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Everyday agreements and contracts for editors

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Editors need practical strategies for creating simple, plain language agreements to protect ourselves from ambiguously defined projects and untenable scope creep and to ensure that clients understand what services they are requesting and purchasing. We also need to know what to look out for in contracts and agreements we receive from clients and how to interpret and influence the terms and conditions of these. Whether you work with public or private organisations or with individuals, it is an advantage to be able to interpret and create contracts and agreements, discuss contract terms with clients, manage your own contracts and learn how to use everyday agreements and contracts to define writing, editing and publishing work in ways that are helpful for all parties.

Disclaimer: The information in this paper should be considered general advice, not legal advice, and you should consult a lawyer when your circumstances require specific legal advice.

Introduction

I am an editor, not a lawyer. I've been an editor now for 25 years, in corporate and educational settings. However, throughout that time I've also managed many projects in the public sector and in private enterprise and been responsible for developing and negotiating the contracts for my writing, editing and publishing projects.

My business is AusVoc Educational Publishing, and we mostly create and support the creation of educational and corporate publications for the aid and development sector in the Pacific. This involves contracts with governments and other organisations in Australia and overseas. We also work at times with individuals.

An advantage of my experience to date has been the opportunity to work with corporate lawyers and Crown Solicitors to draft contracts and agreements, including setting the standards for the typical agreements used by a large TAFE Institute. As the proprietor of my own business, an important responsibility I have is to interpret the contracts I receive from organisational clients, provide details required during their drafting and draft my own agreements and contracts for other projects.

I'm not suggesting that editors don't need lawyers – quite the opposite. Ask any lawyer and they will tell you that commercial contract law is complicated and full of potential hazards. Keep talking and they will confirm that anyone can make a contract or agreement for their everyday practice, simply by expressing in plain English the terms to which they wish to agree. They will also explain some basic ideas that underpin contracts, and which will allow you to better interpret contracts you receive from others. This is the territory that affects you as an editing practitioner and business person, and thus is the subject of this paper.

Take-home messages

There are four key things I've learned about this topic, which remain tremendously helpful to me in my business.

1. Using contracts is good business practice and good professional practice. It doesn't matter how small the project; articulating an agreement confirms for your client that you are a professional. Professional behaviour on your part will create an expectation of professional behaviour from your clients in return.
2. Creating your own everyday agreements or influencing the terms of your contracts is an advantage. Having input into contracts that come to you will make it more likely you can fulfil the agreement and that both parties to the agreement are clear about what you are promising.
3. Understanding the contracts you receive before you sign them is more likely to result in projects that end well for both parties.
4. Be sure to only make agreements that reflect what is possible and what you really intend to do.

There is no 'one size fits all' for contracts. A contract that suits my type of project won't necessarily suit your type of project. Therefore, we are not going to look at the specific clauses that might appear in a contract, but instead at some key principles you need to know before you can start drafting or evaluating a contract.

Definitions

The *Macquarie dictionary* (5th edition, 2009) contains the following relevant definitions for agreements and contracts:

- *Agreement* is 'an expression of assent between two or more parties' and 'an exchange of promises'.
- *Contract* is 'an agreement between two or more parties for the doing or not doing of some definite thing' and 'an agreement enforceable by law'.

We can use the word 'agreement' in broad and general ways. For example, we agree to meet a client tomorrow at 10 am – this agreement is made by some 'expression of assent' on the phone or by email, and we both promise to keep the appointment.

However, if at that meeting I agree to copyedit the client's 80,000-word manuscript or their 50,000-word thesis by the end of the month, then we may have entered into a contract to do this 'definite thing' in a way that could be 'enforceable by law'.

Are the terms interchangeable?

If we consider the distinction between 'contracts' and 'agreements', contracts are a special type of agreement, and a contract can be called a range of things, including 'Agreement'.

It is possible to make a contractual agreement through something as simple as an email conversation — you don't necessarily need to have a special contract drawn up by a lawyer for an editing project. Any form of agreement that is designed to bind its parties to what they have negotiated has the potential to be an enforceable contract if it meets the right criteria.

Why make a contract?

You may be wondering why you would go to the effort of creating a contract or agreement when, for example, the editing work in question is just a small, quick project, or only involves an individual client, such as a student or a retired local history enthusiast. Likewise, you

might only work for a large organisation or government and believe that you have no control over any contract that might be offered to you.

There are at least three good reasons for making a contract:

- A contract, even in the form of a simple agreement made by email conversation, provides a clear record for all parties of the intentions, obligations and scope of services involved in a project.
- It is generally the basis for claiming payments, refusing 'scope creep' and assigning risks and benefits.
- Ideally, it is legally enforceable if you choose to defend it and will also provide a deterrent against breaches.

When you create your own agreements or try to influence the content of your contracts, you can make sure there are no misunderstandings. It also allows you to plan your work schedule and your business better, for example, to meet cash flow requirements and manage risk.

