



A B C's of Equine Contracting Applicable Binding Clear, Concise and Conforming

INTRODUCTION

Although horse people are well known for doing business on a handshake, such practices can often get YOU into deep trouble. For example, did you know that you are required by law to use a written contract for horse sales exceeding \$500? If you fail to put it in writing, the contract is unenforceable and either party can elect to rescind (i.e. act as if the contract never occurred, which means take the horse back, or demand the money back and return the horse). In other instances, the failure to use a contract may contribute to each parties basic misunderstanding of fundamental terms and conditions. Failure to use contracts may increase a stable's liability exposure. Similarly, use of "canned" contract forms may create extra problems, particularly if the contract form you are using was not drafted with your protection in mind.

I. General Rules of Contract Review and Construction

If you're not currently using written contracts, you may worry about what your customer will think. If contracts are presented in the proper manner and with a positive approach, most people appreciate the professional exchange of information. The contract creates opportunities to clarify each party's understanding of the terms and conditions. People are used to signing such contracts and waivers, as nearly all business or sporting activities require them. The use of contracts will often set the relationship between the customer and the stable, and will indicate the stable is a well-managed and professionally run business.

This class will focus primarily on how you evaluate your equine contract needs based on YOUR equine business activities. The class will examine the fundamental A B C's of equine contracting, asking:

1. Is my contract **Applicable** to my operations?
2. Is my contract legally **Binding** on the necessary parties?
3. Is my contract **Clear, Concise and Conforming** to relevant local law?

A. Is My Contract Applicable?

Before you can determine if your current contract forms are applicable, you need to determine what factors are involved in your equine business. Exhibit A is a questionnaire that will enable you to identify relevant factors in your business.

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Answering these questions will enable you to quickly review the current contract forms you use to determine if those forms cover all issues raised. If not, then you must evaluate whether additional contract forms or modifications are required. By going through this exercise, you can quickly see for yourself why “canned” forms are typically irrelevant to the unique factors of YOUR operation. If you are going to use a contract form for protection, doesn't it make sense that it should protect YOU and the specific exposures involved in YOUR operation? Given the breadth of activities possible in the equine industry, you can quickly see why a canned contract form may not cover all activities, and their related risks and exposures, as applied to your business.

Once you've arrived at a decent contract form, how often do you update it? Even the best contract will be meaningless if it is not kept current. Horses and clients come and go frequently in this business. Accordingly, at the **VERY MINIMUM** all contracts should be reviewed at least annually. To keep it simple, make all contracts subject to review and renegotiation at least once a year, preferably in January so as not to forget this important update. For long-term customers, a new contract should be executed each year. This regular update permits you to: (1) include any newly required language to comply with your state's equine activity limited liability laws; (2) review and potentially consider price increases to offset overhead operating expenses; (3) include new contract phrases which address certain issues. What happens if you don't perform this annual review? A good example is where one equine business owner required execution of an original boarding contract which granted a security interest in the horse for unpaid board. The horse was subsequently traded for a new horse but the stable did not require the owner to execute a new contract identifying and naming the new horse. When the owner fell behind in board payments, the stable subsequently found it had no contractual grounds for perfecting and foreclosing its security interest where the old contract was now inapplicable to the new horse.

DON'T wait until a problem arises to review and update your contracts. Make this review and update an annual practice of your business, keeping your contracts in line with your ever changing business and its attendant risks.

B. Is my Contract Binding?

A contract can be created in many forms. For horse sales less than \$500, it can be a verbal agreement. For sales or other services exceeding \$500, it requires a written document. The form of that writing can vary widely. It can be a document drafted by an attorney, or a napkin which lists the basic terms of sale, initialed by both parties. It can be a single letter on letterhead, or a series of letters linked together by their express wording. It can be a check with a detailed memorandum entry, endorsed by the other party. The main elements required to create a binding contract are specific terms and conditions (ie parties, date, object, price and if applicable, time for performance). It must be signed by parties with mental and legal capacity to enter into contracts (i.e., cannot be executed by a minor under 18, cannot be executed by a person without mental capacity to understand what they are signing. This includes mentally insane people or people incapacitated by drugs or drink). It must be signed freely and voluntarily, based upon what is referred to as “ a meeting of the minds”, or a clear offer which is promulgated by one

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person and accepted by the other. It cannot be procured through fraud, misrepresentation, coercion or duress.

