

Welcome

Our Presentation

Will Begin at 10am

- All viewers are muted. Audience cameras cannot be turned on.
- Who's with us today? Feel free share your nonprofit's name in the chat box.

How to Navigate Technology and Clickwrap Agreements



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We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

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In order to be a client of Pro Bono Partnership of Atlanta, an organization must:

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- Be located in or serve the greater Atlanta area.
- Serve low-income or disadvantaged individuals.
- Be unable to afford legal services.

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Introduction

What is a clickwrap agreement?

Do you review your IT contracts or clickwrap agreements or do you just sign them?

If you do review your IT contracts or clickwrap agreements, how many have you negotiated?

Everything is negotiable!



Agenda

- Why IT Transactions Fail
- Common Negotiable Contract Terms
- Tips on Retaining Control of Data
- Ways to Mitigate Risk Internally
- Options for Termination

Why IT Transactions Fail

The background of the slide is a dramatic, abstract image. It features a dark, stormy sky with heavy, dark clouds. In the foreground and middle ground, there are numerous bright, colorful light trails in shades of red, blue, green, and white, which appear to be streaks of light or data flowing across the scene. The overall atmosphere is one of intense energy and complexity, suggesting a digital or technological environment.

Common Pitfalls in IT Transactions

1. Poorly defined scope / description of customer responsibilities
2. Poorly defined business objectives
3. Unclear pricing methodology
4. Lack of service provider accountability
5. Inadequate measure for performance (measuring level of service)
6. Ineffective change management
7. Lack of executive / organizational support
8. Poor post-transaction deal management

Common Negotiable Contract Terms

The background of the slide is a digital artwork. It features a dark, moody sky with soft, golden light filtering through the clouds, suggesting a sunrise or sunset. Overlaid on this are numerous vibrant, multi-colored light trails in shades of blue, red, green, and white. These trails appear to be data streams or fiber optic paths, crisscrossing the scene and creating a sense of dynamic movement and connectivity. The overall aesthetic is futuristic and high-tech.

Common Negotiable Contract Terms: What Are They?

- Scope of services
- Pricing
- Performance warranties
- Service level agreements
- Termination clauses (to be discussed at the end)

Common Negotiable Contract Terms: Scope of Services

What?

- **Clearly describe the scope of services**
 - Focus on the desired results
 - Identify critical tasks and capture any business or technical requirements (e.g., compatibility, interoperability, scalability)
 - Statements made by the vendor during the sales process / RFP stage are not part of the deal unless they are expressly stated in the contract

Who?

- **Clearly allocate responsibility for performance**
 - Things don't just happen
 - Clearly assign responsibility to the vendor
 - Where a task is your responsibility, include as much detail as possible regarding the resources, information, and other details and the general timeframe when they are required by the vendor

When?

- **Clearly state any milestones, deliverable dates, and go-live dates**
 - Hold the vendor accountable for timing

Common Negotiable Contract Terms: Scope of Services

Common Problems

- Too general/not enforceable
- Conflicts with master services agreement or license agreement
- Littered with assumptions, dependencies, and customer responsibilities
- Contains more out-of-scope services than in-scope

Solutions

- Make specifications part of the contract
- Review SOW for conflicts
- Challenge the supplier's assumptions and dependencies on your team, limit customer responsibilities
- Where appropriate, include a "sweeps clause" to fill in the gaps in your description of services

Common Negotiable Contract Terms: Pricing

- **Common Pricing Methodologies**

- Fixed fee
- Variable
- Cost Plus
- Time & Materials
- Time & Materials (with a cap)
- Milestone Payments

- **Note: Beware of “Estimated” Fees**

- Estimated fees are only an estimate
- Estimated fees do not provide price protection



