

# Basics of Contract Formation

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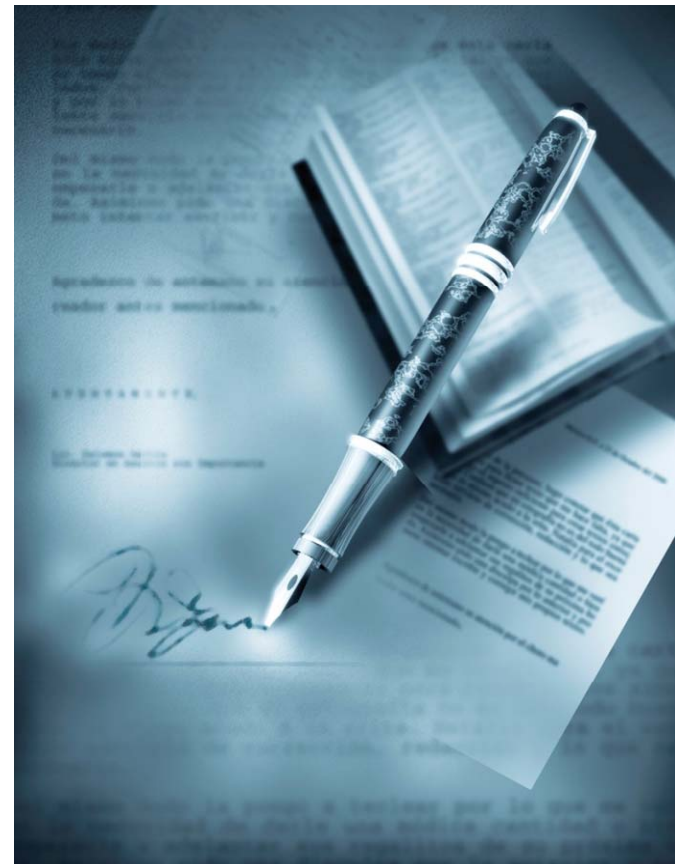
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# What is a contract?



**A contract is an agreement to do or not to do a certain thing.**

**(California Civil Code Section 1549)**

## **ELEMENTS OF A CONTRACT**

- 1) Parties are capable of contracting;**
- 2) Their consent;**
- 3) A lawful object;**
- 4) A sufficient cause or consideration.**

**(California Civil Code section 1550)**

## **CAPABLE PARTIES**

- Over 18**
- Mentally sound**
- Convicts**

**(California Civil Code section 1556)**

# CONSENT

**Free, Mutual and Communicated**  
**(California Civil Code section 1566)**

## **FREE IS NOT:**

- 1) Under Duress**
- 2) Menace`**
- 3) Fraud**
- 4) Undue Influence or**
- 5) Mistake**

**(California Civil Code section 1567)**

## What is “Duress?”

**Unlawful confinement the person or relative**

**Unlawful detention of property  
(including security deposit)**

## What is “Menace?”

**The threat of Duress (detention of property or person)**

**Violent injury to a person or their property**

**Injury to the character of a person**

**What is “Fraud?”**

**2 kinds: ACTUAL and CONSTRUCTIVE**

**Caution: Major Leagalese!!!**



**ACTUAL = WHAT IT IS**

**“Actual fraud, within the meaning of this chapter, consists of any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:**

**1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;**

- 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;**
- 3. The suppression of that which is true, by one having knowledge or belief of the fact;**
- 4. A promise made without any intention of performing it; or**
- 5. Any other act fitted to deceive.”  
(California Civil Code section 1572)**

**CONSTRUCTIVE = WHAT IT IS BECAUSE WE SAY IT IS**

**“Constructive fraud consists:**

**1. In any breach of duty which, without any actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or**

**2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.”**

**(California Civil Code section 1573)**

## What is “Undue Influence?”



**“Undue influence consists:**

- 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;**
- 2. In taking an unfair advantage of another’s weakness of mind; or**

**3. In taking a grossly oppressive and unfair advantage of another's weakness of mind; or**

**4. In taking a grossly oppressive and unfair advantage of another's necessities or distress.”**

**(California Civil Code section 1575)**

What is “Mistake?”



