

LEHIGH
UNIVERSITY®

Legal Updates: Contract Basics II

November 11, 2005



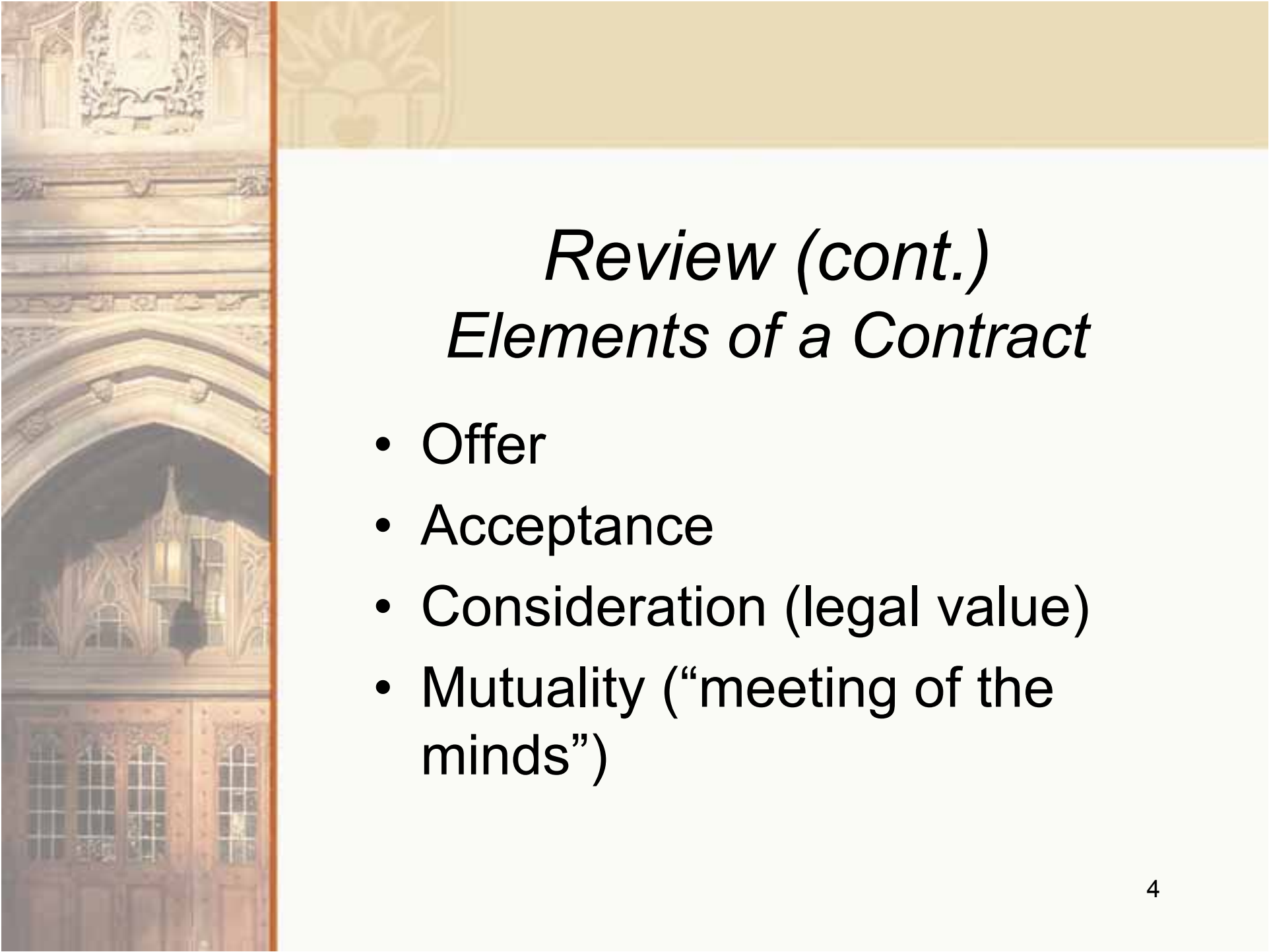
Review of Contract Basics I

A contract is ...
a legally enforceable promise



Review (cont.)

- A contract may be written or oral;
- It can have many names (i.e., Agreement, Purchase Order, MOU, Ticket, etc.)
- Or ... no name at all (i.e., letter, telephone call, e-mail)



Review (cont.)

