

WRITING CONTRACTS: DO'S, DON'TS; WHY'S AND WHY NOTS

(SBDC: Outline for Webinar on Writing Contracts)

A. Why is it important for you—as a business owner—to know how to enter, and write, a contract?

1. If you reach an agreement with another person, you want to make sure it is enforceable in a court of law. [PPT Graphic: A smiling judge.]
2. Contracts are like fences. Good fences make for good neighbors. [PPT Graphic: A white picket fence.] If you have a well written contract, the chances are better that you won't have to go to court to obtain compliance by the other party. They will simply read the contract and agree with you that it is clear and they will lose if they go to court. [PPT Graphic: Two hands shaking, with earth in background.]
3. You should know how to write a contract on your own. [PPT Graphic: Yellow legal pad.] Attorneys are expensive, they will cost you upwards of \$250/hour. [PPT Graphic: Paying cash.] Even the simplest contract will take an hour to draft by the time you explain to the attorney exactly what you're trying to accomplish and review the work product. Additionally, you might not even be able to find an attorney willing to bother with setting up a new client just to earn \$250. [PPT Graphic: 0% Interested button.]

B. The six elements of an enforceable contract

1. Offer. [PPT Graphic: House for sale.] "I will agree to hire you as an independent contractor at \$125/hour." [PPT Graphic: One person speaking to another.]
2. Acceptance. "I agree to work for you as an independent contractor at \$125/hour."
3. Consideration: Something of value that the parties are agreeing to exchange. [PPT Graphic: Man and woman shaking hands over contract.]
 - a. "Consideration" in contract law is simply the exchange of one thing of value for another thing of value.
 - b. A contract is a legally enforceable promise (Restatement (2nd) of Contracts §1). Exceptions aside, a promise is legally enforceable only when there is consideration for it (§§ 17(1) - (2)).
 - c. The consideration is another promise or a performance (§3, §71). A promise or performance is consideration when it is "bargained for" (§71(1)).
 - d. A promise or performance is bargained for "if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise" (§71(2)).
4. Competency/capacity of the Parties—

- a. Of sound mind [PPT Graphic: Jack Nicholson, The Shining.]
 - i. Not suffering Alzheimers, etc.
 - ii. Not impaired by alcohol or drugs
 - iii. Not mentally deficient to the point of not appreciating the significance of the legal actions being undertaken
 - b. Of legal age for entering contracts. In Colorado, the age of majority is 18 for purposes of entering a contract, i.e. the age at which a person is no longer considered a minor. [PPT Graphic: Kids running a lemonade stand.]
 - c. Having proper corporate authority of a corporation, partnership, or LLC.
5. Mutual consent. There must be a meeting of the minds. [PPT Graphic: Diagram of Offer, Acceptance, Contract.]
 6. Legality. For example, one cannot enforce a contract to have someone killed, buy illegal drugs, or pay for prostitution. [PPT Graphic: Illegal drugs.]
 7. Writing—in some situations, such as the purchase of real estate, the contract must be written in order to be enforceable. Apart from such exceptions, oral contracts are just as legally binding as written contracts. However, written contracts are easier to prove up in court because there is no “he said / she said.” [PPT Graphic: Written Contract.]

C. What are the basic parts of a written contract?

1. Identification of the parties to the contract.
 - a. The parties are identified in the first paragraph of the contract and again at the end where the parties sign. For example, “This agreement is between ABC Company (“ABC”) and John Doe (“Doe”).” [PPT Graphic: Text.]
2. Identification of the date of the contract—signature date and/or effective date.
 - a. For example, “This contract is entered this 18th day of July 2019 between . . .” [PPT Graphics: Text of stated date contrasted with effective date.]
 - b. Where the date of entering the contract is different from the date the contract takes effect, “This contract is entered this 18th day of July 2019, effective August 18, 2019 between . . .”
3. Identification of the context and purpose of the contract—the Recitals. [PPT Graphic: Text.]
 - a. For example,

“RECITALS

WHEREAS, a dispute has arisen between the Parties; and

WHEREAS, the Parties desire no resolve their dispute without the resort to litigation;
and

WHEREAS, the Parties intend that this contract be legally binding and enforceable;

NOW, THEREFORE, in consideration of the representations, covenants, and promises contained herein, the Parties agree as follows:”

- b. Court cases frequently state that the “polestar of contract interpretation is the intent of the parties.” Therefore, be explicit in stating what your intent is. In the example given, the parties state: “the Parties desire,” and “the Parties intend”.
- 4. Provision of legal “consideration” as described above. State what it is the parties are agreeing to do for each other.
- 5. Date and Signature blocks. [PPT Graphic: Text.]
 - a. For example,

