NONPROFIT RISK MANAGEMENT CENTER
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Contracting Do's, Don'ts and Musts for Nonprofits

A Risk Management Webinar

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WEBINAR DESCRIPTION

Contracting Do's, Don'ts and Musts for Nonprofits

Nonprofit managers and leaders sign contracts on a regular basis. But too often we take pen in hand without first taking time to make certain that we understand the language in front of us. Even fewer people give contracts the time they require to understand whether they are in the nonprofit's best interests or require revisions to be acceptable. One of the reasons for our haste with contracts may be fear of a large invoice if we reach out for professional help. In other instances a nonprofit CEO may feel "under the gun" to sign a contract. Whatever the reason, contracts create both opportunities and risks for a nonprofit.

Register for this Web seminar if:

- You've ever regretted signing a contract without reading it first;
- You've ever been in a dispute or surprised about a contract you signed but did not understand;
- Your responsibilities include negotiating and signing contracts for a nonprofit, but you have not been to law school;
- You want to learn practical strategies for integrating risk management into your contracting practices;
- You want to hear a straightforward discussion of contracting do's and don'ts;
- You want to pose questions to a risk management expert about how you can negotiate contracts for your nonprofit that protect vital assets while allowing you to go about the business of achieving your mission.

Each registrant will be given instructions for downloading the seminar materials. These materials include a "follow-along" visual presentation for use on the day of the seminar as well as a narrative containing background information, advice, samples and checklists

What's a Contract?

According the *Restatement (Second) of Contracts*, Section 1 (1981), a contract is "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

A second way to determine whether a contract exists is to consider whether the three steps or elements of a contract exist. These are:

- ❑ **Offer**—Step 1: Most contracts begin with an offer, generally a written or spoken statement by one part of his/her intention to be bound by a commitment (e.g. I'll sell you this car for $500.)
- ❑ **Acceptance**—Step 2: Acceptance of the offer, such as "I'll take it!" A valid acceptance is one made while the offer is still open/valid.
- ❑ **Consideration**—Step 3: Something of value given in exchange for performance or a promise to perform (do something).

Still another way to define a contract is to think of the essential components that must exist in order for a contract to exist. These are as follows:

(1) **Competent Parties**—A contract can't be formed unless the parties to the contract have the capacity to enter into a contract. Simply stated: *no capacity = no contract*. Most people and most organizations are legally competent and have the capacity to enter into a contract. Who isn't competent? Someone who is drugged or otherwise mentally impaired has impaired capacity. Minors (e.g., usually those under eighteen) lack capacity and therefore can't enter into a binding contract without parental consent. The exceptions to this rule include when the contract is for the necessities of life, such as food, clothing, or for student loan contracts.

(2) **Consideration**— Consideration is often defined as "something of value that is given in exchange for performance or a promise to perform." Without consideration, an agreement to do something might be considered a gift. The most common consideration is money, however additional examples of consideration include a promise to do something there is no legal obligation to do, or a promise to not do something there is a legal right to do. Goods or services are additional forms of consideration.

(3) **Mutual Assent or Meeting of the Minds**—A contract can't be created unless each side is clear as to key details and obligations. This doesn't necessarily mean that your nonprofit is off the hook with regard to that vague contract you signed last year! A "meeting of the minds" may be established through spoken words or gestures. An obvious joke doesn't work. Nor does an agreement where both parties have made a material (significant) mistake as to the terms or details of the proposed contract.

