

"Contracting with a Co-Author"¹

http://cba.unomaha.edu/faculty/mohara/web/AEF09_Contract_Co-Author.pdf

by

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ABSTRACT: *Writing with a co-author rarely is a neutral experience. When good, co-authors provide a tremendously positive learning experience. When not good, co-authors are stern teachers from the school of hard knocks. Many of the sources of conflict and disappointment in the co-author relationship can be minimized or avoided with a contract between the co-authors.*

It was the best of times, it was the worst of times,
it was the age of wisdom, it was the age of foolishness,
it was the epoch of belief, it was the epoch of incredulity,
it was the season of Light, it was the season of Darkness,
it was the spring of hope, it was the winter of despair,
we had everything before us, we had nothing before us,
we were all going direct to heaven, we were all going direct the other way
- in short,
the period was so far like the present period,
that some of its noisiest authorities insisted on its being received,
for good or for evil, in the superlative degree of comparison only.
Charles Dickens, *A Tale of Two Cities*. 1859.

At some time in your academic career the opportunity to co-author with a colleague will surface. Take that opportunity and you are likely to visit one of two cities.

The authors of this manuscript each have co-authored multiple times and have done so with multiple co-authors. We both have visited both cities. If you co-author with multiple persons, then we are sure that you will visit both cities.

Some arrangements with co-authors work out, and some do not. Some, and more likely most, of the co-author arrangements that fail can be flagged at the outset as problematic. Clearly stated expectations and commitments will uncover difficulties early in the production process. Towards that end, the authors of this manuscript have resolved to never co-author again without a prior, written, signed co-author contract. It's a pain to craft contracts, but that is a smaller pain than visiting an unpleasant city for an age, or an epoch, or even a season.

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Based upon our personal experiences as co-authors; and our second hand experiences with colleagues who were co-authors; and upon O'Hara's experiences as a journal editor required to manage co-authors, we recommend to you that you never co-author without a prior, written, signed, contract. Never. And, we do mean never.

Life happens to everyone. But, especially, life seems to happen most frequently to co-authors. Everyone's memory fades concerning past conversations. But, especially, it seems co-authors can not recall clear commitments made in conversations. Accordingly, never co-author without **a prior, written, signed, contract**. We each know many faculty who have co-authored and who disagree with this advise because they object to the foolish optimism created by the last six words of the preceding sentence.

A co-author contract always identifies and resolves predictable points of contention. That resolution is at the time of contract. Implementation of the contract is sure to reveal new points of contention as well as deficiencies in the attempted resolutions. However, with the prior, written, signed contract in hand the co-authors are far more likely to achieve prompt, sure, and amicable resolution of those late arising points of contention.

Below we list a fifteen sure-fire of points of contention. When you are contracting with a co-author always include [1] through [13]. Always include more than merely [1] through [13] if you can identify additional points of contention. It is likely you will discover more points of contention since each co-authoring opportunity is unique. Never start a project with an identified point of contention that is not resolved within the prior, written, signed contract. Never. Festering points of contention do not improve with age. To believe otherwise is unquestionably foolish optimism.

[1] Who is the **lead author**; and, what is the sequence of listing of all other co-authors (see also, [8])? Note, some journals impose the journal's own naming nomenclature (e.g., alphabetical by last name); which is why you want to attach the submission guidelines as an appendix, since the journal's naming nomenclature trumps the parties' contract clause [1]. Note particularly below in clause [5] wherein the co-authors agree upon a list of intended journal destinations. This lead author agreement in clause [1] is necessary in a single manuscript project, but is especially important in multi-manuscript projects. Note how the author with the greatest percent contribution listed in clause [8] might not be the lead author in clause [1]. Lead author status might go to the author originating the manuscript's main idea, or lead author status might be rotated among authors across a multiple manuscript project, or lead author status might be so venial as to be merely part of the marketing strategy for the manuscript.

[2] What is the **article's title** as of the date of the contract? The purpose of the contract is to define the contours of a project. A working title will go a great distance in that task. The phrasing of the title as well as the jargon used in the title can convey a substantial amount of contours of the project.

