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How to Draft a Contract

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Before attempting to figure out how to draft a contract, it is important to understand what a contract really is. A contract is a written or spoken agreement, especially one concerning employment, sales, services, or tenancy that is intended to be enforceable by law. In the old days, a simple handshake was good enough, using the old term, "my word is my bond." Now, in today's litigious society, it is not even possible to do that.

Any time someone wants to enter into an agreement between two or more people, each item must be spelled out in writing with all parties in acceptance. If it is not in writing, it does not exist. The next time the contract is viewed is when there is a misunderstanding or misconception on the terms and conditions of the written agreement. Never allow for an agreement to be ambiguous as these are how disputes arise, since there is a lack of mutual understanding.

In the beginning of the agreement, define the roles of each party and what the nature of each one of the businesses is. At this point, it can be stated that both parties mutually agree to the following terms, conditions, and covenants. Clearly list the names of the interested parties and corporations, defining the roles and obligations of each party.

Laws vary from state to state, so skin care professionals should ensure that there is enforceability where they reside or work in the event of a lawsuit. Profes-



sionals can win the suit, however, if the suit takes place in a court of competent jurisdiction all the way across the country, it may not be worthwhile for professionals to pursue damages in light of the expense of having to enforce their rights. They can always hire an attorney if the plaintiff is local, but it diminishes their costs of recovery due to the expense.

In the skin care industry, the main types of contracts professionals might engage in are, but not limited to the following categories:

EMPLOYEE/INDEPENDENT CONTRACTOR

This contract may include the professional's attorney, accountant, sub-contracted colleague(s), and maintenance vendors. When professionals re-engage in these types of contracts, each party must state their position,

requests, demands, and details of the terms and conditions. Prior to finalizing the agreement, ensure that there is bilateral understanding and that each party has had the opportunity to discuss it with their trusted advisors. Try not to engage in a settlement unless it really fits all parties or else it will fall apart somewhere in the near future.

CAPITAL EQUIPMENT

This contract may include purchase agreements for all the professional's capital equipment. Be certain to include the full restricted and unrestricted warranties (expressed and/or implied), shipping costs, training, collateral marketing materials and support, onsite or offsite maintenance, and whether or not the replaced parts are OEM (original equipment from the manufacturer) or generic.



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Skin care professionals should also determine if they are allowed to move the purchased or leased equipment without written consent and without voiding the manufacturer's warranty. Professionals should determine upfront whether they are able to sell their equipment to a third party and if there is a recertification fee to the new buyer. The answer will vary from manufacturer to manufacturer and needs to be negotiated prior to the engagement of the contract.

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FINANCIAL

This contract may include private lenders (angel investors or friends and family), bank or finance company loans or leases, landlord or tenant, mortgages, or basic loans for leasehold buildout. Professionals should determine if they are engaging in a lease or a loan. What are the interest rates? Is there a pre-payment penalty determined on the length of the loan or lease or can it be paid off at any time without a penalty? Many times, there is a sliding scale based on a percentage of the balance, contingent on the remaining life of the loan.

Do not be fooled by offers of no payment for six months or \$99 for the first six months, after which the standard lease or loan rate begins. The deferred interest is built into the rate and final balance. These type of finance agreements are good for professionals when they are short of cash and need the time to gain revenue until they have the available cash to start making the standard payments.

GENERAL BUSINESS

These contracts may include website creation and ongoing maintenance, marketing, social media and external vendor(s), consultants (business and risk management), equipment and supply companies for pricing guarantees for term commitments, credit card processing, and patient financing. Always question the length of the agreement and whether it automatically renews if the professional does not give written authorization within a prescribed period of time. Many agreements may self-renew and some have automatic price escalation clauses based on certain percentages of the existing agreement.

Be sure to totally understand renewal maintenance agreements based on a percentage of the purchase price. Read the fine print to determine if the renewal is based on the percentage of the purchase price that may have been discounted or if it is based on the existing retail price at the time of the renewal of the maintenance agreement.

PATIENT

These types of contractual agreements are usually for patient procedures or treatment packages. It is extremely important to lay out all terms and conditions of the intended procedure(s), as well as include releases and consent forms describing all of the contraindications and adverse reactions. It is not uncommon for a patient to state that they were not aware that bruising, swelling, and extended downtime could exist, and they may come back stating that they would not have gone through with the procedure had they known these conditions may have existed.

Professionals should ensure that they have a refund for cancellations, which includes the length of time required for a cancellation or rescheduling and whether or not the refund policy is an actual refund or credit for other services they offer. Prior to the engagement of any patient treatment, professionals should discuss their retreatment policy and state in writing if there are any additional fees for a retreatment or correc-

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tion. Professionals may feel as if they are entitled to their actual costs, while the client may feel otherwise. Do not leave this open for a dispute after the fact. Skin care professionals should clearly define their payment terms and options for litigation to acknowledge whether

the lawsuit is limited to mediation or a standard court procedure.

HIPPA, CONFIDENTIALITY, AND NON-DISCLOSURE

Always consider including mutual non-disclosure and confidentiality

agreements to ensure that proprietary information is kept proprietary. When these are included, detail the penalties for violating the nondisclosure agreement. It is always difficult to place a monetary value on the breach of information; however, an amount should be specified. HIPPA has been in force for some time and is a mandated requirement in the medical industry. Professionals must have clients sign all of the HIPPA forms and keep them on file. Allow the client to have a copy of the spa's policy and, if the spa has a website, ensure that the documents are prominently placed on the website.

