ABA-IPL Terms of Use Subcommittee
Drafting an Effective and Enforceable Terms of Use Checklist

- Consider your objectives
  a. Business Activities potentially covered by website terms of use
     i. Company provided content
        1. Texts, images, podcasts
     ii. User Generated content
        1. Forums, blogs, pictures, email, instant messages, uploaded files
  b. Protection
     i. Liability and compliance
     ii. User Experience and Rights

- Review earlier samples
  a. Boilerplate: indemnification, termination, limitations
  b. Terms:
     i. Acceptable Uses
     ii. Scope of licenses,
     iii. Choice of law, forum, jurisdiction
  c. Do NOT solely rely on Boilerplates
     i. Customize in accordance with the needs of your client

- Watch out for potential conflicts with other agreements such as IP licenses

- Users must be aware of TOU in order to be bound
  a. Notice and Opportunity
  b. Make TOU visible, mandatory and click-through
     i. Click-wrap presentations that provide a user with access to the TOU, even if TOU are not presented on the same page as the acceptance button, are sufficient
     ii. Err on the side of caution and make sure your users cannot bypass the TOU
  c. Ask yourself, is the TOU displayed on the website in a way that a reasonable user could be expected to notice them?
     i. Considerations:
        1. Plain language vs Legalese
        2. Understand user base and conform language

- Pay attention to your User Generated Content Policy
  a. Avoid ownership language or assignments
  b. Ability to Modify Terms
     i. Notice
     ii. Opportunity to Reject Terms (terminating account)
  c. Content Restrictions
  d. Prohibited Users
  e. Submission rules and limitations such as ownership/licensee for
     i. creative content: images, videos, blog posts
     ii. general submissions: forum post, suggestions, customer service submissions
  f. Indemnification
  g. Termination and Survival Rights

- International scope
  a. Does your TOU need to be adapted for other countries?
     i. Culture/language differences

- Dispute resolution
  a. Arbitration Clause
     i. Is it well-drafted and reasonable in its terms and limits?