Elements of a Contract

- Offer
- Acceptance
- Consideration (legal value)
- Mutuality (“meeting of the minds”)



Contract Review

You should always read and understand all terms and provisions of a contract before signing



Frequently Negotiated Contract Provisions

- Indemnification and Insurance
- Disclaimer of Warranties
- Intellectual Property Rights
- Publication Rights & Confidential Information
- Dispute Resolution
- Termination



Indemnification/Indemnif y:

- To restore the victim of a loss, in whole or in part, by payment, repair, or replacement. To make good; to compensate.
- Theory: tool to shift and allocate risks between contracting parties based upon economic considerations and without regard to either party's relative degree of fault



Indemnification - Sample

Each party (the “Indemnifying Party”) agrees to defend, indemnify and hold harmless the other party and its respective directors/trustees, officers, employees, and agents (collectively, the “Indemnified Party”) from and against any and all claims, actions, damages, liability, cost and expenses (including attorneys fees) including loss of life, bodily injury or damages to property (collectively, a “Claim”) arising from any negligent or intentional wrongful act or omission of the Indemnifying Party, except to the extent that such Claim arises from the negligent or intentional wrongful act or omission of the Indemnified Party.



Indemnity Provision - Analysis

- Each party (the “Indemnifying Party”)
- agrees to defend, indemnify and hold harmless
- the other party and its respective directors/trustees, officers, employees, and agents (collectively, the “Indemnified Party”)
- from and against any and all claims, actions, damages, liability, cost and expenses (including attorneys fees) including loss of life, bodily injury or damages to property (collectively, a “Claim”)
- arising from any negligent or intentional wrongful act or omission of the Indemnifying Party,
- except to the extent that such Claim arises from the negligent or intentional wrongful act or omission of the Indemnified Party.



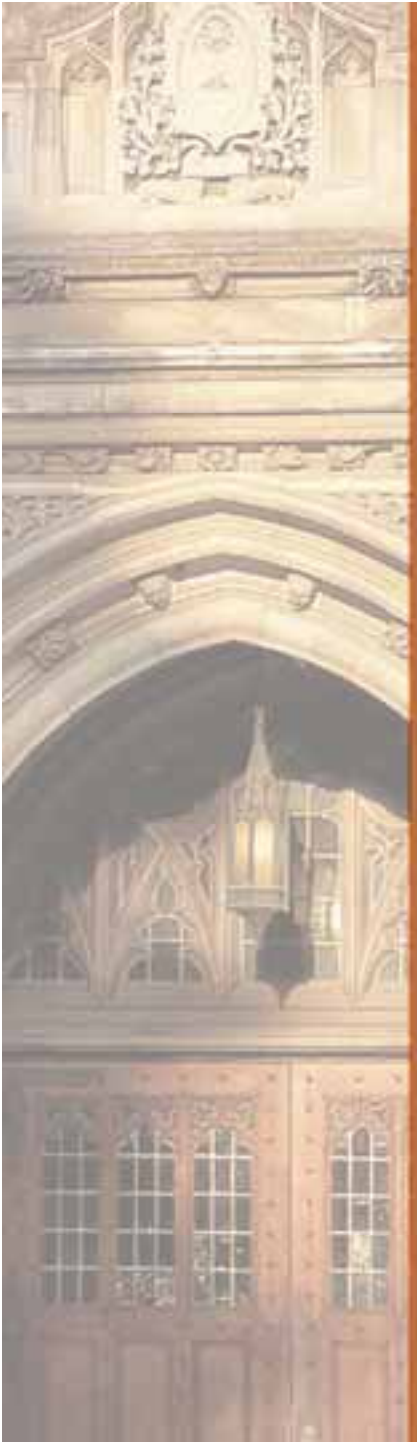
Why Insurance – Financial Assurance

- To ensure the other party can honor its promise to indemnify Lehigh.
- To ensure the other party has the financial ability to pay Lehigh for damages regardless of a contract or an enforceable indemnity provision.



Insurance Specifications

- “Contractor shall carry the following insurance coverage with companies licensed to do insurance business in the Commonwealth of Pennsylvania and acceptable to the University”
 - “Commercial General Liability Insurance at the minimum limit of \$1,000,000 per occurrence and \$2,000,000 aggregate”.



