

Protecting Business Clients Through Strategic Contracting



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Why Have Written Contracts?



- Formalize/document a business/legal relationship
- Make private promises legally enforceable
- Identify and memorialize the parties' respective rights, responsibilities, and obligations
- Assign and allocate risk, etc.
- Allow for efficient, effective management of the relationship
- Encourage internal uniform business practices/approaches to managing relationships
- **Avoid/reduce disputes between parties**
 - Uncertainty and ambiguity breed disputes

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Goals of Strategic Contracting

- Maximize Protection of Client Rights, Assets, and Interests
- Minimize Potential Client Exposure
- How to Achieve these Goals?
 - Understand client purpose and goals as to the relationship
 - ✦ Of course, client needs to understand purposes of contract
 - Thoughtful contract drafting and negotiation
 - ✦ Polar Star: what furthers the client's interests, but...
 - ✦ Provisions and negotiations need to be based in rationality
 - At a minimum, **make sure Clients READ and UNDERSTAND their contracts**
 - preferably, before the contract is signed

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Business Relationships – Internal and External

- **External Relationships** (discussed later)
- **Internal Relationships**
 - **Employees**
 - **Independent Contractors (hybrid)**
 - **Sales Representatives (hybrid)**

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Assets/Interests Needing “Internal” Protection, and How to Protect

- Trade Secrets and Confidential Information
 - ✦ Non-Disclosure/Confidentiality (NDA) and Company Property Clauses
- Business Reputation
 - ✦ Non-Disparagement Clause
- Customer relationships
 - ✦ NDAs
 - ✦ Non-Disparagement Clause
 - ✦ Non-solicitation/Non-compete Clauses
- Inventions, Copyrighted Works and Other Work Product
 - ✦ Work for Hire/Inventions Assignment and Company Property Clauses
- Why is Protection through Contract Important?
 - ✦ **In NC, little employer protection absent a contract**

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External Business Relationships

- **Customers/Clients** (e.g., sale of goods/services)
- **Manufacturers/Suppliers/Vendors**
 - “Master Agreements”
 - Standard Terms and Conditions
- **Licensing Relationships**
- **Distributors/Resellers**
- **Independent Contractors/Sales representatives**
- **Subcontractors**
- **Joint venturers/joint developers**
- **Business Acquirers**

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Issues/Clauses Relevant to Most Business Contracts

- Identification of Parties
 - Any third-party beneficiaries, etc.?
 - Any additional obligors?
 - Affiliates?
- Price and Payment terms
 - How much, for how long?
 - Any price increases/fluctuations?
 - Timing and method of payment.
- Acceptance/Rejection of Goods/Services
 - Timing
 - Remedies

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Issues/Clauses Relevant to Most Business Contracts

- Contract Term (Duration)
 - Set Term
 - Initial Term with Renewal upon notice
 - Initial Term with Automatic renewal subject to notice not to renew
 - No set term (subject to termination)
- Termination
 - Termination by Mutual Agreement
 - Termination upon Notice
 - Termination for Breach
 - Any right to cure? (may depend on nature of breach)
 - Termination for Insolvency
 - Effect of Termination
 - Survival of any obligations?

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Issues/Clauses Relevant to Most Business Contracts

- Indemnification, Defense, Hold Harmless
 - Scope of Duty to Indemnify, etc. – by whom, to whom, and for what
 - Indemnification Procedures
- Required Insurance/Additional Insured
- Representations and Warranties
 - (often vary by type of contract)
- Limitation of Liability Clause
- Limitation of Damages Clause

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Issues/Clauses Relevant to Most Business Contracts

- Governing Law
- Dispute Resolution
 - Arbitration vs Courts
 - Pre-proceeding mediation
- Venue for lawsuits/arbitration
- Remedies
 - Injunctive relief
 - Damages
 - Liquidated Damages
 - Attorneys' Fees

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Issues/Clauses Relevant to Most Business Contracts – General Provisions

- Entire Agreement
- Amendments to Contract
- Assignment
- No Partnership/joint venture
- Third-Party Beneficiaries?
- Notices
- Survival
- Severability
- Waiver
- Governing Law
- Venue for lawsuits
- Dispute Resolution
- Waiver of Jury Trial
- Attorneys' Fees
- Construction of Contract
- Force Majeure
- Publicity
- Counterparts/electronic signatures

