

PBPA Podcast Transcript
Before You Sign: A Nonprofit's Guide to Contract Review
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[00:00:00] **Sireesha:** Nonprofits deal with a wide range of contracts, from volunteer waivers to grant agreements, and from office leases to independent contractor agreements. Sometimes these contracts are short and relatively straightforward. Other times they're lengthy and full of complicated legal language. In this episode of the PBPA Podcast, we will embark on Part One of a two-part series of nonprofit contract strategy and management.

Thomas Federico will guide us through important contract provisions and how your organization can develop a contract strategy to assess and minimize your legal risks. Join us today for part one. As we talk about which contract provisions your organization should really focus on and when you should consider enlisting an attorney to help you.

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Thomas Federico is a staff attorney with PBPA. Thomas has a fantastic and diverse background from both in-house and law firm experience covering such areas of law as technology, privacy, intellectual property, and tax. Thomas was also a dedicated volunteer at PBPA prior to joining our staff. Thomas now brings that robust experience to counseling nonprofit clients every day and even to conversations like this on the PBPA podcast. Thomas, I'm looking forward to our conversation today.

[00:02:54] **Thomas:** Thank you, Sireesha. That was a very gracious introduction and I'm looking forward to talking to you and our listeners as well.

[00:03:01] **Sireesha:** Thomas in this episode we're going to be focusing on key contract provisions, and this is an idea that has even come out of our conversations among PBPA staff attorneys about what we would love for our nonprofit clients to know about contracts.

[00:03:18] **Thomas:** Three points for everyone before we begin. First this podcast series is really not a substitute for specific legal advice and we don't want you to get the impression that you never need a lawyer to help your organization with a contract. Rather, our goal today is to help you think more carefully about contracts generally, and to know when you should reach out to a lawyer for specific help. Second, while all contracts share certain things in common, like certain basic provisions or legal conditions for determining if a contract has been formed, things you may be familiar with, like offer and acceptance, something of value that was exchanged, or when a party is in breach - that's just a fancy way to say that they violated the terms of the contract. Remember that there is no

one size fits all approach to contracts. There is no one form, for example, that can address every contract need, and not all contracts will involve the same sort of risks. Contracts are always going to be fact dependent, and we're gonna go into more detail about that later in this podcast.

Third, I like to think about dealing with contracts in both what I call tactical and strategic terms, and you may wanna think that way too. By tactical, I mean figuring out how to best address a specific contract that your organization may need right now. We're gonna focus on that aspect of contracts today.

And by strategic, I mean figuring out how to deal with all of the contracts your organization has already entered into and will enter into in the future. And we're gonna focus on that strategic aspect in part two of this series. Both of those approaches, however, benefit from a form of triage, which I'll talk about a little bit later.

[00:04:58] **Sireesha:** That's some fantastic background, Thomas. But do organizations even need to always sign contracts before they begin to work together? And what happens if the parties start doing business with each other without a signed contract?

[00:05:17] **Thomas:** Well, that's a really good place to begin, and there's an old saying that a verbal contract's not worth the paper that it's printed on, and there's some truth to that. Not all contracts need to be in writing. Those that do are generally specified by state law, but whether a contract needs to be written to be enforceable or not, it's really always a good idea to have a signed written contract in place.

This eliminates any ambiguity and provides clear ground rules for the parties to transact their business together and for a variety of reasons, including losing all of your negotiating leverage. It's really better to negotiate the contract, sign it, and then work together.

Once again, though, it really depends on the type of deal you're negotiating. If it's something very basic that doesn't implicate some high risk activities like collection of personal data, intellectual property events or activities where injuries or death could occur. Or if there's a high level of money that's involved. All of these, again, are high risk attributes. That's where you know you're gonna wanna have on a contract locked in before you engage in any activities. If it's something that's very low risk, then the consequences not be so severe.

But again, I don't recommend doing that I think you should have everything taken care of in advance because you're just gonna lose negotiating leverage. And I've seen a lot of situations where that occurred and then the party that you know, that wants to get something doesn't get it. And I've also seen situations where the party that you were working with never actually signed the agreement and they just strung people along. So it's something definitely to be aware of.

[00:06:52] **Sireesha:** Okay, so first step, always try to get a written contract in place. And you mentioned earlier triage, triaging your contracts. Is that like at a hospital? Can you talk a little more about the triage process and how can our listeners use it to assess the different contracts that their organization may need?