Common Contracting Mistakes and Missteps

Like other legal challenges confronting nonprofit managers, negotiating sound contracts requires time and understanding. In the rush to devote as much attention as possible to a community-serving mission, contracts sometimes appear to create roadblocks that serve only to slow an organization down. And it wouldn't be surprising to hear a nonprofit manager report having physical symptoms ranging from a headache to an upset stomach when there's no alternative to reviewing a voluminous contract set in small type and featuring convoluted phrasing and archaic terms. Given the natural aversion to reading contracts, few nonprofit managers with a number of years of experience have avoided making one or more of the following contract-related missteps during their careers:

- ❑ failing to enter into a contract when engaging an independent contractor, vendor or other service provider, choosing instead to proceed on a handshake.
- ❑ not reading a contract presented for signature, assuming instead that since it's an official pre-printed document the terms are fair, appropriate and not open for negotiation.
- ❑ authorizing work to begin before contract negotiations have concluded.
- ❑ signing a contract that contains inappropriate, vague or incomprehensible terms and provisions.
- ❑ failing to limit contracting authority to designated persons in the nonprofit.
- ❑ not considering the possibility of termination, breach, or the possibility of circumstances that make it impossible to continue the relationship.
- ❑ not realizing they have entered into a contract in the first place.
- ❑ failing to assign responsibility for harm and the costs of harm.
- ❑ failing to protect the nonprofit's valuable assets, such as copyrights, trademarks, or other types of intellectual property.
- ❑ failing to determine a strategy for dealing with unexpected costs or a disagreement about each party's responsibility for project expenses.
- ❑ failing to note important deadlines, such as expiration date, termination dates, notice requirements prior to termination and automatic renewal provisions.

Contracting Musts

If the previous list represents a summary of *don'ts* with respect to contracts, then the list of contract *do's* is complementary. For example:

- ❑ Do *consult an attorney for help* in drafting contracts and reviewing them, especially if you encounter terms in a proposed contract that are inappropriate given the circumstances at hand, vague, or incomprehensible. Don't be embarrassed if you don't understand certain terms or provisions in a contract, and don't be surprised if the person presenting

the contract doesn't understand them either! Do insist that vague or inappropriate clauses be removed or fixed before you sign the contract.

- ❑ Do use a contract to set forth the expectations, requirements, payment terms, cancellation terms, risk-bearing, and other key elements every time your nonprofit enters into a relationship with other parties, including with an independent contractor, vendor, service provider or other nonprofit with which you are collaborating.
- ❑ Do use a contract even if your nonprofit has been doing business with the person or company for a long time, they are an insider (e.g., board member or family member of a board member or staff member), or the person expresses a desire to conduct business in a more informal fashion.
- ❑ Do *read every contract* presented to you for signature. Remember that the contract binds your nonprofit legally, and its provisions may apply for a number of years after the work specified in the contract has been completed. Remember that you could be held to account in court for the promises made in the contract.
- ❑ Do *wait until contract negotiations have concluded* and the ink on the contract (both parties' signatures) has dried before authorizing work to begin on any project governed by a contract.
- ❑ *Make sure only those individuals who are authorized to enter into contracts on behalf of the nonprofit do so*. Make it clear who has authority to negotiate and execute contracts on the organization's behalf.
- ❑ Do *include language in every contract that describes how the relationship can be terminated* and under what time frame and conditions.
- ❑ Do *include language in every contract that protects the nonprofit's assets*. For example, it's important to indicate who owns what in your contracts with vendors and independent contractors. If an independent contractor is preparing a report for your nonprofit, that report should be the nonprofit's property.
- ❑ Do *think about how the relationship with the other party(ies) affects your organization's intellectual property*, such as your name, logo, Web site, and written materials developed by your nonprofit, including donor lists and other sensitive information. In some cases the contract should limit the use of such property or prohibit it entirely outside the context of the contract.
- ❑ Do *include a confidentiality provision* in the contract that prohibits the other party from breaching the privacy of clients, constituents and others affected by the party's conduct.
- ❑ Do *include a clause in every contract indicating how disputes will be resolved*.

SPECIAL CONTRACTS

Space-Sharing Arrangements and Leases

Nonprofits commonly sign leases in order to enjoy access to the space where they'll deliver services, perform fund-raising and administrative tasks, and conduct other mission-related activities. The sharing of space by two or more nonprofits is also common. In some cases nonprofits sharing space work together regularly, in other cases the space sharing is sporadic and simply a way for both to afford occupancy.

