2, not the landlord. The landlord only has recourse against T1, not T2.

Why/When should you use it?

You should use a Residential Sublease whenever you sublease residential property. A Commercial Sublease would be used where the property being leased was for commercial, as opposed to residential purposes. To be enforceable, a sublease for more than a year must be in writing. Even if your lease is for something less than a full year, you should still put it in writing.

Who should use it?

The tenant of residential property who wants to sublet all or part of its space should use a Residential Sublease .

How should you use it?

Negotiate the terms of your lease before you sign it. We suggest that you carefully read the preceding discussion titled "Structuring Real Estate Transactions." It provides a lease checklist intended to aid businesses (as well as individuals) negotiate favorable lease terms.

Important Tips

Most master leases require the landlord's approval before a tenant is permitted to sublease. AgreementBuilder's Sublease includes a separate form for the landlord to complete. Make sure you either get the landlord's approval before executing a sublease or make the sublease expressly conditioned on obtaining the landlord's approval. A subtenant shouldn't just sign a sublease when it is handed to them. Remember, this is the last chance to negotiate.

If possible, try to use AgreementBuilder's Lease Assignment. If the landlord approves, this makes T1's life a lot easier. With an assignment, as opposed to a sublease, T2 is directly responsible to the original landlord. Although T1 is still liable to the landlord if T2 breaches, the landlord can still take action against T2 directly, something not doable in a sublease situation. Unless the landlord cancels the master lease, T1 remains responsible to the landlord until that lease expires.

Sublease Guaranty

In a Lease, a lessor/landlord leases property to a tenant or lessee (T1). In a Sublease, T1 becomes a landlord, or lessor, of that property, subleasing it to a new lessee/tenant (the subtenant or T2). A Sublease Guaranty is an agreement whereby a third party (Guarantor) guarantees all of T2's obligations pursuant to the lease to T1. If T2 doesn't pay or otherwise violates the provisions of the lease, then the guarantor will be directly responsible to T1.

Why/When should you use it?

You should use it anytime you sublease commercial or residential property and have any doubt about the financial wherewithal of the new tenant. A tenant who subleases property should use a guaranty because it provides additional protection in the event that the subtenant doesn't pay or otherwise violates its lease.

Who should use it?

Anyone who subleases commercial or residential property should consider using a Sublease Guaranty.

How should you use it?

Make the guaranty a condition of subleasing the property. You can require this guaranty.

Important Tips

Always do a credit check before leasing property, and if the results are less than satisfactory, either reconsider leasing to that tenant or make sure you get a guarantee from a financially secure third party. If you are subleasing to a corporation, remember that if the corporation goes under, you will have nothing to go after in the absence of a guaranty. You may wish to include a personal guaranty with the sublease itself. This would be appropriate where you are leasing to a partnership and want personal guarantees from the partners or to a corporation and you want personal guarantees from the officers.

Protecting or Transferring Assets

Beware of little expenses; a small leak will sink a great ship.

~ Benjamin Franklin

You have probably heard the term intellectual property before. Sometimes the most valuable asset owned by a business can be its intellectual property. It could be a patent for a breakthrough drug, a trademark for a cola can logo, a copyright in a book, a customer list, a computer database or a business plan. These intangible assets have value and are therefore deserving of protection. Because they are valuable, other businesses or individuals may be willing to purchase or license these assets for a substantial amount of money or to steal these assets for their own benefit. Included here are agreements that cover the protection and transfer of intangible assets, as well as several agreements relating to the protection of your rights to assets should you experience future problems in business or personal matters. These agreements are:

- Commercial Software Licensing Agreement
- Copyright Assignment
- Indemnity Agreement
- Licensing Assignment for Sale and/or Manufacture of Patented Invention
- Non-Disclosure Agreement
- Non-Disclosure and Non-Circumvention Agreement
- Patent Assignment
- Prenuptial Agreement (Version 1)
- Prenuptial Agreement (Version 2)
- Security Agreement
- Technology Assignment
- Technology Evaluation Licensing Agreement
- Trademark Assignment
- Trademark Licensing Agreement

Trade Secrets & Confidential Information

You may have spent years developing a customer database that includes specific aspects or idiosyncrasies of individual customers. Or you may have spent countless research dollars figuring out how to manufacture a product. Undoubtedly you've treated this type of information as confidential, and, if you haven't, you should. Other examples of confidential information can include a market analysis, demographic statistics relating to your customer preferences, or even a list of suppliers. If you have developed this type of information, chances are you've used it to your advantage and have not readily disclosed it to anyone who asks. This information may be deemed a trade secret under state law. Most if not all states have laws protecting trade secrets.

Generally, information may be a trade secret if...

- (1) it is not readily ascertainable to others outside of your business;

- (2) if you have taken precautions to protect the confidentiality of the information to prevent its disclosure; and
- (3) the information has economic value as a result of not being known to others.

The benefit of having information classified as a trade secret is that you are given certain legal rights to restrict the use of that information. Basically, you can sue people who misappropriate your trade secret. The right to sue someone to pursue a legal claim is called a “cause of action” or “claim for relief” in legal parlance. In the trade secret context, you have a cause of action if someone who had knowledge of the secret nature of the information misappropriates it. Misappropriation means a wrongful acquisition or disclosure. Trade secret laws apply to people and businesses alike, so individuals and corporations can be liable for misappropriation of trade secrets. Analogous to trade secret protection are legal rights relating to the wrongful disclosure of confidential information. These laws are distinct from those relating to trade secrets and are designed to protect information which may be confidential but may not rise to the level of a trade secret. Disclosure of private information may constitute a breach of a duty of confidentiality. A duty of confidentiality may arise because of a special relationship between the parties or by written agreement. For example, a lawyer has a duty of confidentiality to the client which prohibits the attorney from disclosing certain information about the attorney-client relationship. In another example, a confidential relationship exists if two software companies exchange technical know-how and sign an agreement in which each promises to keep all information confidential.

The Non-Disclosure Agreement included in this chapter establishes a contractual duty of confidentiality, so use it when you are disclosing information or trade secrets which you don’t want the general public to know. Also, if you have employees who will be learning all about your trade secrets and other confidential information, make sure to notify them in writing that the information is considered confidential and maybe have them sign a Non-Disclosure Agreement or include a non-disclosure provision in an employment contract. For more information about employment matters, see the chapter of Managing Employees and Contractors.

Patents, Trademarks & Copyrights

Patents

To obtain a patent you have to file a special application with the United States Patent and Trademark Office. The PTO, as it is often referred to, issues several types of patents, including a utility patent, a design patent, and a plant patent. The PTO will grant an applicant a utility patent for an invention that is not obvious, novel and useful. The holder of a utility patent has a 17 year monopoly on its use. Design patents, which convey a 14 year monopoly in the design, are granted only if the design is novel, not obvious and ornamental. Plant patents, which offer a 17 year monopoly, may be granted to for inventions or discoveries of a new variety of plant, like a giant beanstalk. As you may guess, there are abundant distinctions about what is “not obvious” or “novel”, so if you think you have a patentable idea, there are many issues to consider.

If you hold a patent you can sue anyone who infringes upon the patent. Infringement means the use, sale or manufacture of the patented invention in the United States during the monopoly period without permission from the patent holder. You can also transfer all or some of the rights to your patent to someone else. For example, if you held a patent for a jet engine, you could license the patent to an airline

manufacturer for use only on 747s. Or, using an example noted above, you could license the seed of a giant beanstalk to some guy named Jack. In this section of *AgreementBuilder* we have included a Patent assignment and a Patent Licensing Agreement.

Trademarks

Trademarks are a different type of intellectual property. A trademark can be a word, name, symbol or device, or any combination of these, which identifies, differentiates and distinguishes one party's goods from another's. A "service mark" is also a trademark but it identifies services rather than goods. Trademarks are everywhere you look. For example, the name of any soft drink you have ever tasted is probably trademarked.

Trademarks are like patents in that you must apply to the United States Patent and Trademark Office to obtain a federally registered trademark. Before the PTO will officially register a trademark, the mark has to be presently used on products or in conjunction with services. The PTO uses certain standards to judge whether a work, name or symbol should be given trademark protection. For instance, if you filed a trademark application for the word "tomato", your application would be rejected because the word "tomato" is not by itself distinctive. Distinctiveness is the main standard applied by the PTO. An example of a distinctive mark would be the name "JIAN". Once you obtain a registered trademark you have special rights to protect the registered mark. For example, you are given certain procedural rights when suing someone who has infringed upon your mark by using it without your permission. Like patents, you can assign or license the use of your trademark to others. We have included both a trademark license and trademark assignment in this chapter.

Copyrights

Copyrights are property rights in an author's particular method of expressing an idea. Most people think of copyrights as applying to books and other writings. However, copyright law also encompasses photographs, videos, paintings, software - anything that can be defined as a "work of authorship" under the Copyright Act of 1976. The full definition of a copyright under the Act is an "original work of authorship fixed in any tangible medium of expression, now known or later developed, from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." A copyright protects the idea, not the physical manifestation of the idea. For example, a photographer can sell a picture but retain the copyright in that picture.

U.S. copyrights are economic rights to control the use of and benefits derived from the work. Some foreign countries imbue more personal rights, such as the right to protect one's reputation, in their copyright laws. Like patents and trademarks, copyrights are assets which, because of their economic nature, have value. The Copyright Office of the Library of Congress registers copyrights and issues certificates of registration. You don't have to register the work to have a copyright. Registration acts as an office acknowledgment of the existence of the copyright. The most important factor in creating a copyright is that the work of authorship be fixed in tangible form. As in the photographer example above, the copyright is the expression of the idea—the scene depicted in the photo—whereas the tangible form is the photograph itself.

A copyright is really a bundle of rights which include the right to:

- (1) reproduce the work;
- (2) prepare derivative works;

- (3) distribute copies of the work;
- (4) publicly perform the work, in the case of music; and
- (5) publicly display the work.

When you license or assign the rights to a copyright, you can include all or some of these rights. We have included a Copyright Assignment in *AgreementBuilder*.

Tax Aspects of Transferring Patents, Trademarks and Copyrights

Yes, it's true, there are tax consequences to transferring rights in patents, trademarks and copyrights. These tax rules can be quite complex, so you would be well-advised to seek counsel when transferring rights in these forms of intellectual property. Generally, the tax consequences depend on whether the transfer is a sale or a license. A license is something less than an ownership interest. Income received from the transfer of a license is taxed as ordinary income. If the transfer is a sale then income may be characterized as capital gain or as ordinary income. The rules get pretty complex, so take the time to understand what tax effect you may encounter as a transferee, licensor, transferee, or licensee of a patent, copyright or trademark. Talk to your accountant and/or your lawyer.

Protecting Property Rights for the Future

Sometimes you may find yourself entering a transaction or partnership arrangement where you are required to risk your property rights or in which you need to protect those rights. We have included three agreements which involve the protection of rights against problems which may arise in the future. These agreements include an Indemnity Agreement which can protect you and your assets from the wrongdoing of another, a Security Agreement which gives you rights to another's property, and a Prenuptial Agreement which can help you protect your personal and business assets in case of divorce. Take the time to review these agreement to get a better idea of how and when they can be used.

In Conclusion

Many of the agreements in this section may be new to you. We have included them in *AgreementBuilder* to provide an overview of the legal considerations relating to the protection and transfer of assets. You may find the need to use one or several of these agreements in the course of business, but remember that there may be lots of issues tied up in an agreement which require the attention of an attorney.

Commercial Software Licensing Agreement

What is a Commercial Software Licensing Agreement? This is an agreement in which an off-the-shelf software package is licensed to individuals or businesses through dealers or sales representatives.

Why/When should you use it?

If you publish software and market it through resellers or sales representatives, you would want purchasers of your software to sign this agreement because it protects your ownership interest in the software. Also, it limits liability exposure through its special warranty provisions.

Who should use it?

Commercial software publishers and their resellers and sales representatives would have the end-purchaser sign this agreement.

How should you use it?

If you are a software publisher who uses resellers and sales representatives, have them require their customers to sign this agreement when they purchase your product. Also, you should have a separate agreement with the reseller or sales representative. Take a look at the related sales agreements in *AgreementBuilder* to get an idea of what type of agreement to use with resellers and sales representatives.

Important Tips

Make sure to have your resellers and sales representatives require customers to sign this agreement or a modified version of it and return the original to you.

Copyright Assignment

A Copyright Assignment is a document which, when executed by the owner of the copyright, allows the Assignee to hold all rights to the copyright, including the right to sue others who may infringe on that copyright. An assignment is much broader than a mere license which only grants the use of a copyright with specific limitations.

Why/When should you use it?

If you want to have all of the rights to a copyright, including the right to prevent others from using it, you should use this form of assignment.

Who should use it?

Anyone who want to acquire another's copyright.

How should you use it?

The copyright holder need to execute this document and return it to you.

Important Tips

Remember, if you only need limited use of someone' copyright, you don't need an assignment, you need a license.

Indemnity Agreement

An Indemnity Agreement is an agreement in which one party, the Indemnifier, agrees to assume legal liability of another party, the Indemnitee, which may rise out of the Indemnitee's actions. This type of assumption of liability is used in special circumstances. For example, if a company hires an independent contractor to design a magazine layout and provides the independent contractor with images to use in the layout, the independent contractor may want to be indemnified against all personal liability which may arise from the use of those images.

Why/When should you use it?

You should use this agreement if you are performing duties for another party and the ordinary course of performance of those duties may give rise to personal liability. Use this agreement to protect yourself from liability if you are to perform duties for another party.

Who should use it?

Anyone performing duties for another party.

How should you use it?

This agreement may be used on its own or its provisions may be incorporated into another agreement.

Important Tips

This type of agreement may be difficult to apply in a given situation. Just remember that, if you are required to act on behalf of another party and your actions take in the ordinary course of performance of your duties could expose you to liability, you should ask to be indemnified for any liability arising out of your actions. This is not an unreasonable request. You should not have to assume the risk of liability that really belongs to someone else.

License Assignment for Sale or Manufacture of a Patented Invention

A person who holds a patent to an invention may grant others licenses to manufacture or use the patented invention. That party in turn may assign that right to another party unless prohibited to do so in the original licensing agreement. This agreement is an assignment by the license holder to a third party.

Why/When should you use it?

When someone has the right to manufacture or use a patented invention, they may need to assign the right to another business. For example, if a semiconductor fabrication company no longer wants to bear the burden of manufacturing and selling a licensed microchip, the company may want to assign that right to another fabricator.

A business which holds a license to manufacture and/or sell a patented invention may need to restructure its business operations or its product line. For example, a board game manufacturer may want to terminate a low volume board game from its product line. The company will want to realize value from the game, so it will assign its rights to the game to another company for a fee.

Who should use it?

Businesses holding licenses to manufacture and/or sell a patented invention would use this agreement to assign their licensing rights to a third party.

How should you use it?

Spell out the consideration to be paid and the rights involved.

Important Tips

This agreement requires the assignee to assume royalty payments to the original patent licensor. The assignee to this agreement should understand those royalty terms before entering into this agreement.

Non-Disclosure (NDA)

This is an agreement in which the parties decide to share protected information with each other and agree not to disclose that information for a specified period of time unless access to that information becomes available through other lawful means.

Why/When should you use it?

You should use a Non-Disclosure Agreement to protect the confidential nature of your information. The information can be a business plan, a patent idea, a screenplay—anything that you do not want the world to know. Use this agreement or a modified version of it when you will share protected information with another party. For example, if you have designed a microprocessor and you would like some engineering

testing performed, you should have the testing company sign a Non-Disclosure Agreement.

Who should use it?

Anyone who needs to disclose confidential information should have the receiving party sign a Non-Disclosure Agreement.

How should you use it?

This agreement is designed to be used when disclosing information to solicit investments. However, it can be modified to apply to any situation in which you need to disclose protected information.

Important Tips

Some people won't sign Non-Disclosure Agreements. For example, venture capitalists who review hundreds of business plans are reluctant to sign an agreement which could prevent them from investing in a similar idea. You should discuss with the other party their feelings about non-disclosure agreements before asking them to sign one.

Confidentiality & Non-Circumvention

It is an contract between the owner or provider of certain proprietary, nonpublic information and the party who wants to see or learn about that information. This agreement prohibits the latter party from disclosing the information to third parties and from using that information other than as set forth in the agreement, generally to evaluate a potential relationship with the owner of the information.

Why/When should you use it?

Anytime you share non-public, proprietary information with a third party, the use of this agreement may protect your ideas from being used by other parties. While it does not guarantee that the information you have provided won't be freely disseminated, it affords you some protection. In most cases, you won't be able to go forward with an idea unless you share it with others; therefore, it is important to try to protect your ideas.

Who should use it?

An individual or organization (corporation, partnership, sole proprietorship) who wants to share proprietary information with a third party.

How should you use it?

Use the agreement freely; it is better to err on the side of using the agreement than not using it.

Important Tips

Make sure to execute the agreement before you disclose any confidential or proprietary information to anyone. Once you have made the disclosure, it may be too late to ask the other party to complete the agreement.

Patent Assignment

A patent is a grant of right by the government to a patent holder which excludes others from making, using or selling the patent holder's invention; the patent includes the right to license others to make use of or sell that invention. A Patent Assignment is the contract used to effect the sale and transfer of all of the rights and interest to a patent granted by the United States Patent and Trademark Office from its owner (assignor) to a buyer (assignee). The Assignment is like a bill of sale for personal property.

Why/When should you use it?

Anytime you assign or are assigned a patent, you should execute a Patent Assignment. You need to have a written agreement in order to assign a patent. Furthermore, the agreement makes it clear that the assignee now has the legal right to use or sell the invention.

Who should use it?

Both the assignor and the assignee of a patent should use this agreement.

How should you use it?

It's a fairly straightforward agreement so it should be easy for you to complete. However, make sure that the assignor actually owns the patent before you execute this agreement.

