

“Contracts”

Our Constitution at Article I section 10 guarantees us that the right to contract shall not be impaired. What constitutes a contract and makes it legally binding? A “Contract” is a binding agreement between two or more parties setting forth the rights and benefits as well as the duties, responsibilities, and obligations, of each party, called terms, along with the time frame for the performance. Contracts need to be entered into knowingly, intentionally and willingly. A Contract that a person is forced into is said to be under duress or coercion and is not lawfully enforceable since it is no Contract at all. Additionally, Contracts in which some terms are hidden by or from a party are not legally binding. The Supreme Court has ruled that fraud corrupts all that it touches making void such agreements.

Generally, there are five parts of a Contract. They are the Offer, Acceptance, Consideration, Competency, and Legality. All five are needed to make an agreement legally binding on the parties involved. Although difficult to enforce if not in writing contracts are binding whether verbal or written. A verbal agreement witnessed or admitted to by the parties constitute a Contract. There is a law in most all jurisdictions referred to as the “Statute of Frauds” which states that all contracts above a certain value must be in writing to be enforceable. This amount may vary in different jurisdictions and in some may be as low as \$500. Now, this does not mean that an agreement above said value is not a legal contract it simply means that the courts in such a jurisdiction will not be obligated to hear an argument regarding it or help you to enforce it.

Verbal unwritten agreements occur every day and are entered into meeting all five criteria and closed and completed very quickly sometimes with hardly even a word exchanged. When you enter into a market and pick up a gallon of milk displayed for sale at \$2 as Consideration and the clerk Accepts it and bags the milk for you to carry away. You both appear Competent and of course, the sale and purchase of milk being Legal the whole agreement is entered into, performed and completed in just a couple of minutes.

Written agreements can range from the simple to extremely complicated and everything in between. For instance, the purchase of a home is an agreement that is more complicated and takes place over time in stages. A homeowner will make known her willingness to Accept Offers on her property by putting out a sign or employing a Real Estate Agent. When an interested buyer comes along, he makes an Offer to purchase the home at a particular price. Wanting to be clear about what he is willing to pay and by when he may include specific terms to the agreement. Such things as his Offer needing to be Accepted by a specific date and other issues like making sure the appliances go with the house and or that he has the right to check the foundation for cracks or the walls for termites or that his bank will lend the funds. If these terms and price are agreeable to the seller, she will Accept the Offer being made and a Purchase and Sale Agreement will be entered into which includes all the agreed upon terms and time frames. Usually, some amount of money called a Deposit is put up along with the Purchase and Sales Agreement. Usually a part of the terms maybe \$500 to \$1,000, in the case of a home sale, is placed in escrow with the agent or Title Company. This Deposit is to make the parties legally bound to follow through with the agreement by adding the criteria of Consideration which would otherwise be lacking and the contract unenforceable. Since selling a home is legal and the parties, appearing to all be Competent responsible adults of legal age the Competency and Legal criteria are met at the time of Offer and Acceptance. This leaves in most cases some form of Consideration the final factor in making a binding agreement.

Obviously, agreements between drug dealers, for drugs or thieves for stolen goods or any number of other criminal acts whether written or verbal are not legally binding contracts.

Regarding the issues of Competency when entering into agreements, this may be one of the more obscure parts of the contract. The other four being reasonably straight forward. Competency, for the most part, is presumed between consenting adults who are not otherwise obviously incompetent. You should know that although it is not illegal to enter into agreements with minors that should you enter such an agreement you are bound to the terms and the minor is not. A minor can change their mind about an agreement and cannot be held in breach. So that should be taken into consideration when entering agreements. Also if a person is apparently under the influence of alcohol or drugs, it is incumbent on you to recognize they are not competent to enter a contract.

Additionally, a mentally disabled or handicapped individual may also not be held accountable or competent to enter agreements. If you enter such contracts, they may not be null and void automatically you will most likely be held to perform even though they could be released.

The rule of thumb criteria is to be sure you can argue that any or most reasonable men or women would have come to the same conclusion. There are certain circumstances for which even though most people of average intelligence would be considered competent or enter into an agreement that you may want to go the extra mile with additional witnesses and or explicit disclosure statements and disclaimers. For instance when selling financial or investment opportunities or products to anyone not well versed in such areas especially the very old or very young. Or when selling extremely technical or scientific products, services or opportunities.

Successfully entering an agreement or selling a product or service to someone you know or suspect does not fully understand all the terms or ramifications is a recipe for disaster. The long term health of you and your business are not worth any one time sale or score.

A few more caveats regarding contracts should be kept in mind by all. If an agreement or form needs your signature, It is Voluntary! It is probably an offer to contract or to subject yourself to some agreement or agency. READ what you sign! If you are uncertain get advice Before you sign. After is too late. Most agreements are bilateral meaning both sides agree on all terms, and both sides are required to change any terms of the contract at a later date. Unilateral contracts may be entered into voluntarily by parties agreeing to mutual terms. But in unilateral agreements, one party may change the terms, and the other party may remain bound to the contract. Be aware and wary of such agreements and look carefully for them when dealing with certain multi-national Corporations and most especially when dealing with Banks, Financial Institutions and Government Agencies.

I would like to mention a couple of other agreements that can be very convenient and beneficial at times yet have the potential to be quite detrimental if not used cautiously.

