

THE TEN COMMANDMENTS OF CONTRACTS

- I. There is no substitute for having your contracts reviewed by a competent attorney who is familiar with your business.
- II. You are a sophisticated person; therefore, courts will be inclined to enforce your contracts, both oral and written. Never enter into a bad contract because you think that you can get out of it because it is “unfair.”
- III. Headings are meaningless and are sometimes misleading. Read the entire contract – not just the headings. Never trust a heading that is drafted by someone else’s lawyer. (You will notice that there are actually nineteen “commandments” of contracts.)
- IV. After reading all of the contract, fulfill your side of the bargain.
- V. Typos matter.
- VI. In many situations oral contracts are enforceable. There are times when an oral contract is enforceable even if there is also a written contract. Oral representations can also create claims based on fraud, misrepresentation or unfair and deceptive business practices.
- VII. There are also many situations in which oral contracts are not enforceable. If an agreement is important to you, always insist on a writing signed by the other party.
- VIII. In many situations covenants not to compete are enforceable. We have enforced a covenant not to compete against a person who only worked for my client for three days.
- IX. The real zingers are often buried. They can be buried on the back of the page, in small print, in the middle of a paragraph or even in the middle of a sentence.
- X. “Indemnity,” indemnify,” and “hold harmless” mean “we will write you a check if” Repeat the phrase for every concept in an indemnity clause.
- XI. Carefully read any provision that limits or excludes warranties or remedies, that limits the time in which claims can be made or that reduces the statute of limitations. Expect that these clauses will be enforced against you.
- XII. “Consequential damages” can be almost anything beyond damage to a defective product, including down time, lost profits, damage to your property or personal injury. A clause that excludes liability for “consequential damages” can severely limit your remedies if there is a serious problem.
- XIII. Carefully read any provision that shifts costs or attorneys’ fees.
- XIV. Watch out for liquidated damages clauses or clauses that accelerate the amount due.

- XV. In contracts for the sale of goods, you can be bound by the language that is contained on the back of the other side's purchase order or invoice (or other document) if you do not "object" to the language within ten days. If you are involved in the purchase or sale of goods and you do not have language that protects you on the back of every purchase order or invoice that you send out, please do business with my clients.
- XVI. Some of the nastiest disputes we have been involved in were between family members or former friends. Sometimes the best way to preserve a friendship or your relationship with a family member is to draft an agreement which resolves everyone's concerns before the business relationship begins.
- XVII. Whenever you go into business with someone, you need to remember that most businesses fail and most business partnerships ultimately split up. We have litigated many cases involving partnership agreements or shareholder agreements that were the business equivalent of "til death do us part". Make sure that your partnership agreement or shareholder agreement is the business equivalent of a pre-nuptial agreement. Then ask yourself, "what would Donald Trump do?"
- XVIII. To evaluate a contract you should:
- (a) Imagine that there is a problem, both sides are angry and the other side has just hired the meanest lawyer in town.
 - (b) Now go through the contract carefully to see how your interests are protected or are harmed by the language of the contract.
 - (c) For each part of the contract try to imagine all of the things that could go wrong.
 - (d) Determine how the contract affects your rights under each scenario where something has gone wrong.
 - (e) Imagine that the other party is in your office and telling you in person what will happen under the contract if something goes wrong.
 - (f) React to what the written contract tells you in the same way that you would react if the other party told you the information in person. For example, imagine how you would react if the other party sat down in your office and told you to your face that you would only have seven days within which to file a notice that a product is defective or that the other party would not be liable if his product was defective and caused your factory to burn down; or that the other party wanted you to indemnify it for its own negligence. If you would not agree to contract terms in oral negotiations, then you should not agree to a contract term merely because it is buried in a written contract.
- XIX. If someone really wants to do business with you they will negotiate the terms in their form contract.