# FORMATION OF A BINDING CONTRACT

**The plaintiff must first prove that the parties had a binding contract. A contract is an agreement between two or more persons, people, or businesses to do, or not do, certain things. Parties can enter into a contract by their words, their conduct, or a combination of words and conduct.**

**For example, in a contract for the purchase and sale of a house, the buyer promises to pay a certain amount of money to the seller on a certain date, and the seller promises to deliver to the buyer on that date a deed to the seller's house. Each party has agreed to exchange a promise to do something for a promise by the other party to do something.**

**Sometimes, a contract is made when one party makes a promise in exchange for the other party's performing, or not performing, a particular action. For example, a homeowner promises a neighbor $20 if he will mow her lawn, and the neighbor does so. They have agreed to exchange the homeowner's promise to pay $20 for the neighbor's mowing the lawn.**

**A contract may have a single term or many terms.**

**To form a contract, the parties must mutually agree to the terms and conditions of their promises. This is often referred to as "mutuality" or a "meeting of the minds." When an agreement is mutual, it means that the parties communicated to each other their agreement to the same terms and conditions. That is, they had those same terms and conditions in mind when they entered into the contract.**

**A party can communicate (his / her / their / its) agreement to the terms and conditions of a contract by written or spoken words, even words sent electronically, or by performing, or not performing, a particular action, as long as it's intended to show agreement to the other party. The law presumes that a person intends the natural and probable consequences of (his / her / their / its) acts.**

**Keeping in mind this concept of "mutuality," you must determine whether the plaintiff has shown that the parties intended to have a binding contract by proving each of the following three elements by a preponderance of the evidence:**

***First:*** **that an offer was made;**

***Second:*** **that the offer was accepted; and**

***Third:*** **that the contract was supported by consideration, that is, the plaintiff and the defendant each exchanged something of value or promised to exchange something of value.**

*Sea Breeze Estates, LLC. v. Jarema*, 94 Mass. App. Ct. 210, 215 (2018), quoting *I & R Mechanical, Inc. v. Hazelton MFG. Co*., 62 Mass. App. Ct. 452, 455 (2004) ("This manifestation of mutual assent, otherwise known as a 'meeting of the minds,' occurs when there is 'an offer by one [party]' and an 'acceptance of it by the other.'") See also *Haufler v. Zotos*, 446 Mass. 489, 499-500 (2006) (written agreement can be binding even if only one party signs it when the other party demonstrates acceptance); *Vacca v. Brigham & Women's Hospital, Inc.*, 98 Mass. App. Ct. 463, 467-468 (2020) (mutual assent in an oral contract); *Constantino v. Frechette*, 73 Mass App. Ct. 352, 356 (2008) ("A binding contract requires mutual assent to all essential provisions."); *Fecteau Benefits Group v. Knox*, 72 Mass. App. Ct. 204, 212 (2008) (mutual assent in email exchanges); G.L. c. 110G (Uniform Electronic Transaction Act).

A contract becomes binding upon intentional agreement to terms: *Situation Mgmt. Sys., Inc. v. Malouf*, 430 Mass. 875, 878 (2000) ("It is axiomatic that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement."); *Canney v. New England Tel. & Tel. Co.*, 353 Mass. 158, 164 (1967); *Guarino v. Zyfers*, 9 Mass. App. Ct. 874, 874 (1980); *David J. Tierney, Jr., Inc. v. T. Wellington Carpets, Inc.*, 8 Mass. App. Ct. 237, 241 (1979); Restatement (Second) of Contracts §§1-5.

## I. OFFER AND ACCEPTANCE

**The first two determinations you must make are whether a party in this case made an offer, and if an offer was made, whether the other party accepted the offer. A binding contract requires both an offer and acceptance of that offer.**

**A party makes an offer by expressing a willingness or desire to enter into an agreement with the intent that, if the other party accepts the terms of the offer, then there is a binding contract. The offer must state with reasonable certainty what is to be exchanged by the**

**parties. An offer may be made by written or spoken words or even by a person's conduct. What is important is that the offer was made in such a way that justified the other party's understanding that (his / her / their / its) acceptance of the offer will bind both parties to the terms of the offer.**

**A party accepts an offer by expressing ~~a~~ willingness or desire to agree to the terms of the offer.**

**If the parties have not agreed on all material terms, however, then the parties have merely engaged in negotiation and they have not made a binding contract.**

State with reasonable clarity: *Cygan v. Megathlin*, 326 Mass. 732, 733 (1951); Restatement (Second) of Contracts §33 (1979).

For online contracts, see *Kauders v. Uber Technologies*, 486 Mass. 557, 572 (2021) (holding that determining whether online contracts are binding should be based in traditional contract law and use a "two-prong test, focusing on whether there is reasonable notice of the terms and a reasonable manifestation of assent to those terms.")