Important Tips

If you are limiting the assignment in any manner, then you are licensing, as opposed to assigning the patent, and you should use AgreementBuilder's Patent Licensing Agreement. An Assignment transfers everything, forever. A patent license, on the other hand, empowers the licensee to make, use or sell the patented article for a limited period or in a limited territory.

Prenuptial Agreement (Version 1)

A Prenuptial Agreement is an agreement entered into by prospective spouses prior to marriage. The agreement secures to one or both or their children their property and financial rights. Specifically, it ensures that their separate property, that property which they will come into the marriage with, and all earnings attributable to that property, will remain that party's separate property if and when the marriage ends.

Why/When should you use it?

Whenever you are getting married and have assets that you want to make clear are separate property, you should use this agreement. Although property owned by a prospective spouse before marriage and any earning attributable to that property earned during marriage is separate property even without this agreement, it may be helpful to use a Prenuptial Agreement so as to avoid later confusion regarding the extent of that party's separate property.

Who should use it?

Prospective spouses should use a Prenuptial Agreement.

How should you use it?

In community property states, any property acquired by either party will be subject to community property laws of that state. This agreement deals with property that you enter the marriage with. If you want to keep property acquired after marriage separate, you should use AgreementBuilder's Prenuptial Agreement (Version 2).

The agreement includes provisions for the certification by an attorney for both spouses. This means that each spouse needs to have a attorney review this document before executing it. This is very important if one of the spouses is coming into the marriage with considerable assets and the other is not. In that case, it is imperative that latter be represented by an attorney.

Important Tips

Many states have adopted the Uniform Premarital Agreement Act, which directs the content, execution,

and modification of Prenuptial Agreements. This agreement provides for comprehensive disclosure of your assets; you need to make these disclosures to help ensure enforceability of the overall agreement.

Prenuptial Agreement (Version 2)

A Prenuptial Agreement is an agreement entered into by prospective spouses prior to marriage that secures to one or both or to their children their property and financial rights. It ensures that their separate property, that property which they will come into the marriage with, and all earnings attributable to that property, will remain that party's separate property if and when the marriage ends. This particular Prenuptial Agreement also includes any property acquired by either party once the marriage is entered into (after acquired property). If you want to keep after acquired property separate, you should use this agreement, as opposed to Version 1 which only protects property you bring into the marriage.

Why/When should you use it?

Whenever you are getting married and have or will acquire assets that you want to make clear are or will be separate property, you should use this agreement. Although property owned by a prospective spouse before marriage and any earnings attributable to that property earned during marriage is separate property even without this agreement, it may be helpful to have a Prenuptial Agreement so as to avoid later confusion regarding the extent of that party's separate property. The law for property acquired during marriage differs depending on the state. While this agreement may provide guidance, we recommend that you consult an attorney.

Who should use it?

Prospective spouses should use a Prenuptial Agreement.

How should you use it?

The agreement includes provisions for the certification by an attorney for both spouses. This means that each spouse needs to have a attorney review this document before executing it. This is very important if one of the spouses is coming into the marriage with considerable assets and the other is not. In that case, it is imperative that latter be represented by an attorney.

Important Tips

Many states have adopted the Uniform Premarital Agreement Act, which directs the content, execution, and modification of Prenuptial Agreements. This agreement provides for comprehensive disclosure of your assets; you need to make these disclosures to help ensure enforceability of the overall agreement. Consult an attorney.

Security Agreement

A Security Agreement is used to give meat to a loan to purchase certain goods and equipment. A Borrower can agree to pay you back the \$20,000 he borrowed to buy his truck, but if he doesn't pay, you cannot repossess the truck unless you have a Security Interest. Also, part of the Security agreement allows the Lender to attach the wages of the Borrower.

Why/When should you use it?

Whenever you lend money to another party for the purpose of purchasing specific goods or equipment, you should look into becoming a secured creditor. In other words, use this agreement if you are financing all or part of the purchase price and receiving a security (ownership of the item contingent upon failure to

pay the debt) interest in the property. In the event that the debtor defaults on the debt, the Lender can repossess the asset. Furthermore, the Security Agreement gives the Lender priority in collecting the debt (evidenced by a promissory note) in the event of bankruptcy. The Security Interest he or she has in the property gives him or her a preference in the event that more than one creditor goes after that asset.

Who should use it?

Any lender who lends money to allow a borrower to purchase specific goods or equipment or the seller of those items should use a Security Agreement.

How should you use it?

The Uniform Commercial Code (“U.C.C.”) provides a method for the seller/ lender to get a security interest in the property. Generally, the customer/ debtor signs this agreement along with a U.C.C. Financing Statement, which is then filed with some public office such as the county clerk or secretary of state.

Important Tips

It takes time, paperwork and money to create a security interest. While banks generally take a security interest when they loan money to a customer to purchase large amounts of equipment, you may not want to go through the hassle. In that case, consider taking a credit card and letting someone else worry about getting paid.

Technology Assignment

A Technology Assignment is an assignment by one party (the assignor) to another (the assignee) of specific technology defined in the agreement along with related properties, documents, agreements and intellectual property rights. The assigned assets generally include software technology and programs, but can include any manner or type of technology.

Why/When should you use it?

Anytime you assign or are assigned technology, you should execute this agreement. You should use it so that it is clear that you have the legal right to use another company or individual’s technology. Furthermore, if you are assigned a specific technology, this agreement gives you all rights associated with that technology.

Who should use it?

Both the assignor and the assignee of technology should use this agreement.

How should you use it?

Its a straightforward agreement so it should be fairly easy for you to complete. For the most part, all you have to worry about is accurately and specifically describing the technology being transferred.

Important Tips

If any trademarks are being assigned, you may wish to use this agreement in conjunction with the Trademark Assignment.

Technology Evaluation License

A Technology Evaluation Licensing Agreement is a contract between the developer and/or owner of a certain form or type of technology and the individual or entity it contracts with to evaluate that

technology to determine if it can be developed into a commercially viable product(s). The Evaluator agrees to examine, modify and enhance the technology during an Evaluation Period. Thereafter, the Evaluator returns the Technology to the Developer. At no time during or after the evaluation may the Evaluator manufacture, market or sell the technology or any products based on it.

Why/When should you use it?

Anytime you license or are licensed technology to evaluate, you should use this agreement.

It is important to use this agreement so that it is clear that the Developer is only licensing the technology to the Evaluator to evaluate. Without this agreement, the relationship of the parties might be unclear, and the Evaluator might think it has additional rights to the technology, especially if it modifies and improves the technology.

Who should use it?

The owner or Developer of technology and the individual or entity evaluating that technology should use this agreement.

How should you use it?

Make sure to execute this agreement before actually giving or transferring the technology to the Evaluator. If you need to share confidential or proprietary information with the Evaluator before either one or both of you are prepared to sign this agreement, we recommend that you execute AgreementBuilder's Non-Disclosure and Non-Circumvention agreement. This will protect you in the event that the Technology Evaluation Licensing Agreement is not used.

Important Tips

Assuming the developer is not in the business of manufacturing or marketing, you may wish to compensate the Evaluator by offering an option to purchase the Technology. This option could be executed along with this agreement.

Trademark Assignment

A trademark includes any word, name, symbol, or devise used to identify or distinguish particular goods of one business from those sold or manufactured by another. A Trademark Assignment is the contract used to effect the sale and transfer of all of the rights to the trademark from its owner (assignor) to a buyer (assignee). The Assignment is like a bill of sale for personal property.

Why/When should you use it?

Anytime you assign or are assigned a trademark, you should execute a Trademark Assignment. You should use it so that it is clear that you have the legal right to use another company or individual's trademark. Furthermore, if you are assigned a trademark, this agreement gives you all rights associated with that trademark.

Who should use it?

Both the assignor and the assignee of a trademark should use this agreement.

How should you use it?

It's a fairly straightforward agreement so it should be fairly easy for you to compete. However, make sure that the assignor actually has the right to the trademark before you execute this agreement.

Important Tips

To be effective, the assignment of rights in a trademark must include a transfer of goodwill associated with that trademark; this is because there a trademark represents the goodwill that is associated to it. If you are limiting the assignment in any manner, then you ought to use AgreementBuilder's Trademark Licensing agreement. With the license, the licensor may qualify the license by making it nonexclusive or exclusive or for a limited or unlimited territory. The Assignment transfers everything, forever. This agreement is written from the perspective of a licensee. For example, there are sections that assign the assignee (the person buying the trademark) the rights to sue not only for past and future infringements, but to past infringements as well. The assignor may want to limit the scope of the assignment, whereas the assignee will want as broad of an assignment as possible.

Trademark Licensing Agreement

A trademark includes any word, name, symbol, or devise used to identify or distinguish particular goods of one business from those sold or manufactured by another. A Trademark Licensing Agreement licenses or permits another party (the licensee) to use one or more of the licensor's trademark(s) in a designated territory. The license may limit the licensee's use of these trademarks, and the licensor can grant either an exclusive or non exclusive license in the territory. In return for licensing the trademarks, the licensee agrees to pay the licensor royalties.

Why/When should you use it?

Anytime you license or are licensed a trademark, you should execute a Trademark Licensing Agreement. The licensor's trademark is generally a valuable asset; this agreement preserves and protects that asset. The licensee should use the agreement so that it is clear that it has the legal right to use licensor's trademarks. One frequently overlooked reason to use this agreement is to establish and require the licensee to adhere to certain quality standards.

Who should use it?

Both the assignor and the assignee of a trademark should use this agreement.

How should you use it?

You should leave this agreement as intact as possible.

Important Tips

The licensor should check out the fitness and suitability of the licensee before granting any trademark rights. The licensor must be confident that the licensee will use licensor's marks appropriately, and that it will continue to pay for the use of the trademarks. If you are permanently assigning as opposed to licensing all of your rights to the trademark(s) for all territories, you should use the Trademark Assignment.

Handling Financial Matters

*Financial sense is knowing that certain men will promise to do certain things,
and fail.*

~ Ed Howe

Most businesses extend credit. This discussion introduces you to some of the issues involved with extending credit to your customers, what options you have to ensure timely payment, and what to do if payment is not made. We address a few of the numerous federal and state laws that affect how and to whom you may extend credit. We also discuss issues involving disputed accounts and dishonored checks. To help you handle some of these financial matters, *AgreementBuilder* includes the following agreements:

- Account for Collection Assignment
- Agreement to Settle Disputed Account
- Collection Agent Appointment
- Credit Application/Agreement
- Debt Assignment
- Non-Delinquent Accounts Receivable Assignment
- Personal Loan Guaranty
- Personal Loan Guaranty (Short Version)
- Promissory Note

Extending Credit

Since the ultimate liability for any debts incurred by a business will vary depending on whether that business is a sole proprietorship, limited or general partnership, or corporation, it is very important to identify the entity you are dealing with before extending credit. If the business is a sole proprietorship, the assets of the sole proprietor, along with those of the business are available to satisfy the business' debts. Where the debtor is a general partnership, you can go after any of the general partners; however, with respect to limited partnerships, you can only go after the general partner, not the limited partner(s). With corporations, in most cases, you cannot go after officers, directors or shareholders.

Personal Guaranty

In situations where there is no direct individual liability as with corporations, you may want a personal guaranty, and depending on where your business is located, if you do get a personal guaranty, you may

need to get a new guaranty each time you extend credit to a particular customer. Be aware that while it is legal to ask for such a guaranty, it may violate certain trade practices.

The Equal Credit Opportunity Act

It is illegal to discriminate against a credit applicant on the basis of his race, color, religion, national origin, sex or marital status. In general you cannot discriminate on the basis of age; however, you can reject minors.

Secured Creditors

Some businesses take a security interest in goods it sells on credit; usually, it's only worth it for expensive items (a \$20,000 computer, as opposed to a \$400 printer). If the customer doesn't pay, you can reclaim the property. Adopted in all states, the Uniform Commercial Code (U.C.C.) provides a method to get a security interest in items you sell. Basically, the customer signs a U.C.C. financing statement, and then you file that statement with the appropriate public office, usually the county clerk or secretary of state.

Encouraging Payment

While payment in full is common in retail transactions, it is fairly uncommon when selling on consignment or in dealings between manufacturers and distributors. In these situations, most sellers agree to extend credit. Assuming you are one of the many businesses that delay payment, there are a number of approaches you can take to collect moneys owed you.

Offer Cash Discounts

Not surprisingly, the offer of a 5% discount for early or on-time payment may keep your customers current.

Charge Interest on Overdue Accounts

Inspire buyers to pay on time by charging interest on late payments. You should be aware, however, many states put a cap on the interest you can charge. We suggest that you either contact an attorney or head to a good law library to check out your state's code; look under interest, usury or finance charges. Furthermore, whenever you charge interest, you must inform your customers exactly how it will be computed. The Federal Truth-in-Lending Act, which applies chiefly to consumer sales, requires exact credit terms including the monthly finance charge, the annual interest rate, payment due dates, total price of the item(s) including service or other charges, if any, and late payment charges be disclosed on any contract or bill that charges interest. As discussed above, individual state laws set the actual rates you can charge. Where applicable, these disclosures have been included in AgreementBuilder's agreements. Although many of these disclosures may seem inapplicable to your sales transactions, we suggest that if you want to charge interest, you leave these sections intact. Better safe than sorry!

Court Costs and Attorney's Fees

Either in your credit applications or in a separate agreement, you should include a section that requires the customer to pay for court costs and reasonable attorney's fees if he doesn't pay as agreed, and you are forced to take legal action.

Collection Problems

Generally, when you sell something, you have a legal right to demand payment in full upon delivery. If you do not get paid, you have a number of options available to you including: filing a lawsuit, going to small claims court, assigning the account for collection and appointing a collection agent.

File a Lawsuit

Many states require you to make a formal demand for payment before initiating a lawsuit. In addition, unless you are owed a lot of money, you might not want to go this route as you will probably need to retain an attorney, and it could become quite costly. Filing fees and other court costs range from \$40 to over \$100, and each defendant must be personally served at a cost of \$15-\$20 or more each. Furthermore, even if you win, the defendant might still refuse to pay. In that case, you must initiate proceedings to execute or force payment of the initial judgment. It is not uncommon for creditors to end up spending more in costs collecting the debt than they end up collecting.

Go to Small Claims Court

When a modest debt is involved (from maximums of between \$500 to \$2,500 depending on the state), you can bring an action in small claims court. Unlike regular lawsuits, small claims' suits are relatively inexpensive, quick and easy. Filing fees are usually less than \$50. One of the major drawbacks of small claims court in many states is that although you may win, the judgment itself may be uncollectible; traditional methods for enforcing judgments—property liens or garnishment of wages—may not be available. Some states, such as New York, only allow for an enforcement action if the debt resulted from a business transaction (as opposed to a consumer sale), and the debtor has three or more other small-claims judgments outstanding.

Assign the Account for Collection

In this situation, you transfer your right to moneys owed you to a collection business. Whatever they collect they keep. Although they only pay you a small percentage of the moneys owed, in the long run it may be easier to let someone else worry about collecting so you can stick to your business and thus avoid the hassle and expense of the collection process.

Appoint a Collection Agent

If you want to be more involved with the collection process and you do not want to assign the account for collection, you may want to appoint a collection agent. Here you hire a collection agency to attempt to collect your delinquent accounts. Generally, the collection agency gets a percentage of any moneys it recovers on your behalf.

Prohibited Collection Practices

Although federal law regulates collection agencies through the Fair Debt Collection Practices Act, there is no federal law that applies to businesses that collect their own debts. However, most states have a law that applies to you. California's Fair Debt Collection Practices Statute is a good example of such a law. Among other things, it prohibits: Using or threatening to use physical force to collect a debt; using profane language; forcing the debtor to make long distance calls at its expense regarding the debt; annoying the debtor with continuous phone calls; communicating with the debtor so frequently as to be unreasonable; and communicating with a debtor's employer except to verify employment or to carry out a garnishment following a civil suit.

Credit Card Transactions

Point of sale payments can be either by way of cash, credit card, or check. When a customer charges goods or services using a bank credit card, the bank will credit your business account the amount of the purchase less its fee, usually between 3-5%. Although many businesses are unaware of the fact, often this fee is negotiable if you are a big enough customer. The fee the bank charges you is for handling the

transaction itself and, most importantly, accepting the risk that the customer won't pay. Frequently, credit cards are more cost effective than extending credit directly to your customers. If you follow the credit card company's rules which usually involves nothing more than getting authorizations for charges over \$50, you have nothing to worry about since they absorb any loss if the customer fails to pay. Furthermore, many electronic systems now used by credit card companies automatically credit you business' banking account when a charge is made.

There are a few exceptions to the general rule that you will always get paid if you follow the credit card company's rules. One of these exceptions arises when you sell defective goods and the customer refuses to pay his charge. You should carefully review your contract with the bank to see what the rules are in these situations and whether you will have to bear the cost. There is one small matter that you should be aware of regarding credit cards and identification. In roughly 10 states, including California, you are not allowed to record personal identification information about a cardholder such as his address or phone number unless the credit card company requires it or you need it for shipping related purposes.

When You Get Paid by Check

Cash and credit card transactions involve little risk; however, frequent problems arise over personal checks. In fact, roughly 450 million bad checks are written each year.

Dishonored Checks

A number of circumstances can and often do prevent checks from being honored by banks. The person writing the check might have stolen the check; if you accept such a check, you're probably out of luck unless the impostor is caught and subsequently makes restitution. The most common situation involving dishonored checks occurs where the customer has an active bank account, but there are insufficient funds to cover the check. In most states, it is a crime to knowingly write a check when you do not have adequate funds. If you get stuck with a bad check, you can bring a lawsuit in small claims or otherwise depending on the sum involved to recover the amount of the check, and, in some states, costs of litigation and attorney's fees. Many states go further and provide for treble (three times) damages. Another situation where a check won't be honored occurs where the signatory to the check of a partnership or corporation doesn't have the authority to sign for the business.