Common Negotiable Contract Terms: Pricing

- **Pricing Best Practices**

- Understand your **base case and retained costs** – don't pay more than you currently pay
- Understand **vendor's pricing model**
- Require **scalable pricing** to satisfy future volume requirements – i.e., committed pricing for additional quantities of software or services
- Include a **rate card** or **pricing list** for future purchase
- Avoid **minimum revenue and volume commitments**, if possible
- Avoid **contractual language that allows the vendor to increase fees (without due process)**

Common Negotiable Contract Terms: Performance Warranties

- “Vendor represents and warrants that....
 - the Software/Solution/Services will conform in all material respects with the Documentation/Specifications....”
 - all Services shall be performed in a timely and workmanlike manner with a degree of care and skill consistent with industry standards applicable to the performance thereof.”
 - all Deliverables will be free from material defects and will conform to the following specifications or requirements....”
- “THE SERVICES AND DELIVERABLES ARE PROVIDED “AS IS” AND “AS AVAILABLE”, WITHOUT WARRANTIES OR GUARANTEES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, AND ANY WARRANTIES IMPLIED BY A COURSE OF PERFORMANCE, DEALING, OR USAGE OF TRADE.”

Common Negotiable Contract Terms: Service Level Agreements

Getting Started

- Identify the required **level of service (quality)**
 - I.e., conduct some vendor due diligence
- Understand your **pre-deal performance**
 - Do not contract for less than your current scope and performance level
 - E.g., this solution is worse than the old one
- Determine **minimum** and **expected** levels of service
 - E.g., what do I absolutely need and what do I want?

Common Negotiable Contract Terms: Service Level Agreements

Study the Service Level Agreement

- **Study the definitions** for the service levels
 - E.g., what does it mean for the service to be “available” or for a problem to be “resolved”
- **Test your formulas** for unintended consequences (check the math!)
- Require service level **credits/deliverable** credits
 - Credits are NOT penalties (penalties are unenforceable)
 - Credits reflect a price reduction in response to a reduced quality of service
- Ensure credits are significant enough to **encourage the desired behavior**
 - I.e., the vendor should not profit from poor service
- Require that the vendor **monitors its performance** against the service levels and provides **regular reporting**
 - Watch out for language requiring credits be claimed before reporting arrives and avoid self-reporting

Common Negotiable Contract Terms: Service Level Agreements

Availability %	Downtime per year	Downtime per month	Downtime per week	Downtime per day
90% ("one nine")	36.5 days	72 hours	16.8 hours	2.4 hours
95%	18.25 days	36 hours	8.4 hours	1.2 hours
97%	10.96 days	21.6 hours	5.04 hours	43.2 minutes
98%	7.30 days	14.4 hours	3.36 hours	28.8 minutes
99% ("two nines")	3.65 days	7.20 hours	1.68 hours	14.4 minutes
99.5%	1.83 days	3.60 hours	50.4 minutes	7.2 minutes
99.8%	17.52 hours	86.23 minutes	20.16 minutes	2.88 minutes
99.9% ("three nines")	8.76 hours	43.8 minutes	10.1 minutes	1.44 minutes
99.95%	4.38 hours	21.56 minutes	5.04 minutes	43.2 seconds
99.99% ("four nines")	52.56 minutes	4.38 minutes	1.01 minutes	8.66 seconds
99.995%	26.28 minutes	2.16 minutes	30.24 seconds	4.32 seconds
99.999% ("five nines")	5.26 minutes	25.9 seconds	6.05 seconds	864.3 milliseconds
99.9999% ("six nines")	31.5 seconds	2.59 seconds	604.8 milliseconds	86.4 milliseconds
99.99999% ("seven nines")	3.15 seconds	262.97 milliseconds	60.48 milliseconds	8.64 milliseconds
99.999999% ("eight nines")	315.569 milliseconds	26.297 milliseconds	6.048 milliseconds	0.864 milliseconds
99.9999999% ("nine nines")	31.5569 milliseconds	2.6297 milliseconds	0.6048 milliseconds	0.0864 milliseconds



Tips on Retaining Control of Data: Definition of Customer Data

INPUTS: Customer shall retain exclusive **ownership** of all rights and title in all data, information, reports, or other content, in any form, that is: (a) loaded into the Solution by or on behalf of Customer, its Affiliates, and/or any Authorized Users or as otherwise collected or obtained by or on behalf of Customer or its Affiliates....

