Get It In Writing! Well, Sort of....

by PAUL ASKER

We're all familiar with the maxim "Get it in writing." While this is always the best practice, it is neither necessary nor sufficient to protect your legal rights.

Writing is Not Necessary

Many of my clients are shocked to learn that they have substantial legal rights, including contract claims, even though they have not reduced their agreement to writing. In effect, they have internalized the "get it in writing" admonition too well and believe if their agreement is not in writing, it does not exist. The law is quite to the contrary.

In order to have a valid contract, only three things are necessary:

- An offer.
- An acceptance.
- Valid consideration.

More to the point, in most circumstances none of these three elements have to be in writing to be enforceable. An offer is just what it seems to be; a proposal from one party to another. An acceptance is also what it seems; approval of the proposal. Attorneys spend an obscene amount of time and your money arguing about the nuances of offers and acceptances, such as: whether an offer is an offer or rather a request to receive an offer; whether the offer made was actually accepted or changed to such a degree that it amounts to a counteroffer; and the precise time at which an offer was made or accepted. However, for our purposes, the first two of the three elements necessary for a contract are simply an offer and an acceptance of that offer.

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Exchanging Value

Consideration is a little trickier. Simply stated, consideration is a mutual exchange of value, no matter how small. This exchange of value does not need to be presently made. Instead, a mere promise to exchange this value in the future is sufficient.

A simple example helps to clarify the fundamental concepts underlying a valid contract. If you and I agree that I will paint your house for $1,000, we have entered into a binding, legally enforceable contract. An offer to paint the house for $1,000 has been made. That offer has been accepted, and the necessary consideration is present since I have given you value in the form of promising to paint your house and you have given me value in the form of promising to pay me $1,000.

Conspicuously absent from the above example is any writing. Our agreement does not need to be in writing to be enforceable. You and I both have extensive rights under our oral agreement which can be enforced in court. Unfortunately, due to people's misconception about the enforceability of oral contracts, these claims are often never asserted. Thus, too often those who fail to live up to their word are allowed to do so with impunity.

Exceptions That Prove the Rule

In fact, one may even have a contract without an explicit oral agreement. Under various legal and equitable theories, most of which have fancy Latin names, courts will often impose contract obligations on parties even though there is no written or oral agreement between the parties. In these cases, a party's actions alone suffice to establish an obligation to act consistent with the expectations which reasonably arise from those actions.

Let's return to our house-painting example for an illustration. Suppose that when I came to paint your house on Saturday morning, pursuant to our oral agreement, I made a mistake and instead started painting your neighbor's house. Your neighbor, awakened by the sound of scrapers and clanging paint cans, is at first alarmed by this marauding paint slinger. However, he quickly realizes that if he simply hides in his house all day, he can finally accomplish the house painting his wife has been nagging him to do for months for free. So he hides out and, in my ignorant bliss, I finish my job just as the sun is setting.

In this example, none of the three elements for a contract, oral or otherwise, have been met between your neighbor and me. We did not exchange either an offer or acceptance. In fact, we never even spoke. Furthermore, although I provided valid consideration by painting his house, this consideration was not mutual, as required, because your neighbor neither promised nor provided any value to me. Notwithstanding this complete failure of all the elements of contract, not to mention that nothing was in writing, courts have consistently held that your neighbor would have to pay me $1,000 for painting his house. Why? Generally speaking, because I gave value to your neighbor, he knew that I expected payment, and it would simply be unfair to allow him to get this benefit after being such a sneak without paying for it.

Why then are attorneys constantly telling you to "get it in writing?" The short answer is that it makes their job as attorneys a lot easier.

Writings Are Very Rarely Required

In the interest of full disclosure, there is a certain small subset of contracts that must be in writing in order to be enforceable. Usually, these types of contracts are listed in a statute. The name of that statute is called the Statute of Frauds. Therefore, these particular contracts that must be in writing to be enforceable are said to "fall within the Statute of Frauds." It is not important for our purposes to enumerate these particular contracts which must be in writing to be enforceable. However, even with these contracts there are many exceptions to the writing requirement and the courts are generally liberal in finding exceptions. In short, even with contracts that fall within the Statute of Frauds and thus must technically be in writing, courts are extremely hesitant to allow a party to escape his obligations under an agreement simply because it was not reduced to writing.

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Why Does Everyone Know the Wrong Rule?

Why then are attorneys constantly telling you to "get it in writing?" The short answer is that it makes their job as attorneys a lot easier. Attorneys have to prove the existence and the terms of a contract in court in order to enforce it. It is much easier to simply introduce a written contract into evidence at trial than to elicit testimony from a witness as to the terms of a contract. Furthermore, a written contract cannot be as easily refuted by the opposing side with contrary testimony from their witnesses as an oral contract.

Returning to our house painting example, it is much easier for an attorney to prove you owe me $1,000 since I painted your house if our agreement is in writing. It is also much more difficult for you to credibly testify that you only agreed to pay me $500 for the paint job if the contract clearly states $1,000.

There are many good reasons for you to want to make your attorney's job easier by getting it in writing.

- First, having a written contract often prevents litigation. The drafting process itself helps to identify and clarify issues that may otherwise have been unanticipated and lead to future disagreement. Furthermore, a well-drafted contract will resolve most disputes by establishing the rights of the parties so you don't have to litigate who is supposed to do what and when.
- Second, a written contract will substantially increase your chances of succeeding on a contract claim if litigation is necessary.
- Finally, a written contract reduces the amount of work your attorney has to do on your case and could save you a substantial amount of money on attorney fees alone.

So "get it in writing." But just because you forgot to write it up, doesn't mean you have to give up. The law recognizes that keeping your word is important and ultimately forces those who fail to live up to their oral or implied promises to pay. Getting it in writing is extremely helpful, but usually not necessary.