



## **Three Steps to Bolster Your Contract Management Process**

**Corporate, Securities, and Governance**



## CHEAT SHEET

- **Define the process.** The first step in contract management is defining your process: Who are the key personnel? What are the non-negotiables? What type of due diligence is in place? And what are your internal policies regarding negotiation?
- **Sign-off authority.** To eliminate internal confusion, implement limited signature authority that is communicated to all company employees.
- **Use templates.** Templates increase efficiency and consistency, streamlining the contract process.
- **Contract lifecycle.** A contract management system should account not only for fully executed agreements, but capture the entire lifecycle of a contract.

The legal department is not usually considered as the department that brings in revenue; often, and unfortunately, legal is seen as a “necessary expense.” But what about the revenue legal keeps from seeping out of the company’s pockets? One way we, Jacks (and Jills) of all trades, add value to the company and help prevent the timely and costly clean-up efforts that will unquestionably happen otherwise is through proactive risk assessment and management.

One of the ways in-house counsel assess and minimize risk is through the contract process. Contracts are frequently viewed as “just paperwork” and deemed the legal bottleneck of pushing

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through a “great” deal. However, these great deals are often too good to be true. As counsel, we know that the deal between salespeople and the contract between lawyers can look completely different. The contract negotiation process is crucial for risk management; however, it begins long before you start redlining a contract.

Risk assessment and mitigation begins internally, and it begins with planning, communication, and training.

Risk assessment and mitigation begins internally, and it begins with planning, communication, and training. In his book, *Competitive Advantage: Creating and Sustaining Superior Performance*, Michael E. Porter writes that “risk is a function of how poorly a strategy will perform if the ‘wrong’ scenario occurs.” To know what that “wrong” scenario might look like, your internal teams (e.g., sales, marketing, executive, etc.) need to be trained on what red flags to look for. Before you can train your team, however, you need to get organized.

## **Step 1: Define your process.**

Before you can train your team to identify red flags, you need to have a good grasp of your contract negotiation process. You might have an established process already, or you might be creating one from scratch. Either way, you should figure out:

- Who are the key personnel involved in negotiating the business deals? Are they aware of the key hit points?
- Non-negotiables: What are the three issues your company will rarely, if ever, budge on? Some things, like indemnification, may stay constant regardless of the contract type, while others, like payment terms, will fluctuate depending on the specific type of contract.
- Due diligence: How do you vet the other party? What kind of due diligence does your company conduct? Who is responsible for conducting each portion of the due diligence?

**TIP:** Have a list of items that are cause for concern. If there are deal-breakers, make sure your team knows them in advance.

**TIP:** Check the entity name — many times the entity you’re doing business with is not the entity you’re contracting with. Make sure you know who you’re doing business with and that the legal entity is in good standing.

- Negotiations: Throughout the contract negotiation process, what is your internal policy/approach? Are there a set number of redlines that will go back and forth before getting on a call? Do certain types of contracts always require board approval? Is legal always on calls pertaining to contract terms?

## **Step 2: Delineate the internal hierarchy.**

What happens when a business team member gets a contract?

- Review process: What is the review process? Is everyone aware of the review policies and procedures? Are certain types of agreements allowed to pass without legal review?

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**TIP:** Consider if there are types of agreements that have to go to your CEO or board for approval. If so, these will help you develop your list of red flags when reviewing a contract.

**TIP:** Create a contract review request intake form or term sheet and have the business person complete all pertinent information before the contract even gets to legal. This should have all the material terms listed out (think back to the elementary principles of who, what, when, where, why, and how).

- Sign-off authority: Who can sign off on contracts? Is there an escalation process to legal, or does everything go through legal? How does it go up the chain within the legal department?

**TIP:** Having limited signature authority and making it known to all company employees will eliminate any confusion as to who has authority to bind your company.

- Turn-around time: What is the turnaround time that the legal department impresses on contracts from their entry point to final signature from the board or executive committee?

## Red flags

- Lack of transparency
- Hard to work with in the negotiation process
- Revisions not tracked
- Refusal to make one-sided agreements more balanced
- Unwillingness by the other party to indemnify you for their mistakes

## Step 3: Create, use, and reassess your contract templates.

Templates will help you streamline the contract process by increasing efficiency and reducing the time spent drafting documents. Templates will also ensure consistency across the board.

- Create templates
  - Boilerplate provisions are called boilerplate for a reason! You can create templates for provisions such as headings, severability, waiver, modification, entire agreement, etc.
  - Contract-specific provisions are great for a confidentiality/nondisclosure agreement pertaining to a potential partnership with a customer, for example. Your template should have a clear definition of what kind of confidential information you will provide (of course, the template may differ depending on the nature of the relationship). For an independent contractor agreement, create a template for your work-for-hire provision. Since this should be in every independent contractor agreement, there's no need to recreate the wheel.
- Use your templates
  - Have your templates readily accessible so you can copy and paste when you need to and remain efficient in your contract review process.
  - Don't be afraid to counteroffer with using your template agreement when presented with a third-party contract.

