

## How Can it be a Contract? It isn't in writing.

In most parts of the English-speaking world, including the U.S., some contracts need to be in writing to be valid and enforced in court, but some not in writing are fully valid and enforceable.

There are statutes passed by Congress and state legislatures that require written contracts in specific situations. For example, in Maryland and most states a retail installment sales contract—for example selling a home theater or car on installment payment terms—must be in writing and have certain information in that writing.

It all started when **An Act for Prevention of Frauds and Perjuries (a/k/a “Statute of Frauds”)** was passed by the English Parliament in 1677 and signed by Charles II. Under it, a promise to be married, a deal to sell an interest in land, a promise to back up someone else’s promise to pay money, a sale of goods over a certain value, and a contract that could not be fulfilled within a year all had to be in writing to be valid. But no other contracts had to. That Act, and all other English law, became the law of the original 13 states in 1776, subject to being later changed by the state legislatures, as you will see.

An example of what need not be in writing even today would include a deal to deliver a certain horse in 30 days for \$450 cash. This deal certainly can and should be fulfilled in a year. But if the deal were for \$500 then it requires a writing. That is because of section 2-201 of the so-called Uniform Commercial Code.

It is so-called because each state legislature is free to modify what the National Conference of Commissioners on Uniform State Laws (ULC) proposes, and they have. For example, the ULC proposed in 2003 that the section 2-201 limit on unwritten contracts for sale of good be raised from \$500 to \$5000, but so far no state has. So, sell your horse for up to \$499 or put it in writing.

Whether in writing or not, all a contract needs for enforcement is an exchange of promises, in enough detail (what, where and when) that a reasonable person would know what was expected of each side and whether they had done those things. That means a simple “IOU” is not enforceable; a promise to repay an amount of money received as a loan is enforceable.

I do not advocate unwritten deals, even when the law allows them. Putting deals in writing forces the parties to agree on what the deal really is, uncovering unspoken differences in understanding that can cause trouble down the line.

On the other hand, do not assume a deal that is not in writing is no deal at all. Unless it is one of the kinds that must be written, it can be enforced based on oral testimony about what the deal was. Don’t try to get out of paying for your \$400 meal for four by saying you never signed a contract to pay for it. The restaurant can sue, and win, because that deal does not need to be in writing.

The bottom lines: if you don’t want it to be a contract, better not agree to it—if you do, get it in writing.