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Purchase Orders/Invoices

- Offer and Acceptance – “Battle of Forms”
- Prices/Taxes
- Payment Terms
- Seller's Property
- Drawings and Data
- Changes
- Stop Orders
- Delivery
- Transportation/Packaging
- Inspection and Rejection
- Quality Assurance
- Warranty
- Termination and Cancellation
- Intellectual Property Indemnity
- General Indemnification
- Insurance
- Confidentiality
- Compliance with Laws
- Export Issues
- Notice
- Force Majeure
- Supply Chain Security
- Environmental Health and Safety
- Applicable Law
- Assignment
- Severability

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Manufacturing/Supply Agreements

- Scope of Agreement
- Sale of Products (process)
- Supplier's Adherence to Standards
- Availability of Products
- Delivery
 - Quality
 - Inspection
 - Acceptance And Rejection
 - Recalls
- Exclusivity (on either side)?
- Territory
- Forecasts
- Orders
- Pricing
- Payment
 - Invoices
 - Payment Terms
 - Taxes
- Grant of Trademark License/Terms of Use
- Term and termination
- Any rights post-termination?
- Representations and Warranties
 - Warranty
 - Disclaimer
- Indemnification
- Intellectual Property
- Confidentiality
- Compliance with Laws
- Regulatory Matters
- Import and Export Requirements
- General Terms

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Master Service Agreements

- Scope of Services
- **Statements of Work (SOW) - which controls?**
- Assigned Management and Personnel
- Subcontractors
- License (e.g., Software)
- Facilities
- Service Levels
- Additional Services
- Fees and Expenses
- Payment
- Business Continuity and Disaster Recovery
- Acceptance of Services
- Customer Obligations
- Changes to Services
- Term
- Representations and Warranties
- Proprietary Rights/Ownership of work product and IP
- Risk of Loss
- Confidentiality
- Non-Solicitation (customers, employees, subcontractors)
- Publicity
- Use of Name
- Compliance with Laws
- Insurance
- Data Protection
- Cooperation
- Export Control
- Regulatory Matters
- Books And Records
- Audits
- Termination
- Effect of Termination
- Indemnification
- Limitation Of Liability
- General Terms

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License Agreements

- Grant of Rights
 - Rights as to what?
 - Rights to do what?
 - Where? (territory)
 - Exclusive/Nonexclusive
 - No other rights
 - Reserved rights
- Sublicensing
- Diligence
 - Licensee's Efforts
- Payments
 - Fees
 - Royalties
 - Minimum Royalties
 - Earned Royalty
 - Milestone Payments
 - Payment Terms
- Records And Audits
 - Records
 - Auditing
- Reports
 - Royalty Reports
 - Progress Report and Commercialization Plan
 - Prior Signing Agreement Licensee Has
 - Licensee Solely Responsible Determining Tax
- IP Prosecution And Maintenance
- Quality Control/Use of IP
- Warranties/Disclaimer Of Warranties
 - Mutual Representations and Warranties
 - Licensor Representations and Warranties
 - Licensee Representations and Warranties

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License Agreements (cont.)

- Confidentiality
 - Limitations on Use and disclosure
 - Confidential Information Defined
 - Confidentiality of Terms
 - Publicity
- Markings
- Use of Licensor Name
- Licensee's Use of Rights to the Benefit of Licensor
- No Challenge of IP Rights by Licensee
- Export Compliance
- Insurance
- Term And Termination
 - Term
 - Termination by Licensee
 - Termination by Licensor
 - Minimum Sales Requirements
 - Other Conditions of Termination
 - Cure Period
- Infringement And Litigation
 - Notice
 - Licensee Prosecution of Infringement
 - Licensor Rights to Prosecution
 - Cooperation
 - Recovery of Damages
- Indemnification
 - Indemnification
 - Procedure
- General Provisions

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Distribution/Reseller Agreements