BUSINESS ASSOCIATE AGREEMENTS

These agreements are mandated by law and must be given to all vendors who come in contact with protected health information (PHI). Such people include any consultant, EMR, billing, laboratory, medical waste vendors, drug representatives, or any business associate who comes into the facility

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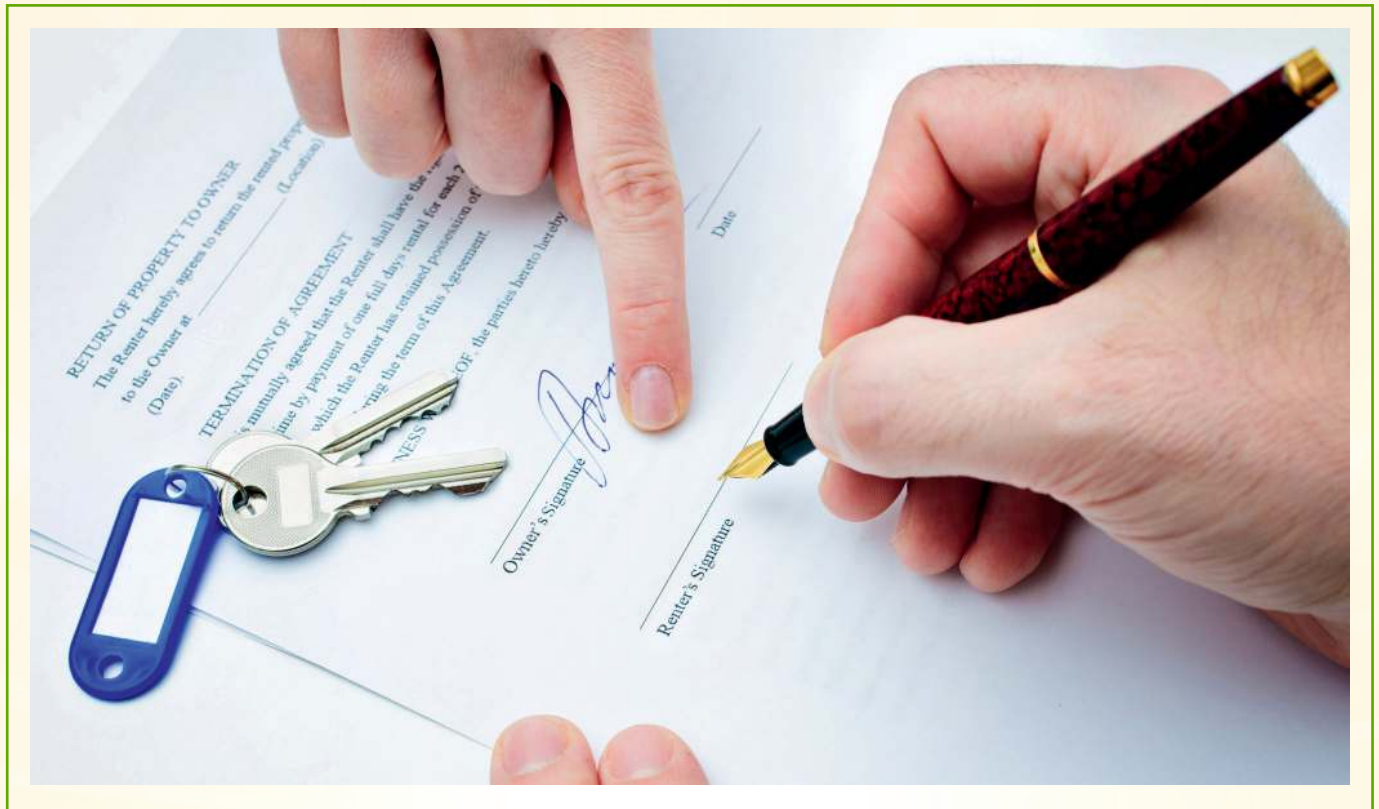


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and may have visible access to PHI. Business associate agreements are not just required for personal onsite viewing of PHI, but also includes visibility by electronic means.

EXIT STRATEGY

When drafting a contract, it is extremely important for professionals to know what their exit strategy, dispute resolution, and cancellation clauses are in the event of unsatisfactory performance by either party. Do not try to complicate things by writing in "fluff" that is just mere legalese. Keep agreements simple, starting with basic information. Contracts are hard enough to really understand with all of the mandated jargon and, to the layman, the words may sometimes seem to conflict with one another.

Include basic financial information, including the full amount of the agreement and how the parties will be compensated. List how the compensation is broken down into payments terms, whether it is weekly, monthly, annually, or all at once. If there are additional fees, they must also be included to en-

sure that both parties understand the financial obligations of one another. Professionals can always add addendums to the original agreement if their contract requires it.

Many contracts are general or generic in nature, clearly defining the terms and conditions as mentioned above; however, a Schedule "A" or addendum may be used to define the actual capital equipment with the make, model, and serial number, if known. Be sure that this information is accurate prior to executing the agreement because it will be too late once the professional signs it; at that point, they will have to go back to dispute what they actually purchased and what was actually delivered.

When negotiating any contract, do not be afraid to seek the advice of a third-party consultant who specializes in contract negotiations and is on the professional's team. It is also important to understand the person's needs and objectives and to ask questions and insist on answers. Skin care professionals should prepare and compare what they are negotiating and understand the au-

thority levels and limitations of the person with which they are negotiating. Furthermore, everything must be put in writing and professionals should never be afraid to walk away from the deal.



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