[3] What is the **article's abstract** as of the date of the contract? Note how the lead off sentences of both clause [2] and clause [3] end with the phrase "as of the date of the contract". Very rare is the research project that does not morph significantly between start and finish. But, a clearly defined starting point can help curb that tendency to morph and forestall wholesale transformation. Once two or more authors start their joint production the sunk costs of each make them emotional captives of the project. It is far harder, emotionally, to make a "no go" decision on a project that has been underway for multiple months that it originally was to make the "go" decision to initiate that project. Also, if you are the least bit concerned with your co-author's stability of attention, then you ought to include within clause [3] a requirement that the prior, written, signed approval of all co-

authors is necessary for a material change in the abstract. In any event, you will want all co-authors to start working the same direction.

[4] Of course, the manuscript will be presented at least once at an academic conference or a professional conference. In clause [4] specifically identify each **presentation conference** to which the manuscript will be submitted. Clause [4] needs to include which co-author will make the submission (e.g., pay submission fee) as well as identify which co-author will make the presentations (e.g., who does the traveling?). Critically, clause [4] needs to identify whose travel budget will pay for the conference expenses. Some academic employers only reimburse travel expenses to some types of conferences (e.g., national academic conferences). It would be appropriate to add a very rough budget for each presentation (e.g., registration, airfare, and meals and lodging). A rough budget at the start will help the parties appreciate whether inflation in travel expenses is material.

[5] What are the **destination journals** to which the manuscript be submitted? Clause [5] ought to identify the co-authors' first, second, and third choice journals to which the manuscript *qua* article will be submitted. If the intended destination is a specific journal and no other, then that should be stated unequivocally. Some academic employers rank journals; additionally, some academic employers employ rating systems that can generate negative points for a publication in a disfavored journal. Some co-authors, in contrast, quickly tire of the publishing game and just want to find that puppy a home, any home. Also, some authors are in hot pursuit of tenure or promotion which may greatly influence their appraisal of a beneficial outcome. Lastly note, if a project is interdisciplinary, then the authors might have very different expectations concerning which journals are top tier and just how manuscript prose is presented. As noted in clause [1], and because of its importance it is repeated here in clause [5], you ought to attach as appendices to this prior, written, signed, contract the then current submission criteria for journal #1, journal #2, and journal #3. Each journal has its own submission requirements, some of which can be onerous. It is important to understand how listing the destination journals adds definition to the project's contours and further curbs the project's tendency to morph. Clearly, just as with morphing the project's content, so too your co-author contract ought to be required to obtain your prior, written, and signed consent to a change the project's destination journals.

[6] What are the **production milestones** for this article? Be sure to identify at least five discrete production steps for each conference and for each journal submission. These production milestones need not be extremely specific as to content since the production of all journal articles share many similarities. However, these milestones do need to be unambiguous as to criteria for accomplishment (e.g., delivery of submission to a journal).

[7] What are the **calendar dates** (be date specific [e.g., use the unambiguous January 1, 2009; rather than the ambiguous January 2009]) for each of milestone? Each milestone needs to be the sole responsibility of one person: no assignment of tasks to a committee. If, a milestone follows an action by another (e.g., journal's reaction to your submission is a request for a "revise and resubmit") and the date of that action by another can not be specified at the time of contract, then that following milestone is expressed in calendar weeks following the occurrence of that contingent milestone. Remember, it is better to under promise and then to over deliver, than it is to over promise and then under deliver.

[8] Specifically, rather than generally, what are the **contributions** of each co-author to each of the milestones identified in [6]; **as well as** what **percent credit** for the entire manuscript will each co-author rightfully claim (see also, [1])? In specifying

contributions you can not be too specific. For example, just exactly does it mean when a contract requires one co-author to obtain the data and to write the prose of the manuscript while the other co-author is to do the statistical analysis of the data? If the data is to be purchased, then a rough budget ought to be included. If the statistical analysis is to use a particular software package, then how the co-authors will gain lawful access needs to be specified. Again, the purpose of the contract is to define the contours of the project and to resolve ahead of time all reasonably anticipated points of contention. Accordingly, you can not be too specific in clause [8]. Recall where the devil resides.

