

Ten Tips for Avoiding Litigation: Tip #4 - Every Significant Business Transaction Should be Documented

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There is a nostalgic notion among traditional businesspersons that the best deals are sealed by a hand-shake (*or an elbow in this COVID-19 world in which we live*), and you don't need fancy lawyers and contracts to be successful in the business world. That approach to reaching agreements seems to work well in John Wayne and Clint Eastwood movies, but it can lead to problems in the real world. Robert Frost famously said: "*Good fences make good neighbors.*" In the business world, good contracts make good deals.

So why should you insist on – and pay the expense of creating – written contracts to memorialize your significant agreements? Consider the myriad of psychological research studies, which show that memories fade with age and the passage of time and that, even under the best of circumstances, we tend to remember what we want to remember. The corollary to that rule is that different people will tend to remember different things, depending upon their varying interests. Next consider that, according to the natural order of the world, otherwise known as "Murphy's Law," if something can go wrong, chances are it will go wrong. Finally, consider what will happen when you and the other party to the deal have differing recollections about the terms of the deal but nothing in writing to confirm either party's position.

For example, suppose you understood that your customer was going to pay shipping costs for the goods it purchased from your company. Your customer, to the contrary, is certain that shipping costs were included in the price it paid for the goods. Similarly, what if our customer thinks it is entitled to receive a 2% price discount if it pays your invoice within 20 business days of receipt. You recall discussion of a discount but swear the terms you agreed to required payment of the invoice within 10 days and a resultant 1% discount.

How will you resolve such disputes without a definitive written agreement that includes provisions for shipping, payment and price terms? To paraphrase Yogi Berra: If you don't know where you are going, how will you know when you get there? More to the point, if you don't have a contract, how will you know what the deal is?

Faced with such a disagreement about the terms of the deal, you will either negotiate a new deal to resolve the disputed issues, stop doing business with the other party, or end up in court. If you end up in court, without a written contract, it will be your word against your adversary's. Unfortunately, that kind of litigation, which depends upon either a jury or judge deciding whose testimony is more credible – a so-called "credibility contest" — is one of the most expensive and unpredictable kinds of contract disputes to resolve. Moreover, even if you are fortunate to prevail in the litigation, you will most likely be responsible for your own attorney's fees and costs, which could be enormous. Under the so-called "American Rule," which is followed, with rare exception, by every state and federal court in this country, each side bears its own costs of litigation, regardless who wins. One exception to the American Rule occurs when the contract that is the subject of the litigation contains a "loser pays" provision. But, of course, without a

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written contract containing such a provision, you will be out of luck and will probably have to bear your own litigation costs.

One additional reason to insist upon a written contract to memorialize significant transactions is the good will it will buy you with your most valuable customers. The truth is that wasteful and unnecessary litigation is just as expensive, time consuming, and distracting for your customer as it is for you. Your adversary will be forced to eat its own attorney's fees and litigation costs, just as you are, if the dispute ends up in litigation. Therefore, both parties will benefit from a well-drafted contract that resolves disagreements without the need to resort to litigation.

Finally, not every deal requires a full blown contract with all the bells and whistles, but even in those circumstances, there should be some written confirmation of the agreement. In many cases, a simple purchase order with pre-printed standard terms and conditions, sent by one party and accepted by the other, will suffice. Some simple deals will only require a confirming email or two back and forth to provide a record of the principal terms of the deal. With the convenience of electronic communications these days, there is no good excuse for not documenting every deal in writing!

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