[00:07:16] **Thomas:** Yeah, sure. That's exactly what I'm talking about. It's just like the triage that happens at a hospital's ER. You might not know. I'm a bit of a history buff, so if you can just indulge

me for a second for a little bit of a, what we call a "frolic and a detour". Triage comes from the French word 'to pick or sort', and it was first used as a medical assessment system by France's Chief military surgeon during the Napoleonic Wars. He wanted a system where the wounded were treated based solely on the gravity of their injuries without reference to rank or nationality.

The same sort of assessment system can be applied to assessing your organization's contracts. Some are gonna be more critical than others. For example, a grant agreement for \$250,000 is gonna be much more critical than an agreement for some routine maintenance services around your organization's offices. And some deals will carry more risks, such as an agreement for website development and hosting services, or if you're want to engage an independent contractor to create content for your organization.

Even within a contract that is looking at each of the provisions in it, and some contracts can be several pages and have 20 or more provisions. You can apply the triage approach here too, because what you're gonna be doing is looking at some of the terms that are more critical than others. Some that can be negotiated and some that you may not want to be negotiated at all, or some that the other party will just not want to negotiate.

[00:08:41] **Siresha:** Tell me a little bit more about that. Non-negotiables. Can you please elaborate?

[00:08:48] **Thomas:** Yeah, so a contract has a lot of provisions in it. Some of them are mostly business or operational in nature. These are things like the names of the parties where the contract. Will take place when the contract will start, when it will end a description of the services to be provided, or list of each of the parties obligations. Other provisions are more legal or risk management in nature. Things like insurance types and amounts of coverage, indemnification, limitations of liability, confidentiality of information, governing law, dispute resolution and use of intellectual property.

Let's say your organization's based in Georgia. You probably don't want to agree to governing law or dispute resolution in New York. And if your organization is contracting with a party that's creating materials for your organization, say you're engaging an independent contractor, you wanna make sure your organization owns the materials and that the person creating those materials for your organization is going to promise that they don't infringe another party's rights because you just don't want them to just copy materials from another party and pass them off as their own. Your organization doesn't want to be subjected to a lawsuit by another organization or person that claims to be the rightful owner of something that you just paid that contractor thousands of dollars to create.

So while you might be willing to negotiate around a contract start date and an end date whether your organization provides or receives certain deliverables. The two examples I just gave of governing law and IP ownership are good examples of legal terms that are generally non-negotiable because there are provisions in which your organization does not want to just give away certain legal rights that are important to it and will protect your organization from liability.

Firstly, suppose your organization is on the opposite side and you want to integrate an online donation platform into your website. Well, that platform probably has their own standard terms and conditions and a lot of large scale service platforms, some that we as individuals have even tried to get services from, they probably are gonna rely on click through terms or something similar where

the customer just has to agree to standard online terms and it's not gonna have the opportunity to negotiate them.

So this concept of non-negotiable can work both ways. Whenever your organization is asked to sign a contract, whether it's on paper or online. I think it's a good idea to help set expectations and to save time and resources to go ahead and ask that other party, are they even open to changes? Because if they're not, then you are wasting a lot of your time and possibly an attorney's time if you were to get some attorney involved and helping you.

[00:11:34] **Sireesha:** Okay. Now let's talk about getting attorneys involved. Some of our clients might ask: i'm not a lawyer. Shouldn't we have an attorney help us review every contract that we're asked to sign?

[00:11:48] **Thomas:** That's another great question. It's not really realistic to think that if you are A-P-V-P-A client. That, one of your staff attorneys or one of our great volunteers or if you're not a PBPA client, your own lawyer is gonna be able to review every contract that your organization may need to sign or that you may need for a specific situation.

So this is really where triage comes into play. You will need to learn how to assess a contract situation, determine if it's low risk or high risk using some different criteria. If something is high risk, you'll want to consider working with a lawyer. So you might be thinking, okay, can you gimme some help with what this criteria for a high risk will be? What's, how do we apply this triage concept?

What I do is I'll look at things based on a couple of different categories. Financial exposure, how much money are you talking about? And is your organization receiving the money from the other party or are you paying out the money? What's the complexity of the deal? Is the agreement covering a single event where two nonprofits are just setting up tents and sharing promotional materials? With the public that's fairly low risk. Or is it for a strategic alliance with another nonprofit or for a profit, a for profit organization where there might be significant issues like mission compatibility a long list of contractual obligations and deliverables that are expected. Are there plans for revenue generation that might require the advice of a non-for-profit tax lawyer?

Another category would be liability. Think to yourself, what's the worst thing that could happen if something goes wrong? Is it just extra payments to the other party? Are you at risk of exposing the organization to government fines and penalties? Injury or death, reputational harm? Are you making promises in a contract where there could be personal imprisonment if you violate one of the covenants in that agreement?