Insurance Specifications

Commercial General Liability

(CGL)

Commercial General Liability (CGL) Insurance covers the insured's liability for:

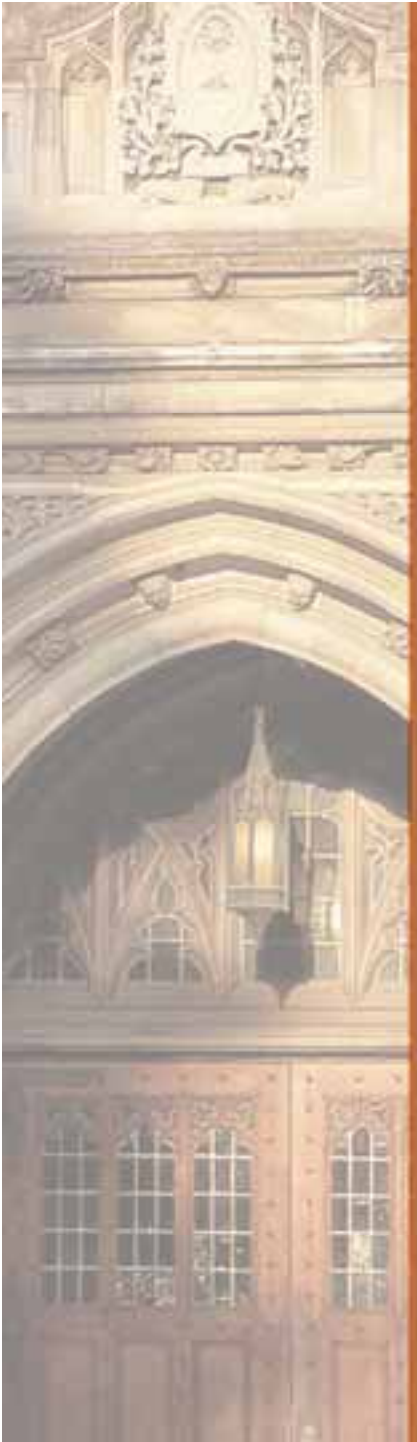
- Bodily Injury
- Personal Injury (e.g., slander, defamation of character, false arrest)
- Property Damage
- Contractual Liability (contractually assumed liability)
- Products and Completed Operations
- Independent Contractors



Insurance Specifications

Automobile Insurance

- “Automobile Liability Insurance at \$1,000,000 Combined Single Limit per Occurrence”
 - required to assure the other party has coverage to respond to any liability it may incur for damaging Lehigh’s property or injuring its employees
 - required to provide coverage on behalf of Lehigh for any liability Lehigh may incur as a result of the other party’s activities.



Insurance Specifications Workers' Compensation

Workers' Compensation:

- Coverage A at Statutory Limits
- Coverage B (Employer's Liability)
at \$1,000,000



Insurance Specifications Workers' Compensation

- Coverage “A” – Statutory Limits
 - no-fault insurance; required by each state
 - payment for medical expenses and lost wages
 - provides “sole remedy”



Insurance Specifications Workers' Compensation

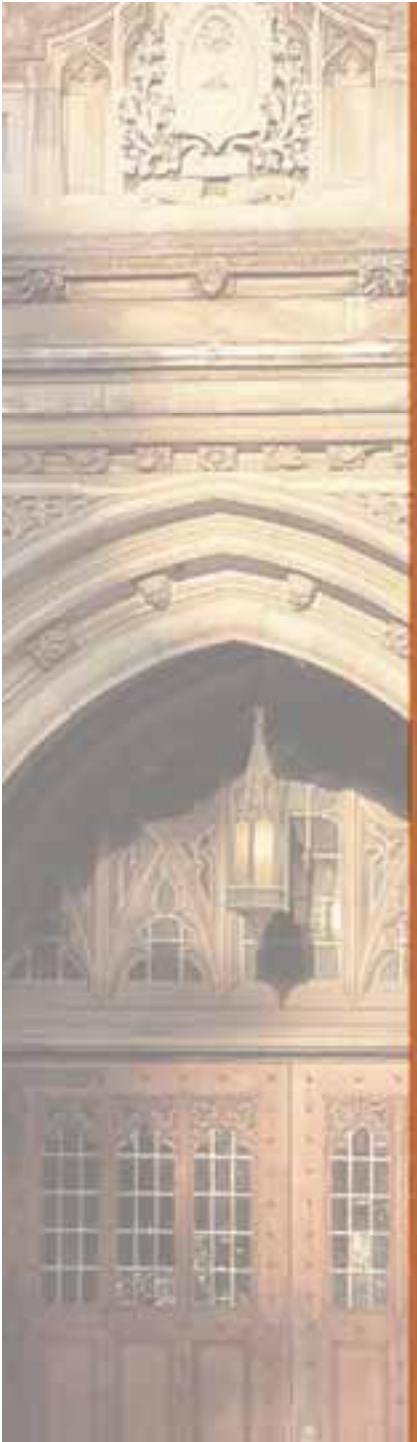
- Coverage “B” – Employer’s Liability
 - responds to bodily injury claims resulting from accident or disease of employees or dependents who do not fall under the Workers’ Compensation Act
 - rare because the Act is so broad
 - example: suit by a surviving spouse for loss of consortium, companionship or affection



