



A Checklist for Joint Collaboration Agreements

By John ("Johnny") E. Miller



A 30-item checklist that serves as an excellent resource when drafting or reviewing joint collaboration agreements.

Collaboration is a process of participation through which people, groups, and organizations work together to achieve desired results.¹ It is a creative activity taking place at the intersection of common goals by sharing knowledge, learning, and building consensus. It encourages introspection. It takes place in art, business, education, music, publications, science, technology, and in other domains.²

However, establishing and operating a successful collaboration is hard. It requires the right people, mutual trust, and the ability to morph conflict into cooperation. To be successful, it also requires a written agreement that establishes the rules of engagement, such as a “joint collaboration agreement.”

At some point during your contract management activities, you will likely be asked by your employer to either draft or review a joint collaboration agreement.

For the purposes of this article, such an agreement does not create a legal entity (such as a partnership, legal joint venture, or other legal entity); it is a document that primarily describes a mutually beneficial relationship between two or more parties. It is purely a contractual relationship. There are, of course, certain situations in which the parties may desire to jointly create a new legal entity to perform the collaboration. However, such a collaboration is outside the scope of this article.

The joint collaboration agreement is also commonly called a “joint cooperation agreement,” “strategic alliance agreement,” or some similar type of name that signifies a joint relationship between parties. Typically, the joint collaboration agreement is much more far-reaching than a teaming agreement, which usually just focuses on one or more specific potential business opportunities.

The joint collaboration agreement forms the basis for the ongoing and mutually beneficial joint activities of the parties. As with any substantive contract executed by an entity, joint collaboration agreements are important contracts that contain numerous issues that need to be properly addressed.

In my contracts management career, I have drafted and reviewed many joint collaboration agreements. In order to systematically

cover the multitude of unique issues in a typical agreement of this kind, I have developed a practical “Joint Collaboration Agreement Checklist.” Set out below are 30 general items which I use in drafting and reviewing joint collaboration agreements.

Joint Collaboration Agreement Checklist

- Are the parties to the joint collaboration agreement (hereinafter referred to as the “agreement”) accurately identified by full legal name, type of entity, state of entity creation, and entity physical address?
- Is legal consideration cited (e.g., “In consideration of the mutual promises of the parties, the parties agree as follows...”)?
- Is there a “Background” section that essentially states that due to the synergistic capabilities and experience of the parties in the specific areas of collaboration, it is mutually beneficial for the parties to jointly collaborate while remaining separate and distinct entities and not as a legal partnership, legal joint venture, or other arrangement in which a new legal entity is jointly created? Further, are the qualifications of the parties described?
- Is there an “Intent and Guiding Principles” section that states the need for:
 - A cooperative working environment, good and open communications, the ability to confidently work together, and a trusting working relationship;
 - A relationship that is a mutually beneficial, nonexclusive arrangement;
 - The optimum performance by the parties;
 - A cooperative spirit;
 - The parties to seek certain objec-

- tives and to understand each other's expectations, organizational goals, and values;
 - The commitment to work together cooperatively by sharing certain knowledge, risks, and rewards; and
 - Each party to remain an independent contractor under the agreement, as well as during all operational aspects of the agreement?
- Is there a "Definitions" section that clearly defines the agreement's key capitalized terms, such as:
 - Each party's "Proprietary Information";
 - Each party's "Rights," including know-how, technical data, computer software, and inventions now in existence or later developed by each party (including all such party's applicable copyrights,
- mask works, trademarks, service marks, trade dress rights, patents, provisional patents, patent applications, trade secrets, moral rights, and other related intellectual property, including related future developments and improvements); and
- Any other key terms which need to be capitalized and defined?
- Is there a "Relationship of the Parties" section that clearly states that each party is an independent contractor with regard to each other under the agreement and that neither the agreement nor the operation of the agreement in any way causes the parties to become legal partners, legal joint venture parties, or parties to any other legal entity?
- Does each party state that it is not and will not be a party to another contract that would prevent or impair its
- performance or obligations under the agreement?
- Is it clear that nothing in the agreement shall prevent, preclude, or restrict either party from dealings with outside parties to the extent such outside party dealings do not create a default under the agreement?
- Is there an "Activities of the Parties" section that clearly, completely, and accurately states the activities and responsibilities of each party individually as well as the collaborative activities of the parties jointly under the agreement? (This is the heart of the agreement—these activities need to be carefully prepared.)
- Is there a "Collaboration Management" provision that addresses how the collaboration activities will be managed and how decisions will be made?
- Is there a "Term of the Agreement"

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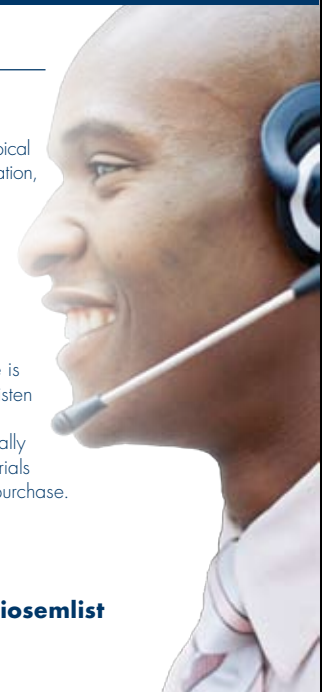
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section that states the effective date, the length of the period of collaboration, and how to extend the period of collaboration of the agreement?