Only the parties' objective manifestation of intent matters: *Acushnet Company v. Beam, Inc.,* 92 Mass. App. Ct. 687 (2018) ("Evidence concerning a party's uncommunicated subjective intent, however, is irrelevant.")

Understanding that terms are binding: *Rodriguez v. Massachusetts Bay Transportation Authority*, 92 Mass. App. Ct. 26, 29 (2017), quoting Targus Group Intl., Inc. v. Sherman, 76 Mass. App. Ct. 421, 428 (2010) ("Put another way, '[a]n enforceable agreement requires (1) terms sufficiently complete and definite, and (2) a present intent of the parties at the time of formation to be bound by those terms.'")

Jokes or loose talk: *Kerwin v. Donaghy*, 317 Mass. 559, 568 (1945). See also *Situation Mgt. Sys., Inc. v. Malouf, Inc.*, 430 Mass. 875, 879 (2000) (where material terms of an oral agreement were left to be negotiated, it was a question for the jury to determine the existence of the agreement and its terms); *David J. Tierney, Jr., Inc. v. T. Wellington Carpets, Inc.,* 8 Mass. App. Ct. 237, 239 (1979) ("Ordinarily the question whether a contract has been made is one of fact. If the evidence consists only of writings, or is uncontradicted, the question is for the court, otherwise it is for the jury") (citation omitted).

Agreement on all material terms: *Rosenfield v. United States Trust Co.*, 290 Mass. 210 (1935); *Situation Management Systems, Inc. v. Malouf, Inc.*, 430 Mass. 875, 878 (2000) ("It is axiomatic that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement."); *Vacca v. Brigham & Women's Hospital, Inc.*, 98 Mass. App. Ct. 463, 467-468 (2020), quoting *JP Morgan Chase & Co. v. Casarano*, 81 Mass. App. Ct. 353, 356 (2012) ("'[i]t is not required that all terms of the agreement be precisely specified' so long as the material terms are ascertainable").

## II. CONSIDERATION

**If you find that an offer was made and accepted, then you must determine whether the plaintiff and the defendant each exchanged something of value or promised to exchange something of value. The legal term for this exchange is called "consideration". The plaintiff must show that the agreement created either a benefit to a party or an obligation for a party. For example, if you promise to pay your neighbor $20 if he mows your lawn, and he does so, there is consideration. There was an obligation, a promise of $20, in exchange for a benefit, a newly mowed lawn. Note that the value of the benefit each party exchanges does not have to be equal to be valid consideration.**

**A hope of a future benefit or a promise to enter into a contract in the future, without any present agreement for that benefit or promise, is not valid consideration. A contract without consideration is not binding and is not enforceable.**

*Alternatively, if applicable*: **A contract without either consideration or a valid substitute for consideration is not binding and is not enforceable.**

*Congregation Kadimah Toras-Moshe v. DeLeo*, 405 Mass. 365, 366 (1989); *Loranger Constr. Corp. v. E.F. Hauseman Co.,* 376 Mass. 757, 763 (1978); *Marine Contractors Co. v. Hurley*, 365 Mass. 280, 286 (1974); *Cottage St. M.E. Church v. Kendall*, 121 Mass. 528, 529-30 (1876); *Sewall Marshal Condominium Ass'n v. 131 Sewall Ave. Condominium Ass'n*, 89 Mass. App. Ct. 130, 134 (2016) (finding consideration even though one party received a greater benefit). See also *Miller v. Cotter*, 448 Mass. 671, 684 n.16 (2007) (holding that an agreement in which the parties agreed to submit to arbitration in lieu of judicial process was supported by consideration because it was a "reciprocal exchange" of the benefit of arbitration and detriment of forgoing litigation.)

Hope or promise for future: *Schwanbeck v. Federal-Mogul Corp.*, 412 Mass. 703, 706 (1992) (noting that a promise made with an understood intention that it is not to be legally binding, but only expressive of a present intention, is not a contract); *Congregation Kadimah Toras-Moshe v. DeLeo*, 405 Mass. 365, 366-367 (1989) (holding that an oral promise to donate money to a synagogue lacked consideration and was unenforceable: "A hope or expectation, even though well founded, is not equivalent to either legal detriment or reliance"); *Graphic Arts Finishers, Inc. v. Boston Redev. Auth.*, 357 Mass. 40, 42-43 (1970) (stating that a promise that binds one to do nothing at all is illusory and cannot be consideration); *Rosenfield v. United States Trust Co.*, 290 Mass. 210 (1935); *Sea Breeze Estates, LLC. v. Jarema*, 94 Mass. App. Ct. 210, 215-216 (2018) ("'expectations and negotiations fall far short of a binding agreement.'"(citation omitted)); but see *Basis Technology Corp. v. Amazon.com, Inc.,* 71 Mass. App. Ct. 29, 39 (2008), quoting *Lafayette Place Assocs. v. Boston Redev. Auth.*, 427 Mass. 509, 518 (1998) (holding that email containing formula in stock purchase was sufficient to establish enforceable agreement; "'If party specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding'").