AND OUTPUTS: (b) generated by the Solution based on such information, data, reports, or other content (collectively, “Customer Data”).

Tips on Retaining Control of Data: Return or Destruction of Data

- Do not let vendors hold your data hostage
- Ensure you contractually have the right to get your data back or have the vendor delete your data under the contract (at no cost or at a pre-negotiated cost)
- E.g., “After termination or expiration of this Agreement, Vendor shall, within a reasonable period of time (not to exceed three (3) business days) and at no cost to Vendor, **return** all Customer Data stored in the Solution in the form reasonably requested by Customer.”
- E.g., “Upon termination or expiration of this Agreement and only upon Customer’s request, Vendor shall, at no cost to Customer, **permanently delete** all Customer Data from the Solution and Customer’s systems (including any third-party systems used by Vendor to host or process the Customer Data).”

Tips on Retaining Control of Data:

Use Limitations

- **Limit Use to Provide the Services**

- E.g., “Vendor agrees: (1) to collect, process, store, use, or disclose Customer Data only for the limited and specific purpose of providing the Solution and performing the associated Services as specified in this Agreement and (2) not to use the Customer Data outside of the direct business relationship with Customer.”

- **Look Out For Other Uses – E.g., “Aggregated or De-Identified Data”**

- E.g., “Vendor may create or derive from Customer Data aggregated or de-identified data that does not reasonably identify Customer or any person and use, retain, or disclose such aggregated or de-identified data for its own purposes.
 - *May be ok, but it is important to understand the implications – pay particular attention with personal / sensitive data or if data is proprietary to your organization

Ways to Mitigate Risk Internally

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Ways to Mitigate Risk Internally:

Practical Steps

- **Identify the constituents** to each transaction (e.g., finance, IT, HR, operations, etc.)
- **Elicit input from each constituent** on the goals and objectives for the project
- Establish clear and balanced **organizational objectives**
- Understand **roles and responsibilities** of each constituent
- **Pre-negotiation contract alignment:**
 - Clearly communicate business needs and expectations
 - Allocate time and resources required to meet objectives
 - Ensure organizational and executive support for the project
 - Establish and leverage the contracting process (i.e., leverage the RFP process with multiple vendors where possible)

Ways to Mitigate Risk Internally: Contractual Obligations

- Carefully review “Customer Responsibilities”
 - Make sure these are accurate and in line with expectations
 - Relevant constituents need to be aware of these “Customer Responsibilities”
- Check any “Assumptions”
 - Question what the vendor provides – ask are these true?
 - Do the assumptions set up a situation for failure (or opportunity for the vendor to re-scope and re-price)?
 - Relevant constituents need to be aware of these “Assumptions”



Options for Termination

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Options for Termination: Termination for Convenience v. Termination for Cause

■ Termination for Convenience

- Hard to get with no leverage
- Check to see if there are associated termination fees – it's about quantifying your cost of exit

■ Termination for Cause

- Termination for “material breach” is a **very high standard**
- Seek to include additional termination rights that are measured by objective standards:
 - Service level failure termination events
 - Critical outages
 - Multiple misses or milestones
- Bottom line – if your vendor is underperforming, **document it**

Options for Termination: Performance Warranty

- Remember the performance warranty? This is another place to look
- Check if the performance warranty has any **obligation to fix issues or material defects**
 - This may be another thing to point to show material breach and terminate for cause
- Review the performance warranty to see if there is any **right to terminate**
- Be aware of **short notice periods** to bring a warranty claim



Options for Termination: Uphill Battle



Questions?

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