[9] Who is the **corresponding author** for each journal submission? Note, the corresponding author need not be the lead author specified in clause [1] nor need be the person physically managing in clause [9a] or clause [9b]. The corresponding author might be the same as the lead author, or like some lead authors the corresponding author merely might be part of the marketing program for the manuscript (e.g., college roommate of the journal editor).

[9a] Identify which co-author will **physically manages production of galleys** with the journal's editor and physically manage correspondence between the co-authors and the journal.

[9b] Identify which co-author will **physically submit the finished manuscript to journal #1**, to journal #2, and to journal #3. Recall, some journals have submission fees that must be paid by this co-author. This is another reason to attach as appendices each journal's submission requirements. If there are submission fees, then those ought to be specifically listed in the co-authors' contract rather than merely included in the journal's submission requirements. If a destination journal was selected because it did not require a large submission fee, or that fee was eligible for employer reimbursement, then a material change in out of pocket expense for the corresponding author can be a reasonable basis for changing the list of destination journals.

[10] Is this a project to produce a **single manuscript** through to publication as an article; **or**, is this article the first of a **series of articles** to be co-authored by the co-authors? All academics are advised to have a research agenda if for no other reason than to minimize start up costs. If every project is totally new, then the author is forever paying tremendous start up costs. Also, the quality of research answers can build as the author's depth and breadth of familiarity with the literature increases. However, that an author ought to have a research agenda does not equate with every co-author ought to be a major part of that research agenda. It is best to start with single manuscript projects to see how the co-authors work together. It is very unwise for newly collaborating co-authors to commit to a multi-manuscript project. Recall, it is better to under promise and over deliver than it is to over promise and to under deliver.

[11] How are **additional co-authors**, if any, selected? Content can morph, so too can the project team. As a co-author works on a component of a project the need for additional skills or resources may come to light. Also, politics within a co-authors network of colleagues may urge acceptance of additional co-authors. As everyone knows, too many cooks spoil the broth. Surely, the original set of co-authors anticipated this risk. Therefore, the co-authors ought to agree either that zero additional co-authors are allowed or agree on how and why the project team is to be expanded. Additionally, the contract ought to specify how clause [8]'s allocation of credit will be modified. For example, the contract might specify that if co-author #1 wants to add a co-author #3, then #3's allocation of credit must come entirely out of #1's original allocation of credit (e.g., original split of 50% going to co-author #1 and 50% going to co-author #2 is morphed into #1 gets 25%, #2 gets 50%, and the newly added #3 gets 25%). Just as with morphing away from the agreed upon title and

abstract, prohibitions on or processes for changing the project team need to be detailed at the outset. The importance of providing this flexibility increases both with the scope of the project and the anticipated duration of the project. A multiple journal article project must be able to morph as to content and participants. But how?

[11a] Can project **team members be added or deleted** by unilateral action of some specified individual? Clearly, good management calls for a manager with authority. However, academics tend to be prickly about taking orders. Also, it is wise to remember that some folks are unethical and few academics are skilled managers. Unanimous consent, and all the troubles that entails might be superior to unilateral authority to act. Regardless of the choice made the choice needs to be made clearly and unequivocally.

[11b] The larger the project team the more the team needs clear processes for generating timely decisions. Since trying to compel performance from an academics is a fool's game, as any dean can attest, barriers to entry are quite likely more important than barriers to exit. However, in a large project team there will arise the time when a co-author must be given the old heave ho. The contract ought to anticipate types of decisions that warrant **unanimous approval versus a majority vote**; as well as when secret ballots are to be used.

[12] Who controls the **copyright** and how are **royalties** to be distributed? Let us dare to dream and to dream big. Let's absurdly assume that someone would actually want to read what we write. Well, since textbook placement is a far more likely source of royalties the readers will not be entirely voluntary. In any event, it would be the height of hubris to craft a contract controlling the rights and duties of co-authors without addressing copyright questions and royalty distribution. Note, the percentages specified in the clause [12] royalty distribution need not match the percentages specified in the clause [8] contribution and credit allocations. However, if the co-authors' contract is silent on clause [12] copyright and royalty distribution questions, then the percentages specified in clause [8] might take on disproportionate importance. Recall, the clause [8] allocation of credit might reflect a host of variables wholly unrelated to creative contributions (e.g., need for a bit hit just prior to an impending tenure decision).

