

MEMORANDUM OF UNDERSTANDING

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A memorandum of understanding (MOU) is an agreement between two parties that is not legally binding, but which outlines the responsibilities of each of the parties to the agreement. An MOU is often the first step toward creating a legally binding contract. In the U.S., an MOU can be considered identical to a letter of intent, which is another kind of non-binding agreement that suggests that a binding agreement will soon follow. To explore this concept, consider the following memorandum of understanding definition.

Definition of Memorandum of Understanding

Noun

1. A nonbinding written document that states the responsibilities of each party to an agreement, before the official contract is drafted.

Differences Between a Memorandum of Understanding and an Agreement

While a Memorandum of Understanding is a kind of agreement, there are actually several differences between a Memorandum of Understanding and an agreement. An MOU is more of a promise, whereas an agreement is more of a no-frills commitment. The below table outlines the clear differences between the two:

COMPARE	AGREEMENT	MEMORANDUM OF UNDERSTANDING
Definition	An agreement is a document by which parties commit to working together to reach a common goal.	An MOU describes the terms of an agreement without being legally binding or involving the transfer of finances.
Traits	Offer made and accepted.	Offer. Acceptance of that offer. Intentions for the project. <u>Consideration</u> of the terms of the project.
Enforceable in a court of law?	Yes, sometimes.	No (with exceptions).
Binding?	Yes, always.	Only if the MOU is signed with the intention of exchanging monies.
Form	Can be oral or written.	Written.

Types of Agreement

An agreement is more straightforward than an MOU in that once an offer is made by one party and accepted by the other, the agreement then becomes a binding promise that the parties have agreed upon. In the event that one party fails to fulfill his end of the agreement, then the other party can take him to court to sue for damages. There are several different types of agreement, including:

- **Conditional Agreements.** Conditional agreements are only enforceable once previous conditions have been met first.
- **Express Agreements.** Express agreements are contracts that specifically lay out the intentions of all of those involved.
- **Implied Agreements.** An implied agreement is an agreement that is understood based on the actions of the parties, rather than by writing down or speaking the terms of the agreement.

- **Executed Agreements.** An executed agreement is an agreement that has been signed by all of the parties involved. Those signatures are necessary in order for the contract to go into effect.
- **Executory Agreements.** An executory agreement is a contract that has not yet been fulfilled and that is understood to be one that will be fulfilled at a later date.
- **Void Agreements.** Void agreements are agreements that cannot be enforceable by law. It is not void at the start but ultimately becomes void due to some sort of change that affects the terms of the agreement.
- **Voidable Agreements.** A voidable agreement is different from a void agreement, in that a voidable agreement is a valid contract that can either be affirmed or rejected by a party to the agreement. If a party rejects the contract, then the voidable agreement becomes a void agreement.

The major difference between an agreement and an MOU is that parties will typically go for an MOU if they have no interest in ever involving a court in their affairs. An agreement is made with the express intention to take the other party to court, should the other party breach the terms of the agreement in any way.

How to Write a Memorandum of Understanding

An effective Memorandum of Understanding prevents misunderstandings and potential disputes by clearly laying out the expectations and responsibilities of all parties to the agreement. For example, a Memorandum of Understanding will cover the types of insurance the parties have, including [liability](#) insurance, as well as the promises everyone is willing to make and everyone's level of commitment to the project at hand. If anyone refuses to put anything in writing, then that is a major red flag that should tell everyone involved in the project that perhaps they should not go forward with the arrangement.

Every situation, as well as the parties to it, is unique, and thus so is a Memorandum of Understanding. However, the following elements are general enough and important enough to potentially be included in most MOUs:

- **Overall Intent** – An example of a Memorandum of Understanding that is well-written is one that begins by outlining the intentions of all who are involved. The overall intent [clause](#) must be an exact and clear reflection of the aims of all parties to the agreement. Nothing should be assumed, and there should be no gray area here.
- **Parties to the Agreement** – All who are involved in the agreement should be specified within the Memorandum of Understanding.
- **Time Period** – The exact time period of the project should be specified, with both start and end dates.
- **Responsibilities** – Everyone's responsibilities and duties should be thoroughly detailed in this section of the MOU so that there are no misunderstandings insofar as who is responsible for doing what. Shared responsibilities should be included here as well, not just individual ones. This is perhaps the most important section of the MOU because it is essentially the reason why the MOU is drafted in the first

place. Therefore, this will probably be the lengthiest section of any MOU.

- **Disclaimers** – If there are any disclaimers that should be mentioned in the MOU, then a separate section should be created to outline them. This is the section where it would be prudent to note what the project is not supposed to accomplish, as well as what is not guaranteed by or during the completion of the project.
- **Financial Arrangements** – In this section, the parties should be specific about who will pay for what, when those payments are due, and who will be receiving those payments.
- **Risk Sharing** – Risk sharing is another one of the most important aspects of an MOU. Who is going to take responsibility if something goes wrong? What if the project results in an injury or death, or a loss of profit? In this section, the responsible party or parties are to be named only if they are both willing and able to pay for any losses that could result during or from the completion of the project.
- **Signatures** – While an MOU is not necessarily a legally binding contract, it is still important that it include a section for signatures. Each party should keep a copy of the fully signed MOU for his records.

No matter how iron-clad an MOU may seem, however, the parties involved should still consult with an attorney before proceeding with the terms of the agreement. Some courts may uphold an MOU as if it were an official contract, and it is important to verify that all assets are properly protected and that the parties are not sacrificing more than they have to in order to move forward with the project.

Memorandum of Understanding

Example in an Investment Case

Despite the fact that a Memorandum of Understanding is not legally binding, it might still be enforceable in court – even if an official contract was never created after the fact. The key is that the agreement needs to be rock-solid, leaving nothing outstanding for further negotiating.

Such was the case with *Juliano v. Smith*, an example of a Memorandum of Understanding case concerning two investors who had invested in two companies while owning shares in two other companies: iSecurity and Ecology Coatings. The investors brought suit against an officer and sole director of Ecology Coatings, alleging that the officer was endangering Ecology Coatings' ability to do business, and was therefore causing the value of their investments to drop.

The Circuit Court found in favor of the investors and upheld an MOU that was created between the investors and the officer. The MOU included a clause saying that the parties had “reached an agreement,” the terms of which were to be detailed in a settlement agreement that was supposed to be created at a later date. However, despite this agreement, the parties failed to execute a final settlement agreement, and so the court upheld the MOU as a final settlement agreement instead.

The officer appealed, however the Michigan Court of Appeals agreed with the Circuit Court, finding that the MOU was indeed enforceable, even though it was what the court called a “contract to contract” (in other words, an agreement to create an agreement). It was the Court of Appeals that determined that an MOU can be enforceable if it contains all of the important terms of the agreement and leaves nothing outstanding for negotiation.

Further, the Court of Appeals denied the officer's additional arguments against legally upholding the Memorandum of Understanding. This was because the court found that the officer did not provide enough evidence that a fraud was committed, nor was he able to properly show that a mistake had been made.