Based on these principals, contracts should be presented to and signed by each and every customer or participant. If any participant or customer is under the age of 18, such party's parents or legal guardians must also sign the contract. For liability waivers, both parents or guardians should sign as either parent can bring an action on behalf of their minor child. The presenter should make sure that the customers understand the terms of the contract they are signing and should be willing and able to honestly answer any questions the customer may have. The presenter should ensure that all blanks are filled in, that all signatures have been secured, that the document is dated, and that any particularly important areas are emphasized as much as possible. The presenter should never hand a contract to a customer and ask them to immediately sign it. Sufficient time should be allowed in order to give the customer time to thoroughly read and understand the agreement. When the customer returns the signed contract, the presenter should ask if the customer has read and understands the contract. **NEVER DOWNPLAY THE CONTRACT AS A MERE FORMALITY.** Your contracts are important, and should not be treated or taken lightly.

C. Is my Contract Clear, Concise and Conforming?

1. Clear

There are certain rules of contract interpretation applicable to a court's review of any contract. First, the terms must be read and construed according to their usual, customary meaning. If any term or phrase is ambiguous, that ambiguity will be construed against the drafter, who is obligated to make its contract terms clear and unambiguous. The intent of the document is construed within its "four corners" (i.e., by the terms and conditions within that contract document), and the court will not look to other documents or testimony outside the contract if the contract is clear. However, if the contract is ambiguous, the court will look to extrinsic evidence to try to ascertain the intent of the parties. This is a chancy proposition at best, as the court rarely reaches the same conclusion the parties thought they reached at the time of contracting.

2. Concise

How can you tell if your language is clear and concise? First of all, can you understand every clause in the contract? Can other people understand it? Give the document to someone and have them highlight any provision which does not make perfect sense to them. Then review that clause or phrase and see if it can be rewritten in a more clear and understandable manner.

Are there sections of the contract that seem to be repeated in another section? If so, do they conflict with one another? If so, fix the conflict! Do you need to repeat clauses or can you get by with one? Is the liability waiver language in one part of the contract identical to other liability language elsewhere in the contract? Do you refer to other documents without incorporating them specifically by reference in the contract? Address and fix each of these issues and you should go far in clearing up the contract terms and meaning.

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3. Conforming

Once you've made it as clear and concise as possible, consider whether it is legally conforming. In addition to proper signatures and capacity to contract, does the contract contain your state's required equine liability act warning? Did you use the proper wording and type set for the warning? If you're employing lien or UCC clauses, do those clauses strictly comply with your state's statutes? Are you properly charging interest or accrued penalty? If so, have you identified the specific terms and have both parties signed the agreement denoting their intent to abide by and be bound by same?

BE CAREFUL IN THIS REGARD. In many states, the sale of horses to a private owner is treated as a sale of consumer goods. Should you inadvertently negotiate a contract with another person that contains unenforceable terms and conditions, or clauses which run afoul of applicable state law, you may find yourself in violation of that state's consumer protection laws which in turn may expose you to substantial civil penalties, including repayment of the other side's attorneys fees!

II. Additional Considerations for Sales Contracts

Horses sell every day, but when it comes right down to it, most people involved in a horse sale are not sure what facts the seller must disclose. Likewise, there are certain rules that govern a buyer's conduct, most importantly being the buyer's duty to ask relevant questions. The law creates a fine line between a seller's duty to disclose versus right to remain silent, and a buyer's duty to ask. The general rules are as follows:

Rule No. 1: Thou Shalt Not Lie or Mislead a Buyer.

A seller cannot lie or mislead a buyer. However, sellers do not have to disclose every known fact regarding a transaction. A seller generally does not commit fraud by remaining silent about most aspects of a horse sale. Most courts around the nation hold that, with some exceptions, silence will not amount to fraud, especially where the defect or problem could be readily discovered by the buyer through a routine inspection. However, failure to disclose information may amount to fraud in the following circumstances:

1. If the seller agrees in the purchase agreement to disclose all relevant facts, then the seller must disclose such known facts to avoid fraud. Silence will not serve as protection to fraud in this situation.
2. If the seller and buyer have a confidential or fiduciary relationship, the seller has a duty to disclose all relevant facts. Thus, a trainer has a duty to disclose to his or her customer all relevant facts regarding the transaction; otherwise the trainer could be liable for fraud.
3. Where the seller knows the buyer is mistaken to certain facts, the seller must correct the mistaken belief. An example is when the potential buyer of a mare states that they intend to breed the mare next year but the seller knows that the mare is not able to carry a foal due to a problem not discernible from a normal veterinarian examination. Under these circumstances, the seller must clear up the mistaken belief of the buyer in order to avoid fraud.