Space-sharing agreements are a good example of why written agreements are helpful. For example, two nonprofits agree on a handshake to share the same large space. One nonprofit wants to use it for an after-school program, the other for an evening support-group gathering. One of the nonprofits owns the building, the other just uses it—no rent is exchanged. What happens if the following issues arise?

- ❑ *The Messy User*—The after-school program repeatedly leaves the space a mess so that the evening program has to clean up for half an hour before they can use the space. Who pays for the cleaning service? What are the ground rules for cleaning up after use?

- ❑ *Who Pays?*—A child coming to the after-school program falls on the steps leading into the space. The building is owned by the nonprofit that runs the support groups in the evening. When the family of the injured child asks for medical expenses, which nonprofit should pay?

- ❑ *What Notice?*—When the owner of the building wants to terminate the arrangement with the after-school program, how should the owner proceed? Is notice required? Should the after-school program have to replace any property damaged during the time period it used the space?

When a nonprofit leases property to others, the leases should contain, at a minimum, the following:

1. the name, street address (if available, a street address other than the address of the property the lessee is renting from you), contact person, and telephone number of the person or organization renting property from you;
2. the address and a specific description of the property with a statement about its current condition;
3. the duration that you are leasing the property;
4. the rental amount due, when, and where;
5. any security deposit you obtain from the lessee and whether lessee will earn interest on the amount;
6. any right you have to enter and inspect the property at reasonable times and upon reasonable notice;

7. permission to do any credit checks that you want to do;
8. the permitted uses of the property;
9. that the lessee can't make any alterations without your prior written permission;
10. who is responsible for the property and/or liability insurance on the property and the evidence that this insurance is in force; and
11. an indemnification clause protecting your nonprofit from liability arising out of the rental of the property and requiring the lessee to name your nonprofit as an *additional insured* on the lessee's general liability policy.

NOTE: Before you lease any property your nonprofit owns, make sure that your interest in the property is properly filed with your local land records office.

Contracts for Goods and Services

The use of a contractor to provide goods or services subjects a nonprofit to additional risk, because the organization loses control of the activity. When a nonprofit contracts with another organization, the contract typically seeks to transfer responsibility for risk, as well as set forth the terms and conditions under which the contractor will perform. When a nonprofit retains the services of a contractor, but doesn't relinquish control of the method and means of service delivery, the intended risk transfer hasn't occurred and there's little to distinguish the contractor from an employee of the nonprofit. In order for true risk transfer to take place, a nonprofit's contractors should provide all of the tools, materials, equipment and supplies to accomplish the service; set a schedule to accomplish the service; decide on the sequence of tasks to be done; hire and supervise others to assist in the completion of the job; and shouldn't be subject to the nonprofit's training requirements.

Also make certain that contractors are indeed independent, since the independence of contractors is required for risk transfer to take place. Otherwise, the hiring organization may find itself held partially, if not fully, responsible for any incident. That doesn't mean, however, that a nonprofit shouldn't be involved in planning the performance of a contractor. Nor does it preclude the nonprofit from dictating job specifications, such as the type and amount of materials, supplies and equipment to be used; any safety requirements; and the terms and conditions of the contract.

From a risk management perspective, there's a fine line between exercising too much control and not exercising enough. When the nonprofit exerts too much control over its contractors, risk transfer doesn't occur, and the organization may be exposed to potential vicarious liability. When the nonprofit doesn't exert enough control, an unnecessary hazard may be created. Even when the contractor has complete responsibility for an incident, the nonprofit may still suffer a loss. For example, there are various categories of loss that won't be completely covered by the contractor. These include public relations costs, loss of key personnel and lost business opportunity.