To go back to the example from earlier, you don't really need a lawyer to help you with a contract for maintenance services or landscaping services to beautify your organization's space. But you should consult a lawyer if your contract deals with those things I talked about earlier: collection of personal or health data, creation of intellectual property, like a book, videos or a website or an event where people like volunteers can get injured or killed. So apply all those different categories to the contract, assess whether it's low risk or high risk, and then determine whether that's something is high risk, you should get a lawyer involved ideally.

And Sireesha, we had talked in one of our meetings before about AI and I'd like you to say a little bit about that here because, AI is a really hot topic right now. You know, I think we understand that

there's a desire for organizations to leverage AI wherever they can and here in the context of contracts to maybe use AI to quickly generate a contract or a form.

But the problem is you don't really know what sort of contract that AI tool will generate. It could have errors, it could have provisions that are not enforceable in your jurisdiction. It could have provisions that are not favorable to your organization and depending on the AI tool that you're using and the particular version, you may be sharing confidential information in the search query where the AI vendor and even other AI users may have access to that information. So I would certainly not rely on AI to generate any contract that's complicated or high risk. I would rely on the value that a lawyer provides to those situations.

[00:15:15] **Sireesha:** Thomas, those were some really helpful tips on what criteria to use for triage, including financial exposure, complexity and liability, and also some great background on the use of ai. Now that we've addressed some of those preliminary matters, can you give us a high level overview of some of the key terms in the contract?

[00:15:39] **Thomas:** So for all of you listening, whether your organization is the party offering your form contract, or you're the party that's receiving a form contract from the other party, let's just do a quick review of what I talked about earlier. Every contract is gonna have some key business, operational terms and some key legal terms. You organizations shouldn't assume that even if it's a low risk contract or that if you have a lawyer reviewing a contract that you can just completely tune out.

It's really important that you or someone else from your organization get tasked with the responsibility of the contract, reading the contract and weighing in on the business and operational terms to make sure they reflect the deal. A lot of contract disputes are not about the legal terms. They're about these business and operational terms, so you wanna pay close attention to them and get it right.

Then there are gonna be the important legal terms that you or that contract point person are gonna want to understand in terms of the implications to your organization. Um, these are the provisions that I mentioned: indemnification insurance, limitation of liability. Confidentiality, intellectual property. These are all high risk provisions within the contract itself, and they can have serious implications to your organization if you don't understand their purpose at a high level and how they're drafted in the contract specifically.

[00:17:04] **Sireesha:** And now let's take a closer look at some of those higher risk provisions and some of the specific risk mitigation strategies that are available. Can you talk more about the indemnification provision, for example? What is it and how does it work?

[00:17:22] **Thomas:** Yeah, so indemnification is a provision that confuses a lot of people and it can be very complex to implement correctly. It's a way to create a process within the contract to address claims or losses that one of the parties might incur as a result of the other party's actions or their inactions. It can also extend to claims or losses that are incurred by third parties. These are the people organizations that are not actually parties to the contract.

So for the non-lawyers listening, the indemnification provision can seem like a lot of legal mumbo and jumbo. Think of verbiage that you might see in a contract that reads "indemnify, defend and

hold harmless", and "from and against any and all claims, actions, suits, demands, settlements, expenses of any kind whatsoever". That's a mouthful, right?

Depending on what your organization's bringing to the deal, your organization may want a very broadly drafted indemnification, so the other party is on the hook for the widest range of claims and losses as possible to protect your organization. Or you might want your organization to implement very narrow indemnification language to reduce your exposure of liability to the other party and or to third parties.

So depending on the deal and the size and the quality of the organization on the other side of the deal an indemnification provision will basically only be as good as the insurance, the reputation, and the assets of the organization that you're dealing with.

[00:18:56] **Sireesha:** Okay, so you mentioned that indemnification is generally tied to insurance. Can you elaborate?

[00:19:04] **Thomas:** I'm gonna use some examples. I think that would be the best way to get our listeners to better understand this concept. Toward the beginning of this podcast, I talked about an independent contractor agreement. They were gonna be engaged to create some content for your organization. Is the contractor a reputable national service provider with a large experienced staff, or is it a sole proprietor working remotely? Let's say it's a large organization.

Well, the large organization will typically carry several different kinds of insurance in amounts of upwards of tens of million dollars or more to cover claims or losses that are attributable to its services. For example, it'll have comprehensive general liability insurance. It'll have auto liability and accident insurance, property insurance. It might have errors in omissions insurance, and maybe cyber liability insurance. And I'll tie all that up with a bow in a second.

