

CONTRACTS 101: Reading & Understanding Legalese

Web Seminar
October 22, 2009



PRESENTED BY:
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Chicago, IL

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Contracts: 101 The case for contracts...

Contracts provide clarity to the business deal reached by the parties

Without a comprehensible writing—including all of the terms of the deal—the parties won't know the standard for performance, or for possible remedy.



*What is/was the deal?
Who is right?
Who is wrong?
No contract...call Miss Cleo.*

Contracts: 101 Putting the pieces together...contract formation step-by-step

1. The parties come up with the "deal"
2. One party or the other submits the "deal" to its attorney
3. The attorney prepares a draft contract and shares it with the client and the other attorney
4. The parties and their attorneys "talk amongst themselves"
5. Modifications are discovered, discussed agreed and drafted into the document
6. The parties sign the contract and then head out for a steak dinner to celebrate



Talk amongst yourselves...I'll give you a topic...


Contracts: 101
Contract formation...a survival guide for attorneys and clients

Attorneys must:

1. The attorneys must understand the economic realities of the deal and incorporate those realities into the contract
2. The attorneys must help their clients understand all reasonably expected contingencies and issues that may arise during the contractual relationship and draft protections into the contract addressing those contingencies

Clients must:

1. Clients must have a clear understanding of all agreed and not agreed points of the deal
2. Clients must be clear on the desired "division of work" among itself and its attorney AND the other party and its attorney



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Contracts: 101
Operating Agreements

Purpose: to set out the relative rights and responsibilities of LLC members

Key Provisions:

- Management—Manager or Co-Managers with broad discretion
- Members—Ultimate authority over Manager
- Cash distributions to Members—At discretion of Manager except for distributions to pay taxes (mandatory)
- Maintenance of Capital Accounts—Section 704 and "Substantial economic effect"
- Admission of New Members and Transfers of Membership Interest
 - Transfers
 - ✓ Approval of all members
 - ✓ No approval = economic interest holder
 - ✓ Includes pledge of membership interest and involuntary transfers
 - New Members
 - ✓ Approval of Manager; OR
 - ✓ Member approval

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Operating Agreements
Management

Authority of Manager. Except to the extent reserved to the Members in the Articles of Organization, the Manager(s) shall have exclusive authority to manage the operations and affairs of the Company and to make all decisions regarding the business of the Company. Without limiting the generality of the foregoing, the Manager(s) shall have exclusive authority to establish such business strategies, accounting procedures and other practices and to make such business decisions as the Manager(s), in their sole discretion, deem advisable for the operation of the Company. In addition, it is understood and agreed that the Manager(s) shall have all of the rights and powers of a Manager as provided in the Act and as otherwise provided by law, and any action taken by the Manager(s) shall constitute the act of and serve to bind the Company. In dealing with the Manager(s) acting on behalf of the Company, no person shall be required to inquire into the authority of the Manager(s) to bind the Company. Persons dealing with the Company are entitled to rely conclusively on the power and authority of the Manager(s) as set forth in this Agreement. Subject to the foregoing, the Manager(s) are hereby granted the right, power and authority to do on behalf of the Company all things which, in their sole judgment are necessary, proper or desirable to carry out the aforementioned duties and responsibilities.

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Operating Agreements
IRC Section 704 Compliance

Allocations of Income, Gain, or Profits. Except as otherwise provided in this Article 10, the Company's income, gain, or profits for each fiscal year shall be allocated to the Members in accordance with their respective Participating Percentages; provided, however, that such allocations shall be made in accordance with Section 704 of the Code and applicable regulations thereunder.

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Operating Agreements

Admission of Members

Restrictions on Transfer. A Member may assign, sell, transfer or pledge or otherwise encumber its Interest, or any portion thereof, without the consent of the other Members. However, no assignment, sale, transfer, pledge or other encumbrance of a Member's Interest shall be allowed if, in the opinion of the Company's attorney, such assignment, sale, transfer, pledge or other encumbrance violates any securities laws of the United States or any individual state. In case of any permitted transfer, the instrument of transfer shall be in form and substance satisfactory to the Manager(s).

Transferee; Substituted Member. No assignee or transferee shall automatically become a substituted Member or have any of the rights of a Member, except that an assignee or a transferee shall be entitled to receive the share of profits and losses of the Company, the return of capital contributions and any other payments to which such Member would have been entitled. The assignee or transferee of a Member's Interest, or any portion thereof, may be admitted to the Company as a Member in the place and stead of, or together with, as the case may be, the Member who has assigned or transferred all or part of its Interest upon satisfaction of all of the following conditions:

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Contracts: 101

Employment Agreements

Purpose: to set out the terms of the employment relationship between employer and employee

Key Provisions:

- Scope of employment—broad
- Compensation
- Term of employment—set period with automatic renewal
- Termination
 - With cause—Employer favorable
 - Without cause—Employee favorable
- Restrictive Covenants
 - Confidentiality
 - Non-Competition
 - Non-Solicitation
 - Non-Disparagement
 - Assignment of Inventions

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Employment Agreements Termination—With Cause