- Scope
- Definitions
- Appointment of Distributor/Reseller
- Orders
- Territory
- Exclusivity
- Delivery and Shipment
- Price (resale price maintenance – MSRP; minimum advertised price (MAP))
- Payment
- Reseller Responsibilities
- Company Responsibilities
- License
- Term
- Representations and Warranties
- Ownership of Intellectual Property
- Right to use Trademarks
- Compliance with Laws
- Export Control
- Confidentiality
- Non-competition/Non-solicitation
- Public Announcements
- Audit Rights
- Termination
- Indemnification
- Intellectual Property Indemnification
- Limitation Of Liability
- General Provisions

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Sales Representative/Independent Contractor/Subcontractor Agreements

- Nature and Scope of Appointment
- Sales Price of Products
- Compensation
- Expenses
- Payments
- Responsibilities of Representative
- Responsibilities of Company
- Territory
- Exclusivity (either way)
- Term
- No Conflicts
- IP/Work Product Ownership
- Compliance with Laws
- No Authority to Bind
- Relationship of the Parties
- No employment relationship
- Use of Trademarks
- Confidentiality
- Non-competition/Non-solicitation/Non-disparagement
- Termination
- Effect of Termination
- Any Trailing Commissions?
- Indemnification
- General Provisions

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Joint Development Agreements

- Involved Parties
- Term
- Schedule
- Purpose
- Confidentiality
- Scope
- Intellectual Property
 - Existing IP
 - Resulting IP
- Ownership/Use of IP
- Exclusivity
- Regulatory Concerns
- Fees/Costs/Expenses
- Resources
- No Guarantee of Success
- Termination

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Business Purchase Agreements

- See PowerPoint for “Buyer and Seller Beware: Navigating Business Purchase Agreements.”

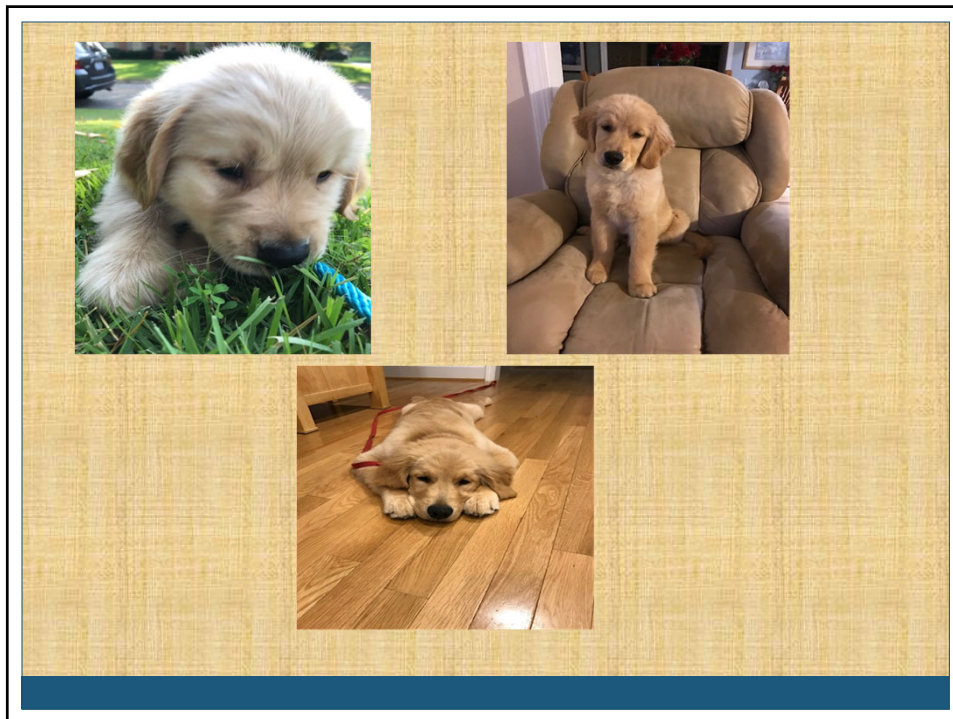
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Parting Thoughts



- The best time to protect client interests in business relationships generally is at the outset.
- Exercise thoughtfulness and intentionality in contracting
- Strategically prepared contracts are an investment that can often save clients \$\$\$, and often much more.

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