If a customer's check bounces, call and ask him make the check good. As many states place limitations on what can be said or done to recover debts, be careful not to call before 9:00 a.m. or after 9:00 p.m., don't say anything about the bad check to the customer's employer, and don't be rude. Furthermore, it is illegal to threaten a debtor with publication of his debt or notification of his employer. If the phone call doesn't get you anywhere, send the customer a demand letter, return receipt requested. If he intentionally defrauded you, the demand letter will set the stage for possible criminal prosecution. In some states, the fact that you have sent a written demand letter may permit you to collect extra damages, potentially two or three times the value of the check. In the event that a customer intentionally passes a bad check, you may elect to seek criminal prosecution. Some states require that you first send a written demand letter so as to avoid innocent mistakes. If you are considering filing charges (or even if you are not) do not threaten prosecution since some states' statutes consider this harassment or even extortion.

Depending on the amount of the check, you may want to consider using small claims court. Most states have a limit of between \$2,000 and \$5,000; if you are owed more than that amount, you can either waive the excess and sue for the maximum or file an ordinary law suit. As discussed above, if you have given the customer proper notice, you may be entitled to two or three times the amount of the check as damages

plus certain costs. Furthermore, some states have post-judgment proceedings which may allow you to attach wages and bank accounts if the person has a job or bank account. Additionally, most states let you put a lien against the debtor's real estate, if any.

As discussed in more detail above, another possibility for recovering moneys owed you is to use a collection agency or to assign the account for collection. While you will have to pay the agency a hefty fee, you won't have to bother dealing with it yourself, when your time can be better used elsewhere. When a customer stops payment on his check and he has a legitimate claim, you won't be able to prosecute or collect multiple damages in a civil lawsuit. If the items purchased are somehow defective, the customer will only have to pay you what they're worth, and, in some cases, nothing at all. On the other hand, if there is no merit to the claim, you are entitled to all of the remedies described above.

Checks which Say "Payment In Full"

You should be very careful cashing checks marked "payment in full" when you are owed more than the amount of the check. Generally, when the debtor has a good faith dispute involving the amount owed and he writes "payment in full" on the check, if you cash that check, it is assumed that you are accepting that payment as satisfaction for the debt owed you. In most states, crossing out the words "payment in full" has no effect. A few states, including Alabama, Delaware, Massachusetts, Minnesota, Missouri, New Hampshire, New York, Ohio, Rhode Island, South Carolina, South Dakota, West Virginia and Wisconsin, now permit you to reserve your right to sue for the balance if you write the words "Under Protest" or "Without Prejudice" along with your endorsement. California alone allows you to cross out "Payment in Full," cash the check and sue for whatever is still owed you. (You should take a look at California Civil Code Section 1526 first, however, since there may be a few ways out for the debtor.)

Account for Collection Assignment

An Assignment of Account for Collection is a contract in which a business assigns its delinquent accounts receivable to a collection business. The collection business pays a certain dollar amount, such as \$0.25 per \$1.00 owed, to obtain the rights to collect and keep the proceeds of the delinquent accounts.

Why/When should you use it?

You should consider using this contract when you want to realize income on your delinquent accounts and avoid any further involvement in the collections process. If you want to be more involved in the collections process, you should consider using the Appointment of Collection Agent form which is included with this package. It may be useful for a business to enter into such an arrangement when it would like to realize some income without the hassle and expense of chasing down debtors. Sometimes companies can spend more money to collect an account than the account is actually worth. By selling all the rights to its delinquent accounts a business can cut its losses and move on.

Who should use it?

Companies with delinquent accounts receivable.

How should you use it?

You should use this agreement when entering into an arrangement with a collection company or you should compare this agreement to any given to you by the collection company.

Important Tips

When negotiating the dollar value of your accounts receivable, make sure to have done some research

beforehand.

Settlement & Release

An Agreement to Settle Disputed Account is a contract in which a business and its customer agree to settle a disputed account. For example, a customer, in good faith, says that he only owes you \$200, but you bill him \$300. He refuses to pay anything unless you accept the \$200 as full payment. You can use this agreement to settle the account, such that once executed neither party has any right to question the agreed upon payment.

Why/When should you use it?

You should use this agreement when a customer has expressed willingness to settle a disputed account, and it is financially reasonable for you to settle. A business would want to use this agreement to help liquidate an outstanding debt. In other words, instead of receiving all or part of the amount the business says is due it sometime in the future, it can receive a lesser but acceptable amount now.

Who should use it?

Businesses with disputed accounts may want to use this type of agreement with their customers. Not only can it help in the collection of outstanding accounts, but also it can help bring an uncomfortable situation to a positive ending. Who knows? Maybe you won't lose a customer forever.

How should you use it?

Send duplicate copies to the customer and ask that he or she sign them and return one copy to you.

Important Tips

If the account isn't in dispute, then you don't need to use this agreement. For example, if a customer ordered a 19" television for \$300 and you shipped him a 17" television along with a bill for \$200. Assuming you acknowledge that he ordered the 19" model, nothing is disputed. Since you sent him the wrong item, he can either return it you or send you \$200.

Collection Agent Appointment

An Appointment of Collection Agent document is a contract in which a business hires a collection agency which will attempt to collect on the business' delinquent accounts receivable. It is quite similar to an Assignment of Account for Collection except that the company retains the ownership of the accounts receivable.

Why/When should you use it?

You should consider using this type of contract when you want to take action to collect delinquent accounts receivable but do not want to give up your rights to those accounts. For example, if you would like to have the option of treating these accounts as bad debts for accounting purposes, you would chose this method over an assignment of accounts receivable. It may be useful for a business to enter into the type of arrangement when it does not have the resources to collect its own delinquent accounts.

Who should use it?

Companies with delinquent accounts receivable.

How should you use it?

You should use this agreement when entering into an arrangement with a collection agency.

Important Tips

Before you discuss the collection agent's percentage, make sure to have an idea of the going market rates.

Credit Application/Agreement?

A Credit Application/Agreement is both an application for credit and an agreement by the individual or company seeking credit to certain terms and conditions if and when credit is extended. These terms may include due dates, service and interest charges, and the policy regarding past due customers. AgreementBuilder combines aspects of a credit application, along with the more detailed credit provisions of a credit agreement, thus allowing you to obtain a security interest in the goods sold.

Why/When should you use it?

You should require all of your customers to complete a Credit Agreement before extending credit to them. Many businesses give their customers 30 days, 60 days, or even longer to pay for goods and services. If you are one of these businesses and don't have a Credit Agreement with your customers, you won't be able to enforce your credit terms. Furthermore, the agreement makes clear to your customers when payment is due, whether you offer discounts for early payment, and if and when you charge interest or add finance charges.

Who should use it?

Any business, including professional and personal service businesses and wholesale and manufacturing business, which extends credit to its clients or customers ought to use a Credit Agreement.

How should you use it?

Don't use this agreement in isolation. Before extending credit, use a credit reporting agency to check out your customer's credit. This is fairly routine. If you charge interest, you need to find out the maximum interest rate permitted which differs from state to state—look at the index to the annotated statutes for your state (usually called a “code”).

Important Tips

Review the previous discussion on “Handling Financial Matters.” You need to understand the Fair Credit and Reporting Act and state laws dealing with credit. For example, in professional and personal service businesses, if you reject someone based on that credit report, you have to explain the basis of the rejection, and you must identify the specific credit reporting agency that gave you the information.

Debt Assignment

An Assignment of Debt is a contract in which one party assigns to another party the right to collect a debt.

Why/When should you use it?

A Debt Assignment should be used whenever a debt is being assigned so that the Assignee will have legal standing to collect the debt. It should be used when a creditor wants to liquidate a debt that is not yet due. Also, you may want to use this document when it is unclear whether the debt instrument is a negotiable instrument, such as a promissory note.

Who should use it?

Creditors and purchasers of debt instruments should use this document.

How should you use it?

One party should complete the necessary information and both parties should sign. Make sure to spell out the details of the debt being transferred, such as amount owing, date due, etc.

Important Tips

If you are a purchaser, make sure you are buying a real debt and not just some phony piece of paper.

Delinquent Accounts Receivable Assignment

An Assignment of Accounts Receivable is a contract in which a business assigns its existing, non-delinquent accounts receivable to another party in exchange for cash or some other consideration.

Why/When should you use it?

Usually, you would use this type of agreement in unfortunate circumstances. However, this type of agreement could conceivably be used for happier reasons, such as the assignment of accounts receivable to a local charity. A business would use this type of agreement to obtain immediate financing or to settle a dispute. For example, if a company is dangerously short of cash flow, but it has some significant accounts receivable that can't be paid for several months, the company can assign the right to collect the accounts to a factoring company (which is basically a high-risk lender) in exchange for immediate cash.

Who should use it?

Businesses with non-delinquent accounts receivable would use this agreement.

How should you use it?

Describe the accounts to be assigned in a separate attachment. Be very clear in identifying the accounts and the amount of each account.

Important Tips

When assigning accounts receivable, you should notify the debtor of the assignment.

Personal Credit Guaranty

A Personal Credit Guaranty provides a personal guaranty by a third party individual by backing up the obligations of the primary debtor. Sometimes a Personal Guaranty is used when you want a corporate officer to personally guaranty payment for an obligation made by his/her corporation. It can be modified for any type of transaction that you may wish to enter.

Why/When should you use it?

It's always in the best interest of a creditor to get a personal guaranty as it provides additional protection for the collection of a debt. Of course, in many cases, you may not ask for one. For example, if you were lending money to IBM, you wouldn't need a Personal Guaranty, and even if you did, they wouldn't give one to you. Try to get one whenever you are dealing with someone with a limited credit history or a newly formed corporation. A Personal Guaranty provides additional protection for a lender or other company giving credit. In the event that the original Debtor to an obligation defaults, you can collect from him or the Guarantor. You have the option of whom to go after first. Since a Guarantor usually has more money than the Debtor, it is a great way to protect yourself. Also, where the original Debtor is a corporation, a Personal Guaranty provides recourse against an individual so that in the event the corporation goes bankrupt, you can still get paid.

Who should use it?

Any company or person who is extending credit to another person or company. You may be leasing a warehouse or store or lending money for the debtor to buy a car. In all of these cases the person providing the credit or lending the money should get a personal guaranty.

How should you use it?

Use it freely in any of the situations described.

Important Tips

If you are relying on the creditworthiness of the guarantor, you ought to run a credit check before you extend credit to the debtor.

Personal Loan Guaranty

A Personal Loan Guaranty is an agreement whereby one or more parties (the Guarantors) guaranty the loan obligations of another party (Obligor) to a Lender. If the Obligor doesn't pay the lender, then the Guarantor will be responsible. The Guarantor's obligation to pay comes due immediately upon the Obligor's failure to make timely payment. Thus, for example, as soon as the Obligor misses a payment, the Guarantor must pay the Lender directly; the Lender does not first have to give notice or satisfy any legal requirements with respect to the Obligor.

Why/When should you use it?

You should use a Loan Guaranty anytime you lend money and have any doubt about the financial wherewithal of the Obligor. It cannot hurt to have the added protection of a guaranty. A lender should use a Loan Guaranty because it provides protection in the event that the Obligor doesn't pay its debt. A borrower may find it easier to get a loan if he has someone with a solid financial background to guarantee his debt.

Who should use it?

Anyone who lends money should consider using a Loan Guaranty.

How should you use it?

This agreement can be used to guarantee a single loan obligation or to provide an ongoing guaranty for all debts between an Obligor and a Lender.

Important Tips

When detailed provisions affecting the guaranty are not necessary, you can use *AgreementBuilder's* short form Loan Guaranty. Always do a credit check before lending money, and if the results are less than satisfactory and you are still determined to make the loan, get a guaranty from a solid third party. A Personal Guaranty is just a form of a Loan Guaranty but is generally included with the loan agreement itself. The Personal Guaranty is usually provided by the partners of a partnership or officers of a corporation. If you are lending to a corporation, remember that if the corporation goes under, you will have nothing to go after in the absence of a guaranty.

How to Protect Your Business From Ruinous Litigation

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Vincent DiCarlo has represented clients in a wide variety of civil proceedings before state and federal courts, administrative agencies, and panels of arbitrators, with special emphasis on investor complaints, investment disputes, securities compliance, business litigation, and securities fraud. Personally, and through his of counsel relationship with the law firm of Bartel Eng & Schroder, Mr. DiCarlo is also able to provide a range of both routine and sophisticated transactional services that have been carefully selected to meet the needs of businesses. Areas of transactional services include contracts, the issuance of securities, corporate finance, banking, corporate governance, mergers, acquisitions, reorganizations, contests for control, intellectual property, taxation, bankruptcy, creditor arrangements, and regulatory agency law.



Vincent DiCarlo, after his graduation from Hamilton College and Cornell Law School, was appointed in 1978 as an Assistant District Attorney in Brooklyn, New York. As an Assistant District Attorney, Mr. DiCarlo investigated, indicted, and tried a wide variety of cases including fraud, official corruption, and arson.

In 1982, Mr. DiCarlo joined the Division of Enforcement of the Securities and Exchange Commission in Washington, D.C., where he served until 1986. While there, he investigated and litigated complex matters involving violations of the federal securities laws including stock manipulation, faulty accounting, false disclosure, and insider trading. Mr. DiCarlo also advised the Commission concerning the federal securities laws as they relate to registration of securities,

disclosure, financial reporting, underwriting, trading, and financial projections. Mr. DiCarlo conducted the Commission's investigation into the estimates of construction costs disclosed by the Washington Public Power Supply System in connection with the largest municipal bond default in history.

In 1988, Mr. DiCarlo joined the predecessor of the law firm Bartel Eng & Schroder as a litigation associate. He became a shareholder of the firm in 1992. In 1994 he started his own practice. Since 1988, Mr. DiCarlo's practice has included all kinds of business and commercial litigation in both state and federal court. He has represented clients in matters involving securities fraud, commercial leasing, real estate partnerships, construction law, wrongful termination, partnership disputes, fights for corporate control, Securities and Exchange Commission enforcement, broker-dealer regulation, insurance practices, civil rights, antitrust violations, equipment leases, securities compliance, tax law, libel, personal injury, interference with economic advantage, accountant's liability, professional malpractice, enforcement of judgments, and breach of contract.

Mr. DiCarlo has taught continuing legal education courses and published professional articles on the law of evidence, effective and economical pretrial discovery, spoliation of evidence, federal jurisdiction, and arbitrations. He also lectures business groups on how not to get sued, how to control the high cost of litigation once it starts, and the effective use of arbitration clauses in employee and vendor contracts. He has been awarded an A-V rating by the Martindale Hubble legal directory, reflecting its highest rating for both ability and ethics. He is also a member of the New York Bar and a licensed real estate broker.

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General Strategies for Avoiding Litigation

Sooner or later, most businesses will be sued by one of their employees. Most of these suits would not be brought without two essential ingredients—a motivated employee and a triable case.

In order to avoid lawsuits, you systematically look at each of the areas that most often cause problems and implement practices that are designed to avoid motivating the employee and to make the case against you untriable by establishing and documenting your defenses. Problem areas that should be examined include claims for wrongful discharge, unpaid leave or overtime, defamation, and discrimination or sexual harassment.

1. How to Avoid Motivating the Potential Litigant.

Many people live their entire lives without ever suing anybody. When an employee goes to see a lawyer, it generally means that the litigant is truly angry, or has dollar signs in his eyes, or both. Therefore, by treating your employees fairly and with respect, and by implementing sound procedures that will keep you from presenting a tempting target, you can avoid many potential lawsuits. The specific ways that you do this are covered below in connection with each of type of claim.

2. How to Discourage a Plaintiff's Lawyer

People generally do not bring their own lawsuits. Nor will most of your employees have enough money to pay a lawyer \$100 to \$200 per hour to prosecute their claims through the courts. This means that the vast majority claims that are brought against employers are being brought by lawyers who have agreed to take the case for a contingent fee.

Lawyers generally are not willing to invest the time necessary to pursue a case for a contingent fee unless they think they have a good chance of winning and the prospective damages are substantial. Therefore, if you can make the potential cases against you look like losers to a plaintiff's lawyer, you can usually avoid a lawsuit.

3. How to Preserve and Document Your Defenses

You make the case against you look like a loser by preserving and documenting your defenses. Below we will explain how to do this in the context of some of the most common claims. However, there are some general principles that may be helpful.

Everyone will tell you to have thorough documentation. However, this advice will not help you with the two really tough issues: what to document and how much documentation is needed.

4. What to Document

Documentation is a two edged sword. It is common knowledge that your own documents can be the most damaging evidence against you in a lawsuit. There is no way to avoid the chance that one of your documents will end up hurting you. However, you can minimize this risk by knowing what to document.

You document your defenses, that is, the facts that show that, in each case, you acted fairly and properly. For example, you would document the fact that you gave a warning, that you specified consequences for noncompliance, that you did not make any promises, that you made an accommodation for a disabled employee, that harassment is forbidden in your company, that you did an investigation of a complaint, and that you had a good reason for discharging an employee.

While you do not create records that are misleading by omission, you need not and should not go out of your way to document obviously adverse facts. You should most especially not document your unspoken fears, conjectures, speculations, and doubts.

For example, if you are at a meeting at which a problem is being discussed, do not record what was said by the participants. And most especially do not record your concerns. You would be amazed at how many people take notes, which will probably have to be given to opposing counsel, that say things like "uh oh, we may have a problem here" or "could be a disaster." With documentation like that, it probably will be.

However, if your company is following sound procedures, it is best to assume that documentation is desirable, unless that is obviously not the case.

5. How Much Documentation is Needed

Once you have decided that a fact should be documented, you have to decide how much documentation is enough. To do that you use DiCarlo's law of documentation, which states that the amount of documentation that is needed for any fact is in direct proportion to the amount of danger inherent in being unable to prove that fact. In other words, the more risk, the more documentation.