Employee does something "bad" (like show up to work on drugs)



Employer has the right to:

1. Immediately terminate employee, without notice
2. Pay only current period salary
3. Require employee to be bound to "restrictive covenants" (discussed later)

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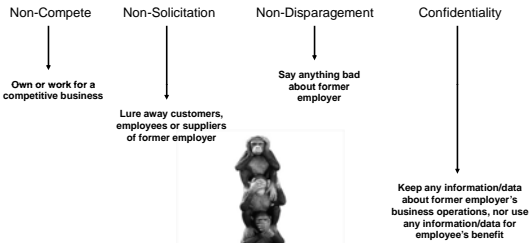
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Employment Agreements Restrictive Covenants

After termination—employee agrees not to:



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Contracts: 101
Non-Disclosure Agreement

Purpose: to protect the secrecy of confidential information

Key Provisions:

- Unilateral or Mutual
- Definition and Protection of Confidential Information
- Term of Agreement
- Exclusions from definition of Confidential Information
- Allowed uses of Confidential Information



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Non-Disclosure Agreements
Definition and Protection of Confidential Information

Definition. Recipient's obligations shall extend only to information that: (i) is marked as confidential at the time of disclosure; or (ii) in the case of an oral communication, or other communication in non-tangible form, is identified as confidential at the time of disclosure and is summarized sufficiently for identification in a written memorandum sent to Recipient within fifteen (15) days of disclosure; (iii) is not marked or identified as confidential but that a reasonable person in like circumstances as the Recipient would recognize as confidential; or (iv) is a software program or related documentation, including all source and/or object code and all parts and aspects thereof, that is the property of the Discloser, in whatever form, whether or not marked as confidential.

Protection. Each item of information disclosed by a party ("Discloser") and identified as confidential pursuant to paragraph 3 ("Confidential Information") shall be held in confidence by the receiving party ("Recipient") and used only for the purpose(s) stated below ("Purpose") during the term of this Agreement. The Recipient may only disclose Confidential Information to those of the Recipient's employees and contractors who need to know such information in connection with the Purpose and who have previously agreed to be bound by written terms and conditions substantially similar to those of this Agreement.

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Non-Disclosure Agreements

Term

Term. Either party may terminate this Agreement upon thirty (30) days prior written notice. Unless earlier terminated, this Agreement shall expire and have no further force and effect two (2) years from the Effective Date hereof. Notwithstanding any such expiration or termination, all Confidential Information shall be kept confidential, subject to the terms of this Agreement, for a period of five (5) years, after the expiration or termination hereof. Should either party exercise its right to terminate this Agreement, upon the effective date of termination or expiration, the Recipient shall cease to use any of Discloser's Confidential Information and shall, upon request, return such Confidential Information to Discloser pursuant to Section 10 herein.

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Non-Disclosure Agreements

Exclusions

Exclusions. This Agreement imposes no obligation upon Recipient with respect to information that: (a) was in Recipient's possession before receipt from Discloser; (b) is or becomes a matter of public knowledge through no fault of Recipient; (c) is rightfully received by Recipient from a third party without a duty of confidentiality; (d) is independently developed by Recipient; or (e) is required to be disclosed under operation of law, provided that Recipient gives Discloser prompt written notice of such requirement and reasonable assistance in limiting the scope of disclosure; or (f) is disclosed by Recipient with Discloser's prior written approval.

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Non-Disclosure Agreements

How they really work...



1. "Everything" Sam shows Tom is confidential ("secret sauce")
2. Tom will only share the "secret sauce" with key people in his organization, who also agree to keep information confidential
3. Sharing of the "secret sauce" with Tom will only continue for the purpose of Tom deciding whether or not to complete the transaction
4. Tom agrees not to disclose any information about the "secret sauce" for five years

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Contracts: 101

Boilerplate

Purpose: To set ground rules for disputes between the parties

Common Boilerplate Provisions:

- Integration Clause
- Arbitration
- Choice of law / venue / submission to jurisdiction / waiver of jury trial
- Submission to equitable remedies
- Time is of the essence
- Severance



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Boilerplate Integration Clause

Full Integration. This Agreement, along with any exhibits, appendices, addendums, schedules, and amendments hereto, encompasses the entire agreement of the parties, and supersedes all previous understandings and agreements between the Parties, whether oral or written. The parties hereby acknowledge and represent, by affixing their hands and seals hereto, that said parties have not relied on any representation, assertion, guarantee, warranty, collateral contract or other assurance, except those set out in this Agreement, made by or on behalf of any other party or any other person or entity whatsoever, prior to the execution of this Agreement. The parties hereby waive all rights and remedies, at law or in equity, arising or which may arise as the result of a party's reliance on such representation, assertion, guarantee, warranty, collateral contract or other assurance, provided that nothing herein contained shall be construed as a restriction or limitation of said party's right to remedies associated with the gross negligence, willful misconduct or fraud of any person or party taking place prior to, or contemporaneously with, the execution of this Agreement.



Side deals not allowed



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CONCLUSION

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Thank you!

Questions?

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