

Tips for Reviewing Contracts

Involving Less than \$50,000

This outline provides an overview of some of the frequently asked questions that arise when reviewing contracts. This outline is divided into two parts: (I) a brief background of what constitutes a legally valid, enforceable contract; and (II) explanations and tips concerning particular provisions that generally should be included in Pepperdine University's contracts.

The University also maintains a standard form Consulting Services Agreement for use by all departments where appropriate. The Consulting Services Agreement is regularly updated and contains all of the provisions discussed below.

If you have any questions or would like a copy of the standard Consulting Services Agreement, please contact the Office of the General Counsel at extension 4607.

One final thought about negotiating and entering into contracts on behalf of the University – liberal use of common sense can help avoid most potential problems. In the end, perhaps the best advice that we can provide is to simply treat the University's resources as you would your own.

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I. Background Information

What are the necessary legal elements to form a valid contract?

- Every valid contract must fulfill the following four requirements:
 - A. *offer and acceptance* - the parties voluntarily intended to enter into the contract; and
 - B. *consideration* - something of value is exchanged (such as money, a tangible object, an act, or a return promise); and
 - C. *parties capable of contracting* - each party has the legal capacity to contract at the time they enter into the contract, i.e. generally the party is not a minor, or mentally infirm; and
 - D. *a subject matter or purpose that is not illegal* - the subject matter is not against the law, e.g. there is no contract formed if the agreement was to pay off a gambling debt in states where gambling is illegal.

What is a recital?

- A **recital** is a preliminary statement in a contract explaining the background of a transaction or showing the existence of particular facts. The recitals should set forth the qualifications of the other party and also state the expectations and understandings of Pepperdine.

Examples:

- A. Institution has established an approved program of Special training for the GSEP entitled the Doctoral Program in Clinical Psychology (the "Program"); and
- B. Clinical practicum and intern experiences are a required and integral part of the Program; and
- C. Institution desires the cooperation of District in the training of students through the clinical practicum and internship experiences; and
- D. District desires to participate in the training of students through the clinical practicum and internship experiences.

II. Provisions Typically Included in a Contract

What are the terms of the contract?

- **Terms** set forth the conditions of the contract, the parties' duties and obligations and perhaps the reasons why the parties entered into the agreement. The terms should be clear, precise, and without ambiguity so each party knows how to perform the terms. Under the terms of the contract:
 - A. The parties' obligations are clearly stated.
 - B. There are clear time limits or expected time frames.
 - C. Pepperdine should be able to fulfill its obligations and duties on the timetable required.
 - D. If there are any obligations conditional upon a triggering event, the event should be defined clearly.
 - E. The location of the performance of each duty and obligation should be adequately identified.

Example:

- A. In consideration of the mutual covenants and promises of Pepperdine and Other Party in this Agreement, the parties agree as follows:

[List the duties of each party.]

What are the requirements for payment?

- Typically Pepperdine agrees to **payment (or remuneration or compensation for goods or services)** to the other party for a specific dollar amount per year payable on a monthly basis for providing timely and effective services. However, no payment is required until the work is satisfactorily completed and accepted by Pepperdine. Payment may be withheld on any portion of work Pepperdine finds unsatisfactory. Furthermore, Pepperdine should have the authority to reject work that does not conform to other provisions in the contract.

How are the fees and expenses paid?

- Generally, Pepperdine agrees to pay the other party a specific dollar amount in return for services. The total **fee and expenses** should be payable upon completion of the project or in incremental phases upon completion of each phase of the work and submission of an invoice. The other party should be required to submit an invoice and receipts as requested by Pepperdine to support reimbursement of all reimbursable out-of-pocket expenses. Furthermore, this provision should provide that the other party agrees to be solely responsible for payment of income, social security, and other employment taxes due to the proper taxing authorities.

Example:

- A. Pepperdine agrees to pay Other Party for providing timely and effective _____ services _____ dollars (\$_____) per year in twelve equal installments, payable on the first day of each month.

How does the contract end (terminate)?

- Often **termination** refers to the ending of the contract based upon the passage of time. Other termination provisions are termination upon occurrence of an event (such as the event of default, or _____ days written notice), payment of a stipulated sum, automatic termination, or termination for unsatisfactory performance. Under the termination provision:
 - A. There should be a clearly ascertainable starting and ending date.
 - B. Ideally, the term of agreement should be limited to one or two years, at the most, and the contract should not allow for automatic renewal.
 - C. If there is a "no-fault" termination prior to a specific ending date, the method of notice should be clear.
 - D. Contracts with fixed terms and no-fault termination in the same document should be viewed suspiciously.
 - E. If the contract provides for termination in the event of default, ask whether it applies with equal force to both parties.
 - F. The events of default should be described with clarity and specificity.

Example:

- A. This Agreement shall be for a term of ____ years, beginning on [date] and terminating without further notice on [date].

Is there an indemnification/hold harmless clause?

- The **indemnification/hold harmless** provision refers to a party's duty to reimburse a loss that someone has suffered because of another's act or default. One party assumes the liability inherent in a situation and agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved. Where possible, Pepperdine should:
 - A. Seek the indemnification of the other party against any and all liability.
 - B. Avoid indemnifying another for potential loss, doing so only when it is essential to have a contract.

- C. Have the indemnification cover Pepperdine's governing board, regents, attorneys, officers, faculty, staff, students, employees, agents, contractors, and volunteers.
- D. Not agree to hold another party harmless unless it is limited to the amount of any insurance purchased by Pepperdine.

