



PDHonline Course P139 (1 PDH)

Contracts for Professionals

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Course Content

Why do I Need a Contract?

At its core, a contract is made up of an offer, acceptance of the offer, and some exchange of what's called "consideration," such as money or property, or a promise of money or a promise to do — or not to do — something. A valid, enforceable contract can be consciously intended — a written or oral "express" contract — or it can be simply implied.

The importance of a contract is not only to hold someone to an agreement but is considered part of any professional agreement that is done to protect both sides. Presenting a potential client with a contract affords you both a chance to understand and state just what the terms are going to be and set it clearly. A contract also states that this is a sincere agreement and should get rid of anyone who is not truly willing to do business. Contracts can be used to prove and disprove that work was intended to be done, and can be the difference between battling out a dispute in court or simply proving that you were in the right by showing this legal document.

A good contract memorializes in writing, the agreement that has been made between them, specifying: the type of service, its extent, products to be rendered, any client assistance necessary, the standards to be employed or the accuracy to be attained, fee and billing information, a schedule of completion, a procedure for change orders, and any other special considerations. If these details are established, lawsuits over misunderstandings are rare.

- The professional is well advised to develop a standard contract for most of his clientele and execute this with his client after filling in the blanks. This will suffice in most cases. Larger more detailed projects will require a contract specific to that project.
- There are two types of contracts, formal and simple. Formal contracts refer to written agreements, while simple is typically a verbal agreement. Contracts may either be performed by each side, or party, and is referred to as bilateral. Many deals for service or sale of a product are considered unilateral contracts, because one side performs a promise for the other.

- Contracts cannot involve illegal practices or violate the law. Betting, price fixing, bartering for illegal goods, and similar unlawful acts cannot be bound by a contract.
- It is important when writing a contract that you avoid an express warranty, sometime defined as a guarantee that there is no error or that the professional will defend all facets of his/her work. When a client purchases a professional service he is not purchasing insurance. The professional is not liable beyond the ordinary standard of care prevailing in his area of practice. An express warranty may result in a lawsuit because professionals, who set themselves forth as providing the most accurate survey or the highest quality of services, may abandon the “normal standard of care doctrine”.

Fundamental Elements

- **Offer and acceptance**

The offer is made either in writing or verbally and the terms are decided at the time. The offer must describe what is being given, provide specific terms (price, quantity, etc.), and be presented to the other party. A contract is not "pay me whatever you feel it's fair - when you get the chance." It is specific and detailed. During this time, the other party may then make a counteroffer, or negotiate on terms.

Accepting the contract requires that all parties understand the terms, will not need further additions or adjustments, and satisfy both parties.

- **Mutuality and consideration**

Both parties in the contract will perform some service or provide some product - something of value is exchanged. Usually, consideration refers to money, but legally this can be anything that is decided as fair.

- **Competent parties**

This is a fancy term which means that both parties must be freely and willingly entering into this agreement, and that both parties are of "sound mind" to make such an agreement.

Legal Form

There is no legal form that the contract must take. The intent is more powerful, than the paper it is written on. This owns to the fact that verbal contracts are legal. However, most professional contracts are written, and seldom will a verbal contract take precedence over a written one. Specific contracts that are always written include:

- Sales over US \$500
- Promise to pay someone else's debt
- Exchange of land
- Contracts with a time limit over one year
- Marriage and prenuptial agreements

Voiding a contract

If you feel it is necessary to void a contract, you must be able to prove the following:

- The other party intended to deceive you
- A material fact was misrepresented, and you relied on this misrepresented component to make the decision to accept the contract.
- You suffered injury or penalty as a result of the fraud.

To prove fraud and misrepresentation is not easy, since one of the burdens during acceptance is to understand the contract before signing.

Writing a Contract

If you want to write your own contract, there is no uniform template to use. Detail the issues and conditions important to you. Some things to consider:

- *Scope:* Provide a detailed account of what the scope of work will consist of so that there is no ambiguity in what product they are looking for. If you fail to detail the scope of work sufficiently, the client have expected something different that the product he received, thus giving him/her reason to default on payment. Specify what the proposal/contract does not include in order to avoid confusion.
- *Payment:* The client agrees to make all payments within 30 days after invoice. Should the client fail to pay when payment is due, you have the right to consider this a breach of the contract.
- *Delays:* Surveyor will not be responsible for any damages for delay. Delays in completion of survey are subject to the weather or other uncontrollable circumstances.

- *Extras:* If any extra work is ordered, payment will be made on either a time or material basis or on other mutually agreed upon terms.
- *Liability:* The surveyor's liability is limited to the damages resulting directly from surveyor's negligence. Under no circumstances is surveyor's liability to exceed the amount of the contract price.
- *Collection:* Client will be responsible for the costs incurred for the collection of overdue sums.
- Prices are valid for thirty (30) days from the date indicated
- Client shall provide a 60-year title abstract, in addition to any maps or drawings in their possession.
- *Retainer:* Request that the client pay a retainer prior to your commencing work on the project.
- *Acceptance:* Make sure you leave a place for the client to sign the contract.

Both parties to a contract may agree to modify it without necessarily breaking or invalidating the contract. But if the party you've contracted with unilaterally changes the terms of a contract, or begins acting contrary to what was agreed upon, you should immediately express your concerns. Do not passively accept the new terms or actions, or you may find yourself locked into a contract you don't want. Your passivity could be considered acceptance of a contract.

When a contract is breached, a court may decide there is a substantial or "material" breach if it alters the core spirit or purpose of the contract. A court may ignore minor breaches, and the parties will be required to fulfill their promises.

What are the consequences when someone breaches a contract? Generally, courts will only award money "damages" to compensate for direct losses. Indirect or "consequential" losses are seldom awarded unless the parties clearly knew those losses would occur if they breached the contract.

Sometimes a court may order "specific performance," meaning that the terms of the contract must be fulfilled. This typically occurs when money would be an inadequate remedy because the subject of the contract is considered unique — such as a house or land — or perhaps an antique.

A court may award "liquidated damages" — a sum of money agreed upon in the contract to value the loss should a breach occur. "Punitive damages," or sums designed to punish a party for breaching a contract, are almost never awarded if the legal claim only concerns contract law. Punitive damages could, however, be awarded under different legal theories or where a specific state statute allows punitive damages.

There are generally common defenses for breaching a contract, such as competence, a mistake — usually only where both parties were mistaken about an underlying fact —

fraud and misrepresentation, duress, failure to follow through on a promise, statute of frauds, or that the contract was for an illegal or immoral purpose.

How a court interprets a contract depends on the parties involved. For example, experienced businesspeople in a particular trade may use "terms of art" which are enforceable against one another, even though outsiders may not understand their meaning. Otherwise, a court will likely interpret a contract in its simplest language and with commonly accepted meanings. Also, if the terms of the contract appear clear and unambiguous as written, a court generally will not consider other outside evidence or explanations of the contract language.