RISK MANAGEMENT REVIEW OF CONTRACTS

The careful review of contracts prior to execution is essential to protecting the interests of a nonprofit. The following section addresses instances when a contract is presented to a nonprofit for review and signature. At this time, it's necessary to review contractual provisions that specifically relate to the risks assumed, created and assigned through the contract itself. The principal purpose of conducting a risk management review of contracts is to protect a nonprofit's interests. But the risk management review also provides an opportunity to:

- *strengthen the nonprofit's relationship with the other party* (contractor or vendor) by providing a context for the discussion of deliverables and expectations. Both parties benefit from the time it takes to consummate a contract and work out the various details of the relationship.
- *reduce uncertainty*. With commitments to each other in writing, the contract itself reduces uncertainty and apprehension for both parties.
- *allocate risk appropriately*. A contract that contains essential elements allocates risk between the parties according to the responsibilities and control asserted by each.
- *improve understanding* (of the vendor). Many parties to contracts report that it wasn't until after contract negotiations were complete that they had a good understanding of the other party's operations, mission, etc.
- *reduce the likelihood of uninsured losses*. While there's always the possibility that losses stemming from contract-related activities will be uninsured, a contract with risk management elements reduces the likelihood of this occurring and eliminates the possibility that one party will assume the other party has appropriate insurance coverage.

Using a Term Sheet as a Guide

It's also important to lay out the basic understanding of the parties prior to writing the initial draft of the contract. One strategy for doing this is to create a summary document, sometimes referred to as a *term sheet* that spells out all the important terms (conditions or stipulations) of the agreement. The term sheet is used as a starting point for the development of the contract. Itemizing all the basic components of an agreement is a great risk management practice. For example, a term sheet might include answers to a number of questions, including:

- What are the deal breakers?
- What are the terms pertaining to termination of the agreement with the other party(ies)?
- Is there an opportunity to renew the contract or is it only for a limited time?
- Whose insurance covers what?

Conducting a Risk Management Review of Contracts

Managing the risks associated with purchasing goods and services actually begins long before a contract reaches the desk of the nonprofit staff member responsible for review. It begins with considering the advantages/disadvantages of purchasing goods and services, and continues with a review of the vendor candidates. Once the vendor has been chosen, the process continues with *contract risk review*. Within this phase of the process, there are four steps or key considerations:

(1) What risks are the nonprofit and the vendor assuming in this contract?

(2) Is the proposed risk allocation and transfer appropriate?

(3) Are the nonprofit's risk management techniques appropriate for this contract?

(4) Are the vendor's/contractor's risk management techniques appropriate/sufficient for this contract?

Many considerations come into play in determining whether to accept contractual terms, and there can be no simple template that determines whether a contract is in the best interests of the nonprofit and should therefore be executed.

SPECIAL TOPICS IN CONTRACTING

Is It Ever Wise to Enter Into an Unenforceable Contract?

Much attention is paid to making certain that a contract contains the provisions necessary to ensure enforceability. This is a good approach. For example, it would be imprudent to knowingly include unconscionable terms in an important contract governing the delivery of services, as these provisions could render the entire contract moot and defeat the purpose of the contract in the first place. However, there are circumstances that might call for the use of a contract that wouldn't be enforceable in court. We provide two examples below.

1. *Unenforceable contracts that attempt to limit liability*—The courts of at least three states—Virginia, Louisiana and Montana—have held waivers of liability to be unenforceable. Despite this fact, waivers are still valuable risk management tools in these jurisdictions. Why? Because a waiver provides an opportunity to warn a volunteer or service recipient about the dangers of a particular activity, enabling the volunteer or service recipient to alter his conduct accordingly. For example, someone signing up to participate in a whitewater rafting trip may decide not to do so after reading a waiver of liability form that indicates that whitewater rafting is inadvisable for persons who aren't strong swimmers. Or a mother may decide to consult a physician about whether her child should receive any additional inoculations or other medicines prior to allowing her son to participate in an overnight camping trip.

