

Do I Have To Put It In Writing?

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A common misperception about contracts regards whether they must be in writing. As a general principle, no, in most circumstances a contract may be verbal and still be enforceable. While there are exceptions to this rule, to form any contract, verbal or written, you still need the same three basic elements: (1) offer, (2) acceptance, and (3) consideration (sometimes referred to as detrimental reliance or mutuality of obligation).

Perhaps the simplest of these three elements, the offer begins the process of forming the contract. It is a specific proposal (from a person called an offeror) to enter into an agreement with another. As an example, you could begin to form a contract by saying to someone "I will give you \$5.00 if you wash my dog." Although that offer does not express all possible contingencies, i.e., it does not tell us when or where or how, it is specific enough that the person receiving the offer could accept.

Once the offer is tendered, the recipient of that offer (called an offeree) may either accept or reject. If the offer contains a time limit in which the offeree may accept, then that term will govern how long the offeree has to accept. Absent an express time restriction, the offeree has a reasonable amount of time in which to accept. If the offeree does not accept within the time limit, or if the offeree expressly rejects the offer, then the offer is dead and no contract is formed. However, if the offeree accepts the offer, "I agree to wash your dog for \$5.00," then all that remains is to assess whether there has been consideration. Throwing a curve ball into the mix, if the offeree responds to the offer with a counteroffer, "I'll wash your dog for \$10.00," that counteroffer acts both as a rejection of the original offer and as a new offer thus beginning anew the process of offer, acceptance, and consideration.

The third element of contract formation, consideration, is perhaps a nebulous concept but no less essential than offer and acceptance. It has been defined as a benefit which must be bargained for between the parties, and is the essential reason for a party entering into a contract. It represents the actual value that is intended to be exchanged between the parties. In most jurisdictions, the exchange of consideration has been interpreted to include the act of merely binding oneself to performing the contract, e.g. if you accepted the offer to wash my dog for \$5.00, the consideration is your obligation to wash the dog and my consideration is the obligation to pay you \$5.00 after you wash my dog. But in some jurisdictions, the law requires a minimal exchange of some value or detrimental reliance. Detrimental reliance can be as simple as

your doing or refraining from doing something in expectation that the contract you entered into will be fulfilled, or it can be as substantial as undertaking the promised act, e.g., washing the dog.

So, once you have all three elements of a contract fulfilled, you are bound and obligated to perform. Don't be misled though into thinking that all contract formations are this simple. All sort of arguments can be made for and against the formation of a contract, depending upon whether you are trying to enforce one or trying to get out of one. Issues to challenge a contract are far too numerous for this article, so they won't be discussed. But here are just a few examples of issues to challenge contract formation. Was the offer definite enough? Was acceptance timely? Was acceptance provided in the proper format? Did the parties have lawful capacity to make or accept an offer? Was the subject matter of the offer legal? Does a statute or other law impose other conditions on the offer? On acceptance? Did the parties have a meeting of the minds as to the subject matter of the contract? Did one or both parties mistake what it was they thought they were promising? The list goes on.

Regarding those pesky contracts that actually must be in writing, that requirement originates with the Statute of Frauds. Enacted first in England in 1677 to prevent fraudulent land title transfers, the Statute of Frauds has since grown to include a host of other contracts that **MUST** be in writing (and signed, of course). In Arizona, the Statute of Frauds requires that the following types of contracts be in writing:

- Certain types of leases;
- Sale of goods greater than \$500;
- Surety;
- Guaranty;
- Promise to marry;
- Agreements whose performance will be greater than one year later;
- Agreements authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or a commission;
- Agreements which by their terms will not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make provision for any person by will;
- Agreements to charge an executor or administrator upon any promise to answer for any debt or damages due from his testator or intestate out of his own estate;

- Agreements affecting title or transfer of real property;
- Agreements to loan money or to grant or extend credit, or a contract, promise, undertaking or commitment to extend, renew or modify a loan or other extension of credit involving both an amount greater than two hundred fifty thousand dollars and not made or extended primarily for personal, family or household purposes.

With all of the foregoing in mind, it is usually the better choice to use written contracts. Signed written contracts can substantially diminish later argument about whether there even ever was a contract and if so what were its terms.

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