

KAHN, DEES, DONOVAN & KAHN, LLP
ATTORNEYS & COUNSELORS AT LAW

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IF YOU DON'T UNDERSTAND IT, DON'T SIGN IT

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One of the cornerstones of Kahn, Dees, Donovan & Kahn, LLP is our pledge to serve clients well. Reviewing contracts, forms, agreements and other legal documents is one of the ways in which we can achieve that purpose. We pride ourselves on being able to draft and analyze contracts, while allowing our clients to keep focused on their day-to-day operations.

AN OUNCE OF PREVENTION ...

An ounce of prevention can be worth a pound of cure. It is useful to have the input of legal counsel when making projections as to an appropriate contract term. The most desirable term may be one year or ten years, depending on the circumstances. Applicable state law and venue in the event of litigation must also be carefully considered. When dealing with out-of-state parties, it can be costly to inadvertently become subjected to another state's unfamiliar laws and far away courts.

Each transaction should be reviewed in terms of whether litigation, arbitration, or mediation is the best means of dispute resolution. When litigation is not chosen, it still may be fitting to reserve the right to seek injunctive relief from the courts. Any document containing waivers and releases should be reviewed by legal counsel.

A leading cause of disputes is ambiguously stated contractual obligations. A contract should spell out each party's responsibilities, with reasonable specificity as to what is to be performed, when it is to be performed and how it is to be performed.

A "merger clause" makes it explicit that no terms or agreements exist outside the current written agreement. Conversely, if other documents make up part of an agreement, they should be referenced and made a part of the contract.

The right to recover attorney fees must never be assumed to be provided by statute. If attorney fees are to be recoverable in certain events, the agreement must so state. Legal counsel can ascertain what remedies will be available if there is a breach of the contract. Remedies "at law" include the payment of money damages while remedies "in equity" (such as injunctions) are awarded only by judges, not juries, and then only where an award of money damages cannot make the damaged party whole.

REAL ESTATE AND CONSTRUCTION CONTRACTS

Real estate purchase and construction contracts generally revolve around emotionally charged decisions: purchasing or building a house or business of your dreams. Naturally, disputes over real estate purchases or construction projects are best avoided with up-front legal advice. Timing is everything in these transactions. When the real estate or structure is not available or completed on schedule, this is at the purchaser's expense unless "liquidated damages" have been agreed upon. The lawyer and client can predetermine and negotiate an amount of damages that will satisfy the client in the event of untimeliness. This is both an incentive to the seller or builder to stay on schedule, and a safety net of cash for the client. Lawyers are useful in the negotiation of price, responsibility for property taxes and closing costs, post-inspection repairs or price incentives, review of financing documents, and legal representation at closing to assure the proper appropriation of costs and passage of title.

Bank Financing Documents are often expressed in preprinted forms and package deals. While a lender may not be willing to negotiate certain terms, lawyers can assist by summarizing the key points of the lending documents and determining whether you should select a different financing package. Many lending agreements contain strict penalties and default provisions. A future business transaction could unintentionally result in a default under the terms of the lending documents. The lender may then "accelerate" the agreement requiring full immediate payment. The attorney-prepared summary can be used as a future reference tool to avoid events of default.

In Indiana, Residential Lease Agreements are governed by specific landlord-tenant laws. Indiana law provides specific instructions as to dealing with residential tenants on security deposits, evictions, storage of left belongings, and the collection of attorney fees. Commercial Leases are customarily negotiated as to lease fees, term, renewal, assignment and subleasing, manner and right to terminate, build out provisions, common area maintenance charges, and environmental and Americans with Disabilities Act (ADA) responsibility.

OTHER TRAPS FOR THE UNWARY

- *Not all agreements are written.* In some instances, an oral contract will be enforceable. When negotiating the terms of a prospective agreement, agreement drafts should be exchanged in writing with a specific designation that the terms are for discussion purposes only.
- *Negotiating the best terms of a deal is often more easily done through attorneys.* In many instances, a client is negotiating an agreement with a familiar, friendly party. Due to the friendly nature of the relationship, that party may prefer loose terms or expect waivers of important provisions. Dealing through attorneys simplifies the process of arriving at strong but necessary provisions.
- *Non-compete Agreements can be deemed unenforceable due to overbroad geographic limitations or because of unreasonably long time limits.* Non-compete Agreements can also be unenforceable if they do not accompany another contract. Current legal research applicable to the underlying contract should be undertaken to ensure an effective Non-compete Agreement.
- *A popular but mistaken belief is that there is a three-day right of rescission in contracts.* This is only true in limited circumstances involving consumer financing.

Do not sign a contract if the terms are not clear ! Chances are it was poorly or unfavorably written. In either case, the parties will inevitably arrive at differing interpretations and frustrated expectations unless a clear document is constructed.

