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Is There a Contract? If so, what is it?

A common issue in our law practice revolves around the question of whether there is a contract between the parties and, if so, just what is that contract. Consider this common scenario: The architect meets with the potential client and then submits a form AIA contract for the client's signature. The form is filled out based on the prior discussions between the client and architect. The client tells the architect to go ahead with the work, but never bothers to sign and return the written contract. When the litigation starts, you need to know whether the unsigned document is the contract or not.

This problem ordinarily comes up on smaller projects. On larger projects, the question usually revolves around changes to the contract. A written contract is the norm on such projects, but once changes start to occur, the parties may be sloppy about the process of modifications to the contract. A change order, properly signed, modifies the contract. But what about a change order request by the contractor that is not signed by the owner where the contractor has done the work shown on the change order? This is where attorneys really earn money.

Contractors are not immune from the unsigned contract problem. For instance, in *Mendelson v. Ben A. Borenstein & Co.*¹, the owner entered into an oral contract with the contractor for construction of a strip shopping center. Thereafter, the parties drafted a written contract to formalize the terms of their oral agreement, but the written document was never signed. The trial court found that the written contract accurately set forth all of the terms of the parties' oral agreement. The oral agreement was the actual contract, but the terms of that oral agreement could be found by reading the proposed written agreement. This makes sense and provides some easy answers. But what happens when there is a dispute as to whether the written agreement sets forth the agreement of the parties?

Where there is no signed written contract, the issues are often diffi-

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cult to straighten out. Typically, the person who failed to sign a proposed agreement will argue that the reason he did not sign was that the writing was not an accurate reflection of the agreement. If the court accepts that argument, then the question becomes: what was the oral agreement? This will be difficult, if not impossible, to prove. By their very nature, oral agreements will not cover most of the terms of a typical written contract. For instance, it is unlikely that the parties will actually cover issues such as arbitration or copyright in their oral discussions. The precise duties to be performed by a contractor or architect will not be set forth with any clarity. Yet these are exactly the issues that the court will need to address in most lawsuits.

This clarity of contract — exactly what each party is to do — defines the duties of the parties. These duties can be extremely important, not only in litigation between the parties, but in litigation with others. Consider a situation where a pedestrian trips on the sidewalk. The architect and general contractor (and others) will probably be sued. One way of defending the case as to the architect or contractor is to demonstrate that that party had no contractual duty regarding the sidewalk. If the court can be convinced that under the contract there was no duty to design the sidewalk, the architect will probably get out of the lawsuit early on. With an oral contract on the other hand, that is highly unlikely. The same is true for a contractor. This demonstrates the importance of a written contract even in situations where you completely trust the other party, because the contract may affect what happens with strangers to the contract.

Safety is normally covered in written contracts, but not in oral agreements. When a worker is injured, the written contract will guide the court in determining who is responsible for safety. In this case, a written contract will be invaluable for the defendant architect.

Taking a more extreme situation, consider an oral agreement between an architect and owner to design a house. What happens when the owner does not want to pay the architect? Simple: find something about the house that the owner is unsatisfied with and raise that as a breach of contract by the architect. For example, the owner has difficulty parking his large SUV in the third stall of his three car garage. Was the architect supposed to design a three-car garage or not? Was each space supposed to accommodate average cars or trucks or oversize vehicles? The possibilities are endless. With no written contract or other clear evidence of the contract, the

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architect will have problems with this case.

Another variation on this issue is where there is an initial written agreement but the parties make oral modifications. Suppose the contract prohibits oral modifications, just like this provision in AIA Document B141-1997: “1.4.1 . . . This Agreement may be amended only by written instrument signed by both Owner and Architect.” You cannot depend on this provision, because the law in virtually every jurisdiction permits the parties to orally modify contracts even when there is a specific provision in the contract that prohibits oral modifications. The major problem with oral modifications is proving just what the modification was. Each party will probably have a different understanding of what was meant. Oral modifications should always be avoided.

Business relationships are contractual relationships. Some contracts are in writing while others are oral. If the relationship is important, make sure all of the important terms are clearly spelled out in a written document signed by the parties. If you send out a proposal, do not do work until you get the signed copy back.

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1. 608 N.E.2d 198 (Ill. App. 1992).

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