## 2 Kinds: Mistake of FACT and Mistake of LAW

## **Mistake of Fact:**

**“Mistake of fact, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:**

- 1. An unconscious ignorance or forgetfulness of a fact present, material to the contract: or**
- 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.  
(California Civil Code section 1577)**

## **Mistake of Law:**

**“Mistake of law constitutes a mistake, within the meaning of this article, only when it arises, from;**

- 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law;  
or**
- 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.”  
(California Civil Code section 1578)**

**What is the “object” of a contract?**

**“The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do.”**

**(California Civil Code section 1595)**

# What is a “lawful” object?



## **LAWFUL**

**“The object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed.”**

**(California Civil Code section 1596)**

# Deconstructing “LAWFUL”

**“Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly ascertainable, the entire contract is void”**

**(California Civil Code section 1598)**

**BUT,**

**“Where a contract has several distinct objects, of which one at least is lawful, in whole or in part, the contract is void as to the latter and valid as to the rest.”**

**(California Civil Code section 1599)**

**What is “CONSIDERATION?”**



- something of value
- a benefit conferred
- or a detriment withheld



## **ELEMENTS OF A CONTRACT**

- 1) Parties are capable of contracting;**
  - 2) Their consent;**
  - 3) A lawful object;**
  - 4) A sufficient cause or consideration.**
- (California Civil Code section 1550)**

## **BASIC RULES:**

**“An implied contract is one, the existence and terms of which are manifested by conduct.”**

**(California Civil Code section 1621)**

**Oral contracts are valid.**

**“All contracts may be oral, except such as are specially required by statute to be in writing.”**

**(California Civil Code section 1622)**



**They may be valid but are they enforceable?**



## Statute of Limitations

**A law limiting the time in which you may bring an action to recover for a loss.**

**In general:**

**Oral Contract – 2 years**

**Written Contract – 4 years**

**From the date of breach or other wrong**

## **Some of the agreements that must be in writing:**

**A contract effecting rights to real property  
(California Civil Code section 1091)**

**A contract creating a joint tenancy  
(California Civil Code section 683)**

**A contract which by its terms cannot be  
performed within one year  
(California Civil Code section 1624)**

**A guaranty  
(California Civil Code section 1624)**

**A lease for longer than a year  
(California Civil Code section 1624)**

**A contract to employ a real estate agent or  
broker for a term longer than a year  
(California Civil Code section 1624)**

**An agreement that by its terms can't be performed within the lifetime of the promisor (California Civil Code section 1624)**

**A mortgage (California Civil Code section 1624)**

**A loan over \$100,000 (California Civil Code section 1624)**

## **Parole Evidence Rule:**

**No contradictory evidence**

**Only explanatory evidence**

**(California Civil Code section 1856)**

## **Litigation and how to avoid it:**

- 1) Know who you are dealing with – is this even the correct person?**
- 2) What are your goals in the deal?**
- 3) What are their goals?**
- 4) What terms have you reached?**
- 5) PUT IT IN WRITING**

**If they have expectations, what are they and can you meet them? If they don't, now is your time to set the tenor of your relationship.**

## Establish communication tools

- Reports
- Statements
- Email, phone, fax, snail mail

## WHEN A DISPUTE ARISES

- Try and prevent it
- Put it in writing
- Assume the writing will be reviewed
- Go up the ladder
- Whose expectations are not being met?
- Has a personality dispute arisen?

## **MAXIMS OF JURISPRUDENCE:**

**He who consents to an act is not wronged by it. (California Civil Code § 3515)**

**Acquiescence in error takes away the right of objecting to it. (California Civil Code § 3516)**

**The law helps the vigilant, before those who sleep on their rights. (California Civil Code § 3527)**

**Areas of Practice**

**Estate & Tax Planning**

**Probate & Trust Administration**

**Corporate & Partnership Law**

**Business Litigation**

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