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**TIP:** As a sign of good-faith negotiation, always track your changes and be cautious when you don't get tracked changed back — remember the compare function is your friend.

- Update the templates
  - Learn from your mistakes and take advantage of experience — don't be afraid of change!

Remember, spending the time to properly negotiate a contract is preferable to spending the time, money, and resources when the deal goes up in flames months down the line.

## Contract management

- What is the process for getting executed agreement to legal?
- Who has access to all executed agreements?
- Create an inventory of all executed agreements with a bird's-eye view of all material terms and important details of each contract.

As much time as we spend negotiating and drafting a contract, the hope is to never have to use the contract. Our company's general counsel often says that "the goal of any executed contract is to file it in a drawer and never look at it again." If the business deal doesn't go sour, that's wonderful. But if it does, the contract needs to be a sword and shield. So, how can you ensure your contract will protect your company?

Write clearly and succinctly. Going back to elementary law here, say what you mean.

## Tips and best practices for a well-drafted contract

Perhaps science fiction author Charlie Stross put it best when he said: "Contract law is essentially a defensive scorched-earth battleground where the constant question is: 'If my business partner was possessed by a brain-eating monster from beyond spacetime tomorrow, what is the worst thing they could do to me?'" While brain-eating aliens are unlikely, having a checklist of issues to address when reviewing a contract will help protect the company.

- Checklist particulars
  - How do you identify the risks you need to prevent? Consider regulatory, legal, business, and financial risk factors.
  - What is the organization's risk appetite?
  - How do you deal with lack of transparency from the other side?
  - How do you allocate risk?
    - Examine the severity of the possible risk against the likelihood of that risk — the greater the risk and the more likely that risk is to occur, the more careful you have to be with your contracts.
    - Some of the ways you can allocate risk to the other party in the contracting process is through requirements for insurance, limitation of liability clauses, and indemnification obligations.

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- Failure to have a checklist can lead to the failure to consider key points, which in turn may lead to unintended obligations.

**TIP:** If you are in a take-it or leave-it situation, you still need to review the deal and assess the potential risks — in some cases the potential risks will be minimal. Other times, you may need to present your concerns to the executive management and let them make the business decision as to how to proceed (or not).

- If the agreement references external documents, make sure you have reviewed those documents before the contract is executed. If you don't, you could go through the motions of negotiation and then be bound by one-sided online terms of use, leaving you exposed.
- Write clearly and succinctly. Going back to elementary law here, say what you mean.
  - Avoid unnecessary legalese (unless, of course, you're trying to confuse the other side).
    - Remember, Juliet wasn't blind when she asked, "Wherefore art thou Romeo?"
  - Every. Word. Matters.
    - Define any capitalized words or other terms with special meaning for the particular agreement you're working on.
    - Don't use ten words when four will do — there is no need to be convoluted.
  - Don't waffle on word choice. If you are imposing obligations on the other side, state so and avoid using uncertain words like "should." For example, "the party should give notice when..." "Should" is not a requirement for affirmative action or inaction — it's merely a guideline.
- Proofread
  - Always spell check, especially since tracked changes can be hard to decipher. Don't forget to look for things spell check won't catch, for example:
    - "The Indemnified Party reserves the right to *retail* counsel."
    - "Confidential information does not include information that is a matter of *pubic* knowledge."
    - "Neither Party shall not be liable for..."

**TIP:** Remove commonly mistyped words from the dictionary, for example, have spell check flag the word "asses" so you don't miss it when you really mean to say "assess."

- Make sure section numbers align after edits. This comes up when specific sections are references, particularly in the survivability provision.

Don't forget that risk management doesn't stop with contract review and approval. Once you go through the redlining and have an executed contract on hand, what happens next? Well, we're all familiar with the dreaded "contract management." However, risk mitigation is about evaluating all the circumstances, and knowing where you stand with your executed agreements is crucial. Not only do you need to have a process in place for the negotiation, review, and approval of contracts, you should have a process for tracking existing contracts. There are dozens of contract management platforms and each one offers a little something different. You could also create, implement, and manage a manual system. Whichever you choose, the key is to have something in place. An efficient contract management system is not only a master inventory list of all executed agreements, it should also show you the entire lifecycle of a contract at a glance.

The following is some of the information you should be able to glean from a quick skim of any

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particular contract:

- Counterparty's basic information
- The type of agreement (e.g., vendor, purchase, insertion order, non-disclosure, etc.)
- Material terms (e.g., services provided, price, duration, performance standards)
- Renewal/expiration date (with a calendar alert)
- Process for termination
- Legal protections (e.g., confidentiality, representations and warranties, limitation of liability, indemnification, insurance, data protection)
- Governing law and jurisdiction
- Any other information that is important for you or your company

One of the most missed obligations comes with the renewal, or more accurately, the non-renewal caveats. For example, if a contract is on auto-renew and you miss your 60-day window to terminate, you may be stuck in a bad deal for another year. If you can build calendar reminders into your contract management process, you will alleviate the stress and potential costs that come with missed deadlines and avoid the potential breach of contract for improper termination.

