

**These are generalizations only! Nothing herein creates an attorney-client relationship. Consult a Florida attorney for specific advice. PLEASE DO NOT SEND UNSOLICITED MATERIAL OR CONFIDENTIAL INFORMATION.**

**Question 1 WHAT SHOULD I KNOW ABOUT FLORIDA CONTRACTS?**

**Answer:**

**CONTRACTS PRIMER**

When do you know you're really stuck?

This primer is written very informally and designed to be immediately applicable to your everyday business.

**THINK!!** ... ONCE YOU SIGN A CONTRACT, YOU MAY BE BOUND... even if it's in crayon on the back of an envelope. Consult a Florida attorney. Don't be penny wise and pound foolish.

**BASIC TERMS:**

**OFFER** – Nothing more than a proposal.

**ACCEPTANCE** – Can be a promise or performance (i.e. payment).

**COUNTER-OFFER** (Rejection plus a new offer) – requires acceptance.

Making of a contract not only depends on what the parties meant, but on their having said the same thing. Remember, people have wildly different perceptions of the same event!

**MULTIPLE DOCUMENTS** such as a correspondence which may constitute contract – be careful what you write – you may be bound.

Use Letters of Intent until you're sure you have thought through all the details and want to commit. This is not some special magic form – just say “this is my intention” or these are preliminary thoughts”, or “This is a sketch of terms for further discussion”... “but of course not final ‘til we do a formal contract.”

**CONSIDERATION** – How much are you getting for this? There must be some exchange of value to support a contract. A Contract cannot stand based on something you were already obligated to do. For instance, a promise to pay money you already owe is not consideration. Nor can it stand on a moral obligation. As long as each party is getting something new out of this deal, it's enough. Fair price is not an issue – The Court cannot remake a contract to bail somebody out of a bad deal. In this country you are free to discount yourself into bankruptcy. Be sure to distinguish between “good” and “valuable” consideration. (Valuable consideration is love and affection and will only support a contract between close family members).

**DELIVERY** – not what you think. An acceptance must be delivered to the Offeror (or his agent) to be valid. A contract or letter of acceptance signed, but not sent or given to the other party (or his agent) is not an acceptance. There is no contract.

A deed signed by the Grantor in the presence of the Grantee, but then not given to the

Grantee is not a conveyance.

**RATIFICATION** – Showing an intention to approve a contract despite a breach or despite an otherwise fatal flaw in a contract.

**BREACH or DEFAULT** – violation of the terms of a contract.

**DURESS or COERCION** – You cannot be compelled to honor a contract that you signed with a gun held to your head.

**ORAL CONTRACTS** – Yes they ARE enforceable, with certain exceptions. See Statute of Frauds and Gentleman's Agreement below.

However, my Momma always told me if it wasn't on the front page of the New York Times it didn't happen, so memorialize agreements in writing whenever you can!

**GENTLEMAN'S AGREEMENT** – This is a deal on a handshake between two people who know and trust one another. They can work great - until one of the gentlemen die and you have to deal with Greedy Greta, his daughter and Personal Representative.

**ALL THOSE WEASEL LAWYER WORDS YOU HATE AND WHY THEY MATTER! :**

**AMBIGUITY** – This is a BIG problem and may make your contract unenforceable. Be specific. *Say what you mean, and mean what you say.*

**GOOD FAITH & DILIGENCE** - are implied by law in every contract.

**INTEREST** – No, you do NOT get it unless you contract for it!

**ATTORNEY FEES** – same as above, unless otherwise provided by statute (don't depend on that happening).

**LEGAL INTEREST** – again, not what you think. This is the interest that a Judgment accrues from the date it is entered. (The date of judgment may be years after the money was first due to you, so don't forget to contract for interest). This rate is subject to change every year. This is different from the maximum rate of interest permitted by law.

**FAILURE OF CONSIDERATION** – Check bounced, I call that failure. Services never rendered, that is a failure as well.

**ANTICIPATORY REPUDIATION** – when a party makes it clear he has no intention of performing a future duty.

**RESCISSION** – a way to get out of the deal BUT you must put the other party back where you found him (i.e. got to give the \$\$ back and undo whatever's been done – may not be possible).

**MATERIAL BREACH** – a meaningful violation of the contract.

**USURY** – interest higher than that permitted by law, other fees charged may be added in computing the actual interest. Calling something a ‘yearly fee’ or ‘reinstatement charge’ does not make it any less ‘interest’ under Florida law. This is a favorite of equity skimmers and some foreclosure rescuers.

**ENFORCEABILITY** – can/will a Court of law compel compliance with the contract? Perhaps not, if the terms are too ambiguous or the object of the contract violates the law or public policy of the state (gambling, prostitution, fraud of another, grossly usurious, etc).

