

Contracts by Fax: Are They Legally Binding?

by Perry Safran and Wayne Roper



About seven million fax machines are now operating in the U.S., and it's getting harder every day to do business without one. Even the smallest-volume builder is likely to have a fax machine these days. The fax is a genuinely useful tool, allowing quick, easy communication with suppliers and subs, clients and architects. So it's no wonder that many contractors are now using their fax machines to send contracts and other legal documents. The question, however, is whether such documents are enforceable under law. The courts have yet to rule on the issue. Legal trends indicate that they will eventually rule in favor of faxed contracts, but until they do, the prudent fax user should heed the following.

Problems With Mailed Follow-Ups

When faxing legal documents like signed contracts, cautious people generally follow up by mailing the original. But this practice has two shortcomings: first, it doubles the paperwork; second, it raises some ambiguity about when the contract becomes binding. The latter problem can spell disaster for a small builder. Imagine, for example, that you've landed a contract to build a custom home. You get the go-ahead while your client is out of town on business. To start things moving, you fax him a signed contract, which he signs and faxes back. When the client

gets back in town, he decides that he can leverage you into dropping several thousand dollars from your original price. He argues that the necessity of mailing the original implies that the faxed contract wasn't binding, and that the final price is still negotiable. Unless the original contract contained items that still needed to be agreed upon, such as a choice between completion dates, he's probably wrong. But there's no guarantee, so some precautions are in order.

One way to clear up such ambiguity is to agree not to mail the original. Although the enforceability of such a contract is not clear, precedent can be found in the case of telex, an older but similar technology. Certain industries, such as shipping, consider a telex message sufficiently binding to stand on its own. Likewise, some government agencies accept faxes for official filings without requiring the original documents to be mailed.

Preventing Fraud

For any contract to be enforceable, it must be a legal offer (a "writing" in legal terms) and it must be signed. Whether the fax meets these requirements has caused much debate. The problem is that the fax can be fraudulently altered before transmission. Until there is a direct ruling on this issue, there are some anti-fraud precautions you can take that, theoretically, should hold up in court. For instance, you can state in the faxed

documents that the printout is a legal offer. However, the recipient of the fax would still only be bound after signing and returning it.

That raises the issue of what constitutes a signature. The legal definition of a signature includes anything that the signer intends as a replacement for a normal autograph (replacements have included the use of network access codes or passwords). One way to deal with the signature issue is for all signers to state in their faxed documents that they accept their signature as printed by the receiving fax machine to be an original signature.

Yet another strategy is to sign the document in front of a notary before faxing it, then for the recipient to sign it in front of another notary before faxing it back. In a dispute over the authenticity of the signature, a court could check the notary's records to see if the signer did indeed come before the notary on the indicated date. If there was no record, then the validity of the signature would be suspect.

The Best Evidence Rule

One final issue to keep in mind is "the best evidence rule." It says that the courts give preference to the original document, rather than to a copy. If a fax is seen as a mere copy of the original, you may have trouble admitting it into evidence. To bypass the best evidence rule, the sender should state on the original document that the printout is to be considered an original counterpart. ■

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