

Creating Agreements

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Many readers have purchased this book in order to create legal agreements—for example, employment and independent contractor agreements, website development agreements, and software development agreements. If you're one of these readers and you'd like to get started immediately, I advise you to do two things: (1) read the instructions in the chapter covering the particular agreement you want to use; and (2) review the instructions I've provided below regarding creating and using agreements. (As you are probably aware, the agreements included in this book are provided in digital format on the accompanying CD).

The Process of Reaching a Final Agreement

You should create a first draft of the agreement. This and all subsequent drafts should be dated and numbered (e.g., “draft #1, October 6, 2008”). In addition, a legend like the following should be placed at the top of the draft to make clear that it is not the final agreement:

PRELIMINARY DRAFT FOR DISCUSSION
PURPOSES ONLY—NOT INTENDED AS A
LEGALLY BINDING DOCUMENT.

The draft should be sent to the other party to review. Often, the other party will want to make changes. This can be done in several ways. The other party can discuss the changes with the original drafter in person or by telephone; the original drafter will then make the agreed changes and send a second draft to the other party for review. Alternatively, the other side may suggest its changes in writing; this can be in the form of a letter, interlineations to the original draft, or by completely revising the original draft. The original drafter will then review the changes, perhaps make more changes, and then send another draft back to the other side for review. It is common for contract drafts to go back and forth among the parties many times before a final agreement is reached.

Care must be taken to alert the other side to all changes made in each draft. The normal practice is to underline all additions and to indicate deletions either by leaving them in place with a line drawn through them or by using a caret or other sign to indicate omissions. This can be easily done with many word processing programs.

Print Out and Proofread the Final Agreement

Print out the final agreement on 8.5 x 11-inch paper. Make sure the pages are consecutively numbered (either at the top right corner or the bottom of each page). Read through the entire agreement to make sure it is correct and complete. Minor

changes can be made by hand (in ink only) and initialed. However, it's probably just as easy (and neater) to make any changes on your computer and then print out the agreement again. When you're finished proofreading, print out at least two copies of the agreement.

Attach All Exhibits

Attach a complete copy of all exhibits (also called “attachments”), if any, to every copy of the agreement. Each exhibit or attachment should be consecutively numbered or lettered (“A,B,C” or “1,2,3”). Make sure that your references to the exhibits in the main body of the agreement match the actual exhibits.

Sign the Agreement

It's best for both parties to sign the agreement and to do so in ink. The two of you need not be together when you sign, and it isn't necessary to sign at the same time. There's no legal requirement that the signatures be located in any specific place in a business contract, but they are customarily placed at the end of the agreement—that helps signify that both parties have read and agreed to the entire document.

It's very important that both parties sign the agreement properly. Failure to do so can have drastic consequences. How to sign depends on the legal form of the business of the person signing.

In this section, we take a look at the possible legal forms and their effects on signature requirements.

Sole proprietorships

A person is a sole proprietor if she is running a one-person business and hasn't incorporated or formed a limited liability company. The vast majority of ICs and consultants are sole proprietors, as are many clients.

If you or the other party is a sole proprietor, you can each simply sign your own name and nothing more. That's because a sole proprietorship, unlike a corporation or partnership, is not a separate legal entity from the person who owns it. Therefore, if Susie Davis runs custom shopping tours for wealthy tourists, for example, her agreements with her clients can be signed “Susie Davis.”

However, if you use a fictitious business name, it's best for you to sign on behalf of your business.

EXAMPLE: Chris Kraft is an IC sole proprietor who runs a website development business. Instead of using his own name for the business, he calls it AAA Web Development. He should sign his contracts like this:

AAA Web Development By: Chris Kraft
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Partnerships

If either you or the other party is a partnership, you must sign the agreement on behalf of the partnership, which means that the partnership must be identified in the signature block. Identifying the partnership is very important: If a partner signs only his name without mentioning the partnership, the partnership is not bound to the agreement—only the individual partner will be bound. This means that if you contract with a partnership, but the partnership isn't identified in the signature block, you couldn't go after the partnership's money or assets if the signing partner breaches the agreement. Instead, you could obtain only the signing partner's assets, which will likely be less than the partnership's.

Conversely, if you're a partner in a partnership and mistakenly sign an agreement as an individual, you're setting yourself up as the legal target if something goes wrong and the other side decides to sue. Since the other side won't be able to sue the partnership, it will look solely to you for legal recourse.

Which partner should sign? If the partnership is a "general" partnership (every partner invests and participates in managing the business), any partner can sign. But some partnerships are "limited partnerships," which means that there is at least one general partner, but also some partners who invest in but don't participate in the business. Limited

partners should never sign agreements. That's because by law they have no authority to bind the partnership. The agreement should always be signed by a general partner.

Only one partner needs to sign. The signature block for the partnership should state the partnership's name and the name and title of the person signing on the partnership's behalf.