2. *Contracts with volunteers that don't include "consideration"*—It's good risk management practice to use written volunteer agreements—contracts that specify the duties of the volunteer in serving the nonprofit and the nonprofit's expectations vis-à-vis the volunteer—despite the fact that these contracts don't contain an essential element of an enforceable contract: consideration (the payment of money or forgoing a legal entitlement). Volunteer agreements help volunteers conform their conduct to the nonprofit's expectations, and help the nonprofit communicate its expectations to the volunteer. These agreements reduce the likelihood of disappointment with respect to both parties, and therefore increase the chances that the match of volunteer to volunteer assignment will be successful. Despite their usefulness, it's highly unlikely that a nonprofit could pursue a breach of contract claim against a volunteer who failed to show up for a volunteer assignment, nor could a volunteer pursue a similar breach of contract claim against a nonprofit that didn't provide the full range of volunteer work described in the agreement. Of course, contract language should be only one of several ways of communicating these important ideas to volunteers. As will be discussed in Chapter 6, Employment Liability, these same concepts should also be stressed in the orientation, training, periodic retraining, and written agreement between a nonprofit and each volunteer.

Purchasing Goods and Services: A Contract Review Checklist

The first *must* with respect to contracts for goods and services is to insist that agreements with suppliers and contractors be memorialized in a written agreement. While oral contracts may still be enforceable, they are problematic for several reasons. An oral contract may not be regarded with equal seriousness by both parties to the agreement. Putting commitments in writing signals to the other party(ies) that your nonprofit is serious about having its expectations met. Second, oral contracts place successors to the original party(ies) in a needlessly difficult position and the organization in jeopardy. Imagine taking a new job at the helm of a nonprofit where business was conducted on a handshake. Expect to have a difficult time uncovering all of the commitments your predecessor made for which the organization remains responsible. Who is to validate that the commitments were or weren't made?

To adequately protect your organization, make certain that all of your contracts are in writing. To judge whether you have clearly maximized the rights and interests of your nonprofit, consider applying the following *Contract Review Checklist* to these important documents.

Contract Review Checklist

Review contracts in turn to determine whether each identifies:

- ❑ WHY are you purchasing this good or service, and why from this person? (It's a good idea to state the reasons at the beginning of the contract in the Recitals or *Whereas* clauses.)

- ❑ WHO you are contracting with, the legal status (e.g., a corporation, partnership, individual, or limited liability company), the street address, phone number, and the principal contact person.
- ❑ WHOSE insurance will cover what?
- ❑ WHO will be liable and in what amount if there are problems that lead to a lawsuit? They should indemnify you and hold you harmless for what is in their control and you may choose to indemnify the other party for harm that results solely from your own acts or omissions. (Caution: you should never assume responsibility for something over which you don't have control.)
- ❑ WHO will own any assets that are produced (e.g., copyrighted material)?
- ❑ WHAT goods or services are meant to be provided, conducted, performed, or accomplished? State these in clear and explicit terms.
- ❑ WHEN will the obligations be completed? Consider having interim deadlines or progress mileposts.
- ❑ WHERE will the obligations (or any dispute, such as a lawsuit or arbitration about the performance of same) occur?
- ❑ WHERE (and under which state's laws) must any dispute, such as a lawsuit or arbitration about the performance, proceed?
- ❑ HOW will the performance occur?
- ❑ HOW MUCH payment is expected and how and when the payment will occur?
- ❑ HOW will the parties handle confidential information?
- ❑ HOW will the other party(ies) pay for any liability or indemnification of you? (You want to be certain that anyone who is indemnifying you maintains adequate insurance. You can request evidence of insurance, such as a certificate of insurance, or be named a co-insured.)
- ❑ HOW will you pay for any liability you incur or any indemnification you provide? (Make certain that your insurance fully covers the liabilities and indemnification you agree to, and remember that the minimum insurance requirements in contracts are negotiable.)
- ❑ HOW will any termination will occur, by which parties, under which circumstances (only for unsatisfactory performance or also without cause), and under what terms (for settling amounts owed up until that point)?
- ❑ IS the assignment of the contract permitted?
- ❑ HOW will you handle:
  - ➢ *notices* to each other? You should specify the name and address for official correspondence.
  - ➢ *waiver clauses?* You always want to enforce your rights whenever they have been breached, regardless of whether you've ignored a problem previously.