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4. If a seller knows the buyer wishes to purchase a horse for a particular purpose, the buyer must disclose all facts relevant to whether the horse can meet that purpose. For example, take the family seeking a horse for their 8 year old daughter to ride at horse shows. If the seller knows that the horse is hard to control, and thus potentially dangerous at horse shows, they must disclose this fact in order to avoid fraud or other liability.
5. When the buyer asks a seller a question, the seller has a duty to give a correct response. An incorrect or misleading response may constitute fraud. If the buyer asks the seller if the horse has had any illness in the past, the seller must give a truthful answer.

RULE #2: Thou Shalt Be Specific In Thy Contract.

Sellers can limit themselves, to a certain extent, by including an "as is" statement in the purchase agreement. This statement typically says that the buyer takes the horse as it is, without any warranties.

The seller may protect themselves from certain statements made prior to the sale by including a merger clause in the purchase agreement. A merger clause says that anything intended to be in the agreement is contained in this agreement, and this agreement contains all provisions of the sale. Things not expressly included will not be considered part of the agreement. Take for example the instance where there is a merger clause in the purchase agreement, and the seller has represented to the buyer that the stallion purchased is breeding sound. If the buyer wishes this to be a warranty of breeding soundness, the buyer should have the warranty specifically included in the purchase agreement.

RULE #3: Thou Shalt Accept Responsibility for Thyself.

Buyers should be aware that they too have duties. Buyers must conduct a reasonable inspection of the horse they purchase. A reasonable inspection varies depending on the value and the intended use of the horse. If you purchase a high dollar show horse, you arguably have a duty to secure a detailed veterinarian inspection of the horse, including x-rays. If you purchase an expensive mare for breeding purposes, you should secure a veterinarian examination which includes palpation and other fertility tests to ascertain the mare's breeding capacity. However, if you purchase a pleasure riding horse intended only for recreational use, your duty to inspect will be much lower. The amount of inspection required will vary depending upon the custom in your breed or sport, and the intended use.

RULE #4: Thou Shalt Protect Thyself.

Self-protection in horse sales is no different from other forms of self-protection. View the transaction as an educational experience --- if you don't consummate the deal, you've educated yourself and the negotiation partner, and you've employed good business practice. However, if you follow certain guidelines, you should be able to capably thread your way through the negotiations in flying colors:

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As the Buyer:

1. Ask questions. Document the answers to these questions.
2. Tell the seller what you intend to use the horse for and ask if the horse would be suitable for such use.
3. Specifically ask if there are any known physical conditions which would hamper the horse's performance in this capacity.
4. Always use a written purchase agreement.
5. If there's something that is vital to the sale, such as soundness, breeding capacity, etc., be sure to have it included in the contract.
6. If there is a "sold as is" clause or merger provision in the purchase agreement, make sure that all important statements or guarantees made by the seller are included in the purchase agreement.
7. Properly inspect the horse. The level of inspection depends upon the intended use, breed and sport standards. If you are not sure what type of inspection is necessary contact a professional breeder, trainer or equine veterinarian in your area.
8. Test the horse's suitability for its intended use.

As the Seller:

1. Answer all questions truthfully.
2. Inform the buyer, especially if the buyer is inexperienced, that they have the option to obtain a veterinarian exam of the horse if they desire.
3. Always use a written purchase agreement.
4. Include in the contract "sold as is" language and merger provisions.
5. If the buyer requests to have guarantees or statements included in the contract, determine if you want to be held to those guarantees or statements. If you are willing to be held to such guarantees, include them in the purchase agreement and complete the sale.

RULE #5: Thou Shalt (And Must) Use A Written Contract For Any Horse Sale Exceeding \$500

In our contract negotiations, we are all constrained by a legal policy, called the "Statute of Frauds". Part of each state's Uniform Commercial Code, this policy requires that any contract for sale of goods exceeding \$500 must be in writing in order to be enforceable. What does that mean? If you sell a horse for \$501 without a written contract, either party may refuse to honor the contract (i.e., return the horse, or demand the return of the money).

CONCLUSIONS: FOLLOW THE RULES. Adhering to the above policies will not only keep you out of trouble, but maximize your ability to close the best deal for all concerned.

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While this article cannot possibly cover all contingencies in the contract drafting process, hopefully you have now identified questions capable of analytical use for every contract review you perform in the future. Knowing the right analysis will often let you determine if your current documents are doing the job. If not, you will be able to recognize the weaknesses and significantly shorten any legal time necessary to clean up the documents. You will also increase your contract negotiation abilities by knowing the issues, the risks, and the right questions to ask!

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