## Final thoughts...

Whether you are in the beginning stages of negotiations or deep in the fourth redlined version of the agreement, remember that no matter the circumstance, you have to identify the potential problems, assess the situation, work closely with your internal team, and respond to change when necessary.

The goal is to conduct risk assessment and implement a risk-management system that doesn't interfere, but rather, complements the legal and business functions. Planning ahead can help create a united company front, strengthen compliance protocols, and improve the overall efficiency of the negotiation and review process.

Assessment and management of risk through the contracting process is not easy. It takes time and effort, requires a lot of planning, training, and communication, and at times may even be a little daunting. However, part of our role as in-house counsel is to mitigate risk and bring value to our company. Getting organized, planning ahead, evaluating high-risk versus low-risk factors, knowing your no-no list, creating an internal structure for review, approval, and management, conducting due diligence, and openly engaging in the negotiation process are some ways you as legal counsel minimize risk for your company without halting business operations.

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## NOTES

1 Porter, Michael E., *Competitive Advantage: Creating and Sustaining Superior Performance*, Free Press, 1985.

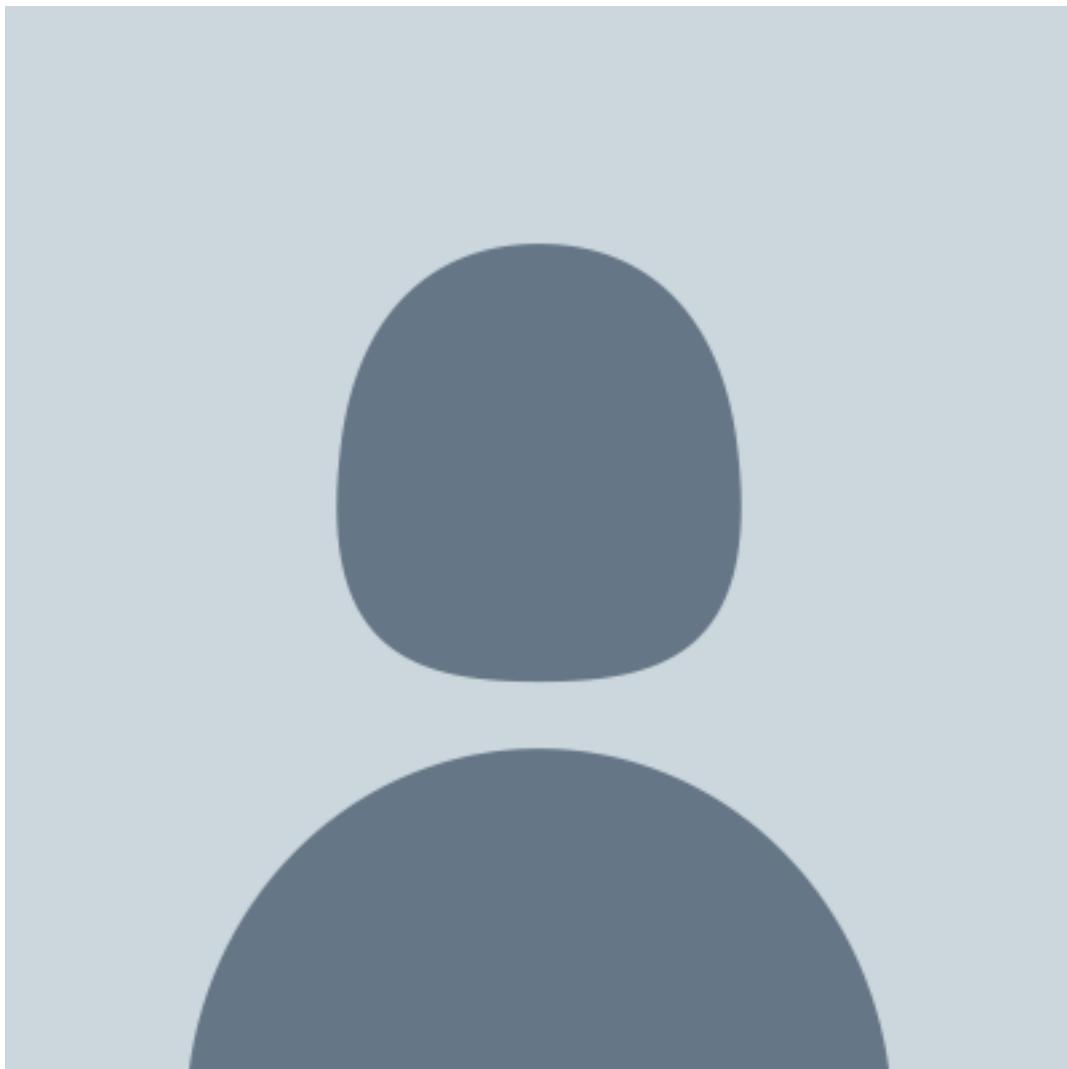
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