The lowest level of documentation is internal memoranda, records, or notes. These may be sufficient for many routine purposes, such as a first warning to an employee about a tasteless joke.

Higher risk means more documentation. The second level of documentation is a document that you give to the employee, like a letter or a memorandum to the employee confirming your warning about a more serious problem.

High risk requires a high degree of documentation. The third level of documentation is a document that the employee signs, like an employment agreement, an annual acknowledgment, an evaluation, or a memorandum about a situation that may result in discharge or disciplinary action. For certain kinds of meetings, you will want to have a second manager present as an additional witness. Your instincts, if you learn to pay attention to them, will usually be a good guide to when you are dealing with a risky situation.

How *Not* To Get Sued By an Employee

1. The Four Most Common Ways to Get Sued

The four most common kinds of claims by employees are for wrongful discharge, claims for unpaid leave and overtime, defamation, discrimination and sexual harassment. We will explain each one in turn below.

2. Your Friend the Annual Acknowledgment

The most useful single document for avoiding a lawsuit by one of your employees is an annual written acknowledgment.⁽²⁾ Plaintiffs' lawyers hate employee's acknowledgments, and with good reason. A good recent acknowledgment cuts off many of their favorite theories at the knees, and can prevent them from even taking a case, let alone filing a suit. It can also give you grounds to win the case before trial by a motion for summary judgment. Haggard v. Kimberly Quality Care, Inc., 39 Cal.App.4th 508 (1995).

A good acknowledgment should have a preamble and should cover at least the following areas: receipt of the sample contract, the at-will employment relationship, the lack of any promises of tenure or advancement, the lack of uncompensated overtime, the amount of any accumulated leave, and the lack of any discrimination or harassment.

The preamble should say that the employee need not and should not sign the form unless the statements in it are completely true and accurate. It should instruct the employee to talk to certain specified officials of the company before signing the acknowledgment if any changes or corrections are necessary to make it completely accurate.

After the preamble, the employee acknowledges that he has received the office manual effective as of a certain date, and that he understands that it is his responsibility to familiarize myself with the information, procedures, and policies described in that manual. The employee agrees to abide by the principles and practices explained in the manual, and to contact certain specified officials of the company if he has any questions about its contents. The employee acknowledges that the policies and procedures contained in the manual are subject to change, and that the manual is not intended to be and does not constitute a contract of employment.

The employee then acknowledges that no promises or assurances of any kind were made to him to accept or to continue his employment, that he knows that no one is authorized to make any such promises, and that any such promises could not reasonably be relied upon.

Next, the acknowledgment says that the employee understands and agrees that his employment is "at will," which means that either the Company or the employee may terminate the employment at any time that either of them desires it, with or without any reason, and that no written or oral promises, assurances, or representations to the contrary, whether express or implied, have been made to him at any time, whether before or during his employment.

Overtime and leave come next. The employee warrants and represents that, since he was first employed by the company, he has not worked any overtime that he has not reported in writing to certain designated officials of the company and that, as of the date of the acknowledgment, he has not worked any overtime, holidays, or other time in addition to normal office hours for which he have not already been properly compensated at the proper overtime rates. He states the number of hours of untaken leave he has accumulated as of the end of the last completed pay period.

Finally, the acknowledgment deals with discrimination and harassment. The employee warrants and represents that, since he or she was first employed by the company, he or she has not been the victim of, or witnessed any evidence or indication of, any form of harassment or discrimination at or by the company based upon race, color, religious creed, sex (including gender harassment, and harassment due to pregnancy, childbirth, or related medical conditions), marital status, age, national origin, physical or mental disability, or ancestry, other than any incident that he or she may already have reported in writing to certain designated officials of the company. As to any incident that the employee may have reported, and of which the employee may have been the victim, the employee acknowledges that he or she has been informed of the outcome of the company's investigation into the matter.

The acknowledgment should be signed by the employee and a supervisor, who will then be able, if necessary, to testify to its due execution, and should be kept in the personnel file for at least four years after the employee leaves the company.

You should have your lawyer prepare or review your form acknowledgment to make sure that it is complete and does not contain anything that can be used against you.

No document, and no other preventive measures, can completely eliminate the risk of getting sued. However, if you take the time to prepare a thorough employee acknowledgment, use it consistently, and keep the executed copies in a safe place, it can be the cheapest and most effective lawsuit repellent that you ever obtain.

3. How to Keep Your Sample contract from Biting You

Your employee policy manual can either be your best friend or your worst enemy, depending on what's in it. Most businesses have an sample contract, but many of them simply use whatever form they get from a book, a friend, or the internet. They fail to analyze their manual carefully to make sure all the essentials are included and the booby traps are excluded.

If you are sued by an employee or ex-employee, you can be sure that his lawyer will not be so casual about what you have put down in black and white. Now is your chance to make sure that the hostile lawyer won't like what he sees! If you follow a few simple rules below for improving your policy manual now, you may be able to avoid a lawsuit entirely, or at least substantially strengthen your position in case you are sued.

Every sample contract should include a prominent disclaimer saying that it is not and does not constitute a contract of employment. Many a lawsuit is brought by an ex-employee who claims that some provision or other in an employee policy manual constituted a binding commitment that was breached by the company. (*We assure you that JIAN's Employee Manual Builder does not! – ed.*)

Then, go through the manual and systematically strengthen the documentation of your at-will employment relationship. The at-will relationship is your first line of defense in any wrongful termination lawsuit, and you should bolster it wherever and whenever you can.

Start by including a general section affirming the right of both the employer and the employee to terminate the employment at will either with or without notice, and with or without cause, and the employer's right to change the conditions of employment at will. Add a statement that no one in your company is authorized to represent anything to the contrary, except in a formal written contract of employment that is signed by a designated officer. Finally, require employees to report any instances of unauthorized promises or representations to the contrary.

Repeat the at-will affirmations in connection with each specific area in which there is a danger of drawing an inference of anything but a pure at-will relationship. For example, if you have grievance procedures, include a statement that those procedures are subordinate to both parties' right to terminate with or without notice and with or without cause. If you have lists of prohibited activities or activities that may lead to specific disciplinary actions, say that those consequences are neither exclusive nor meant to preclude other or more drastic action.

Don't stop yet. If you have probation provisions, say that completing probation does not alter the at-will relationship. If you have lists of factors that may be considered in decisions about promotions, say that the listed factors are given as examples only, are not mandatory or exclusive, and are not meant to constitute a promise of promotion or continued employment. Keep going through the manual until you have identified and neutralized all similar potential problem areas.

Next, start at the beginning and go through the entire manual again looking for and eliminating anything that is superfluous or unnecessary. There is always a chance that even the most seemingly vacuous drivel will come back to bite you, so don't say anything without a good reason. As you go through the manual, look for phrases like "employer shall" and "employer will." Change every instance of "shall" and "will" to "may." Look for any language that could be tortured and twisted by a crafty plaintiff's lawyer into a promise or commitment and take it out.

Once you have given your sample contract a thorough going over, there are still a few more necessary tasks to complete. Many businesses with perfectly adequate policy manuals run into a buzz saw because they fail consistently to implement these three simple but essential follow-ups.

First, you should carefully review and update your sample contract at least once a year.

Second, you must have records that will enable you to determine and produce a copy of the exact version of the manual that was in effect at any given time. Therefore, the cover of each manual should include an effective date and you should keep each succeeding version of the manual in a chronological file.

Third, you should distribute the manual to all your employees and get a signed acknowledgment from each of them at least once a year. The acknowledgment should say that the employee has received and read the policy manual effective as of the date on the cover, that the employee understands that it is his responsibility to familiarize himself with the information, procedures, and policies described in that manual, and that the employee agrees to abide by the principles and practices explained in the manual.

The acknowledgment should go on to say that the employee understands that he should contact certain designated officers of your company if he should have any questions or need clarification as to the content or interpretation of the policy manual. Finally, the acknowledgment should say that the employee understands that the policies and procedures contained in the sample contract are subject to change, and that the manual is neither intended to be, nor does it constitute, a contract of employment.

By the way, the annual written acknowledgment can and should do a lot more than bulletproof your policy manual. A future column will be devoted entirely to how to make the most of such one. Nothing you do can eliminate all risk of being sued. However, if you carefully follow the steps above, you can at least be confident that you will not be ambushed by your own policy manual.

4. How to Hire and How to Fire

Hiring and firing well can go a long way toward not motivating a potential litigant. You do this by not hiring people that you will be likely to have to fire, by not surprising your employees, by avoiding

procrastination when disciplinary action becomes necessary, by conducting a sound exit interview, and by getting a release. We will deal with each of these things below.

5. How to Hire

It should be obvious that the better you hire, the fewer problems you are going to have. Therefore, one of the most important ways you can avoid being sued by an employee is to hire good employees. Do not be seduced by the availability of probation periods to hire marginal persons in the fond hope that it things might work out. Remember the rule that more than 90% of all mistakes in judgment are due to wishful thinking.

When you hire you should always use an employee application and all job references. You also should check litigation databases to see whether the employee has sued his previous employers! Now that you can get this information on the internet in five minutes either cheap or for free, there is simply no excuse not to do so. If you don't know how, ask your lawyer. If he doesn't know how, get another lawyer.

While it is important to gather relevant and proper information about prospective new hires, it is equally important to avoid inquiring into protected status issues. Don't ask about an applicant's marital status, health, or childcare arrangements.

If you want to do drug testing, you should consult your lawyer. Such testing is sometimes permissible, and sometimes impermissible depending on the circumstances and the nature of the job. Also, the law in this area is developing. However, in general, it is easier to justify pre-employment testing than post-employment testing. Loder v. City of Glendale, 14 Cal.4th 846 (1997).

6. Avoid Procrastination

Someone who has been working for you for a long time is much more likely to sue you for being terminated. Usually, the problem employee realizes that he or she is in disfavor, and procrastination causes a buildup of resentment. Longevity is also, a factor that can be used by a court or a jury as a basis for finding that an implied in fact contract. Moreover, procrastination gives you more time to make a mistake, and it carries with it a risk of enhanced damages for emotional distress.

By far, the best time to terminate is during the initial probationary period right after hiring. Therefore, you should not extend the probationary period without a really good reason and you should not keep a questionable employee past the initial probationary period in the hope that he or she will improve. If, after the initial probationary period, and after a fair warning, the employee fails to bring his or her performance up to a specific standard, end the employment. Do not let a bad situation drag on for months and years while the employee rankles and dreams of sweet revenge.

7. How to Conduct a Safe and Effective Exit Interview

Exit interviews are useful, and should be done whenever an employee leaves your company, whether voluntarily or not. They are also dangerous. It is therefore important that the managers who are responsible for conducting your exit interviews have a clear idea of the matters that need to be covered, the things that it is ok to say, and the things that, if said, may get you into a lawsuit.

Because they are the most troublesome, we will focus on exit interviews of employees who you have discharged. It is best to have at least two managers present at such an interview in case there is a dispute about what went on in it.

First, tell the departing employee that the company has decided to terminate his employment due to unsatisfactory performance, tardiness, failure to follow instructions, reduction in force, or other specified

reasons that have been pre-approved by your lawyer. You should always have, and be able to document, a factually solid, sensible reason for terminating an employee, regardless of whether or not the employment was at will.

Even if you don't consult your lawyer every time that you discharge an employee, you should ask him about any reason that you may have that is not on the list above. You need to be sure that you don't fire someone for a reason that is improper or that can easily be made to look suspect.

Remind the departing employee of your previous discussions, if any, with him concerning the problems for which he is being terminated. Tell him, if applicable, that, as a result of the lack of sufficient improvement in the relevant areas, you cannot continue his employment.

If, as you should, you are offering the employee a severance package that contains releases of liability, tell him that you are willing to offer him a severance agreement that would give him certain benefits. Give the employee your standard termination letter,⁽³⁾ the severance agreement, and an extra copy of the usual COBRA notices. The COBRA notice must also be sent by mail within 14 days.

Give the employee the booklet from the California's Employment Development Department concerning unemployment benefits. If you don't have this, you can get it from EDD or your lawyer.

Listen carefully and patiently to what the employee has to say, especially including any complaints he may have. If he expresses disagreement with the reasons for his termination, ask him why he thinks that, and later consider what response may be appropriate, perhaps in consultation with your lawyer. Do not argue with him. Simply say that you are sorry that you do not agree with him and are surprised at any untrue statements that he may make.

Ask the departing employee whether he has any documents or records belonging to the company, including lists of clients, and arrange for their return. Remind the employee that he has a continuing obligation to maintain the confidentiality of the company's business after his departure. Make arrangements for the employee to remove his personal belongings at your mutual convenience.

Ask whether the employee's records relating to compensation are up to date. These might include records relating to sales or leave taken. Tender the employee a check for all accrued compensation, including any accrued salary, leave time, vacation time, commissions, or other amounts that may be due. If there is any disagreement about compensation, tender the amount that you believe you owe, and offer to get back to the employee as to any disputed amount.

There are certain things that, while not necessary, probably won't get you in trouble. For example, It is ok to express your regret that things did not work out well enough for you to continue the employment of departing employee. It is also ok to remind him of any efforts that you made to help him to meet your requirements. You may wish him good luck.

Other things are not ok, and may be expose you to litigation. Do not argue with the employee. It is useless, creates bad feelings, and may cause you to say something that you will heartily regret hearing repeated in court.

Do not tell the departing employee or suggest to him in any way that he is incompetent or dishonest. This is important since such statements may form a basis for tort liability for defamation. Do not suggest that the amount or timing of payment for accrued compensation depends on whether he signs the severance agreement.

Do not promise the employee anything that is not described above, for example, a good recommendation or help in getting another job. Recommendations or references can be a thorny area that involves potential liability to suit, so if someone asks for one you should consult with your lawyer about what your policy should be on the subject. Randi W. v. Muroc Joint Unified School Dist., 14 Cal.4th 1066 (1997) (former employer held liable for negligent recommendation where teacher sexually molests student at new job); Jensen v. Hewlett-Packard Co., 14 Cal.App.4th 958, 965, 18 Cal.Rptr.2d 83 (1993) (libel action may be based on false accusations in employee evaluation form of criminal conduct, dishonesty, incompetence, or reprehensible personal characteristics or behavior); Marshall v. Brown, 141 Cal.App.3d 408, 412, 190 Cal.Rptr. 392 (1983) (wrongful interference liability based on negative comments in former employer's evaluation letter).

Do not give a false reason for the termination, or deny the true reasons. People sometimes are tempted to do this out of a misguided desire to avoid hurting the departing employee's feelings. You should resist that temptation.

If anything unanticipated or troublesome comes up, or the employee accuses you or a fellow employee of some kind of improper behavior, such as improper discrimination or harassment, postpone any response until you have had a chance to carefully consider the information, perhaps in consultation with your lawyer. Don't try to improvise a response.

A carefully structured, well thought out exit interview can ensure that you carry out necessary transitional tasks, end the employment relationship without unnecessary hard feelings, and help to keep you out of court. It should be part of every employer's regular practice.

Claims for Wrongful Termination and How to Avoid Them

As with all claims, you avoid claims for wrongful discharge by not motivating the employee and by making the case un-triable. For wrongful termination, you do this by preserving and documenting the “at will” relationship, by using the probationary period to discharge employees who are not fully satisfactory, by documenting the existence of good cause for any adverse personnel action, by documenting the lack of bad cause, and by getting a release if you can.

A case for wrongful discharge can be brought under many different legal theories, and the usual complaint contains at least several of such theories. The usual ones are Formerly, punitive damages were available. Foley eliminated punitive damages for claims for breach of contract, making these claims attractive to plaintiffs. However, compensatory damages are still available under the contract theories, and punitive damages are still available for many of the non-contractual theories. Damages for emotional distress are also available under certain theories.

The most common legal theories are breach of express contract, breach of implied contract, breach of the covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, fraud, and defamation.

Claims for breach of express contract may be oral or written, and may be based on personnel manuals or memoranda or a job application.

Claims for breach of implied contract may be brought where the circumstances give rise to reasonable expectation of tenure on good behavior. Implied contract theories are strongest where the employee has been working for the company for a number of years, though long service is not a prerequisite.

The covenant of good faith and fair dealing is implied in law into every oral and written contract in California. Claims for its breach are therefore a species of claim for breach of contract. The main significance of this covenant is that, until recently, breaches of this particular covenant, unlike the others in the contract, was considered to be grounds for punitive and other tort damages. The covenant of good faith and fair dealing does not convert an at will employment relationship to employment on good behavior.

Negligent or intentional infliction of emotional distress can be based on virtually any kind of behavior that is considered to be unkind or improper. Therefore, avoiding this claim is usually a matter of not doing something that will be seen as cruel or oppressive by a judge or jury.

Fraud usually comes into complaints for wrongful discharge in the context of allegedly untrue statements or insincere promises that were made to the employee in connection with his employment. A plaintiff's lawyer will often stretch to bring in a claim for fraud because it carries with it the possibility of both punitive damages and damages for emotional distress.

Until recently, defamation claims were fairly common in complaints for wrongful discharge. There were two common kinds of defamation theories. One was that, in the course of deciding to fire the plaintiff, his supervisors talked about him to each other and to the other employees about the cause for the discharge, thereby defaming him. This theory is no longer as common because of recent appellate cases that say that such internal statements are privileged where they are limited to persons who have responsibility for making the personnel decision and there is no evidence of bad faith. See, e.g., Cuenca v. Safeway San

Francisco Employees Fed. Credit Union, 180 Cal.App.3d 985 (1986).

The second common defamation theory was based on unfavorable statements made by the former employer when it was called by potential new employers. While there have been some legal inroads into this theory, it is still alive and well. Robomatic, Inc., v. Vetco Offshore, 225 Cal.App.3d 270 (1990). Therefore, when called by a potential new employer about a former employee, the safest course is, as a uniform matter of policy, only to confirm the position or positions held and the dates of service.

