

LAW OFFICE OF
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CONTRACTS AND AGREEMENTS FOR THE REAL WORLD

Contracts: Creative Thought Structures™ Define the Business Relationship

Why is it some business relationships are successful and achieve their goals, while others fail?

What is the process of building a successful agreement?

Must the parties agree on what constitutes success for them to be able to achieve success? Or can they each have their own definition and still be able to have a mutually profitable and long lasting business agreement?

The answers lie in the concept of relationship, because successful business relationships are built upon coherent and clear underlying agreements as to the nature, purpose, and goals of the relationship. Business is about people working with other people to achieve individual and/or mutual goals. And whenever one person interacts with another person, a relationship is created. The question is how to help that relationship be harmonious rather than discordant over a period of time long enough for both parties to achieve acceptable returns.

Contracts are about relationships and whether it's an informal handshake or a formal executed document, it is the contract that establishes the relationship. The contract gives structure to business arrangements and makes possible the conduct of business transactions within a legally enforceable setting.

The basic definition of a contract is an agreement, a meeting of the minds, of two or more parties with regard to obligations and responsibilities that are enforceable at law. Yet, a contract is much more than this simple definition. It is the structure of thought (a Creative Thought Structure™) by which business people define their relationship to carry out their agreed upon transactions. And, the more effectively the obligations and responsibilities of the parties can be defined and characterized, the more likely the resulting transactions are to be successful and true to the spirit of the Creative Thought Structure™, the original business agreement.

Although an agreement does not need to be written and signed to be a contract, it is best to capture a complex business Creative Thought Structure™ in a formal executed document. The parties will need to remember at a later date what it was they agreed upon.

The well-constructed contract

A well-constructed contract defines the nature of the business relationship within a legally enforceable structure. Legal structures and legal analyses are used to configure and reinforce the business objectives of the relationship established between the parties.

When constructed and drafted well, the contract itself becomes practically invisible to the ongoing business transactions. With a well-constructed contract, the parties feel they are able to rely upon the underlying “rule book” of their relationship and are then able to conduct their business transactions of exchanging value for value within a secure setting.

In fact, the best contract is like a fine watch that keeps accurate time in a quiet elegant way. You don’t need to pay much attention to that well-constructed watch. All that need be done is occasionally to wind the watch (or these days, to change the battery) and it will keep on running accurately.

So it is with a good contract. If constructed well, the Creative Thought Structure™ of the parties is as clear after three years as it is after three days, even if there have been significant changes in the business operations of the parties. The relationship has the ability to keep ticking along with just an occasional rewinding, thereby providing the parties with product, services, money, and success. With a poorly designed contract, although the terms may seem clear upon signing, once a bit of time has passed the obligations of who does what and on what terms may become confused.

Litigation on a contract

Business people enter into contracts to deal with known present situations and also future unexpected ones. Contracts that are well constructed, clearly understood by the parties, concise, and razor sharp reduce the room for ambiguity and lessen the chances of litigation on the contract.

There are times in business relationships when one of the parties has had a change in business circumstances that exceeded their limit of unknown future expectations. Ambiguity in the relationship (or in the Creative Thought Structure™) may lead the party to believe that it can do better in addressing the changed circumstances by litigation, rather than by trying to renegotiate with the other party. Litigation on contracts often occurs not because one side made a bad deal, but because the party making the bad deal believes it can win in court because of ambiguity or confusion in the terms of the contract.

However, if it’s clear that one party will lose in court and the other party prevail, the result is a quicker and more effective business negotiation to address the changed business circumstances. Let’s face it, business deals are about business—meaning making money—and not about justice. The strength of successful business people lies in their ability to adapt creatively to changed circumstances and to continue to do business, and to continue making money.

Ambiguity in the business relationship means that some of the terms or conditions (those dreaded T's & C's) weren't clearly set out at the beginning of the deal. It is the point at which the deal is being formulated when the horse-trading of obligations and responsibilities is most fluid and creative. To be sure, not every negotiation can end in a handshake and executed contract. But it is at the point of creation (and not after the fact in litigation) when these discussions should occur, because the parties are most willing at the point of creation to try and be accommodating and make the deal. However, if ambiguity is allowed to creep in at the point of creation, it may set the seeds for future litigation.

Litigation is a serious obstruction to the need to adapt creatively to new circumstances. Litigation is costly, both in terms of time and energy, it can be very lengthy, and maybe worst of all, litigation takes the decision-making process out of the hands of the business people and places it in the hands of outsiders to the deal, a judge or jury. The economic function of the businessperson is to look for opportunities and evaluate risks inherent in turning those opportunities into realities. The risk involved in completely unknown outcomes are something to be avoided by business people, unless they are for fun and entertainment in Las Vegas.

There is definitely a place for litigation in business transactions and negotiations. It is a necessary tool, but it should be used sparingly and only as a last resort. A well-designed Creative Thought Structure™ captures and represents the business arrangements that were struck by the parties and those arrangements are more likely to survive uncertainty and be durable under changed circumstances. A well-constructed contract squeezes out ambiguity and replaces it with the agreed upon means to address uncertainty. Chances for litigation are thereby reduced and the place for creative approaches enhanced.

Standardized contracts

The well-constructed contract, whether standardized or custom, captures in words (and in tables and attachments where necessary) the business Creative Thought Structure™ and the substance of the business arrangements, within a legally enforceable structure.

Many standard forms of contract have been developed to address standardized transactions. A common example is the residential real estate listing agreement. The boilerplate of the agreement has been developed over many years and found to be both workable and durable and only the variables, such as price of the house, date of closing and agent's fee, are changeable.

The development of a reusable format, such as a listing agreement, is an efficient and cost-effective way to do business. There are many types of business transactions that lend themselves to reusable formats such as licensing agreements and revenue sharing agreements. With each reusable format the objective is the same: invent a well-constructed contract once, then use it over and over by changing only the variable terms.

Custom contracts

In contrast to this type of business agreement, there are many lines of business, or even transactions within a line of business, where the terms of the transaction can vary a great amount from deal to deal, or even from customer to customer. At first glance, it may appear these types of arrangements do not lend themselves to a standard “fill in the blanks” contract. Some of the most common forms of business transactions that appear not to be “standardizable” are those that involve providing specialized services such as consulting agreements, joint marketing arrangements, or distribution agreements.

However, even with these types of agreements, there are many issues in the transactions that can be addressed and standardized. It is advantageous to turn a custom contract into at least a partially standardized agreement. By doing so, the transaction cost and time associated with executing a contract, and thereby turning a prospective lead into a new client, are reduced. A proposed business deal more quickly becomes a successful business reality.

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