Insurance Specifications

“Umbrella Liability Insurance at \$5,000,000”

- provides higher limits for the primary policies scheduled under it (e.g., CGL, Auto, Employer’s Liability)
- coverage should “follow form” of underlying policies



Insurance Specifications *“Professional Liability at* *\$5,000,000”*

- provides coverage for liability arising out of the mistakes inherent in the practice of a particular profession
- required when the party is professionally certified (e.g., architects, design engineers, etc.)
- policy covers claims caused by negligent acts, errors or omissions
- a separate policy is not needed if exposures are only incidental
- pays financial loss – not bodily injury

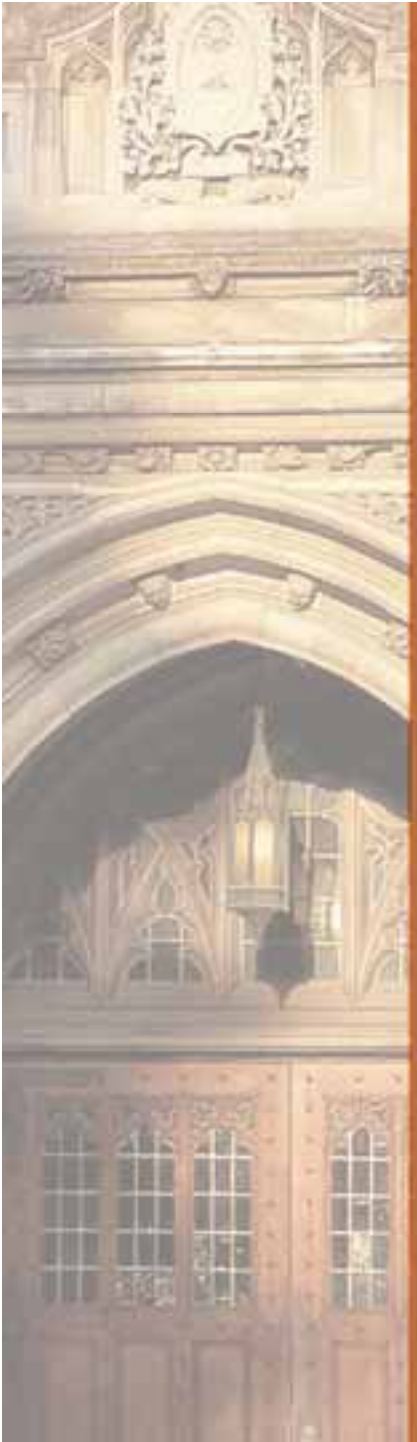


General Provisions

Evidence of Insurance

“Prior to commencement, the Project Contractor shall furnish Lehigh University with proof of insurance by providing a Certificate of Insurance”.

- evidence that the requirement was met



General Provisions

Acceptability of Insurer

- insurer must possess an A.M. Best rating of “A” or better
- indicates company’s ability to meet its obligations over a long period of time



General Provisions

Additional Insured Status

- “Such certificate shall evidence that the University has been named as an *Additional Insured* on all CGL, Automobile, and Umbrella policies.”
 - provides the University with insurance protection under the other party’s insurance policies
 - allows Lehigh to present a claim directly to the other party’s insurer
 - protects Lehigh from adverse loss experience
 - if the indemnity does not apply or is ruled invalid, the *Additional Insured* status may cover defense and damages



General Provisions Primary Insurance

- “All policies of insurance required of the Contractor shall be primary and non-contributory with any other insurance and/or self-insurance carried by the University.”
 - necessary because of “other insurance” language contained in most policies



General Provisions

Limitation of Liability

- “The procuring of insurance required under this Agreement or Article shall not relieve the Contractor of any obligation or liability assumed under this Agreement, including specifically the obligations set forth in paragraph ____, nor of any obligation or liability imposed by operation of law.”
 - the failure of a Contractor to buy insurance does not reduce its liability²³