Luckily, you don't need to know all of the details of each legal theory that may be used by a potential litigant in order to take sensible and effective steps to avoid being sued. Likewise, we will not belabor the obvious, by dwelling on the need to tell the truth in your business dealings. Nor will we assume that you have nothing else to do in your business than try to avoid litigation. Rather, we will discuss practical and non-obvious measures that can really do you some good, without absorbing an unreasonable amount of time and effort.

We have already talked about how to avoid motivating the employee by not hiring people that you will be likely to have to fire, by not surprising your employees, and by avoiding procrastination when disciplinary action becomes necessary. Now we will talk about how to make the former employee's case untriable, beginning with conduct of the internal investigation.

1. How to Conduct an Internal Investigation that Won't Backfire

There are many circumstances in which your business may need to conduct an internal investigation. Since one of the most common such situations is the investigation of a complaint of sexual harassment, we will use that as an example.

a. Privileges

You should consider involving your legal counsel at an early stage of any internal investigation where there is an indication of a serious problem. This can be important if there is a later lawsuit.

If your internal investigation is properly conducted by a lawyer or under his supervision, some or all of the written materials and communications related to the investigation may be protected from future disclosure to parties adverse to you by attorney-client privilege, the attorney work product rules, or both.

Communications between your lawyer and an agent of the company may be subject to attorney-client privilege. This privilege is, in some respects, narrower than work product protection. However, it is absolute: if it exists and is not waived, an adverse party cannot get the substance of the communication no matter how great its alleged need for the information. In order to avoid waiving the privilege, the privileged communication must not be disclosed to anyone other than the attorney and the client. In the case of a corporation, this means that only the corporate agents responsible for seeking advice from the lawyer should be privy to their communications.

Second, communications between the company and the lawyer should be segregated from other material that may not be privileged or whose attorney-client privilege may later be waived.

Other material that is developed in the investigation, because it is being done by your lawyer or under his supervision, and in contemplation of possible litigation, may enjoy limited protection as attorney's work product. Examples would be notes of interviews with witnesses. This information could be obtained later in litigation by order of a judge under certain circumstances.

In order to maintain these privileges, you should segregate any notes or other documents that you

generate in the course of this investigation in a separate file. Mark each document that was prepared specifically for the lawyer's review "Privileged and confidential communication for legal counsel only." Keep communications to the lawyer separate from other material, such as your notes, that may enjoy only work product protection.

You should do your best to maintain all applicable privileges. However, it is best to assume that there is some possibility that anything that you write down will eventually fall into the hands of any eventual opponents. Therefore, it is important to make records only of matters that are necessary and pertinent. Please do not record your mental impressions, guesses, opinions, conclusions, and so on.

b. Goals

The goal of, say, an investigation of a complaint of sexual harassment is to conduct a fair, thorough, and expeditious inquiry into the complaint, to determine whether anyone involved has been guilty of any misconduct, and to determine any additional facts that may be relevant to your determination of what action is necessary or desirable with respect to any of your employees.

c. Procedures

In order to respect the privacy of the parties, and to ensure a timely completion of the investigation, it is important to attempt to avoid straying from issues that are relevant to these goals. In particular, you should avoid any unnecessary inquiry into anyone's religious beliefs or theories, private sexual practices or activities, or other personal business. You should make your desire to avoid unnecessary prying clear to the witnesses who are interviewed and try to keep our interviews focused on the issues. Because of the nature of the issues that have been raised, this will require tact and judgment.

Two officials of the company should be present for each interview. One of them should conduct the interview and the other should take careful notes, which should not be shown to anyone but responsible officials of the company and your lawyer. In order to avoid the appearance of ganging up on the interviewee, the note taker should not ask questions. If the note taker thinks of a question that should be asked, she should make a note of it and discuss it with the questioner during a break.

If a witness expresses a desire to leave, or declines to answer certain questions, you should tell him that, while you cannot require him to cooperate, to the extent that he does not cooperate you may be forced to make whatever decisions are necessary without the information that you are unable to obtain from him. If the witness wants to take a short break, you should of course comply. It is important to be polite and tactful, regardless of any provocation, so that the interview process itself does not become part of someone's complaint.

In an investigation like this, there is a danger of making yourself subject to a claim for defamation. Therefore, it is important not to repeat charges that may have been made against a person or unfavorable facts about him to anyone other than the person himself. If you're interviewing a witness about the possible misconduct of another person, just find out what the witness knows, don't repeat what you may have learned from another source.

You should go into any interview of a witness with an outline of the questions that you intend to ask. However, the outline should not be taken as exhaustive. You will have to follow up on the answers and pursue any relevant further lines of inquiry that become apparent.

If you ask about documents, show them to the witness, then mark the copies that you used so that we will have a record of what you showed her. In addition, after you review these questions, let me know if you

have any questions, additions, or suggestions related to them. Try to let your lawyer know ahead of time when you will be conducting each interview so that he can try to be available by telephone in case any questions or problems come up while it is going on.

Usually, it is best to interview the complainant first. Then, you should prepare an outline of questions for the second witness. Try to be alert to any indications of other possible witnesses who can be interviewed.

d. Closing the Investigation

When your investigation is done, tell the complainant your conclusions and the action, if any, that you took as a result, but do not convey the substance of the statements of any of the other witnesses. If you are not sure whether you might be facing potential trouble, call your lawyer.

2. How to Nail Down the "At Will" Relationship

In California, all employment is presumed to be “at will,” unless there is an agreement to the contrary. Labor Code Section 2922. This means that, in theory, an employer does not need to show that he or she has a good reason to discharge an employee. Mallard v Boring, 182 Cal.App. 2d 390 (1960). However, even where employment is at will, certain bad reasons, like age discrimination, will subject you to liability.

The at will presumption may be rebutted by evidence of any agreement, whether express or implied, and whether written or oral. Pugh v. See's Candies, Inc., 116 Cal.App.3d 311 (1981). You need to preserve and document the at will relationship so that your reasons for discharging an employee will not be second-guessed by a judge or a jury. You do this by, first, watching what you say and what you write. For example, praising an employee where it is deserved is good management; vague promises of reciprocal loyalty or future rewards are asking for trouble.

You should also carefully review your policy manual and personnel memoranda. Any vague promises or assurances should be eliminated. If the policy manual contains any specific causes for discipline or discharge, there should be a disclaimer in the same section clearly reaffirming that, notwithstanding the causes listed, continued employment is at will and can be terminated with or without cause by either the employer or the employee.

You should also get periodic written acknowledgments of the at will relationship. These acknowledgments should be contained in the job application, the policy manual, the periodic written reviews, and in an acknowledgment that each employee should sign at least annually.

This annual signed acknowledgment is one of your most powerful tools. It should be reviewed by your lawyer and should contain a clear acknowledgment and agreement that the employment will continue only so long as both employer and employee wish, that termination may be for any reason or for no reason, and that no contrary promises or statements have been made.

3. Establishing Termination for Good Cause

Once you have done everything possible to establish and maintain an “at will” employment relationship, it does not mean that you can neglect to have and document good cause for any discharge or other adverse action. You must always have and document good cause and warnings, even though they may not theoretically be necessary.

There are several good reasons for this. The first is that, if you don't have a good reason for what you do, people will be ready to believe that you had a bad reason. Even in an "at will" employment, you cannot

fire someone for a reason that is "contrary to public policy" or that is specifically forbidden by a multitude of laws and rules.

Second, no matter how hard you have tried to establish and maintain at will employment, there is no guarantee that you will prevail on this issue at trial. Therefore, it is essential to establish a backup defense of good cause.

When it comes to establishing the factual basis of good cause, such as, say, the fact that the employee was harassing a coworker, you do not have to prove that you were right. Of course, you should always try to make sure that you are right. However, there are cases that hold that a reasonable belief may be good enough. Hicks v. Pacific Bell (Second Dist. 2/5/97). If you have conducted a fair and thorough investigation using the methods described elsewhere in this manual, you should be able to establish your good faith belief in the truth of your facts.

Some specific causes for discharge that have been upheld by the courts are failure to perform, reduction in force, misbehavior, and failure to follow proper instructions. This list is not exclusive.

These are considered good cause for employment at will or for an indefinite term. The list of causes for terminating an employment contract for a definite term before its expiration is shorter, and is given in Section 2924 of the Labor Code.

In order to strengthen your hand in establishing the validity of your usual reasons for termination, you should include a nonexclusive list of causes for termination in your policy manual.

In addition to documenting your good cause, you should take equal care to document a lack of bad causes. An employee often claims bad motive on the part of one or more of the managers who were involved in his termination. Therefore, it is a good idea to anticipate this possibility by involving more than one manager in every discharge.

Where there is a specific anticipated complaint, involve someone who is immune from that complaint in the process. For example, where you anticipate a complaint based on gender or race, involve a manager of the employee's gender or race. Where you anticipate a complaint based upon personal conflict, make sure that all of the evidence is considered by and the ultimate decision is made by a person or persons who have not been involved in the alleged personal conflicts.

4. Avoiding the Defamation Theory

Defamation includes libel and slander. Oral defamation is called slander. Written defamation is called libel. A claim for defamation often accompanies claims for wrongful discharge or be an independent suit.

The elements of a claim for defamation are a false, unprivileged, statement to a third party that causes damage to reputation. You make this case untriable by avoiding and documenting the avoidance of each of the five elements of the claim.

a. Statement

In order to have a defamation you have to make a statement, whether orally or in writing. Therefore, it is a good idea not to say anything about an employee that you don't need to say.

The prime example of where making unnecessary statements is in connection with job references. The safest policy about job references is, as a matter of uniform policy, to confirm the positions held and the dates of employment, and to say or confirm nothing else.

Saying anything else is risky, whether regardless of whether the reference is a good one or a bad one. If you give a bad reference you risk a claim for defamation or interference with prospective economic advantage. Jensen v. Hewlett-Packard Co., 14 Cal.App.4th 958, 965, 18 Cal.Rptr.2d 83 (1993) (libel action may be based on false accusations in employee evaluation form of criminal conduct, dishonesty, incompetence, or reprehensible personal characteristics or behavior); Marshall v. Brown, 141 Cal.App.3d 408, 412, 190 Cal.Rptr. 392 (1983) (wrongful interference liability based on negative comments in former employer's evaluation letter). If you give a good reference, and the employee does something awful when working for the new employer, you could be held responsible for giving a false or negligent reference. Randi W. v. Muroc Joint Unified School Dist., 14 Cal.4th 1066 (1997) (former employer held liable for negligent recommendation where teacher sexually molests student at new job).

b. False

In order to be guilty of defamation, your statement must be false. To use the common expression, in defamation cases "truth is a defense." Therefore, when you must say something bad about an employee, or anyone else for that matter, make sure that you can prove that it is true.

c. Unprivileged

Defamation is defined as an "unprivileged" statement. Two of the most important of these privileges are contained in Section 47 of the Civil Code.

The first of these is the privilege for statements made in a judicial proceeding. Civil Code Section 47(b). This privilege is absolute, and applies to defamation actions, as well as other kinds of claims. The practical consequence of the litigation privilege is the following rule: if you've got to say something bad about someone, say it in litigation.

The second most significant privilege in Section 47 is the privilege for statements made in good faith by one person who has a legitimate interest in the subject of the communication to another person who also has such a legitimate interest. This privilege should protect statements like job references and internal deliberations about personnel actions. Cuenca v. Safeway San Francisco Employees Fed. Credit Union, 180 Cal.App.3d 985 (1986).

However, the problem is that this privilege, unlike the litigation privilege, is not absolute. The plaintiff can defeat it by showing bad faith. Robomatic, Inc., v. Vetco Offshore, 225 Cal.App.3d 270 (1990). Usually, the plaintiff does this by alleging that the statement was made with the intent to harm him.

Notwithstanding the fact that the legitimate interest privilege requires good faith, it is worth having. The practical consequence of this privilege is that, if you must say something bad about someone, and you cannot say it in litigation, say it only to someone with a legitimate interest in the information.

d. Third Party

Defamation requires that a statement be made to a third party. Therefore, if you have something critical to say about an employee, say it to the employee, not his co-workers, your customers, or other persons. This is especially important to remember when you are doing an internal investigation. When you are interviewing a witness, don't tell him the bad things that other witnesses have said about anyone.

e. Damages

A defamation claim requires that the plaintiff prove that he was harmed by the statement. Certain kinds of statements are especially risky and considered damaging as a matter of law without proof. Examples of

these are allegations of dishonesty and incompetence. Therefore, if you can reasonably formulate your reasons for a discharge without using alleging dishonesty and incompetence, you should do so. For example, instead of saying that the employee stole the company's money, you can usually say that he was unable satisfactorily to account for it. Instead of saying that the employee is a liar, you can usually say that some specific statement appeared to be inaccurate.

Claims for Harassment & Discrimination

1. A Practical Approach to Avoiding Litigation

You, as an owner or manager of a business, will never be able to learn all of the laws and rules relating to workplace discrimination and harassment. They are numerous, Byzantine, sometimes contradictory, unpredictable, and constantly changing. What you can and should do is take practical steps that have a good chance of keeping you out of trouble.

Among the many protected classes these days are race, color, religion, sex, gender, pregnancy, childbirth, marital status, age, national origin, physical or mental disability, medical condition, ancestry, and, in some places, sexual orientation.

Luckily, preventing harassment and discrimination and avoiding liability for what you can't prevent require roughly the methods. Here's how to protect your business without becoming obsessed about it.

First, have an anti-discrimination and anti-harassment policy and put it in your written policy manual. The manual should set clear procedures for reporting problems, with plenty of alternative options, so that there will be ways to get around alleged perpetrators in the chain of command.

Require all employees to report all cases of harassment or discrimination of which they are not themselves the victim. Encourage victims to do the same.

Document every complaint that you get. Investigate every complaint thoroughly and involve legal counsel where appropriate. Involving your lawyer at an early stage where there is an indication of a serious problem can be important if there is a later lawsuit.

If your internal investigation is properly conducted by a lawyer or under his supervision, it may be possible to shield damaging documents that are created as part of your investigation from disclosure in any later lawsuit. This protection is called the "work product" doctrine and, while the protection is not absolute, it is well worth preserving. When your investigation is done, tell the complainant your conclusions and the action, if any, that you took as a result, but do not convey the substance of the statements of any of the other witnesses.

If you are regularly using the all-important employee's annual acknowledgment (and you should!), it should cover the area of harassment and discrimination. This section of the acknowledgment should list all the forbidden kinds of conduct. It should then contain a statement by the employee that, since first being employed by the company, he has neither been the victim of, nor witnessed, any incident of such conduct, other than any incident that he may already have reported in writing to specified company officials.

Whenever you must take action adverse to a member of a protected class (or any other employee, for that matter), always document your reasons. Where possible, involve other members of the protected class in the disciplinary process. If it becomes necessary to discharge a member of a protected class, it can be harder for the discharged employee to make a case against you if you replace him with another member of the same protected class.

There are also many positive things that managers can do to promote a workplace that is free of discrimination and harassment. One of the most effective is for you, as a manager, to model the behavior you seek to establish.

Managers should always treat every employee politely and with respect. They should always strive to see employees as people, not as representatives of a class. Managers should always avoid crude jokes, and comments or nicknames that may be seen as pejorative. In fact, managers should always avoid any references at all to age, gender, ethnicity, or membership in any protected class, unless they are clearly necessary and appropriate.

You should never indulge in or tolerate pejorative talk or conduct on the grounds that it is "all in fun," that the butt of the comments was responding in kind, that they "build camaraderie," or the like. Believe it or not, many people will try to defend their abuse by saying things like "he knows I only say things like that to people I really like." Such excuses sound really lame in court.

These things may seem obvious, but you would be surprised at what some otherwise intelligent managers will say to a group of employees at, say, the company Christmas party.

Often, a person who has made a thoughtless comment will respond to a tactful conversation with a supervisor. For example, an employee who habitually refers to another employee as the "old man" might simply be asked whether he has thought about how his conduct might hurt the other employee's feelings, and reminded that, in any event, it is inconsistent with the company's policy of showing respect for coworkers.

A manager or other employee should not be allowed to laugh off unacceptable behavior. If the conduct is sufficiently egregious, or does not respond to correction, you should clearly explain to the offender that, if he will not change his conduct, you will be forced to discharge him. Failure to do so could put your entire business needlessly at risk.

The bottom line is that you should not be tempted to become cynical or careless about matters of harassment or discrimination. Yes, the laws sometimes seem contradictory. Yes, there is no way to be sure of being completely safe. However, if you follow the rules above, your chances of falling victim to a lawsuit over these issues can be greatly diminished, and you will have created a healthier, more productive working environment.

2. Persons with Disabilities

The Americans with Disabilities Act opened up a broad new field for discrimination claims. ADA is so broad and so vague that no one knows its exact limits, including the courts. If you think you may have an ADA situation, you should talk to your lawyer to see what the law is on that particular day in your judicial district.

There are, however, some simple rules that will help you stay in the clear. First, make and document reasonable accommodations of persons who arguably have a handicap. Second, if you need to take adverse action against a person with an arguable handicap, document either

1) his inability to do his job, even after reasonable accommodation, or 2) a reason for action unrelated to handicap.

Claims for Unpaid Overtime, Leave, and Other Compensation

One of the most galling surprises in business occurs when a marginal employee leaves after many years of mediocre performance and then, of the blue, the employer gets slapped with a huge claim for unpaid overtime and leave. Such parting shots are common and can result in payments of tens of thousands of dollars.

If you become the victim of such a claim, perhaps the worst part of it is the knowledge that the whole problem might have been avoided if you had followed a simple procedure.

1. Who Can and Cannot be Treated as an Exempt Employee

Businesses in California are required to pay time and a half to all nonexempt employees who work either more than 40 hours in one week or more than 8 hours in one day. This makes flexible responses to changing workloads and flextime arrangements, such as four day weeks, expensive for the employer. Tracking hours worked and properly adjusting paychecks is also an administrative burden.