Some minimum characteristics of a contract

If your intention is to make a legally enforceable contract in Australia, then there are certain underpinning principles. It should:

- be between parties with legal capacity to enter into the agreement. This means, for example, that each party must be a person over 18 years of age or an organisation of a type recognised by the law in Australia
- set out clearly and with certainty the expectations and obligations of each party, to show their intentions and 'meeting of the minds' and to record both sides of the specific offer and acceptance that the parties to the contract have articulated
- involve some 'consideration', which is the payment to be made and how it will be made, including any in-kind payments or any waiver of payment
- apply from a start date (a nominated date or the date the agreement was executed) and specify a timeframe or end date
- relate to a legal jurisdiction (state, national, international), so you know which laws will apply to what you are agreeing
- not be contrary to other legal obligations – a contract should not try to bind a party to do something that would require another law or contract to be broken
- be signed and dated by all parties; formal contracts will also be witnessed.

If you are not certain whether a contract you have received meets these criteria, then this is a good time to talk to a lawyer. Likewise, if you are creating your own agreements and you are not sure whether they meet the criteria of an enforceable contract, then it will also be worth consulting your lawyer.

Before you sign a contract

Whether the agreement you are signing has been drafted by you or is from a client, always protect yourself by taking the following precautions:

- Read every word, even parts that seem routine, insignificant or boring.
- Clarify with the other party or get legal advice if you are unclear about any of the clauses or the obligations being placed on you, especially if these involve significant business, professional or personal risks.

- Don't assume you can get a variation to the contract later for anything you don't like, or decide is not possible or never intended to do.
- Whenever possible, draft or influence your own scope of services for inclusion in the contract – a client may find it useful to use your wording in the scope of services, and this will enable you to be precise about the services you have agreed to provide.
- A verbal agreement can be enforced, but generally the written word will override any agreement or variation that was only discussed.
- Request corrections if you find errors in a contract, or otherwise initial minor alterations. Don't sign the contract if it isn't what you agreed.

This advice might seem like common sense, but it is surprising how often people don't do these things. For example, how many people even read the software licensing agreements they assent to on a regular basis? The key is to pay attention and take an active role in making your everyday agreements and contracts.

When you make an agreement

Agreements require careful record keeping and detailed thought processes, and these are traits that editors tend to have as strengths. If you are in the situation of making an agreement, make sure you consider the following:

- Be precise and specific, and ensure the agreement can meet the minimum characteristics, in case you need to enforce it as a contract.
- For written contracts, ensure at least two copies are signed: one for each party to hold in their records. Keep a safe copy of your email agreements and a record of any verbal agreements you make.
- Make sure that what you are seeking to record in the agreement or contract is reasonable and possible.
- Fulfil contracts and agreements to the best of your ability.

You don't need to try to use any special legal language if you are drafting your own contract or contributing your scope of services to a client who will provide the contract. Write clearly, plainly and precisely, and avoid assumptions and ambiguities that could result in unreasonable expectations or risks to your successful fulfilment of the agreement (e.g. this includes avoiding imprecise deliverables, timeframes and payment milestones).

Special considerations for editors

When you review any contract, a range of general considerations will always draw your attention, especially in relation to details about the parties involved, the timeframes and how the tasks are detailed and tied to payments.

There are also some particular issues for editors to consider when you are reviewing a contract or creating an agreement. Some of these include:

- What do the clauses in the contract say about intellectual property and copyright?
- What remedy is available to you if you discover plagiarism? Can you get out of the contract if these kinds of risks are evident?
- What obligations of confidentiality will apply for this project? Will you ever be able to talk about the work or show samples of the finished product?

- What do you need to do with any material or files that you might create or have in your possession for the project (during or after the project)?
- How do the *Australian standards for editing practice* apply to the project? Do other professional guidelines apply (e.g. for editing theses or related to a technical content area that is the subject of the project)?
- Has editing terminology been used with the correct meanings, and does the client understand these meanings in relation to the project?

You should look for clauses that do refer to these matters and be sure that they only seek to bind you in ways you are prepared to accept (e.g. so that you cannot be held responsible for the copyright breaches of your client). You should also look for the absence of clauses referring to these matters and consider the level of risk if you don't clarify these matters (e.g. the product you are working on contains embedded third-party copyright, but the licence for this has not been mentioned).

Some useful links and resources

While our local professional authorities don't currently provide any specific advice about contracts and agreements, they offer information that could be useful when drafting a scope of services. See:

- IPEd website: How to brief an editor
http://www.iped-editors.org/Find_an_editor/How_to_brief_an_editor.aspx.
- Canberra Society of Editors: Commissioning Checklist
<https://www.editorscanberra.org/resources/commissioning-checklist/>.

Our Canadian colleagues offer the following pro forma agreement as a starting point for your own contracts and agreements:

- Editors Canada: Standard Freelance Editorial Agreement
<http://www.editors.ca/hire/contract>.

Concluding comments

I encourage you to take an active role in this important aspect of your practice as an editor. If you have never previously created an agreement for one of your clients, start with a simple Letter of Agreement. This is a formal letter setting out the terms of an agreement, but with space for the other party to sign their acceptance of the agreement and for your signature making the offer of agreement.

Pay attention to the contracts you receive and use their best and clearest practices as you start to create more advanced agreements. Also look out for the hidden hazards that might cause you problems with a contract, especially if they concern payments, timeframes and risks such as copyright or standards.

Finally, recognise the limits of what you can do to create or evaluate contracts for yourself, and know when you need to consult a qualified legal practitioner.

Acknowledgements

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References

This paper is primarily based on information that has been shared with me by lawyers I have worked with over two decades, as well as my own professional experience of hundreds of contracts. However, for the purposes of this IPEd conference, I have also consulted the following sources for confirmation and validation of key details:

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