- *merger clauses?* Are all the terms and conditions you want spelled out in the contract or are there some unwritten provisions or understandings? (e.g., "All enforceable provisions of this agreement are included in this written contract.") Without a merger clause, one could argue that other (unwritten) promises and assurances DO and HAVE BECOME part of the agreement enforceable against the party that made such promises.
- *binding on heirs, successors, and assigns?* You want the other party to know that if the signatories are replaced or succeeded by anyone else, that person is bound to fulfill the original party's contract obligations.
- *amendments to the original agreement?* Determine if changes should be put in writing and signed by both parties, too.

Manage Contract Risk With a Purchasing Process

Remember that it might not always be obvious to an outsider *who* in your organization has contracting authority (that is, authority to enter into a contract and commit funds on behalf of the organization). The risk is that an individual with *apparent authority* may knowingly or unwittingly commit your nonprofit to a multi-year or multimillion-dollar contract. So it's important to establish a purchasing process for your nonprofit. This process should include the following:

- a written contract approval policy assigning certain contracting/purchasing decisions to specified employees with other decisions to be made or approved by the board or executive committee. Typically CEO's have authority to sign contracts up to a certain dollar amount without needing to seek specific approval from the board of directors, but in order to sign a contract obligating the nonprofit to any amount in excess of the pre-authorized amount, the CEO must obtain specific approval from the board of directors.
- a clear statement to all members of the organization (employees and volunteers) about their contracting authority or lack of contracting authority and how to avoid contractually committing the organization inadvertently.
- a dollar amount at which two people must sign and approve a check request.
- a statement specifying what your organization expects of the contract before the contract/purchase is approved.
- the name of the person in your organization (or outside legal counsel) who reviews the legal, programmatic, and financial content of contracts.
- the name of the person in your organization who, for the specific contract at hand, oversees performance, communicates about problems, and makes any needed corrections or decisions about termination.

- the person in your organization who reviews your insurance policies to ensure that any risks or liabilities your organization is being asked to assume (e.g., if asked to indemnify another party) are covered by your insurance policies. This person should also review the indemnification and insurance provisions in any contracts to make certain that you have any insurance coverage you are required by contract to purchase.
- if a contract involves ongoing service (e.g., establishing and maintaining a Web site), the person who ensures that your organization's assets (copyrights, trademarks) are protected.
- the name of the programmatic and financial or budget person(s) in your organization who must approve any proposed contracts.

Reducing Contract Dispute Costs

There are two ways to reduce potential contract dispute expenses in a written contract:

(1) through an alternative dispute resolution (ADR) clause, and

(2) through *choice of law* and *choice of forum* statements indicating that any lawsuits arising under the agreement must be filed and tried under the laws where the nonprofit is located. An ADR clause can help avoid costly and delayed court litigation by deciding in advance that the parties to the contract will resolve any disputes using an alternative to litigation. Choice of law/forum statements can help you avoid litigation in another state that may have quirky and unfavorable laws.

Developing Contracts With Independent Contractors

Managing the people who work on behalf of the nonprofit is a critical task. Many of these people will be employees. Others will be independent contractors. Once you're certain you have made the proper distinction and know that the relationship will indeed be a contractual one, it's very important that you formalize the relationship with the individual or firm by writing out what services you expect, when you expect them, and how you expect the services delivered from the independent contractor. This will create an institutional memory for your organization about what is being purchased, and clarify for the contractor what you expect.