Example:

- A. Other Party agrees to defend, indemnify, and hold Pepperdine harmless, including, but not limited to, its governing board, officers, attorneys, employees, agents, and students, from and against any and all claims, costs, allegations, losses, damages, liabilities, expenses, demands, judgments, court costs, attorney's fees, and any settlement paid, which may arise out of, or relate to, any performance or non-performance by Other Party under this Agreement, except to the extent such are caused by the sole fault or negligence of Pepperdine.
- B. The required insurance policy or policies described in this Agreement shall include coverage for this indemnification obligation and each required certificate of insurance and original Additional Insured endorsement will disclose that the policy includes protection for this indemnification and hold harmless obligation.

Is there a provision for insurance?

- Pepperdine should require the other party to carry the proper type of **insurance** applicable to the type of services to be performed (i.e. liability, property, Auto, workers' compensation, accident, medical pay, etc.). The insurance company should be acceptable to Pepperdine. The contract should provide for proof of insurance and that failure to maintain insurance is a default on the contract. Additionally, Pepperdine should be named as an Additional Insured, not just as a certificate holder.

Examples:

- A. OPERATOR agrees to obtain and maintain at its expense during the term of this Agreement, including any renewal(s) of this Agreement, all of the following:
 - 1. *Commercial General Liability Insurance* which includes coverage for independent contractors and contractual liability coverage, specifically referring to this Agreement and to the hold harmless agreement herein with a minimum combined single limit of not less than \$1,000,000 for bodily injury and property damage.
 - "or approved self-insurance acceptable to University" - per Department of Insurance and Risk Management, this is used for state agencies -- if it is "approved" self-insurance, the agency should still be able to provide proof of insurance with a form.

2. *Business Auto Liability Insurance* (for activity on the Malibu Campus or Cottontail Ranch) with a combined single limit of not less than \$1,000,000 for bodily injury and property damage, including all owned, non owned and hire autos.
3. *Worker's Compensation* (California Statutory limit) and
4. *Employer's Liability Insurance* of not less than \$1,000,000.

B. Failure to obtain such policies or to submit such certificates of insurance and original endorsements at least 5 days before the start of the contract shall at Pepperdine's election, constitute a material breach of this agreement and entitle Pepperdine to cancel the agreement without further notice to Operator.

- All liability insurance policies must name "PEPPERDINE UNIVERSITY" as an additional insured with respect to activities of the Provider. Certificates of Insurance for all policies and original additional insured endorsements for liability policies in a form satisfactory to University shall be furnished to University prior to the effective date of this Agreement and shall provide for at least thirty (30) days written notice to University of cancellation or reduction and include a statement that the insurance is primary and non-contributory with any insurance maintained by the University.
- Said insurance shall be issued by a company authorized to do business in the State of California with a BEST's rating of A- or better. All certificates of insurance shall be signed by an authorized agent or representative of the insurance carrier.
- If the general liability insurance is written on the 1986 simplified form or any version thereof, including subsequent versions, the annual aggregate for the bodily injury and property damage liability coverage shall be at least \$2,000,000.

Is there a provision for attorney fees?

- Under a clause for **attorney fees**, if any action or proceeding is necessary to enforce the provisions of the contract, including any claim or demand, collection efforts, or to interpret the contract, the prevailing party shall be entitled to reasonable attorney fees, where such action or proceeding has been prosecuted to judgment.

Example:

- A. If any action or proceeding is necessary to enforce the provisions of this Agreement, including any claim or demand, collection efforts, or to interpret this Agreement, the prevailing party shall be entitled to reasonable attorney fees, costs, or necessary disbursements, including fees and costs of corporate staff counsel, in addition to any other relief which it may otherwise be entitled, where such action or proceeding has been prosecuted to judgment.

Is there a modification/merger clause?

- A **modification (merger, integration or entire agreement)** clause eliminates the effect of any oral or "side" agreements. Under this provision the contract constitutes the entire understanding between the parties and may only be modified in a writing signed by both parties.

Example:

- A. This Agreement and its attachments, if any, contain all the terms between the parties and may be amended only in a writing signed by both parties.

Is there a governing law or forum selection clause?

- A **governing law/forum selection clause** allows contracting parties to pre-select a particular place in which to resolve controversies. By agreeing to a forum selection clause, the parties consent to the personal jurisdiction of a forum (the authority of a particular court) and agree not to sue in any other forum. Should a party to a forum selection clause ignore the clause and sue in a forum other than the one pre-selected, a court is bound either to dismiss the lawsuit or to transfer it to the pre-selected forum. This provision should be included in contracts involving out of state corporations to ensure that California law will govern the dispute. California state law should govern the contract and the venue of any action should be in Los Angeles, California. This insures that Pepperdine will be afforded the most convenient and cost effective location in which to maintain a lawsuit.

Example:

- A. This Agreement shall be governed by, and construed under, the laws of the State of California, which shall be the forum for any dispute arising from or incident to this Agreement. OTHER PARTY further agrees and consents that venue of any action brought hereunder shall be exclusively in the County of Los Angeles, California.

What about arbitration clauses?

- An arbitration clause typically requires the parties to resolve any dispute out of court. Agreeing to arbitration waives the parties' right to a jury trial, among other things. Although Pepperdine is not opposed to considering arbitration if a dispute arises, the University generally does not like to lock itself into arbitration clauses up-front.

Is there a place for the signature of both parties?

- A **signature** is made by the use of any name, including a trade name or assumed name. The parties should attest to the validity of the contract by signing their names at the end of the document.

Example:

A. IN WITNESS WHEREOF, this Agreement is executed by the parties hereto on the date/as hereinafter indicated.

INSTITUTION:
[Full Legal Name of Institution]
by _____
(Signature)

(Printed Name)

(Title)

OTHER PARTY:
[Full Legal Name of Other Party]
by _____
(Signature)

(Printed Name)

(Title)

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