EXAMPLE: The Argus Partnership contracts with Sam to create some custom software. Randy Argus is one of the general partners. He signs the contract on the partnership's behalf like this:

The Argus Partnership
A Michigan Partnership

By:
Randy Argus, a General Partner

It's possible for a person who is not a partner to legally sign on behalf of the partnership. In this circumstance, the signature should be accompanied by a partnership resolution stating that the person signing the agreement has the authority to do so. The partnership resolution is a document signed by one or more of the general partners stating that the person named has the authority to sign contracts on the partnership's behalf. Attach the resolution to the end of the agreement.

Corporations

If either you or the other party is a corporation, the agreement must be signed by someone who has authority to sign contracts on the corporation's behalf. The corporation's president or chief executive officer (CEO) is presumed to have this authority.

If someone other than the president or CEO of a corporation signs—for example, the vice-president, treasurer, or other corporate officer—ask to see a board of directors' resolution or corporate bylaws authorizing him to sign. If the person signing doesn't have authority, the corporation won't be legally bound by the contract. Attach the resolution to the end of the agreement.

Keep in mind that if you own a corporation and you sign personally instead of on your corporation's behalf, you'll be personally liable for the contract. It's likely that the main reason you've gone to the trouble to form a corporation is to avoid such liability. So signing improperly is self-defeating.

The signature block for a corporation should state the name of the corporation and the name and title of the person signing on the corporation's behalf.

EXAMPLE: Susan Ericson is the president of Acme Web Designers, Inc. Since she is the president, any contracts signed by her need not be accompanied by a corporate

resolution showing she has authority to bind the corporation. The signature block for contracts she signs should look like this:

Acme Web Designers
A California Corporation

By:
Susan Ericson, President

Limited liability companies

The owners of limited liability companies are called members. Members may hire others, called managers, to run their company for them. An agreement with a limited liability company should be signed by a member or manager.

EXAMPLE: AcmeSoft LLC, a limited liability company, hires Sally to perform freelance programming services. The contract is signed on AcmeSoft's behalf by Edward Smith, the company's manager. The signature block should appear in the contract like this:

AcmeSoft LLC
A California Limited Liability Company

By:
Edward Smith, Manager

Dates

When you sign an agreement, include the date and make sure the other party does, too. You can simply put a date line next to the place where each person signs—for example:

Date:
Jamie Alvarez

You and the other party don't have to sign on the same day. Indeed, you can sign weeks apart. However, note that unless the agreement provides a specific starting date, it begins on the date it's signed. If the parties sign on different dates, the agreement begins on the date the last person signed. Until the agreement is signed by both parties, they're not bound by it.

Faxing and Emailing Agreements

It has become very common for people doing business with each other to communicate by fax machine or email. Especially when you are hashing out the details of contract clauses, it is very convenient to fax or email drafts back and forth. However, there are some potential problems with using faxes and email.

Preserving confidentiality

One problem is preserving confidentiality. You never know who might end up receiving or reading a fax or email message. For this reason, it's wise to place a confidentiality legend such as the following on your faxes or emails:

The messages and documents transmitted with this notice contain confidential information belonging to the sender.

If you are not the intended recipient of this information, you are hereby notified that any disclosure, copying, distribution, or use of the information is strictly prohibited. If you have received this transmission in error, please notify the sender immediately.

This legend can be placed on a fax cover sheet or at the beginning of an email message.

If your negotiations are particularly sensitive, you may wish to encrypt your email messages so others can't read them. Inexpensive encryption programs such as PGP (Pretty Good Privacy) are readily available. To learn how to obtain both free and commercial versions of PGP, log on to the following website: www.pgpi.org.

Signing the finished agreement

When a final agreement is reached, you'll both need to sign the contract. One approach is for one party to sign the contract and fax it to the other, who signs it, makes a photocopy, and faxes it back. This way, you each have a copy of the agreement signed by both sides.

A faxed signature is probably legally sufficient if neither party disputes that it is a fax of an original signature. However, if the other party claims that a faxed signature was forged, it could be difficult or impossible to prove it's genuine, since it is very easy to forge a faxed signature with modern computer technology. Forgery claims are rare, however, so this is usually not a problem. Even so, it's a good practice for you and the other party to follow up the fax with signed originals exchanged by mail or air express.

If both you and the other party are advanced computer users, you can "sign"

the contract digitally and send it by email. This involves using encryption technology to create a digital signature. This is a technically complex subject beyond the scope of this book. You can find a good deal of material on digital signatures on the Internet. The American Bar Association has a good discussion of this topic on its website at www.abanet.org/scitech/ec/isc/dsg-tutorial.html.

There is also a comprehensive book on digital signature law called *The Law of Electronic Commerce*, by Benjamin Wright (Aspen Law & Business).

Save the Agreement

Each party should keep one original signed copy of the agreement. Make sure to store it in a safe place. You might want to make additional photocopies to ensure against loss. ☹