As a result, many employers fall victim to wishful thinking by improperly attempting to categorize some or all of their employees as exempt from the overtime rules.

The overtime laws exempt executive, administrative, or professional employees, outside salespeople, and certain members of the employee's family. The terms "executive" and "professional" have been subjected to such abuse these days that it would appear that they could refer to almost anybody. After all, inside salespeople are routinely called "account executives." We are sold "executive" pencil sets, "executive" briefcases, and "executive" clothing.

And isn't everyone who does something for money a "professional" of one kind or another? The people who clear your sewage lines, keep your books, exterminate your cockroaches, fix your car, clean your teeth, and trim your trees all consider themselves "professionals."

However, the courts and the government agencies that enforce the overtime rules do not take such a loose view. If anything, many employees (such as certified paralegals working in a law office) who would probably be called "professionals" in common parlance are not exempt. Likewise, the government often takes issue with a business's attempts to categorize a salesperson as "outside."

2. Claims for Unpaid Overtime

Above, we discussed the proper categorization of persons as exempt versus nonexempt and employees versus independent contractors. Once you realize that you are dealing with nonexempt employees, you must make sure that you properly track and pay for their time.

Just because you don't ask your employees to work overtime doesn't mean that you can dispense with monitoring their working hours. Employees are not permitted to volunteer, and managers must not permit them to work early, late, through lunch, or on weekends without compensation. Most overtime claims are based on such "unrequested" overtime.

Finally, you must document overtime or, just as importantly, the lack of overtime. Timesheets are a good tool for this. They should be signed by the employee and kept in a file for at least four years.

The acknowledgment on the timesheet above the employee's signature should include a disclaimer of any hours other than the ones shown, not just a statement that the hours shown are accurate. It should also say

that the employee has not worked any overtime, other than what may be shown on the sheet, for which he has not already been paid at applicable overtime rates. Even for employees who are not supposed to be working overtime, and have regular hours, a time sheet can be helpful in documenting proper payment.

You should also put provisions in your policy manual clearly saying that no employee is permitted to work overtime, work outside of the office, or work outside of regular hours without advance written approval from specific persons. The policy manual should also say that no employee is permitted to work overtime without being paid for it at the proper rate.

If you follow these steps consistently, you will greatly reduce your chances of getting a post-departure surprise from an employee who claims to have spent more hours toiling without compensation than you ever dreamed, thereby piling up a tidy little severance package for himself.

3. Claims for Unpaid Vacation Time

Most businesses give their full time employees paid vacation time, which usually accrues at a rate of so much vacation leave per week, month, or other period worked. Failing to handle such vacation time properly can result in the buildup, over a period of years, of substantial liabilities, and in large claims by departing employees for unpaid vacation time.

The main problems with vacation leave are unenforceable policies that result in invalid forfeitures, failure to track and document usage, and failure consider how vacation policies may apply to top management.

Because most businesses have learned that vacation time, if untaken, can slowly build to staggering proportions, most of them make some attempt to limit the amount of that obligation in some way, often by limiting the amount of vacation leave that can accrue or be carried forward from year to year. However, in doing so, many such businesses inadvertently creating unenforceable forfeiture provisions that will not prevent the buildup enormous obligations.

The important thing to remember is that vacation time, once accrued, cannot be forfeited and cannot be waived. Once accrued, it must be used or paid. Therefore, "use it or lose it" provisions will not be enforced. On the other hand, caps on accruals will.

What's the difference between an invalid forfeiture and a valid limitation on accruals? Consider a leave policy that says that "any accrued vacation time in excess of two weeks will be lost if it is not used by the end of each calendar year." It will be unenforceable because, as written, it calls for the loss of a portion of the vacation time that has already accrued. Likewise, a leave policy that says "no more than two weeks of vacation leave may be carried from one calendar year to the next" will also be invalid, because what is not carried forward is lost.

On the other hand, a leave policy that says that "once an employee has accrued a total of two weeks of vacation time no additional time will be earned" can be valid, because it stops leave from accruing, rather than causing it to be lost after it is earned. Sophistry? Maybe. Is it the law? Yes.

The second common problem with leave is the failure to track and document its usage. This happens for several reasons. First, while tracking accruals is easy, tracking usage is not. Since leave usually accrues at a regular rate, all you have to do to calculate accruals is to multiply the time on the job by the accrual rate.

On the other hand, usage is usually irregular. The disparity in the relative ease of tracking accruals and usage is exacerbated by the fact that, in any dispute, the burden of proving that accrued overtime has been taken is on the employer.

Moreover, once a dispute arises, I sometimes find that a business has unintentionally generated inaccurate computer-generated records, such as computer-generated pay stubs. Each pay period, the computer, like the enchanted broom in the "Sorcerer's Apprentice," mindlessly keeps adding leave time at the programmed rate to the running total on the pay stub, and if the usage has not been carefully entered into the computer by hand each time it occurred the resulting erroneous documents can be dangerous weapons in the hands of a hostile lawyer.

In order to protect yourself from recordkeeping problems, it is a good idea to address the issue of accumulated leave in your annual employee acknowledgment. The leave and overtime section of the acknowledgment should say how much unpaid leave the employee has accumulated and the language should make it clear that the employee is vouching for the accuracy of the figure.

Finally, in tracking leave time, many businesses overlook their top management and professional employees. These businesses mistakenly assume that such persons, who may be exempt from wage and overtime laws, and who may set their own hours and take time off at their own discretion, will not make any claims for accrued leave.

The fact is that, unless applicable written leave policies or employment agreements explicitly exclude such persons, the presumption is that they accrue leave like everyone else. It may seem silly to track the leave of a company's founder and CEO, but failing to do so has more than once resulted in a claim for years of accumulated leave at a fancy rate.

To summarize, you can avoid most claims for unpaid leave by taking the following simple steps: Make sure your policy manual clearly articulates a valid cap on accruals and not an invalid forfeiture. Record all usage of vacation time. Don't forget the managers and professionals. Get periodic acknowledgments of amount of leave taken and balance left. And be sure to check those pesky pay stubs!

Avoiding Liability for Independent Contractors

The taxing authorities aren't the only potential adversaries interested in treating people as employees rather than independent contractors. A business's customers and others may also be affected.

If someone is an employee rather than independent contractors, it is more likely that a business will be liable to others for their mistakes or misconduct. In general, it is unlikely that a business will be liable on a no-fault theory for the acts of an independent contractor, even though it would be liable on such a theory for an employee.

1. Two Different Kinds of Liability—Direct & Vicarious

Direct liability is liability for one's own acts or omissions. In the context of a corporation, these require involvement by persons whose acts are considered to be the acts of the corporation itself, for example, officers and branch managers. Usually, direct liability requires a showing of fault, though there are some no-fault forms of direct liability.

Vicarious liability is liability for the acts or omissions of others. Businesses are often held vicariously liable without requiring the plaintiff to show any fault or wrongdoing on their part.

2. Theories of Direct Liability

There are two common theories of direct liability. First, a corporation, partnership, or limited liability company is responsible when its officers or managers directly participate in the wrongful act or omission.

Second, entities are sometimes directly responsible for their negligent supervision of a person for under their control.

3. Theories of Vicarious Liability

The most common theories of vicarious liability are aiding and abetting, ratification, and respondeat superior. Because it is so broad and does not require any fault on the part of upper management, by far the most dangerous of these theories of vicarious liability is respondeat superior.

4. Aiding and Abetting

In general, a person, including a corporate person, who aids wrongdoing with the knowledge of the facts is responsible for it. Since this is a fault theory, whether the primary wrongdoer is an independent contractor or an employee, will not make any difference.

5. Ratification

When a person or organization knowingly accepts the benefits of wrongdoing it is said to ratify the wrongdoing and becomes liable. Since this is a fault theory, whether the primary wrongdoer is an independent contractor or an employee, will not make any difference.

6. Respondeat Superior

Merriam-Webster's Dictionary of Law

Main Entry: re-spon-de-at superior

Pronunciation: ri-'spän-dE-&t-

Function: *noun*

Etymology: Medieval Latin, let the superior give answer: a doctrine in tort law that makes a master liable for the wrong of a servant; *specifically* : the doctrine making an employer or principal liable for the wrong of an employee or agent if it was committed within the scope of employment or agency <to recover...upon a theory of *respondeat superior*, it is incumbent upon plaintiff to prove that the collision occurred while the driver was within the scope of his employment —*Perdue v. Mitchell*, 373 So. Second 650 (1979)> —compare [SCOPE OF EMPLOYMENT](#) *vicarious liability* at [LIABILITY 2b](#)

Under the doctrine of respondeat superior, an employer is responsible for the wrongdoing of its employee within the scope of the employment. This is a no-fault theory, and depends upon the existence of an employee-employer relationship. It is not available where the wrongdoer is an independent contractor.

Whether an investor can recover from a broker-dealer on most of these theories will not be affected by whether the registered representative is an independent contractor or an employee. However, the broadest and most generally applicable theory—respondeat superior—does depend on whether the registered representative is or is not an employee.

7. Limitations on Direct Theories of Liability

Direct theories of liability have certain important limitations on them that make them less dangerous than respondeat superior. Direct participation requires that responsible persons of the entity actually participate in the wrongful acts or omissions. This is not common in the usual case of misconduct by a lower level employee. Usually, the supervisors of the employee are unaware of the problem until after it occurs.

Negligent supervision is more common than direct participation, but the plaintiff still has to prove negligence and a duty of care. Negligence is not a no fault theory, and, to win on this theory, a plaintiff must show that reasonably prudent supervision would have avoided the harm.

In order to establish a duty of care a plaintiff has to prove that there was a duty to him to supervise the activity involved. Your company may not have a duty to supervise activities of an independent contractor for activities that are not performed in connection with the business of your company.

8. Limitations on Vicarious Theories of Liability

Most theories of vicarious liability other than respondeat superior also have important limitations that make them less dangerous than respondeat superior.

Aiding and abetting requires knowing help in the wrongdoing. This is unusual in the usual corporate context. Ratification usually involves knowing acceptance of the benefits of wrongdoing. This also is comparatively unusual.

9. Respondeat Superior Has Few Limitations

Respondeat superior is no fault liability that covers all activity within the scope of employment. The scope of employment is often interpreted very broadly. Therefore, respondeat superior liability can be breathtakingly broad.

- Employer does not have to be at fault and can, in fact, be completely innocent.
- It does not matter if the acts were in excess of the employee's authority, contrary to the instructions of the employer, or even criminal.
- It does not matter that the employer does not get any benefit from the acts of the employee.

- It does not matter that the employer could not possibly have prevented the employee from doing the wrongful acts.
- Does not matter whether the employee did or did not use an instrumentality of the employer.
- Does not matter that employer made heroic efforts to prevent the harm. Ingle case.

In general, the only requirement for an act to be considered inside the scope of employment is that the harm was a reasonably foreseeable risk of the kind of business in which the employee is engaged. This can include virtually any activity that is similar to what the employee does for your company regardless of whether it is actually performed on your behalf.

When you properly use independent contractors rather than employees, respondeat superior liability is eliminated. This can substantially reduce the risk of legal liability for the acts of the persons involved.

10. Other Issues Affected by Whether Contractor or Employee

Employers have an obligation to indemnify employees for the results of own misconduct under Section 2802 of the Labor Code. You don't have to buy worker's compensation insurance for contractors. When you properly use independent contractors, you don't have to worry about overtime and other provisions regulating the hours and conditions of work.

How to Reduce the High Cost of Unavoidable Litigation

1. The Use of Customized Arbitration Clauses

A contractual arbitration clause is one of the most powerful ways that a business has to try to control its exposure to costly and dangerous lawsuits. Arbitration, mediation, and other methods of resolving conflicts outside of court are sometimes collectively referred to as alternative dispute resolution, or “ADR.”

By the careful use of an arbitration or other ADR clause in its contracts, a business can dramatically affect how disputes with its employees, customers, vendors, and others with whom it does business are resolved, discourage claims from being brought, and limit its exposure to large damage awards. On the other hand, an arbitration clause that is carelessly drafted or slanted in favor of the other party to an agreement can be a serious disadvantage in the event of a dispute.

When parties agree to arbitration, they make a binding determination that some or all of their disputes will be resolved outside of court by one or more persons called arbitrators, rather than in court by a judge or jury. In recent years, courts have allowed the contracting parties broad discretion to make up any rules they wish concerning who will hear the dispute and what rules will govern the outcome.

Arbitration clauses can specify simplified procedures both before and trial. For example, they can limit or eliminate the depositions, interrogatories, document requests, and pretrial motions that are responsible for much of the sometimes crushing expense of litigation. The procedures at the arbitration hearing, which takes the place of a trial in court, can be simpler and less time consuming than those for a jury trial. Arbitration clauses can also set short mandatory schedules for resolution of a problem before both the problem and the business involved in it become ancient history.

In addition to reducing litigation expenses and speeding the resolution of disputes, arbitration clauses can discourage or prevent claims from being made in the first place. For example, a contract can provide that claims that are not brought by certain deadlines are barred altogether. Such provisions, which create shortened statutes of limitations for the parties, will be enforced by the courts if they are found to be reasonable. Other provisions can require that, before making a demand for arbitration, the claimant must first try in good faith to negotiate a resolution either with or without the help of a trained mediator.

Provisions that require the party demanding the arbitration to advance the arbitrator's fees (which can be substantial) can deter groundless claims. So can provisions requiring the loser to pay the winner's attorneys' fees.

Arbitration clauses, and other contract clauses, can limit the type of damages or other relief that may be sought by a claimant. For example, the courts often uphold agreements that prevent the parties from seeking punitive damages, specific performance, or injunctive relief. A contract can also attempt to limit any award to actual economic out of pocket damages, thereby reducing or preventing exposure to claims for lost profits, pain and suffering, mental distress, and consequential or special damages. These kinds of limitations on damages not only reduce the amount of potential awards, they discourage potential claimants, and their lawyers, from making claims in the first place.

There are a wide variety of organizations and individuals that, for a fee, administer arbitrations. Some of them, like the American Arbitration Association, have procedural rules for dealing with issues that may

not be covered in the contract. Arbitration provisions can incorporate these rules into a contract, and vary any of them that the parties wish. If no rules are specified in the contract, California law supplies rules that will apply by default.

Because of the power and flexibility of arbitration clauses, failing to include one in a contract or choosing one poorly can actually determine whether a business will survive a major dispute. As a result, no business should ever sign a contract or enter into a significant transaction or relationship without first considering what kind of arbitration clause or agreement could reduce its exposure in the event of a later lawsuit.

2. The Three Most Common Litigation Traps and How to Avoid Them

If you are trying to control the cost of litigation, it is helpful to distinguish between strategies for reduction of costs and boondoggles. Strategies involve choices requiring thought and the weighing of risks against savings. Therefore, after considering them, you may decide that a particular economy is not worth the increased risk. Boondoggles are work that usually has insignificant value compared to the expense. You always want to avoid them.

The three most common litigation boondoggles are wasteful staffing practices, the digesting of deposition transcripts, and the failure to attempt to settle.

a. Wasteful Staffing

Wasteful staffing practices consist of excessive staffing, changes in staffing, and excessive delegation to junior lawyers. If you have more than one lawyer and one paralegal regularly working on your case, and the litigation is unlikely to result in a judgment of more than a half a million dollars, you should ask your lawyer about staffing.

b. Digesting Transcripts of Depositions

The routine digesting transcripts of depositions is one of those fine old traditions that law firms have been practicing for ages and that, as far as I can tell, produce only useless paper and increased billings for paralegals and junior lawyers. I have never, I repeat, never, found a deposition digest to be at all helpful in a case. Now that you can get your depositions on a computer disk and search do instant text searches on them, I believe that any law firm that is charging you for deposition transcripts is, at best, clueless.

c. Failure to Attempt Settlement

The most effective way to control litigation costs is to settle early. Sometimes this is not possible. However, it should be attempted in every case.

Your lawyer may be reluctant to get the ball rolling on settlement because he thinks it make him look like a wimp, so unless you have an unusually secure lawyer, it may be up to you to raise the subject. This does not mean that you should appear weak to your opponents. The idea is to talk softly, but keep whacking the bad guys with a big stick until they come to the table.

3. How to Help Your Lawyer Reduce His Fees

a. Have a strategy

You can't control your fees if you don't have a strategy. Flailing around at a couple of hundred dollars per hours gets expensive fast.

b. Talk to Your Lawyer

Ask your lawyer about his overall strategy for the case. What kinds of motions does he think may be cost effective? What does he think about the prospects of an early settlement? How are you going to try to win the case? Is a demurrer worth the money? Is it realistic to try to win on summary judgment?

Make sure you talk to your lawyer early about settlement. You should do this even where early settlement is not likely. Many lawyers don't like to bring this up.

Discuss each motion or other significant decision with the lawyer in terms of cost-benefit. Get estimates for specific activities that are under consideration. No lawyer can reliably estimate the cost of an entire lawsuit, but he should be able to do a reasonable estimate for a particular motion. Ask what benefit can reasonably be expected from the motion or other tactic being considered. Ask what alternatives exist for that tactic and what they would cost.

c. Determine What the Case is Worth

Estimate both trial value and settlement value. Settlement value is much higher than trial value because of the staggering costs of litigation. At best, such an evaluation is a guess, but must be done in order to make rational decisions about strategy.

If you are a plaintiff, ask yourself

- How much can you realistically expect to recover if you win?
- What are your chances of winning?
- How likely is it that you will be able to collect any judgment?
- How much is the case likely to cost?

For example, if the most likely recovery if you win is \$200,000, your chances of winning are 50%, your chances of collecting judgment are 100% (often it is far less than that), and the cost of the litigation (including any appeal and collection procedures!) is \$100,000, the trial value of the case is NOTHING! On the other hand, the settlement value of the same case would be \$100,000.