The first is the "Power of Attorney." Both full and limited "Powers of Attorney" can be given by an individual to another individual enabling the "Attorney-in-Fact" (the individual who receives the Power to act for another) to act on behalf of the "Principle" (the individual giving the permission) to take actions, decide matters, enter agreements or do anything the Principle could do for him or herself. This can be done by giving another person permission to act on your behalf in a specific matter such as selling a particular piece of real estate. This would be a "Limited Power of Attorney" confined to a specific event or events for a certain period of time. If for instance you owned a property in Florida but lived in New England and would not be able to attend the closing of the sale of said property. You might allow your sister or friend who lives nearby in Florida to attend the closing and sign all documents on your behalf. The sister or friend would present the "Limited Power of Attorney" to display her authority to act on your behalf in the matter.

The “Durable” or full “Power of Attorney” may be extended to a trusted individual to carry out any matter on your behalf. A possible reason might be a serviceman going overseas giving “Power of Attorney” to his wife or a parent to handle his affairs while he is away and unavailable to do so himself. Husband and Wife may exchange “Powers of Attorney” with each other to protect against the incapacity of one or the other. Numerous examples could be given.

As you can imagine great responsibility and trust go along with these instruments. Those parties such as banks and real estate agents etc.. who rely on your permission for these individuals to act on your behalf are not responsible for the actions of your Attorney-in-Fact. In fact quite the opposite it is not anyone else’s place to police the actions of your Attorney, it is yours. That is why these powers should not be given lightly. If you are contemplating divorce or have any issue regarding trust, do not give it. If it is unavoidable that you trust someone, then give out a Limited or Specific Power that ends or expires after a particular act.

By law, a person receiving a Power-of-Attorney is supposed to act in the interest of the person giving it, but such things can sometimes be subjective or opinionated. If you decide to terminate Powers previously provided, you should do so in writing to the party that you gave it. It is also wise to provide notification to anyone, such as a bank, with whom the Attorney-in-Fact, presented it.

Even though the party you gave permission to may be liable to the Law for misuse of it, if they have lost or spent all your money and are without the means to make restitution it will be you that suffers.

“Nominee Agreement” is another type of agreement that may be convenient for the managing of affairs while absent or for privacy and anonymity. In these agreements again the Principle, a person having actual ownership, or rights to a title or position, either due to absence or a desire to remain anonymous, or to avoid controversy or conflict, may use another person to stand in his stead, as his agent to act, appear to act, own or hold some asset, business, position or title as a Nominee.

These agreements should be carefully considered taking into consideration many factors including confidentiality clauses that may need to extend beyond the term of the general agreement. Clear delineation of the roles of each party including consequences for breach of contract. A detailed listing of the actual assets, fees and income split involved including any interest whatsoever actually held by the nominee.

For example, let’s assume an unknown individual with a good amount of Capital and is a great cook. He decides to open a restaurant in New York City. Let’s call him Jeff the Chef. Jeff knows a famous New York Yankee’s baseball player named Tom Walker. Jeff proposes to Tom to open up a restaurant and bar called Walker’s Place. He will own and finance it all but would like to make it appear that Walker owns the place being sure the name will draw the crowds. Tom Walker agrees that for 20% of the profits and no responsibility to work the business he is willing to represent himself as the owner of the company and even agrees to make an appearance several times a month. He agrees further to supply a display case with some trophies and other memorabilia. An agreement is drawn up, and Tom Walker becomes a nominee owner for Jeff the Chef.

Now they each have concerns that need to be addressed. Jeff the Chef needs to be sure that Tom Walker will not eventually actually claim the business is his and try to sell it or borrow against its value. Tom Walker doesn’t want Jeff the Chef telling people here and there on the QT that he is really the owner making Tom look bad. Additionally, Tom wants it listed in the agreement that although he owns nothing else that the sports trophies and memorabilia are his property.

Certainly, there would be many issues to consider besides those listed above, and there are numerous other examples and reasons for the use of “Nominee Agreements.” Hopefully the above gives some indication of not only the possible convenience but also the potential danger if ill-considered or poorly written.

“Nominee Agreements” are legal if used for a lawful purpose they should not be used to commit fraud. You should bear in mind even a legitimate use may be seen by some as dishonest and depending on your social standing or position you may want to avoid even the appearance of fraud. Remember also a nominee is your agent and although you may include damage clauses in your agreement for inappropriate action by him you remain the responsible party in all likely hood with those parties damaged by your nominee’s action.

Concerning income that appears to be the nominees but is actually the Principles the IRS has forms including the 1099 to pass that income responsibility on. An accountant should know how to handle these transactions.

For those that hoped this Chapter on contracts would include samples of the types mentioned as well as some Partnership and LLC agreements I have provided several sample contracts in the Appendix at the end of this book.

I hope the preceding report or information has been helpful and that it provided you with some information you did not previously have. If you have any unanswered questions or would be interested in exploring further options for business or estate planning please feel free to contact us.

We offer a free first consultation which typically runs from 30 to 60 minutes. In that time we give a short overview of the services we provide and attempt to answer any questions you may have and to discern what services if any that we may be able to provide you with. We are not high pressure and will not ask you to make any purchase or decision during that time.

We will take the information offered by you and prepare a quote or estimate for any services you may have an interest in. We will provide that quote or estimate within a day or two of the free consultation by whatever means you prefer ie email, phone, fax or postal mail. It will be up to you after that whether to contact us again or not. We will not send endless emails, make harassing phone calls, or send continuous junk mail and we will never provide your information to other companies for any reason.

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