ABC Company

John Doe

By: _____

Its: President

An individual

D. What are some optional clauses in a written contract?

1. Integration clause. [PPT Graphic: Text.]
 - a. “This contract contains all the representations and promises of the Parties with respect to the matters addressed in this contract, and all prior written or oral promises not contained in this contract are hereby merged herein.”
2. Headings clause. [PPT Graphic: Text.]
 - a. “The headings used in this contract are solely for the convenience of the parties, and are not to be used in interpreting or construing the meaning of this contract.”
3. Choice of law. [PPT Graphic: Text contrasting Colorado and Delaware law.]
 - a. “This contract shall be governed by and interpreted in accordance with the law of the State of Colorado, notwithstanding the application of choice-of-law laws providing otherwise.”
 - b. “This contract shall be governed by and interpreted in accordance with the laws of the State of Delaware, notwithstanding that it is entered into and to be performed in the State of Colorado.”
4. Choice of venue. [PPT Graphic: Text.]
 - a. “The Parties hereby agree that the courts of El Paso County shall have exclusive venue to hear any dispute concerning this contract, and any action to enforce this contract shall be brought solely in El Paso County, Colorado.”
5. Arbitration or choice of forum. [PPT Graphic: Text.]
 - a. “Any dispute arising out of or related to the existence, performance, or interpretation of this contract shall be decided solely pursuant to the Commercial Arbitration Rules then in effect of the American Arbitration Association.”
 - i. Arbitration greatly impacts the rights of the Parties and should not be agreed to without a complete understanding of the rights, responsibilities, and relative costs of arbitration vs. litigation in the courts. Consulting legal counsel is recommended.
6. Trial by court and waiver of jury trial. [PPT Graphic: Text.]

- a. “The Parties agree that any dispute arising out of or related to the existence, performance, or interpretation of this contract shall be decided solely by a judge in a court of competent jurisdiction and the Parties hereby knowingly, intentionally, and expressly waive any right to a trial by jury.”
 - i. Waiver of the right, if any, to a jury trial greatly impacts the rights of the Parties and should not be agreed to without a complete understanding of the rights, responsibilities, and relative costs of trial by judge vs. trial by jury. Consulting legal counsel is recommended.
- 7. Recovery of attorney fees. [PPT Graphic: Text.]
 - a. “The Parties hereby agree that the prevailing party in any dispute shall be awarded reasonable costs and attorney fees.” [PPT Graphic: Contrasting American Rule and English Rule]
 - i. Under the “American Rule,” attorney fees are not awarded unless provided for by contract or statute.
 - ii. Under the “English Rule,” attorney fees are automatically awarded to the prevailing party.
- 8. “Interest” [PPT Graphic: Text]
- 9. “Force Majeure” or Act of God [PPT Graphic: Text.]
 - a. “The obligations under this contract shall not be required in the event any force majeure or Act of God prevents timely performance including, without limitation, flood, fire, tornado, or terrorism, and in such event this contract shall be deemed void ab initio.”

E. What are contract “conditions”?

- 1. A contract condition is an event that prevents a contract from being formed in the first place, or prevents enforcement after formation of the contract.
- 2. Conditions precedent prevent formation of a contract. [PPT Graphics: Text contrasting condition precedent and condition subsequent.]
 - a. “In the event that ABC Company acquires a contract by September 18, 2019 from the federal government to build widgets, then ABC Company and Doe agree that ABC Company shall hire Doe as an independent contractor at the rate of \$125/hour for the production of widgets.”
- 3. Conditions subsequent negate the enforceability of a contract in the event of certain happenings.
 - a. “ABC Company and Doe agree that ABC Company shall hire Doe as an independent contractor effective September 18, 2019; however, in the event that the federal government shall rescind or modify its contract with ABC Company to build widgets, then this agreement shall be of no force or effect.”

F. Common defenses to breach of contract lawsuits

- 1. The contract is ambiguous—the contract is susceptible of more than one meaning. [PPT Graphic: “Am-bi-gu-i-ty”.]

2. The contract is vague—it is unclear what the parties actually intended. [PPT Graphic: Constitution]
3. The contract is illusory—it seems like there is a contract, but on closer examination it can be seen that there is no meaningful promise to enforce. [PPT Graphic: Text.]
 - a. For example: “The Parties agree to agree on a price for Doe’s independent contractor services.” An agreement to agree is no agreement at all.
4. Fraud in the inducement.
 - a. For example: A party selling a truck to another party represents that the truck has 95,000 miles on it when in actuality the odometer was rolled back to 125,000 miles from 200,000 miles by the seller. The buyer can set aside the contract because its formation was induced by fraud. [PPT Graphic: Odometer.]
5. Coercion. [PPT Graphic: The Godfather.]
6. Expiration of the statute in limitations which, in Colorado, is generally three years from breach of the contract, but is six years for an action to recover a debt. [PPT Graphics: Wicked Witch with Hourglass; Dali Melting Clock; 3 Years Stars.]

G. Remedies for breach of contract

1. Ordinarily, the measure of damages is the benefit of the bargain. In other words, the monetary value of what the non-breaching party would have received but for the breach of contract by the other party. [PPT Graphic: Incredulous Judge Cartoon.]
2. Ordinarily, a non-breaching party can obtain only monetary damages. In other words, a court will not force, or enjoin, the breaching party to perform the contract. An exception would be, for example, for the sale of a unique piece of property, such as a famous painting. [PPT Graphic: Mona Lisa].

H. Sample Contracts [PPT Graphic: Text]

1. Independent Contractor Agreement
2. Employment Agreement