But the sole proprietor that you might engage as an independent contractor he or she might not have any business insurance at all. So if your organization suffers a loss. Suppose the deliverables your organization was promised actually infringe a third party's rights, and then that owner sues your organization. First thing you would do is turn to your contract, see if you have an indemnification provision, and if there was, you had notify the other party of the claim, demand that they indemnify your organization according to the terms in that indemnification provision. You would also typically contact your insurance carrier and you would notify your board of this particular claim.

Then the other party would notify their insurance carrier. They would then defend your organization through their insurance carrier and your organization would look to the other party and their insurance carrier to defend against the claim, pay out any losses you might incur, including possibly attorney's fees .

For purposes of time I'm sort of oversimplifying the process a bit, but I think everyone gets the general idea that if you're working with a large organization that's reputable and has insurance, indemnification can be used to help mitigate the risk. So the more sophisticated the other party is, the greater the likelihood that the indemnification will be effective.

[00:21:21] **Sireesha:** But what if the other party doesn't have any insurance?

[00:21:26] **Thomas:** Yeah, that's the problem. Um, if the other party doesn't have insurance and we'll go back to that sole proprietor example, you would look at your contract, see if there's an indemnification provision in it, just like you would if you were working with a large organization. If the contract does have indemnification, well, what you would actually have is a situation where the legal terms are not really worth the paper they're printed on.

Because if the contractor you're doing business with doesn't have any insurance. How are they really going to cover any claims that are made? Your organization might be able to try to go after the contractor individually to recoup losses. But that will be likely a very uphill battle that you may not win. And they might have some assets that they can provide to cover some of those losses, but without insurance, there's no teeth to that indemnification provision.

So this is really another reason why you should engage in triage, assess the nature of the contract. What are the facts? What's the deal? What are the risks? Determine whether the risks warrant requiring that the other party maintain certain minimum types and amounts of insurance coverage to back up the obligations that they have in that indemnification provision.

[00:22:41] **Sireesha:** So far we've talked about the indemnification and insurance provisions of a contract. What are some other ways an organization can mitigate risk in a contract?

[00:22:53] **Thomas:** Yeah, there are a lot of different ways to do that. Again, for time purposes, I'm gonna just sort of call out a few of the most common ones. First and foremost, make sure each of the party's obligations, all services, all deliverables, all deadlines, those things should be very clearly stated in the contract.

I can't overstate enough that most of the time when there is a contract dispute, it's the result of ambiguity or where one of the parties alleges that the other party didn't fulfill their end of the bargain. It's just basically as simple as that. You were promised something the other party didn't deliver. That's usually what the dispute, um, revolves around. And if you wanna hold the other party accountable, you really need to have specific language that you can point to in the contract so it's crystal clear that they should have done something and they didn't.

Other things you can do to help mitigate risk would be look at the term and termination provision, um, that can be narrowly or broadly drafted to either give your organization the ease and flexibility in terminating a contract easily or conversely, maybe you want to try and lock in the other party for a longer period of time. It's also important to specify what happens when the contract is terminated. I've seen a lot of contracts where it was not specified what happens upon termination, and then there's ambiguity, assumptions are made. For example, if you are expecting to get something returned to you, but it's not in the contract, you might find that it's difficult to get whatever, um, you want returned to you upon contract termination. So specify that in that term termination provision.

There are provisions called noticing cure that can help. What are those? Well. You don't want a contract to be derailed by a minor violation of the terms, and even if a violation by the other party is major, it might have been unintentional. A clearly drafted process for curing a breach. A violation can help repair the party's relationship and avoid disputes and delays. You can give them a certain amount of time, you know, depending on what it is you can give them, five days, 10 days, 30 days to secure the breach. And then the parties continue with their business. If, and like I said, it, it avoids disruption.

There is another section of the agreement, representations and warranties. These are basically a way to add to the contract, additional language that forces the other party to agree that they will comply with applicable laws and regulations, um, that they will not infringe on the other party's rights, for example, and that the services that they're providing meet certain minimum standards.

Now, of course, this can be a double-edged sword because. You will probably, you will want to get these representations and warranties in the contract from the other side, but the other side may, you know, impose representations and warranties on your organization. So you'll have to look at what they're asking you to abide by and make sure that you can actually comply with some of these requirements. And if you don't understand them, you should definitely consult an attorney because you don't want to agree to something and then inadvertently breach it and then have a problem where you get sued. Um. Basically these representations, warranties are added to contracts because they provide some additional remedies if there's a breach.

If your organization's concerned about paying the other party, um, you can build into some safeguards there. For example, just don't pay for a deliverable upfront. Break up that total fee into two or more payments based on meeting, you know, very specific milestones or conditions that will help protect your organization.

