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What you *really* need to get in writing

by Steven Susser

Are you familiar with the expression, "*Get it in writing?*" For today's business people, this expression should be reworded as, "*Get everything in writing.*"

Over the past ten years, courts in Michigan (and elsewhere) have been relying more heavily on the terms of a written contract in making judicial decisions. This is not to say that courts disregarded written contracts in the past; far from it. But courts have become less likely to rely on such considerations as "public policy," "fairness," or "fraud" as a way to avoid the consequences of a written agreement when the terms of that agreement are clear.

For example, until recently, courts in Michigan would entertain a fraud claim along with breach of contract claim. This means that someone who signed a contract would claim that he was deceived into making that agreement or deceived during the course of that agreement. That person would then use the fraud argument as a way to circumvent the written terms of his agreement. Recently, however, courts in Michigan have become more cautious about allowing litigants to use fraud as a way to get around the language of a written contract.

Similarly, courts are less likely to use notions of "fairness" or "equity" as a means to alter a written agreement. If you sign an agreement that gives the other side \$10,000 for doing next to nothing, so be it. That was what you agreed to do and you will be bound to it.

The result, of course, is that companies and individuals need to be wary when entering into contracts. Some things to think about *before* entering into a contract with another party seem like common sense-but they are often overlooked:

Consult an attorney. Many are hesitant to get an attorney involved in contract negotiations. But although it is not imperative that an attorney write the contract and be present during all negotiations, it is wise to have an attorney review the language prior to the parties closing the deal. Attorneys know the pitfalls and potential danger areas to avoid-they see them in practice every day.

Force yourself to confront difficult issues.

Some contracts are between friends or friendly acquaintances and contract negotiations can be unpleasant and tense. When working out the details, it is natural to want to please the other party-but not always prudent. For just a few moments, put your friendship aside and ask, "What

if things don't go as planned? For the next 30 minutes, let's assume the worst." It isn't easy to do, but it's an important process because, among other things, it will help guard against the tendency to make significant concessions to close the deal. If the process is uncomfortable, you may need to have an attorney step in and play the role of devil's advocate.

Focus on how/when the contract ends. It is usually not something one thinks about before even entering into a contract, but it is a good idea to think about what would happen should the contract be terminated. Does the contract stipulate how payments will be made on sales finalized after the expiration of the contract, but generated during the term of the contract? In an employment contract, how long does a non-compete last, and are you comfortable with that? If a product is changed slightly but related to an earlier version covered under the contract, is this new product subject to the terms of the original contract? What protection do you have if the other party tries to orchestrate your termination for cause? Questions along these lines must be addressed, and it is wise to address them before signing on the dotted line - otherwise, you may be addressing them in court.

For these reasons and many more, attorneys specializing in complex contract disputes are urging their clients to memorialize their important transactions in carefully considered written agreements. As another popular expression goes, an ounce of prevention is worth a pound of cure.

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