General Provisions

Waiver of Subrogation

- Contractor shall and does hereby waive any rights of subrogation that it or any of its insurers may have against the University, its agents, employees or its insurers



Disclaimer of Warranties & Limitation of Liability

- Entire provision must be “clear & conspicuous” (ALL CAPS)
- Theory:
 - primary mission of education and research, so institutional decision not to assume this risk;
 - unlike for-profit companies, we do not meet commercial standards of quality control



Disclaimer of Warranties & Limitation of Liability- Sample

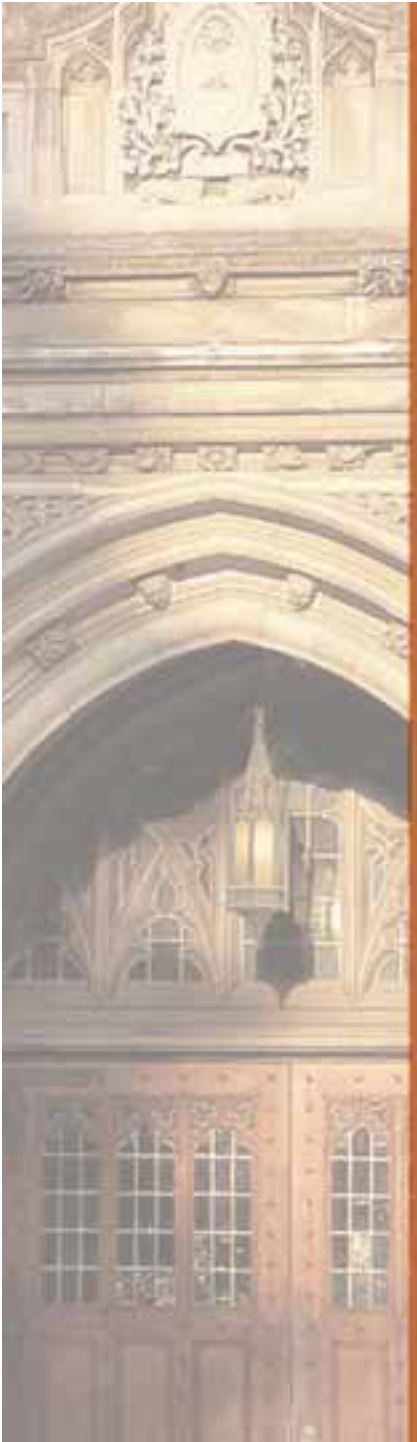
LEHIGH MAKES NO WARRANTIES, EXPRESS OR IMPLIED, AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATION, WARRANTIES WITH RESPECT TO THE CONDUCT, COMPLETION, SUCCESS OR PARTICULAR RESULTS OF THE SPONSORED RESEARCH, OR THE CONDITION, OWNERSHIP, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE SPONSORED RESEARCH OR ANY LEHIGH INTELLECTUAL PROPERTY.

LEHIGH SHALL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, CONSEQUENTIAL, PUNITIVE OR OTHER DAMAGES SUFFERED BY SPONSOR OR ANY OTHER PERSON RESULTING FROM THE SPONSORED RESEARCH OR THE USE OF ANY LEHIGH INTELLECTUAL PROPERTY PRODUCT



Intellectual Property Rights

- As nonprofit, tax-exempt org., we can't transfer assets, profits, resources, etc...
- to private parties to engage in profit making activities for commercial gain
- unless...we receive some legal consideration in return for the transfer



Intellectual Property (cont.)

So ... to meet these requirements:

- The University owns the IP that might be created from a corporate funded research project



Publication Rights

- Another means to satisfy in part the requirements of tax-exempt status
- University missions: creation and dissemination of knowledge
- The challenge: for-profit corporations seek to keep information secret for competitive advantage



Publication Rights - Sample

Sponsor recognizes that under Univ. policy, the results of Univ. projects must be publishable and agrees that researchers engaged in the Project shall be permitted to present at symposia, national or regional professional meetings, and to publish in journals, theses or dissertations, or otherwise of their own choosing, the results of the Project, provided however that Sponsor shall have been furnished copies of any proposed publication in advance of the submission.



Confidentiality

- Requires one or both parties to keep the other's proprietary information confidential for a defined period of time (typically 5 years, although we prefer 2 years or less)
- The challenge: Universities do not meet commercial standards of confidentiality



Confidentiality (cont.)