**ENFORCEMENT** –

- o Liquidated Damages – an agreed amount to be paid in the event of breach.
- o Forfeiture of Deposit – similar to above (Court may refuse if so high as to be a penalty).
- o Specific Performance – the right to force someone to perform the literal terms of the contract.

**CONTINGENCIES, CONDITIONS PRECEDENT, WARRANTIES** – That is what they got them darn lawyers for!

**EQUITY** – the “But Mom, it’s just not fair” side of the Court.

**QUANTUM MERUIT** – The “amount of value” rendered. This is a way of recovering in equity where you have no explicit contract.

**LIENS** – Do not extend credit, but if you must, always get one. This generally consists of a UCC Lien on personal property or a mortgage on real property. ALWAYS do a UCC and/or title search before accepting a lien on personal property. You can search on [www.sunbiz.org](http://www.sunbiz.org) but it might be safer to have a search done by an experienced law office.

**PERFECTED LIENS** – If it is not recorded, it’s close to worthless (but not completely). Recording gives notice to the world of your rights. It also puts you ahead of subsequent lienors as far as actually collecting. Make sure to record in the right place!!! There is more to perfecting a judgment, for instance, than merely recording it, so seek legal advice. [[Click here for more information on perfecting judgment liens](#)]. You can also perfect an interest in personal property by holding it (this includes money and Stock Certificates).

**RACE TO THE COURTHOUSE** – Florida is a “race” state. If you fail to record your lien promptly, sue for collection right away, or execute on that judgment right away, someone may get there first and you may be OUT OF LUCK. The race goes to the swift.

To check records, go to <http://www.mycolliercounty.com>  
<http://www.leeclerk.org>  
[www.sunbiz.org](http://www.sunbiz.org)

**ENTIRE OR INTEGRATED AGREEMENT** – Just some boilerplate the lawyers put in there to jack up their fees? NOT. This kind of provision says (and means) that any side deals you cut in the hall are unenforceable. [You would be amazed how many people do this.] This also puts a stake through the heart of: “But, I assumed...,” or “But, while we were negotiating he always said...” Usually, this kind of provision will state that the contract may be amended only in writing and signed by the parties.

**VENUE** – You live in Naples, Fl. You go fishing in the Bahamas and meet a rich potential customer from Michigan, who has a vacation home on Nassau in the Bahamas. You negotiate a deal on the fishing charter boat, and he orders 10,000 widgets, which you ship from your Collier county factory to his store in Michigan. Not only does he fail to pay you the full amount agreed, he sues you for alleged defects in the widgets you supplied. He sues you in Nassau, claiming Bahamian law applies. Can you afford to fly back and forth to Nassau to litigate this?

**CONSTRUCTION or HOW CONSTRUED** – You get the case moved to the State of Florida and he still insists Bahamian law applies. The Court might possibly agree and say Yeah. Okay. Now What??

Do you have a clue what the law in the Bahamas is??? I don’t and I DO NOT INTEND TO EVER FIND OUT. Nor do I intend to struggle with Michigan law.

That’s why I put in all my contracts that they shall be construed in accordance with the applicable law of the State of Florida and that Venue shall lie only in Collier County, Florida.

**CONSTRUCTION of CONTRACT AGAIN** – Remember a contract is always construed against the party who drafted it. That doesn’t mean you should not draft it, just be thorough and THINK before you sign it.

**COVENANT NOT TO COMPETE, ANTI- SOLICITATION, ANTI-PIRACY CLAUSES** – What is the point of buying Joe’s Bar and Grill if the ever-popular Joe opens a new restaurant across the street from you? Solicits all your customers with mailings offering free beer? Steals (pirates) all his old employees out from under you?

**DEFAULT JUDGMENT** (and ruined credit) - If you fail to show up for Court when sued. If are sued personally and you can’t afford a lawyer, go anyway. You have a right to speak on your own behalf. (Corporations must be represented by counsel).

**THIRD PARTY BENEFICIARY** – Dudley Goodson handles his Mom’s affairs. He pays Larry Lawnman \$50 to mow Mom’s lawn. Mom is a ‘third-party beneficiary’ and can sue Larry Lawnman to enforce this contract.

**WHAT IF??? WHAT IF??? WHAT IF??? NOW YOU KNOW THE LINGO – REMEMBER TO THINK BEFORE YOU SIGN!!!**

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**Ross Lanier & Deifik PA 239 262-2874 or 262-6161** serves Collier & Lee counties (Naples, Fort Myers, Bonita Springs, Marco Island, Cape Coral, Estero).

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**~ FLORIDA ONLY May 2008 ~**

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