[13] Signing of the contract ought to be **notarized**. This is more for emotional reasons than for legal reasons. The idea of this type of contract is to prompt voluntary compliance rather than to be well positioned to legally compel compliance. Notarizing the contract will impress upon all co-authors the importance of the agreement and the durability of the expectations embedded in the contract. Since the initial goal is emotional, ideally the notary will be a person in the campus building shared by both co-authors; or, by a person in the campus building of the senior author (age and/or rank as distinguished from the lead author in [1]); or, on the campus of the senior author. The idea is to impose social costs upon a breaching senior author.

At the beginning of this manuscript we said we would address fifteen sure fire points of contention that you ought to resolve in your prior, written, signed contract. All contracts ought to contain the first thirteen items at a minimum. In summary, those thirteen items are:

[1] lead author; [2] article title; [3] article abstract; [4] presentation conferences; [5] destination journals; [6] production milestones; [7] calendar dates;
[8] contributions and percent credit; [9] corresponding author;
[10] single manuscript or a series of articles; [11] adding co-authors;
[12] copyright and royalties; and [13] notarized.

Recall that you will want rough budgets for each item that reasonably is expected to require any non-trivial expenditure. Also, recall that you will want to create appendices for this contract that include, at a minimum, journal submission requirements.

Now let us turn to those two other items that might or might not be needed in a co-author contract. Both go to questions of power imbalance between the co-authors the genuine risk of abuse of power.

[14] Opinions vary on this next topic, but after much reflection and witnessing of situations, we firmly believe that the junior member of the co-authorship contract ought to be the **lead author on the first manuscript project**. Additionally, absolutely the less powerful co-author must be the lead author on the first manuscript if the project is to be a multiple manuscript project. There are many reasons for this, but a good one to note is that in any calendar year old people die more frequently than young people. Also, as noted in the discussion of clause [11] barriers to exit tend to be fool's gold. Accordingly, the junior member, who has a greater percentage of career at risk, ought to have the protection of hold outs of reaping the largest reward first.

[15] Depending upon how imbalanced is the power relationship between the co-authors, then we either recommend against or strongly recommend in favor a binding **arbitration** clause. Generically, arbitration clauses have the most salutary effect in the form of prompting negotiation and/or mediation rather than actual imposition of arbitration. When the relationship between the co-authors had roughly balanced power (e.g., two full Professors), then we recommend against an arbitration clause. In contrast, when the relationship between the co-authors is grossly unbalanced (e.g., grad student and member of Ph.D. committee; or Asst. Prof. and person with vote on Asst. Prof.'s tenure), then we strongly recommend a clause with binding arbitration.

[15a] **Who** ought to serve as the arbitrator? Ideally, the arbitrator ought to be a person with power over the more powerful co-author and with a bias in favor of the less powerful co-author. An ideal arbitrator might be the academic Dean of the both co-author as of the date of the written demand for arbitration.

[15b] Again, **specifying process** now will greatly facilitate swift resolution when the parties are sufficiently contentious that rational discussion is less common. For example, the arbitrator might be not specified in the contract, and instead the means of identifying the arbitrator would be specified. A reasonable specification might be that the (expressly specified) less powerful co-author gets to designate a willing arbitrator within ten business days of the date of the written demand for arbitration by any party; but, if the designation is not made by that deadline, then the arbitrator shall be an academic Dean chosen within another ten business days by the party making the demand for binding arbitration.

As should be clear from all of the above, to work with a co-author is not risk free. It also ought to be noted that working with a co-author can yield rewards in excess of those risks. As will all risk, it is wise management of the risk rather than complete avoidance of the risk that will generate the greatest profit. Also, as much as any person might try to do so, no person can accurately estimate the many forms of and the various intensities of displeasure that (let us be generous) the less than ideal co-author can impose upon you. Many, but far from all, of those displeasures can be avoided or minimized by a prior, written, signed contract. Accordingly, never co-author without a prior, written, signed contract. Never.