If you are a defendant, you should make same kind of calculation. The results will be equally sobering, I assure you.

d. Consider Strategies for Cost Reduction That May Involve Some Risk

The following options each involve some risk, and are not appropriate in every case. But you should consider them with your lawyer in each case.

Written Statements

Consider the use of written statements instead of depositions for healthy and friendly witnesses who you are sure will be available to testify at trial.

Answer Instead of Demurring

Consider filing an answer rather than a demurrer even to a legally insufficient complaint.

Preliminary Relief

Don't seek preliminary relief, like a preliminary injunction, unless you need it, you have a good chance to get it, and it will be worth the money.

Motions to Compel Discovery

When considering whether to make motions to compel discovery, don't just ask whether you are entitled to the information—ask whether it is worth the cost of obtaining it.

Simplify Your Complaint

Consider whether you can sometimes make a lawsuit that you file less expensive by simplifying it.

(1) Forego Certain Parties

You should consider not suing parties against whom you only have a slim chance of prevailing and peripheral parties who have no money.

(2) Dispense With Exotic Claims

Anyone who has gone to law school can spin a virtually unlimited number of exotic theories involving an unlimited number of defendants. Consider dispensing with theories that don't add anything significant to the case.

(3) Avoid Factually Complicated Claims

Sometimes you have a strong claim that can probably be decided in summary judgment and a weak claim that will require a long and expensive trial. When this happens, consider not bringing the factually complicated claim.

Your Invoice Is Your Friend

Your invoice is one of your best tools for reducing your costs. You should always read it, and ask questions if you have them. If the invoice is not detailed enough for you to understand what you're paying for, ask for more detail.

Don't Let, or Make, Your Lawyer Do the Grunt Work

You can save a lot of money if you will do as much of the necessary but routine tasks involved in litigation yourself. For example, it will cost you a lot less to pay your own clerical personnel to locate and organize your own documents than to pay your lawyer to drag them out of you and then sort through them.

Other things you can do to help keep the costs down are to prepare a written chronology summarizing the relevant facts and evidence in the case, help with the investigation by locating witnesses and obtaining necessary documents in the hands of cooperative third parties, crunch your own numbers, prepare any necessary financial schedules and exhibits.

4. Avoid the Attitude Traps

Certain statements that are often heard in law offices are often the prelude to an sad lesson in the high cost of litigation. If you are tempted to say any of the following to your lawyer, watch out!

“Can you just take a quick look at this?” Ask yourself, is it possible to sort out the relevant facts in the time that you are allowing?

“I want a “junk-yard dog” litigator.” Remember that over 90% of all disputes are settled before a court battle. If you hire a mad dog, you will probably get bitten. You don't want mindless aggression. You want rational aggression.

“It's the principal of the thing.” Usually, after the first \$15,000 or so, the principal seems to get less important.

“Money is no object.” This is almost never true. The only question is, how much is it worth, and “I'd rather pay you than him.” This usually indicates that you have an irrational certainty in your chances of

winning.

1. **DISCLAIMER:** This document is part of an educational presentation. It is not intended as legal advice and should not be relied upon. It is based upon California law as of the date of its preparation, which may be significantly before the last date on which this page was last updated, is subject to change, and may not be the same as other law.

There is no warranty that any information in this material is correct or accurate. You are advised to consult counsel before adopting any of the ideas or suggestions in this material, or using any of the forms in it, which may or may not be applicable to your specific situation.

Legal Glossary

Abatement – The suspension or cessation of a continuing charge.

Acceptance – The taking and receiving of anything with the intention of retaining it.

Accounting – A system of making up or settling accounts, consisting of a statement of account with debits and credits arising from relationships or parties.

Accrual Basis – A method of accounting that reflects expenses incurred and income earned for any one tax year.

Acquire rights and interest – To gain possession of rights and interest which are owing to his or her own procurement, such as the right of property.

Action – The state or process of acting or doing.

Actual Damages – Compensation for actual injuries or loss.

Additional Insured – Person(s) covered by policy in addition to the named insured (purchaser).

Administrators – A person appointed by the court to administer the assets and liabilities of a decedent.

Aforesaid – Previous.

Agent – A person authorized by another to act for or in place of him.

Amend – To improve. To change for the better by removing defects or faults.

Amendment – To change or modify for the better. To alter by modification, deletion, or addition.

American Arbitration Association – National organization for arbitrators from whose panel arbitrators are selected for labor and commercial disputes.

Arbitration – A process for dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.

Arise(ing) – To spring up, originate, to come into being or notice. To present itself.

As to whether or not – Whether.

As to whether – Whether.

As-Is – A sale of goods by sample “as is” requires that the goods be of the kind and quality represented, even though they be in a damaged condition.

Assets – Property of all kinds, real and personal, tangible and intangible, to cover the liabilities of a person or business.

Assign – To transfer, make over, or set over to another.

Assignee – A person to whom an assignment is made or granted.

Assignment – The act of transferring to another all or part of one’s property, interest, or rights.

Assumption – The act of conceding or taking for granted Laying claim to or taking possession of.

At Law – According to law; by, for, or in law.

At Will Employment – This doctrine provides that, absent express agreement to contrary, either employer or employee may terminate their relationship at any time, for any reason.

Attach – Seizure of property under a writ of attachment.

Attachments – The legal process of seizing one’s property in accordance with a writ or judicial order for the purpose of securing satisfaction of a judgment yet to be rendered.

Attorney-In-Fact – A private attorney authorized by another to act in his place and stead, for some particular purpose.

Bailee – In the law of contracts, one to whom goods are bailed; one to whom goods are entrusted by a bailer. The party to whom personal property is delivered under a contract or bailment.

Bankruptcy Code – A federal law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts.

Bankruptcy – The state or condition of a person (individual, partnership, corporation, municipality) who is unable to pay its debts as they are, or become due.

Bargain – A mutual undertaking, contract, or agreement A contract or agreement between two parties.

Best Efforts – With respect to a new securities issue, a commitment by the investment banker or group handling the new issue to sell the securities as an agent of the issuing party, rather than as an underwriting of the entire issue.

Binding Arbitration – A process of dispute resolution in which neutral third party renders a decision after a hearing at which both parties have an opportunity to be heard. Both parties are bound by the ruling. The consent of one of the parties is enforced by statutory provisions.

Binding – To obligate; to bring or place under definite duties or legal obligations, particularly by a bond or covenant.

Bona fide – In or with good faith; honestly, openly, and sincerely; without deceit or fraud.

Breach of Warranty – In real property law and the law of insurance, the failure or falsehood of an affirmative promise or statement, or the nonperformance of an executory stipulation.

Breach – When one party to an agreement fails to perform the obligations he has agreed to, he may be in breach. Generally, once one party breaches, the non-breaching party is no longer obligated to perform his obligations under the contract and may take legal action against the breaching party.

Business Entity – An organization that possesses separate existence for tax purposes.

Bylaws – Regulation, ordinances, rules or laws adopted by an association or corporation or the like for its internal governance.

Capitalization – The total amount of the various securities issued by a corporation. May include bonds, debentures, preferred, and common stock.

Cash Basis – A method of accounting that reflects deductions as paid and income as received in any one tax year.

Catastrophe – A notable disaster; a more serious calamity that might ordinarily be understood from the term “casualty.”

Cause of action – The fact or facts which give a person a right to judicial redress or relief against another.

Chattel – An article of personal property, as distinguished from real property.

Claim – To demand as one's own or as one's right; to assert; to urge; to insist. A cause of action.

Closing Date – Written analysis of closing (i.e. final steps) of a real estate transaction.

Co-Makers – Surety under a loan. Others who guarantee the repayment of the loan.

Collateral Security – A security given in addition to the direct security, and subordinate to it, intended to guarantee its validity or convertibility or insure its performance so that if the direct security fails, the creditor may fall back upon the collateral security.

Commercial – Of or relating to commerce – making money.

Commission – The fee or payment paid to a sales person or broker for consummating a transaction. This may be a flat fee or a percentage of the selling price or a combination.

Common Carrier – Any carrier required by law to convey passengers or freight without refusal if the approved fare or charge is paid in contrast to private or contract carrier.

Common stock – Class of corporate stock which represents the residual ownership of the corporation. Common stock has voting powers, and receives dividends.

Community property – Property owned in common by husband and wife, each having an undivided one half interest by reason of their marital status.

Competent Jurisdiction – As applied to courts and public officers this term imports jurisdiction and due legal authority to deal with a particular matter in question.

Completion of Transaction – The finishing or accomplishing in full of something already begun.

Condition – A provision making the effect of a legal instrument contingent on the occurrence of an uncertain future event.

Confidential – Entrusted with the confidence of another with his secret affairs or purposes; intended to be held in confidence or kept secret.

Consent – Agreement; approval or permission. The act or result of coming into harmony or accord with another party. Voluntarily yielding one's will to the proposition of another; granting acquiescence or compliance therein.

Consequence – The result following in natural sequence from an event which is adapted to produce, or to aid in producing such result.

Consequential Damages – Such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act.

Consideration – The inducement to a contract. The cause, motive, price or impelling influence which induces a contracting party to enter into a contract.

Contained in – In.

Contemporaneous – Originating, existing, or happening during the same period of time.

Contiguous to – Next to. (Eg. The contiguous United States means all the states except Hawaii and

Alaska because they are not next to any/all of the other states.)

Contract – An agreement between two or more persons which creates an obligation to do or not to do a particular thing.

Convey – To transfer or deliver to another. To pass or transmit the title to property from one to another.

Copyright – The right of literary property as recognized and sanctioned by positive law.

Counterclaim – A claim presented by a defendant in opposition to or deduction from the claim of the plaintiff.

Covenant – The legal term for a promise.

Cure – The ability to correct a breach.

Damages – A compensation or indemnity, which may be recovered in the courts by any person who has suffered loss detriment or injury whether to his person, property, or rights through the unlawful act of another.

Default – By the omission or failure to perform a legal or contractual duty.

Defective Products – Lacking in some particular which is essential to the completeness, legal sufficiency, or security of the product.

Defend – To prohibit or forbid. To deny.

Defense – That which is offered and alleged by the party proceeded against in an action or suit.

Deficiencies – A lack, shortage or insufficiency.

Deliver – To bring or transport to the proper place or recipient. Distribute.

Demand – The assertion of a legal right; a legal obligation asserted in the courts.

Direct – To point to; guide; order; command; instruct. To advise; suggest; request.

Discharge – To release; liberate; annul; unburden; disencumber; dismiss.

Disclaimer – The repudiation or renunciation of a claim or power nested in a person or which he had formerly alleged to be his.

Disclaims – Implied warranty of merchantability and fitness for a particular purpose.

Dissolution – Act or process of dissolving; termination; winding up.

Distribution – The giving out or division among a number; sharing or parceling out; allotting; dispensing; apportioning.

Does not operate to – Does not.

Drop Ship – Shipment of goods directly from manufacturer to dealer or consumer rather than first to wholesaler.

During such times as – While.

Duties – All manner of taxes, charges or governmental impositions.

Earned Capital – See Capital.

Effect – To do; to produce; to make; to bring to pass; to execute; enforce; accomplish.

Effective Date – Date on which contract, law insurance policy, or the like, takes effect.

Election – The act of choosing or selecting one or more from a greater number of persons, things, courses, or rights.

Encumber – To put a heavy load on; burden; to hinder or impede.

Encumbrance – A lien or claim on property.

End-User – The ultimate consumer of a product, especially one for whom the product was designed.

Endorsed – A document that has one's signature as evidence of a legal transaction to indicate approval of contents or terms.

Enforcement – The act of putting something such as a law into effect; the execution of a law; or the carrying out of a mandate or command.

Enumeration – To specifically name or list; as in speaking of “enumerated” governmental powers, items of property, or articles in a tariff schedule

Equitable Relief – Where financial damages are inappropriate, the court might consider forcing the breaching party to do or refrain from doing something.

Escrow Account – A bank account generally held in the name of the depositor and an escrow agent which is returnable to the depositor or paid to third person on the fulfillment of escrow condition; e.g. funds for payment of real estate taxes are commonly paid into escrow account of bank -mortgagor by mortgagee.

Estoppel Certificate – A signed statement by a party, such as a tenant or a mortgagee, certifying for the benefit of another party that a certain statement of facts is correct as of the date of the statement.

Estoppel – Means that party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly.

Exclusive Right – Pertains to a right granted whereby only the “grantee” can exercise its privileges, all others are prohibited or shut out from.

Exclusive warranty – See warranty.

Exclusive – Pertaining to the subject alone, not including, admitting or pertaining to any others. Sole. Shutting out; debarring.

Execute – To perform all necessary formalities, as to make and sign a contract, or sign and deliver a note. To complete; to make; to sign; to perform; to do; to follow out; or to carry out according to its terms; to fulfill the command or purpose of some action.

Execution – Carrying out some act or course of conduct to its completion.

Executors – A person appointed to carry out the directions and requests in one's will, and to dispose of the property according to the deceased will and testament.

Exonerate – To free from blame. To free from a responsibility, obligation or task.

Expiration – Cessation; termination from mere lapse of time, as the expiration date of a lease, insurance policy, statute, and the like. Coming to a close; termination or end.

Express approval – Approval granted and manifested by direct and appropriate language, as

distinguished from that which is inferred from conduct.

Express warranty – A promise that a proposition of fact is true. An assurance by one party to agreement of existence of facts upon which other party may rely. A promise that certain facts are true as they are represented to be and that they will remain so, subject to specified limitations.

Express Written Consent – Written permission expressly granting consent for approval of some action to be entered upon by another party.

Express(ly) – In an express manner; in direct or unmistakable terms. Explicitly, definitely; directly.

Express – Directly and distinctly stated. Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous.

Expressly – In an express manner; indirect or unmistakable terms.

External – Apparent, outward, visible from the outside, patent, exterior, capable of being perceived. Acting from without, as distinguished from mental or moral.

Extraordinary Expenses – An expense characterized by its unusual nature and infrequency of occurrence.

F.O.B. (Freight on Board) – FOB [Factory] means the buyer assumes all responsibilities and costs from the factory up to the point of delivery. FOB Destination means the seller assumes all responsibilities and costs from the factory up to the point of delivery.

Faithful Performance – The parties must act in good faith towards accomplishing the stated conditions of the contract.

Faithful – Honest; loyal; trustworthy; reliable; allegiant; conscientious.

Fiduciary – Refers to a person holding the character of a trustee, of or a character analogous to that of a trustee.

Filed – A paper is said to filed when it is delivered to the proper officer and by said officer kept on file as a matter for record and reference.

Finders Fee – A payment to a third party for bringing a buyer and a seller together. A finders fee is generally paid by the buyer to the third party for "finding" the property. The fee may be in addition to a commission or in lieu of one.

Fiscal Year – A twelve month period for which an organization plans the use of its funds.

Fixtures – An item that is fixed or attached property in such a way to be deemed part of the property, example, a furnace in a house, or the kitchen sink.

For Cause – With respect to “removal from office ‘for cause’”. Removal for reasons which law and public policy recognize as sufficient to warrant removal.

For the duration of – During.

For the purpose of [x]ing – To [x].

For the reason that – Because.

Force Majeure – Also known as an “Act of God”, or a “superior force”. In the law of insurance, superior or irresistible force. This clause is common in construction contracts to protect the parties in the event that

a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by using exercise of care.

Foregoing – Previous.

Forfeiture – A comprehensive term which means a divestiture of specific property without compensation. It imposes a loss by the taking away of some preexisting valid right without compensation.

Forthwith – Immediately.

Forum – A court of justice; or judicial tribunal; a place of litigation; an administrative body. Particular place where judicial or administrative remedy is pursued.

Good Faith – An honest belief, the absence of malice and the absence of design to defraud.

Grant – To bestow or confer, with or without compensation, a gift of bestowal by one having control or authority over it, as of land or money.

Grantor trusts – Trusts whereby the grantor retains control over the income or property, or both, to such an extent that such grantor will be treated as the owner of the property.

Grantor – The person by whom a grant is made. The “transferor” of property. The creator of a trust is usually designated as the grantor of the trust.

Gross Negligence – Failure to use such care as a reasonably prudent and careful person would use under similar circumstances.

Guilty – Having committed a crime or other breach of conduct; justly chargeable with a crime; responsible for a crime of tort or other offense or fault.

Heirs, Assigns, Legal Representatives – This phrase is normally used as words of limitation and not purchase.

Heirs – The person appointed by law to succeed the estate in the instance of death without a written or formal will. One who inherits property, either real or personal. A person who succeeds, by the rules of law, to an estate in lands, tenements, or hereditaments upon the death of his ancestors, by descent and right of relationship.

Hereat – At this [paragraph, section, document, contract].

Hereby – By this [paragraph, section, document, contract].

Herein – In this [paragraph, section, document, contract].

Hereof – Of this [paragraph, section, document, contract]; pertaining to or concerning this.

Hereto – To this [paragraph, section, document, contract].

Heretofore – Previously.

Hereunder – Under this [paragraph, section, document, contract].

Herewith – Along with this [paragraph, section, document, contract].

Hold Harmless Agreement – A contractual arrangement whereby one party assumes the liability inherent in a situation, therefore relieving the other party of responsibility. Such agreements are typically found in leases and easements.

Hypothecate – To pledge property as security or collateral for a debt. Generally the pledged property remains the possession of the lendee, but the lender has the right to sell upon default.

Implied Reservation – Type of easement created by grantor for benefit of land retained by him and not included in conveyance.

Implied warranty – A promise that a proposition of fact is true.

Implied – Used in law to contrast “express”. The intention is not manifested by explicit and direct words.

In case – If.

In lieu of – Instead of.

In the event that – If. (Also known as a “trigger” or “triggering event”)

Incidental Damages – Loss, injury or deterioration, caused by the negligence, design, or accident of one person to another.