- Is there an “Exchange of Proprietary Information” section in the agreement? If so, is it a mutual, two-way, nondisclosure/nonuse provision that addresses all the applicable nondisclosure/nonuse issues?³
- Is there a “Termination” section that properly addresses termination for default and termination for convenience?
- Is there a “Limitation of Liability” section that reasonably caps each party’s monetary liability to the other for actions related to or arising out of the agreement (excluding the harmed party’s intellectual property infringement claims or wrongful disclosure/use of proprietary information claims against the harming party)?
- Is there a “Waiver of Consequential Damages” section that provides for an equitable, mutual waiver of consequential, indirect, special, and incidental damages between the parties?
- Is there an “Indemnification” section in which each party reasonably agrees to indemnify the other for third-party general liability claims arising out of the agreement to the extent of the indemnitor party’s proportional negligence or willful misconduct; and third-party intellectual property infringement claims arising as a result of the indemnitor party’s activities under the agreement?⁴
- Is there an appropriate “Warranty” provision, “Limited Warranty” provision, or a “Disclaimer of Warranties” provision?
- Is there an “Insurance” provision that states the types and limits of coverage that will be required of each party? If so, will there be any endorsements (e.g., waiver of subrogation, additionally insured party, etc.)?
- Is there a “Governing Law” provision? If so, is the chosen state law suitable? Does the provision also exclude the chosen state’s choice of law provisions?
- Is there a provision that properly addresses “Public Announcements, News Releases, and Advertising Materials”? (This is an important provision since the involved parties very often like to generate as much publicity as possible from the collaborative arrangement.)
- Is there a reasonable “Allocation of Technology and Intellectual Property” provision? If so, does it accurately address the current “Rights” of each individual party as to its currently existing technology and related intellectual property? Also, does it accurately address the future “Rights” of each individual party as to its technology and related intellectual property solely developed by each party under the agreement? Finally, does the provision accurately address how the ownership and rights of use will be equitably allocated between the parties with regard to jointly developed technology and intellectual property under the agreement?
- Is there a “Dispute Resolution” provision that addresses how disputes between the parties will be resolved?
- Is there a “Business Continuity” (disaster recovery) provision to address how each party plans for the continuation of their business in the event of interruptions?
- Is there a “Business Ethics” provision to address how each party will operate ethically with integrity?
- Is there a “Data Privacy” provision that addresses how individual privacy will be safeguarded?
- Is there a “Records Retention” provision that properly addresses how long applicable records and data will be retained and stored before deletion and destruction?
- Is there a “Score Card” provision so that the parties can periodically assess and evaluate the collaboration?
- Is there an “Antipiracy of Employees” provision that reasonably prohibits one party from soliciting or hiring the other party’s employees?
- If applicable, is there an “Export Compliance” provision that requires compliance with the *Export Administration Regulations*, *International Traffic in Arms Regulations*, Foreign Corrupt Practices Act,⁵ antiboycotting laws, and other export compliance laws and regulations?
- Is there a “General” provision that addresses the following items:
 - Assignment,
 - Force majeure,
 - Notices between the parties,
 - Waivers,
 - Headings,
 - Severability,
 - Compliance with applicable laws,
 - Controlling language and regulations,
 - Survival,
 - Order of precedence,
 - Complete agreement, and
 - Modifications?

The goal of a joint collaboration agreement is to facilitate an ongoing, mutually beneficial, contractual, win-win relationship between your entity and another party or parties without creating a separate legal entity. A good joint collaboration agreement helps the parties in creating, sustaining, and enjoying the collaborative journey.

While this checklist is an excellent resource for creating or reviewing a good joint collaboration agreement, it is not exhaustive. Every joint collaboration agreement has its own unique aspects that may not be addressed in this checklist. However, if you routinely use this checklist as one of several resources when you draft or review a joint collaboration agreement, you will be pleasantly surprised with the large number of substantive, material, risk reduction, performance improvement, and cost-savings issues that will be surfaced for proper resolution. **CM**

ABOUT THE AUTHOR

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ENDNOTES

1. National Network for Collaboration, “Collaboration—The Power of We the People,” accessed May 13, 2009, at <http://crs.uvm.edu/nnco>.
2. See, generally, Wikipedia, “Collaboration,” accessed May 14, 2009, at <http://en.wikipedia.org/wiki/Collaboration>.
3. See Johnny E. Miller, “Forty-five Nondisclosure Agreement Review Tips,” *Contract Management* (November 2006): 64–65.
4. See Johnny E. Miller, “Forty Indemnification Clause Review Tips,” *Contract Management* (March 2007): 55–56.
5. Title 15, U.S. Code §§78dd-1, et seq.

