

BACE LAW REPORT

LEGAL NEWSLETTER

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Written Contracts vs. Verbal Agreements

People are generally averse to signing written contracts. There is a stigma associated with signing contracts, and a general feeling that the party presenting the writing has an advantage and is attempting to lock the signor into horribly unfavorable terms. Even in our modern age of instant information, many small businesses and homeowners alike perform business and enter into contracts with a hand-shake or limited verbal exchanges. Contracts are viewed as long-standing “traps,” where hand-shakes elicit feelings of trust, good-will, and an endorsement of traditional business practices. Written contracts are almost always seen as having “fine print,” that will undoubtedly ravage one party in the event of a disagreement. Worse, in some sectors, the presenting of a written contract or requirement of a written contract prior to conducting business can be an insult to the other party. This is particularly true for homeowners and

residential contractors. What if your local carpenter, painting contractor, or electrician required you to give three bank references and sign a five-page contract that specified the expectations in a detail? Most readers would find it odd at least, and many would react negatively. However, if the contract accurately depicts the agreement between the parties, it is *far more favorable* than traditional verbal agreements.

Enforceable in Theory

In theory, and in legal reality, oral/verbal agreements are enforceable in the Commonwealth with some exceptions contained in the Statute of Frauds. Generally speaking, contracts that cannot be performed within one year must be in writing along with those that deal with real estate transactions. There are other notable exceptions, but most service contracts need not to be in writing to be enforceable. *ESO, Inc. v. Kasparian*, 32 Mass.App.Ct. 731, 733-34 (1992). Wonderful, your hand shake is enforceable. In the event of a dispute, how will the terms of the contract be

determined? How much were you to pay? What work, specifically, was the contractor obligated to perform? Were any warranties issued? Were mid-job modifications or change-orders authorized or within the scope of the agreement? How long does the contractor have to perform the work? In the event of a dispute, these questions are almost limitless.

What Are the Terms?

Without a written contract, the terms of your hand shake agreement will have to be flushed out by piecing together court testimony, invoices, correspondence, and emails. The human memory is far from flawless. As time passes, memories fade. Crucial portions of job site conversations become skewed. Recreating the terms of an oral contract can be like reviewing a professional football play in a fog, without the benefit of the 360 degree camera angles.

As a homeowner, have your attorney review any documentation that a contractor requires you to sign. As stated in an earlier issue, the mere act of signing, without substantial knowledge or understanding, may operate to waive your legal rights.

As a contractor, the best advice is to

have your attorney prepare simple yet effective written contract forms. Paying an attorney now, to draft or review your current contract forms, will save you time and energy and may give you more leverage in the event of a dispute.

As part of this office's Outsourced General Counsel Plan, we provide consultation on steps contractors and small business owners can take to protect their work and ensure a higher potential for successful recovery in the event of a dispute. A small sampling of best practices can generally include: Written contracts prepared by your attorney, stipulations that changes to the underlying scope must be approved by an additional writing, and bank references for new customers.

There are many pitfalls on any contracting job that could prevent payment or cause a dispute between contractors, or between homeowners and contractors. A clear and detailed writing, memorializing the agreement, can prevent costly and lengthy court processes.

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