Incidental – Depending upon or pertaining to something else as primary; something necessary, pertaining to or depending upon another which is termed the principal; something incidental to the main purpose.

Incorporated by Reference – One complete document is included inside a second separate document because of a reference. By mentioning the first document inside the second document, the entire first document is included inside the second.

Incur(red) – To gain something undesirable, such as a liability.

Indemnification – Your acceptance of responsibility for fees or actions incurred by individuals of the company.

Indemnify – To give security for the reimbursement of a person for any loss or damage falling on him.

Indemnity – Reimbursement of a person who is technically at fault by another who is actively responsible.

Independent Contractor – One who contracts to complete a job independently of the customer’s direct daily supervision. Only the end result is negotiated.

Independent Sales Representative – Sales Representative not in the direct employ of a product’s manufacturer. Usually has access to several manufacturers.

Indirect Damages – Secondary loss injury or deterioration caused in a roundabout way.

Indirect – Related, but not by plain or obvious means. Roundabout.

Industry Standards – Generally recognized level of conformity or established practice by competing businesses.

Infringe – To violate encroach, or break into.

Infringement – A violation or encroachment of a law, regulation, contract, or right. Used especially with patents, copy rights, and trademarks.

Injunction – A court order commanding someone to undo some wrong or injury, or prohibiting someone from doing a specific act.

Injunctive Relief – Where a court orders the breaching party to do or refrain from doing something.

Insolvency – The inability or lack of means of a person or business to pay debts.

Insolvent – Liabilities outweighing assets. A business or person unable to pay debts as agreed.

Instrument – Anything reduced to writing. A document given as a means of affording evidence.

Intellectual Property – The exclusive ownership of any ideas or systems written or otherwise conceived by a person.

Intentional Misconduct – Willful transgression of some rule of action, behavior, duty or law by premeditated design.

Intentional Misrepresentation – A statement or action designed to lead to inaccurate representation of actual facts.

Interpolated terminal reserve value – The value of insurance policies for gift and tax purposes, when the policy is not paid up or paid in full at time of transfer.

Inure – To take effect. To come to the benefit of a person.

Invalid – Not of binding force. Inadequate to its purpose.

Invalidate – To deprive of legal force. Void.

It is incumbent on [x] to – [x] must; [x] shall. [x] is responsible for...

Joined – United to combine in time, effort, action or alliance.

Jointly and Severally – Both parties bind individually and together as a unit (jointly).

Jurisdiction – Area of authority by a court.

Landlord – The owner of an estate in land, or a rental property, who has leased it to another person, called the “tenant.”

Latent Defects – A hidden or concealed defect undetectable by reasonable and customary observation or inspection.

Leasehold Improvements – Improvements made by lessee to the leased property. i.e. Addition of a garage, painting, etc.

Legal Entity – A thing (not a person) which can be legally sued or sue and make decisions through agents as in the case of corporations.

Legal Proceeding – All proceedings authorized or sanctioned by law, and brought or instituted in a court for the acquiring of a right or the enforcement of a remedy.

Legal Representatives – Those who stand in place of, and represent the interest of another. A person who oversees the legal affairs of another.

Legal title – Full and absolute title or apparent right of ownership.

Lessee – One who rents property from another.

Lessor – One who rents property to another.

Liabilities – All character of debts and obligations.

Liability Insurance – Contract by which one party promises on consideration to compensate or

reimburse other if he shall suffer loss from specified cause or to guaranty or indemnify or secure him against loss from that cause.

Liability – A broad legal term including almost every character of hazard or responsibility, absolute, contingent, or likely.

Liable – Bound or obliged by law or equity. Responsible.

License – A permit, granted by an appropriate governmental body for a person or legal entity to pursue some occupation or to carry on some business subject to regulations of the government.

Life insurance policy – A paid for contract between a person and an insurance carrier agreeing to pay a designated sum upon the death of the person to a beneficiary.

Life insurance premium – Amount paid to insurance carrier to purchase life insurance policy.

Liquidate – To settle or lessen a debt.

Liquidated – To have cleared, settled or paid a debt.

Liquidation – The process of clearing, settling, or paying a debt. Turning assets into payment of debts.

Liquidator – A person appointed to carry out the settling up or dissolution of a company.

Litigation – A Lawsuit

Legal action – A Contest in a court of law to enforce a right or seek resolution.

Loss Payee – Person named in an insurance policy to be paid in a settlement.

Manufacturing Defect – Flaw made during the making of the product which would not be present if built correctly according to the design.

Material Breach – Major violation of contract usually to the extent that the aggrieved is excused from remaining terms and is given the right to sue for damages.

Material Provision – Foresight and plan for a possible important condition. i.e. Life insurance double indemnity clauses in case of accidental death.

Merger – Absorption of one entity into another.

Misrepresentation – Action or word from one entity which if accepted leads to false assertions or beliefs in others.

Modification – An alteration which inserts or deletes some details while leaving the general purpose and effect of the subject-matter intact.

Modify – To Alter. To decrease or increase in an incidental way.

Monetary Damages – Money compensation sought or awarded as a remedy for breach of contract, loss or injury.

Monies – money

Mortgagee – Person that takes, holds, or receives a mortgage.

Necessitate – Require.

Necessity of – Need to.

Non-conformity – Refusal or failure to conform to accepted customs, beliefs, or practices.

Nondisclosure – A failure to reveal facts, which may exist when there is no “concealment.”

Notice – Information concerning a fact, actually communicated to a person by an authorized person, or actually derived by him from a proper source, and is regarded in law as “actual” when the person sought to be affected by it knows thereby of the particular fact in question.

Notice of Dishonor – May be given to any person who may be liable on the instrument by or on behalf of the holder or any party or other party that has received notice, or any party who can be compelled to pay the instrument.

Notice of Protest – A formal declaration made by a person interested or concerned in some act about to be done, or already performed, whereby he expresses his dissent or disapproval, or affirms his will against it.

Notwithstanding – Despite.

Notwithstanding the foregoing – No matter what has been stated so far...

Obligation – That which a person is bound to do or forbear; the act of binding oneself by a social, legal, or moral tie. A social, legal, or moral requirement, such as a duty, contract or promise that compels one to follow or avoid a particular course of action.

Occasion (verb) – Cause.

On Demand – Note payable upon request. If no due date is stated in note, such is payable on demand.

On the part of – By.

Option – An option is the right to buy something for a fixed term. The price can either be fixed or left open. An option may be sold or given away. It is generally transferable.

Patent – A grant of right to exclude others from making, using or selling one’s invention and includes right to license others to make, use or sell it.

Patentable – Suitable to be patented; entitled by law to be protected by the issuance of a patent. The device must embody some new idea or principle not before known.

Penalty – The sum of money which the obligor of a bond undertakes to pay in the event of his omitting to perform or carry out the terms imposed upon him by the conditions of the bond.

Perform – To perform an obligation or contract is to execute, fulfill, or accomplish it according to its terms.

Performance – The fulfillment or accomplishment of a promise, contract, of other obligation according to its terms, relieving such person of all further obligations or liability thereunder.

Personal Injury – A hurt or damage done to a person’s body, such as a cut or bruise, a broken limb, or the like, as distinguished from an injury to his property or reputation.

Personal Representatives – A person or thing that represents, or stands for a number or class of persons or things, or that in some way corresponds to, stands for, replaces, or is equivalent, to another person or thing.

Personal Services Contract – A written agreement to perform maintenance or repair (or both) on a consumer product for a specified duration.

Pledge – A deposit of personal property to a creditor as security for some debt or engagement; personal property transferred to pledgee as security to a creditor for payment of debt or other obligation.

Possess – Have; Own.

Present Value – The time value of money; the current value of a future payment , or series of payments.

Primary Liability – A description of the nature of a signer’s engagement; their contract liability on an obligation which means they are obligated to pay the debt without someone else refusing to pay.

Promissory note – A signed paper promising to pay another a certain sum of money, an unconditional written promise to pay a specified sum of money on demand or at a specified date.

Proprietary Information – In trade secret law, information in which the owner has a protectable interest.

Proprietary – One who possesses the exclusive dominion or ownership of a thing in his own right.

Provision – Foresight of the chance of an event happening, sufficient to indicate that any present undertaking upon which its assumed realization might exert a natural and proper influence as entered upon in full contemplation of it as a possibility.

Public Domain – A figurative place where information or knowledge that is generally known or available to the public resides. Once something is in the public domain, it may be used freely, without permission. In effect, the information is now owned by the public.

Purchase Money Security Interest (PMSI) – One which is taken or retained by seller of item to secure its price or taken by person who advances funds to enable one to acquire rights in collateral.

Pursuant to – Under.

Quiet Enjoyment – A covenant, usually inserted in leases and conveyances on the part of the grantor promising that the tenant or grantee shall enjoy the possession and use of the premises in peace and without disturbance.

Real party in interest – Person who will be entitled to benefits of an action if successful, the one who is actually and substantially interested in subject matter as distinguished from one who has only a nominal, formal or technical interest.

Receiver – A person appointed by a court for the purpose of preserving property of a debtor pending an action against him, or applying the property in satisfaction of a creditor’s claim.

Recorder – A judge who has criminal jurisdiction in a city.

Recover – To regain as lost property, territory, appetite, health, courage. To be successful in a suit, to collect or obtain amount, to have judgment, to obtain a favorable or final judgment.

Recovery of Possession – The obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose.

Rejection – An offeree’s communication to an offeror that the offeree refuses to accept the terms of the proposal made by the offeror.

Release – A writing or oral statement manifesting an intention to discharge another from an existing or asserted duty.

Remedy – The means by which a right is enforced or the violation is prevented, redressed, or compensated.

Remit – To send or transmit; as to remit money. To send back, as to remit a check or refer a case back to a lower court for further consideration.

Reorganization – A thorough alteration of the structure of a business corporation. The act or process of organizing again or differently.

Repossession – To take back – as when a seller, bank or finance company repossesses or takes back an item if the buyer misses an installment or payment.

Representation – Any conduct capable of being turned into a statement of fact. The state or condition of serving as an official delegate, agent or spokesperson.

Representations – Elements of actionable fraud, includes deeds, acts or artifices calculated to mislead another, as well as words or positive assertions. Any statements meant to induce another to enter into contract are representations.

Representative – A person or thing that represents, or stands for a number or class of persons or things, or that in some way corresponds to, stands for, replaces, or is equivalent, to another person or thing.

Reservation – A clause in a deed or other instrument of conveyance by which the grantor created, and reserves to himself, some right, interest, or profit in the estate granted, which had no previous existence as such.

Residual Value – The value of a depreciable asset after depreciation charges have been deducted from the original cost.

Restraining Order – An order in the nature of an injunction which may be issued upon filing of an application for an injunction forbidding the defendant from doing the threatened act until a hearing on the application can be had.

Revocation – The withdrawal or recall of some power, authority, or thing granted, or a destroying or making void of some will, deed, or offer that had been valid until revoked.

Right of first refusal – Right to meet terms of a proposed contract before it is executed.

Rights – Justice, ethical correctness, or consonance with the rules of law or principles or morals. Something due to a person by law, tradition or nature. A just or legal claim or title.

Risk – The danger or hazard of a loss of the property insured. The element of uncertainty in an undertaking; the possibility that actual future returns will deviate from expected returns.

S Corporation – A small business corporation with a statutorily limited number of share holders, which, under certain conditions, has elected to have its taxable income taxed to its shareholders at regular income tax rates. These corporations usually avoid the corporate income tax, and corporate losses can be claimed by the shareholders.

Secondary Liability – A liability which does not attach until or except upon the fulfillment of certain conditions.

Security – Protection; assurance; usually applies to an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor in order to assure the payment or performance of his debt.

Security Interest – Any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss of liability. Often the word “lien” is used is used as a synonym.

Servants – An employee. One employed to perform service in master’s affairs, whose physical conduct in performance of the service is controlled or is subject to right to control by the master.

Serve – To deliver or present (a writ or a summons).

Set-Off – A counter-claim demand which defendant holds against plaintiff, arising out of a transaction extrinsic of plaintiff’s cause of action.

Severability – Admitting of severance or separation; capable of being divided; separable; capable of being severed from other things from which it was joined.

Shareholder (stock holder) – A person who owns shares of stock in a corporation or joint-stock company.

Special damages – Those which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, by reason of special circumstances or conditions.

Statute of Limitations – Statutes of the federal government and various states setting maximum time periods during which certain actions can be brought or rights enforced. After this period of time, no legal action can be brought regardless of whether any cause of action ever existed.

Stock certificate – The written evidence of ownership of stock, and of the rights and liabilities resulting from such ownership.

Stock – The goods and wares of a merchant or tradesman, kept for sale and traffic, also called inventory or goods. May also mean the capital or principle of a corporation or joint stock company, formed by the contributions of subscribers or sale of shares.

Sublease – A lease made between the lessee and a third party for land or premises.

Subsequent to – After.

Subsisting Legal Instrument – A supporting document given as a means of affording evidence.

Successor – One who takes the place of or follows after another.

Suffer – Allow.

Supersede – To set aside, annul, replace, or make void.

Survive – To remain alive, in existence, in force or operation beyond any period or event specified.

Survivorship – Where a person becomes entitled to property by reason of his having survived another person who had an interest in the property.

Take into consideration – Consider.

Term – A word or phrase. A fixed and definite period of time.

Terminate – To put an end to.

Termination – The ending of the time of a condition or agreement. Termination of employment is the time employment ends.

Terms – Conditions, obligations, rights or prices specifically agreed upon.

Thereby – By that [x].

Therein – In that [x].

Thereof – Of that [x].

Thereunder – Under that [x].

Time of the Essence of Contract – Agreement that a time deadline is placed on one party, in order to guarantee the terms of the second party's performance.

Title – The name by which anything is known; denotation of social rank; written evidence of ownership of land or property.

To the effect that – That.

Tort – A legal wrong. A direct invasion of some legal right, the infraction of some public duty resulting in damages, or the violation of some private obligation resulting in damages.

Trade name – That name which is used by manufacturers, industrialists and merchants to identify their businesses, which actually symbolizes the reputation of the business.

Trademark – A distinctive mark of authenticity, through which the products of one manufacturer may be distinguished from those of another.

Transfer – To remove from one person place or thing and pass to another. The change of title of property from one person to another.

Transferability – The limits in capability of ownership to be passed from hand to hand, and still carry all rights of the original owner.

Transferee – One to whom a transfer is made.

Transpire – Happen.

Treasury stock – Stock issued by a company but later re-acquired. It may be held in the company's treasury indefinitely, re-issued to the public, or retired. It receives no dividends and has no vote.

Trustee – Person holding property in trust. Person interested with property for the benefit of one or more others.

Unconditional Guarantee – An promise without any conditions for payment or performance of principal contract on default.

Under the provisions of – Under.

Unenforceable – Having no legal effect or force in a court action. Void.

Unforeseeable – The inability to foresee or expect.

Uniform Commercial Code (UCC) – One of the Uniform Laws drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute governing commercial transactions.

Until such time as – Until.

Utilize – Use.

Vest – To give an immediate, fixed right of present or future enjoyment. To take effect.

Waiver of Claims and Defenses – A term in a contract whereby the obligor explicitly agrees not to assert

against an assignee of the contract any claim or defense the obligor has against the assignor.

Waiver – The intentional or voluntary relinquishment of a known right.

Warrant – An authority issued that empowers a person to carry through a specified task. Arrest Warrant authorizes the holder to arrest the person named in the warrant.

Warranty – A promise that certain facts are truly as they are represented to be and that they will remain so, subject to any specified limitations.

Whensoever – Whenever.

Whereas – It being the fact that; inasmuch.

Whereby – How; in accordance with; by means of which.

Whereof – Of which; of what.

Whereon – On which; on what.

Work made for hire – A work prepared by an employee within the scope of his or her employment. A work specially ordered or commissioned for use as a contribution to a collective work.

Books

*Somewhere in the world there is defeat for everyone.
Some are destroyed by defeat, and some made small and mean by victory.
Greatness lives in one who triumphs equally over defeat and victory.*

~ John Steinbeck

Bell, C. Gordon with John E. McNamara. *High-Tech Ventures, The Guide for Entrepreneurial Success*. Reading, MA: Addison-Wesley, 1991.

Berle, Gustav. *SBA Hotline Answer Book*. New York: John Wiley & Sons, Inc., 1992.

Blanchard, Kenneth, Patricia Zigarmi, and Drea Zigarmi. *Leadership and the One-Minute Manager: Increasing Effectiveness through Situational Leadership*. New York: William Morrow, 1985.

Brandt, Stephen C. *Entrepreneuring, The Ten Commandments for Building a Growth Company*. New York: NAL Penguin Inc., 1982.

Bygrave, William B. *The Portable MBA in Entrepreneurship*. New York: John Wiley & Sons, Inc., 1990.

Davidow, William H. and Michael S. Malone. *The Virtual Corporation*. New York: Harper-Business, 1992.

Hopkins, Tom. *How to Master the Art of Selling*. Scottsdale, AZ: Champion Press, 1982. Iacocca, Lee with Sonny Kleinfield. *Talking Straight*. Boston, MA: G.K Hall, 1989.

Kishel, Gregory F. and Patricia Gunter Kishel. *How to Start, Run, and Stay in Business*. New York: John Wiley & Sons, Inc., 1993.

Kouzes, James M. and Barry Z. Posner. *The Leadership Challenge. How to Get Extraordinary Things Done in Organizations*. San Francisco: Jossey Bass, 1987.

LeBoeuf, Michael. *The Greatest Management Principle in the World*. New York: Putnam, 1985.

Mancuso, Joseph. *How to Start, Finance and Manage Your Own Small Business*. Englewood Cliffs, NJ: Prentice-Hall, Inc., 1984.

McCormack, Mark H. *What They Don't Teach You at Harvard Business School*. Toronto, New York: Bantam: 1984.

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