

Contracts

Contract: an agreement between two or more parties (individuals, businesses, organizations, or government agencies) that creates a legally enforceable obligation to do or not do something.

- Can be oral or written

Elements of a valid contract:

1) Offer:

- Offers remain open until: (a) accepted, (b) rejected, (c) retracted prior to acceptance, (d) countered, or (e) expired by their own terms.
- If you reject an offer, you have no contract unless at a later date a new offer is put on the table (called a “counter-offer”). A counter-offer is a new set of terms and conditions given in response to the original offer. The difference between the original offer and the counter-offer may be just one clause in particular or multiple provisions or the entire contract.

2) Acceptance:

- Acceptance typically can come in one of three types:
 - (a) Express - a direct and absolute outward manifestation of agreement, such as, “I accept your offer.”
 - (b) Implied - the acts of the parties show that the offer has been accepted, such as when both parties to a contract begin to perform the terms of the contract.
 - (c) Conditional - acceptance is conditional on the happening of something, such as, “I accept your offer so long as you take the photos in the next two days.”

3) Mutual Assent (or “meeting of the minds”): to the essential details, rights, and obligations of the contract.

- There is no meeting of the minds if:
 - (a) one side is obviously joking or bragging,
 - (b) there is no actual agreement (e.g., the business owner who is selling an old film camera and the buyer thinks the item is new digital camera), or
 - (c) both sides have made a material mistake as to the terms or details of the contract.

- 4) **Consideration:** something of value, usually money.
- 5) **Capacity:** must have mental capacity and be over 18.
- 6) **Legality:** purpose must not be illegal or contrary to public policy.

Breach of Contract

A breach of contract usually occurs by one or more of the parties in one of the following ways:

- 1) Failing to perform as promised.
- 2) Making it impossible for the other party to perform.
- 3) Making it known there is an intention not to perform.

- Must have a valid contract to be breached.
- A contract may be breached in whole or in part.
- In general, the remedy for breach of contract is by a civil action for damages, not a criminal action.
- Unless otherwise stated in the contract (in a venue provision), the suit is filed in the county where the defendant is located.

Damages: payment in one form or another, made by the breaching party to the non-breaching party. Damages come in several forms:

- 1) Compensatory damages: put the non-breaching party in the position that they had been in if the breach had not occurred.

- 2) Punitive damages: payments that the breaching party must make, above and beyond the point that would fully compensate the non-breaching party. Punitive damages are meant to punish a wrongful party for particularly wrongful acts, and are rarely awarded in the business contracts setting.
- 3) Liquidated damages: specific damages that were previously identified by the parties in the contract itself, in the event that the contract is breached. Liquidated damages should be a reasonable estimate of actual damages that might result from a breach.
- 4) Specific Performance: if money damages are inadequate as a legal remedy, the non-breaching party may seek *specific performance*. This is the breaching party's court-ordered performance of duty under the contract. Specific performance may be used as a remedy if the subject matter of the agreement is rare or unique, and damages would not suffice to place the plaintiff in as good a position as they would have been had the breach not occurred.
- 5) Rescission: the contract is canceled and both sides are excused from further performance and any money advanced is returned.
- 6) Reformation: terms of the contract are changed to reflect what the parties actually intended.

Basic Rules of Negotiation

In negotiation, a number of basic rules have evolved over millions of years of human existence. Master the following rules, and you will be a real pro at negotiation:

- **Be prepared.** Being prepared gives you a definite advantage in *every* negotiating situation — so much so that the downside of not preparing for a negotiation far outweighs the small amount of time and effort that it takes to prepare.
- **Leave plenty of room to maneuver.** When you develop your negotiation goals and positions, build in enough flexibility to allow you to modify them to better achieve both your clients' goals and your goals.
- **Have lots of alternatives in mind.** For every possible reason that your client gives for *not* agreeing to one of your positions, you should have one or more alternatives ready to go.
- **Keep your word.** In business, as in life in general, your word should be your bond. Negotiation is built on a foundation of trust and mutual respect. If you aren't willing to keep your word, then you'll quickly lose both trust and respect.

- **Listen more than you talk.** One of the most important negotiating skills is the ability to listen — *really* listen — to the other party. If you ask the right questions and then let your counterpart talk about the answers, you usually find out exactly what it will take to successfully negotiate and close a deal.
- **Don't give up too much too soon.** Take your time when you are negotiating with your clients. It's better for *them* to be in a big rush to close the deal than for *you* to be in a big rush to close the deal.
- **Learn to say no.** When you're negotiating a deal, sometimes you have to say no if you want to achieve your own goals. For example, if your client wants you to cut your normal fee in half and you don't want to do so, then just say no, but offer an alternative, such as a slight reduction in fee in exchange for payment in 10 days instead of 30.

Contract Drafting Tips

It is helpful to understand the basics of contract drafting even if you rarely draft your own contracts.

- An effective contract should always be *clear, specific, and focused*.
- Sentences should be *short* to avoid unnecessary complexity and ambiguity.
- You may want to *look at sample agreements* prior to drafting your own.
- Make sure all *party names are accurate*. Include their business titles if applicable.
- A contract should be *consistent* in its tone, grammar, word usage, and abbreviations.
- *Outlining* the contract can aid clarity and allow for quick reference to certain clauses.
- *Define* important terms.
- *Anticipate litigation* by including sections regarding venue, choice of law, and attorney fees.
- All parties should *sign the contract*, including business titles if applicable.
- Pages should be *numbered*. Avoid the appearance that pages could have been added after the agreement was signed.
- As with any business writing, *proofread* very carefully.