Unenforceable without consideration or substitute: *Congregation Kadimah Toras-Moshe v. DeLeo*, 405 Mass. 365, 366 (1989); *O'Connor v. Nat'l Metals Co.*, 317 Mass. 303, 306 (1944); *Bliss v. Negus*, 8 Mass. 46, 51 (1811). See also *Gill v. Richmond Co-Op Ass'n*, 309 Mass. 73, 76 (1941).

## SUPPLEMENTAL INSTRUCTIONS

## A. SUBSTITUTE FOR CONSIDERATION: DETRIMENTAL RELIANCE[1]

[1] The terms "Detrimental Reliance" and "Promissory Estoppel" are used interchangeably. Use the term that is pled in the complaint when reading this instruction.

See *Suominen v. Goodman Indus. Equities Mgmt. Grp., LLC*, 78 Mass. App. Ct. 723, 731 (2011), quoting *Loranger Constr. Corp. v. E.F. Hauserman Co.,* 376 Mass. 757, 761 (1978) ("The Supreme

**There is an alternative basis for enforcing a promise, one that does not require consideration. It is called "detrimental reliance". At the heart of detrimental reliance is the idea that even where no bargain has been ironed out by the parties, justice nonetheless requires one party's promise to another to be enforced when the other party has justifiably relied on the promise and changed (his / her / their / its) position to (his / her / their / its) substantial detriment.**

**To recover under a theory of detrimental reliance, the plaintiff must show:**

***First:*** **the other party made a promise intending to induce the plaintiff's reliance on it;**

***Second:*** **the plaintiff either acted or refrained from acting in reasonable reliance on that promise; and**

***Third:*** **the plaintiff experienced detriment as a result of acting or refraining from acting.**

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Judicial Court long ago observed that 'the expression 'promissory estoppel' ... tends to confusion rather than clarity'… In light of this, the trial judge himself referred to [the plaintiff's] claim as one for 'detrimental reliance.' Although we see substantial merit in this suggestion, we will employ the more common term 'promissory estoppel,' which the Supreme Judicial Court continues to use."); *Anzalone v. Administrative Office of Trial Court*, 457 Mass 647, 662 (2010) ("The complaint's fourth count, for 'detrimental reliance', as [the plaintiff] concedes, essentially is a claim for promissory estoppel.")

**Examples of detrimental reliance could include a general contractor's reliance on a bid from a subcontractor when he submits his general bid to a property owner; or a longtime employee's reliance on her employer's promise to pay a pension or some other benefit.**

**A claim based on detrimental reliance is the equivalent of a claim of breach of contract and a party bringing the claim must prove all the necessary elements of a contract other than consideration. A plaintiff who brings this claim does not have to show consideration but must still prove all other necessary elements of a contract.**

*Rhode Island Hosp. Trust v. Varadian*, 419 Mass. 841, 848 (1995); *Loranger Constr. Corp v. E.F. Hauseman Co.*, 376 Mass. 757, 760-61 (1978).

"Reduced to basic terms, promissory estoppel 'consists simply of a promise that becomes enforceable because of the promisee's reasonable and detrimental reliance.'" *Suominen v. Goodman Indus. Equities Mgmt. Grp., LLC*, 78 Mass. App. Ct. 723, 731 (2011), quoting *Rooney v. Paul D. Osborne Desk Co.,* 38 Mass. App. Ct. 82, 83 1995).

"Circumstances that may give rise to [a promissory] estoppel are (1) a representation intended to induce reliance on the part of a person to whom the representation is made; (2) an act or omission by that person in reasonable reliance on the representation; and (3) detriment as a consequence of the act or omission." *Anzalone v. Administrative Office of Trial Court*, 457 Mass 647, 662 (2010), quoting *Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court,* 448 Mass. 15, 27–28 (2006).

