Can a Handshake Be a Contract?

by Quenda Behler Story

One question I hear fairly often from builders is, "Can a contract with a client be enforced if it's not in writing?" The short answer is yes, it can. Back in the days when I worked at the legal shark shop, we enforced unwritten contracts all the time — though we sometimes ran into problems.

The longer answer is that enforceability depends on a number of factors: what kind of customer you're working with, how much money is involved, and what state you're in. For instance, several states require written contracts between homeowners and builders for jobs involving more than a specified amount of money.

Elements of a Contract

I don't recommend working without a written contract — ever. However, it's not the paper that creates the contract; it's the intent of the parties. So let's say you agree to do a job, you perform the work without getting anything in writing, and then the customer refuses to pay. Do you have an enforceable contract? You might, if you have "mutual consideration" and a "meeting of the minds."

> It's not the paper that creates the contract; it's the intent of the parties. Still, written contracts make everything easier.

Mutual consideration means you and your customer have agreed to give each other something of value. Usually, you agree to do the work and the customer agrees to pay for it. You're both getting something; otherwise, we'd be talking about a gift.

Meeting of the minds means you and the other party to the contract reach a point where you both believe you have a contract. If one of you honestly thinks you're still in the negotiation stage, you haven't achieved a meeting of the minds.

But suppose after this so-called meeting of the minds, your customer says, "Hey, I didn't really agree to pay for it — you just thought I did." In that case, if you want to collect, you'll have to sue — and convince the court that the customer led you to believe there was an agreement. If the court is convinced, that verbal agreement is a contract.

Unjust Enrichment

There's another angle to all this. In most states — even those with requirements about written contracts — if you aren't paid for work you've completed, you can sometimes recover what you're owed under the principle of "unjust enrichment." This means basically that customers can't play the "gotcha" game. If they ask you to perform the work and then try to stiff you because the contract wasn't in writing, the courts may view their behavior as fraud.

You'll need an attorney to win an unjust-enrichment lawsuit — and if you prevail, you may not win the full amount for the job. That's because unjust-enrichment theories are not based on the monetary amount agreed to; they're based on the value of what the customer received.

The most you can hope to win is what the expert witnesses hired by your lawyer say your work was worth. Of course, the defendant will have his own expert witnesses who will claim your work wasn't worth much at all. The final value will be up to the court to decide.

Mechanic's lien. Obviously, you would have been better off if you'd just gotten the agreement in writing in the first place. But if you do get stuck, here's a tip for making this kind of case easier to win: Put a mechanic's lien on the property. The mere fact that a lien has been filed will give you more leverage in this difficult situation.

Better to Get It in Writing

Please don't take any of my advice here as an endorsement of unwritten contracts. As far as I'm concerned, a handshake is never a good enough agreement; even with friends and longtime customers you should insist on a written contract. And this is true not just because that piece of paper finalizes the contract or the law may require it, but because writing everything down makes it a lot easier to figure out later what you guys actually agreed to.

Quenda Behler Story *has practiced and taught law for more than 25 years.*