An effective independent contractor agreement doesn't have to be lengthy (a page or two can often suffice). We recommend that nonprofits use contracts that contain, at a minimum, the following information:

- ❑ name of organization, type of entity (e.g., corporation, limited liability company, partnership, or other), street address, telephone number, and individual contact person of the independent contractor.
- ❑ a description of the services being provided and a timetable with measurable mileposts indicating when specific aspects of the service/work must be completed.

- ❑ compensation (on monthly or work-completed basis, with cap if appropriate) based on invoices indicating services performed, work period, reports on milepost completion of work, and any out-of-pocket expenses that are necessary for the performance of the services (such as travel, lodging and meals), but only if approved in advance and supported by appropriate documentation.
- ❑ the term of the agreement (beginning when, ending when).
- ❑ provisions for terminating the agreement:
  - ➢ How much prior notice is required before termination?
  - ➢ How much, if anything, must the parties pay upon termination?
  - ➢ In what form, and to whom should notice of termination be delivered?
- ❑ statement clarifying that the person/company is an independent contractor solely responsible for determining the means and methods for performing the services and for payment of taxes, with no entitlement to workers' compensation, unemployment compensation, or any employee benefits—statutory or otherwise.
- ❑ statement that the contractor shall at all times comply with all laws, rules, regulations, and ordinances applicable to the performance of the services described in the contract.
- ❑ statement that information obtained from the nonprofit and about the organization and its operations and clients is confidential, and that the contractor will return any confidential information to the nonprofit at the conclusion of the project or upon written request by the nonprofit.
- ❑ statement that the contractor agrees that all creative ideas, developments and creations conceived in the performance of the contract are the property of the organization and assigns all those rights to the organization.
- ❑ statement that the contractor won't engage in unlawful discrimination.
- ❑ statement that the contract is the entire agreement, which can't be amended except in writing by both parties.
- ❑ the state of governing law and forum for any legal action.
- ❑ statement that the work may not be re-assigned by the contractor (e.g., the contractor you choose has to do the work; he can't have someone else do it).
- ❑ the signatures of both parties.

FINAL THOUGHTS….

Is an Oral Contract Enforceable?

Statutes making unwritten contracts void have been adopted in many states. These laws, however, don't make an oral contract invalid. There are various circumstances under which the courts will enforce an oral contract. These situations are viewed as "*exceptions to the statute of frauds*," which is a defense raised by the party seeking to avoid enforcement of a contract on the grounds that the contract was never put in writing. The first situation arises in the context of the sale of goods where the seller has delivered goods and the buyer has received, accepted and paid for the goods. A second situation arises in the context of the sale of property. In the case where the buyer has assumed possession of the property and made permanent improvements to it, the oral contract of sale will be enforced. State laws vary on this exception. In some cases minor improvements to property will be sufficient to enforce the contract. A third special situation is where one party to the oral contract has relied on representations from the other party, to the first party's detriment. For example, if a nonprofit board makes an oral offer of employment to a candidate for the CEO position, and the CEO resigns from his current position in anticipation of beginning work at the nonprofit, a court might find that the CEO has relied on the oral contract of employment to his detriment and enforce the contract despite the board's protest that it changed its mind before putting the contract in writing.

Obtain Legal Review of Contracts Prior to Execution!

Calling on the nonprofit's legal counsel to draft or review contracts is an important practice to limit an organization's contract-related risk and potential liability. Using counsel limits a nonprofit's contracting exposure in three ways. First, you are virtually assured that every significant contract your organization has will be in writing. (Your lawyer will insist on that.) Second, you can expect that your contracts will address all the general contract elements in a way that maximizes your organization's interests and protection. (That's good legal practice in contracting.) And third, your organization's specific needs and demands from each particular contract (e.g., your fund-raising, hotel, or independent contractor agreements) will be reflected in when, where, and how the work, services, or goods will be provided to your organization.