Conversely, if the other party is going to pay you. Well then there you probably want to try to get everything upfront and you may want to include interest payments on late payments to your organization. But here again, it's important that you consult a lawyer because you want to make sure that any interest payments comply with applicable law. You just don't want to put in interest payments, particularly some number, and then it's, you know, held to be invalid.

Something else Sireesha that listeners can do is in the contracts you can try to build in audit rights to protect against underpayments to your organization so that you can request supporting documentation and have more visibility into a revenue stream.

And one last point I'll talk about is there's, uh, something called limitation of liability. This is a provision that can help reduce your organization's liability to the other party. What it does is it can act as a cap on the indemnification provision, so your organization is not agreeing to some unlimited amount of liability. Ways to do this would be to cap liability at insurance amounts, for example, or you can do it at a certain lower dollar amount thresholds. But I want to reiterate again, indemnification and limitation of liability provisions are complex and they really are best addressed by a lawyer.

[00:27:43] **Sireesha:** And now Thomas, to my last question to round out this first installment of the series. , Let's talk about boilerplate provisions. That's the language that's usually at the end of a contract. Tell us more about what are boiler plate provisions and where do they fit into the contract review process?

[00:28:05] **Thomas:** Yes, good old boilerplate. Um, a lot of people talk about, oh, it's just the boilerplate terms. Boilerplate is a term that's used to describe so like standard or formulaic terms. They're usually at the end of the contract. Sometimes you'll see them under the title "Miscellaneous".

I don't really like to refer to them as either boilerplate or miscellaneous because I think those terms are misleading. They suggest that they don't really require close attention. Um, they may not

necessarily be as important as some of the other provisions we've talked about. But they can be important and they shouldn't not be overlooked. , I refer to them as general terms.

And the examples would be governing law venue. That is the place where a dispute is brought. Force majeure, which I'll talk about a little bit more waiver entirety that is the contract is deemed to be , or you want it to be deemed to be the entire. Uh, four corners of the deal. You don't want something else outside of the contract to, to control the arrangement. It should all be within the confines of the document severability, which basically means that if a particular provision in a contract is deemed invalid, you don't want the entire contract to be deemed invalid assignment. What are the rights and obligations of your organization or the party you're dealing with to assign the contract to another party, either to fulfill there services or to take on the rights of the party that's in the contract.

I'm not gonna talk about all of these, but I do wanna call out a few to give you all a better sense of why you should be reading these terms. So you may recall at the beginning of the podcast I referenced governing law and I said suppose your organization is based in Georgia and you're gonna enter into a contract with this organization that's based in New York City.

You would want your form contract, the one that you typically use for recurring deals. If you're based in Georgia, you would want Georgia law to govern. And you would always want to make sure that any disputes or litigation is brought solely and exclusively in the state and the federal courts in whichever Georgia County organization is located. You know, and while it may not be the end of the world, if you signed a contract where a New York law governed you, you really don't want to have to hire a lawyer in New York. To bring or defend a lawsuit. So you want to try and have home court advantage, so to speak. And if it's your form, you should always start with that home court advantage.

Um, sometimes contracts might be with service providers that are based in other countries, and you certainly would not want to just sign a contract without knowing the consequences of agreeing to you know, French law. So again, depending on the contract, you might wanna bring in an attorney to help you.

It's also important to look at force majeure. This provision is based, it's a French term and like triage, it dates back to Napoleonic times. Sorry, I can't just overlook, opportunity to slip in some history. But basically this is a provision. You've probably, uh, seen it and familiar with it. It's sometimes referred to as an act of God clause, but it's essentially frees both parties from liability or obligation. When there's some sort of an extraordinary event or a circumstance that's beyond the control of the parties typically it's listed in the contract as war strike, Riot, rebellion epidemic, sudden legal Change that prevents one or both of the parties from fulfilling their obligations under the contract.

Like I said, it often also brings in these acts of God like natural disasters. But it's a good clause to pay attention to because while they don't entirely excuse a party's non-performance, they can suspend it for the duration of this force majeure event. And because the force majeure can include governmental action. And these, current times that we're dealing with, when there have been a lot of legal changes that have occurred and may occur you may wanna, look at that force majeure clause to see how that could impact your deal.

[00:32:08] **Sireesha:** Thomas, this has been a great overview of contract terms and risk mitigation. With this information, our listeners will have a better idea of what contract provisions to focus on and why. And when to consult with legal counsel. Thank you, Thomas, for sharing your time and

expertise, both on contract law and history with us today. And to our nonprofits, stay tuned for part two of the series where we'll zoom out a bit from contract specifics and talk more about contract strategy and management techniques.

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.