## B. REVOCATION OF OFFER

**A party who makes an offer has the right to revoke the offer any time before it is accepted. The party making the offer is not required to say or write the words "revoke" or "terminate". Any expression that shows an intent not to enter into the contract is sufficient, so**

**long as the intent was communicated to the other party before the offer was accepted.**

**In addition to revoking an offer by words, a party can revoke an offer by action. If the party making an offer acts inconsistently with what was offered and the other party is reliably informed of this conduct before (he / she / they / it) expresses (his / her / their / its) intent to accept the offer, then the offer has been revoked and there is no contract. For example, if Smith offers to sell his car to Jones for $1,000, and before Jones accepts, Jones learns from Smith's spouse that Smith instead sold the car to Brown, there is no contract between Smith and Jones for the sale of the car.**

> *Onanian v. Leggat*, 2 Mass. App. Ct. 623, 630 (1974) ("the fundamental rule [is] that an unaccepted offer may be withdrawn or rejected at any time before acceptance.") See *Epstein v. Lahey Clinic Foundation, Inc.*, 14 Mass. App. Ct. 981, 982, review denied, 387 Mass. 1102 (1982) (no contract created where seller revoked offer before plaintiff signed purchase and sale agreement); Restatement (Second) of Contracts § 43 (Am. Law Inst. 1981) (Oct. 2021 Update) ("An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.")

### C. REJECTION OF OFFER

**Once a party rejects an offer, (he / she / they / it) cannot accept the offer at a later time, unless there is a new offer. A party can reject an offer by written or spoken words. An offer may also be rejected when a party engages in conduct which: (a) is intended to reject the**

**offer, (b) is known or should have been known to the offering party to be a rejection of the offer, and (c) is reasonably understood by the offering party to be a rejection of the offer.**

> The offer, once rejected, cannot thereafter be revived by attempted acceptance thereof. *Peretz v. Watson*, 3 Mass. App. Ct. 727, 728 (1975).

## D. COUNTER-OFFER

**A party who receives an offer and who responds by changing material terms of the offer, makes a "counter-offer", which is not an acceptance of the offer. A counter-offer terminates the original offer. If the counter-offer is accepted, then there is a contract on those terms. A counter-offer must contain all of the elements of an offer, namely that there is a willingness or desire to enter into an agreement with the intent that if the other party accepts the terms of the offer, then there is a binding contract.**

**If a party asks about terms that are different than the original offer or communicates dissatisfaction with the agreement while expressing an acceptance of the offer, it does not automatically mean there has been a counter-offer. A counter-offer is made when a party's acceptance of the original offer includes material terms that are in addition to or different from the original offer.**

Restatement (Second) of Contracts §§39, 58, 59; *Moss v. Old Colony Trust Co.*, 246 Mass. 139, 148 (1923); *Sea Breeze Estates, LLC v. Jarema*, 94 Mass. App. Ct. 210, 215 (2018), quoting *Moss*, *supra* ("'[A] conditional acceptance or one that varies from the offer in any substantial respect is in effect a rejection and is the equivalent of a new proposition.'"). See also *Peretz v. Watson*, 3 Mass. App. Ct. 727, 728 (1975)

Grumbling Acceptance of Offer: *Massachusetts Housing Finance Agency v. Whitney House Associates*, 37 Mass. App. Ct. 238, 241 (1994) ("A comment, purported clarification, or expression of dissatisfaction appended to an endorsement of acceptance, however, does not have the same effect [as a counteroffer]. Those are in the category of 'grumbling acceptances,' acceptances made without enthusiasm but acceptances nonetheless.")

## E. DURATION OF OFFER

**If the offer stated a period of time within which it must be accepted, then a party must accept the offer within that time. If the offer is not accepted in that time, the offer is terminated.**

**If no time was stated in the offer, then the offer remains open for a reasonable time after it was made. A "reasonable time" is that time which a reasonable person would think was available to accept. In determining whether the offer was accepted within a reasonable time, you may consider a wide range of the circumstances including the nature of the proposed contract, the prior course of dealings between the parties and the customs of trade in which they are engaged.**

Reasonable time: *Powers, Inc. v. Wayside, Inc. of Falmouth*, 343 Mass. 686, 693 (1982) ("Reasonable time"…is…from the circumstances,…what would be the understanding of a reasonable person in the position of the offeree as to the duration of the offer); *Dalrymple v. Town of Winthrop*, 97 Mass. App. Ct. 547, 555 (2020); *Duff v. McKay*, 89 Mass. App. Ct. 538, 545 (2016); *Ben-Morris Co. v. The Hanover Ins Co.,* 3 Mass. App. Ct. 779, 780 (1975) (binding contract not formed where offer not accepted within reasonable time).

Continuing offer: *Laurendeau v. Kawaunee Scientific Equip. Corp.*, 17 Mass. App. Ct. 113, 121 (1983) (commercial furniture seller, by practice for over ten years, made a "continuing offer" to a furniture installer, when it would send an "acknowledgement" of the build agreement in the form a materials list to the installer at the beginning of a job and then exchange an invoice from the installer for a contract agreement once work started.)