Exclusions

- Typical exclusions exempt info which:
 - Is already in public domain;
 - Becomes publicly known through no fault of receiving party;
 - Receiving party acquires from 3rd party on non-confidential basis;
 - Is independently developed by anyone at receiving party who hasn't seen the info; or
 - Is required to be disclosed by law or court order



Confidentiality Clause Pitfalls

- If dispute, clause often used as basis for breach of contract lawsuit because:
 - Easy to claim breach by unauthorized disclosure
 - Difficult to defend (prove no disclosure)
 - Definition of confidential information often open-ended as to form (written, tangible or oral), subject matter and/or time
 - Alleged damages due to disclosure are often very significant (\$\$)



Dispute Resolution

- *Negotiation*: between 2 disputing parties w/no guidance by 3rd party
- *Mediation*: between 2 disputing parties but w/independent 3rd party whose job is to try to bring parties to agreement
- *Arbitration*: whether binding or non-binding, typically dispute is brought before panel of 3 arbitrators. Arbitrators aren't required to follow any laws or give a reason for decision



Termination

- *For cause (breach)*: gives aggrieved party the right to terminate because other party did something “wrong”
 - Party in breach often given the opportunity to “cure” the breach
- *For convenience*: contract can be cancelled because we want to do so



“Boilerplate” Provisions

- Assignment
- Merger Clause
- Force Majeure
- Governing Law & Jurisdiction
- No Waiver
- Severability
- Time is of the Essence
- Non-Discrimination



Assignment

- Sample: *Neither party may assign this Agreement without the prior written consent of the other party.*
- Rationale: *Confidence that the party you contracted with will remain in place for duration of the contract*



Merger (Integration) Clause

- Sample: *This Agreement sets forth the entire understanding between the parties relating to the subject matter hereof and supersedes all prior understandings and agreements, whether written or oral.*
- Rationale: *When used properly, this should prevent drafts of the Agreement from being allowed as evidence in court when there is disagreement*



Merger (Integration) Clause

- *Parol Evidence Rule* - when a “final” agreement between parties has been reduced to writing, evidence of any earlier oral or written expressions is not admissible to vary the terms of the writing...
 - UNLESS...one party can prove a material ambiguity or omission exists in the written terms ...THEN oral testimony about contract terms is considered



Force Majeure (“superior force”)

- Sample: *Neither party shall be liable for any failure to perform as required by this Agreement to the extent such failure to perform is due to circumstances reasonably beyond such party's control, including, without limitation, labor disputes ..., acts of God, ..., material shortages, disease, or other such occurrences.*
- Rationale: *Excuses performance for reasons outside of parties' control. But, beware of inserts that are fully within party's control.*



Governing Law

- Sample: *This Agreement shall be construed and governed in accordance with the laws of the Commonwealth of Pennsylvania, without giving effect to conflict of law provisions.*
- Rationale: *Parties to a contract may choose the state law they wish to govern their contract (...otherwise, the court will decide for them)*



Jurisdiction

- Sample: *Same as under Governing Law*
- Rationale: *If there is a dispute over the contract terms, we want it handled in the forum most favorable & convenient to us*



No Waiver

- Sample: *A waiver by either party of a breach or violation of any provision of this Agreement will not constitute or be construed as a waiver of any subsequent breach or violation.*
- Rationale: *Preserves our right to hold the other party accountable for breach of a provision, even if we didn't do so for an earlier breach.*



Severability

- Sample: *If any provision of this Agreement is declared to be invalid, illegal or unenforceable, such declaration shall not in any way affect the validity or enforceability of any other provision*
- Rationale: *Preserves the operation of a contract in which one or more provisions might be found invalid*



Time is of the Essence

- Sample: *Time is of the essence in the performance of all obligations under this Agreement.*
- Rationale: *Any date in the contract is the date the event is to occur and another date is not acceptable; time is important (so lateness can be a breach of contract)*



Non-Discrimination

- Sample: *Neither party shall discriminate against any employee or applicant for employment because of race, color, sex, sexual preference, age, religion, national origin, disability, or veteran status.*
- Rationale: *Compliance with Federal Non-Discrimination requirements and University policy*



Who Can Sign Contracts?

- Only those individuals who have been expressly delegated signature authority by the Board of Trustees or University Officers
 - Unauthorized individuals who sign contracts on behalf of the University expose themselves to possible personal liability