

# A/E RISK REVIEW

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## Get It in Writing: Avoid Verbal Contracts

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

A well written and signed contract with your client can be the cornerstone of a successful and claims-free project. Yet it is surprising how many design firms continue to start new projects with simply a verbal agreement and hearty handshake.

Architects and engineers give many reasons why they forego the formality of a written contract before starting their design services. These include:

- “I’ve worked with this client for years. I’ve never had a major problem on any of their projects.”
- “That’s just not the way you conduct business in this neck of the woods. To ask for a written contract is insulting and tells my clients I don’t trust him.”
- “It’s only a small job. It’s hardly worth the time to write a detailed contract. A simple purchase order and invoice upon completion will do.”
- “Time is of the essence. We’ll start the project now and work out the details later.”
- “None of my competitors demand lengthy written contracts. If I don’t make it equally quick and easy on my clients, I’ll lose business.”

The overriding assumption behind this reasoning is that a written contract is unnecessary because, chances are, nothing serious will go wrong with the project. And if something does go wrong, the parties will set things right.

Sometimes a designer and client can indeed iron out a project upset with a quick conversation and a handshake. But rarely does that happen when there is a lot of money at stake. All of a sudden, that trusted client isn’t quite so amicable and he or she doesn’t remember that verbal agreement quite the same way as you do.

### Verbal Agreements Are Binding

“A verbal agreement ain’t worth the paper it’s printed on,” Louis B. Meyer is supposed to have advised. Still, from a legal perspective, a verbal agreement in lieu of a written contract is generally binding. When you reach a verbal agreement with a client and start to perform services, you are both acting as though a contract is in effect. Therefore, in the eyes of the law, a binding agreement is in effect. The verbal agreement, no matter how brief, is a contract.

But what happens if something goes wrong with the project? In that case, you and your client will explain your respective understandings of what was agreed to. Not surprisingly, those understandings often differ. So while the verbal agreement is binding, the two parties are often in disagreement as to what each party is bound to do.

Who determines what each party to the verbal contract really said and meant? That responsibility typically falls to a trier of fact – a judge, jury, arbiter or mediator. Unfortunately, the trier of fact was not there to hear the verbal agreement, so they have the difficult task of making a ruling based on differing testimonies of the

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two parties. And in the case of a jury trial, the trier of fact likely does not fully understanding the types of services you render or the prevailing standard of care you must meet when delivering those design services.

One instance where a verbal agreement may not be held binding is when a written contract covering the same project is later drafted and signed. In such instances, the written contract now overrides the original verbal agreement.

### **Asking for a Written Contract**

So how does a design firm instill the formality of a detailed written contract with a client who is used to a simple discussion and firm handshake? This shouldn't be too difficult considering that a clearly written contract is extremely beneficial to both parties to the agreement.

Consider this scenario: You meet with a repeat client you've known for years to discuss a new project. The client immediately begins discussing the design services needed and doodling a quick drawing on a napkin. You pull out your notepad and begin recording the client's explanation of the project.

"I'll tell you what, Bill," you say. "I think we would both greatly benefit if we documented this agreement in a formal written contract. I know we've worked off of a handshake before, and I trust you fully. But with a written contract, we can make sure we both have a full and mutual understanding of your wants and needs. It will help us avoid any misunderstandings, like that HVAC snafu we had on your warehouse project on Second Street. I want to make sure you're completely happy on this new project and that I fully understand what you want.

"You know, Bill, I don't like the time and expense involved with these written contracts any more than you do. But I sure as heck would rather have you and I determine our fate rather than a bunch of expensive lawyers and folks who don't know us from Adam. A written agreement will help us make sure that should a dispute arise, it will be settled in accordance with the facts we agreed to, not the opinion of some outsider."

If your client continues to balk about signing a formal written agreement before the project commences, reiterate that a contract is simply a tool to help avoid misunderstandings and resulting problems. Try to allay any fears that the contract is somehow a trap to be used against the client in the event of a dispute.

"Bill, don't look at a written contract as a weapon to hold over someone's head," you can explain. "See it as a confirmation of the terms and services we have agreed to. When it comes to what your project needs relative to my services, we will need to discuss a lot of issues to make things right, and we need to keep track of what it is we discussed. If we don't record what we talked about, one of us – or both of us – stand the risk of being in for an unpleasant surprise. I don't know about you, but I can't promise that I will remember everything said in our discussions. Understandings differ and memories can fade. By putting our agreement in writing, we can have a true meeting of the minds, based on what we see as the best road ahead.

"As we start down that road, we may run into a few unexpected bumps, potholes, curves or detours. We'll talk about it and do our best to resolve problems – just like we always have. You want your project done right and I want to keep you as a valued client. The contract is a great roadmap to get there."

### **Don't Forget Third Parties**

Another important reason for a written agreement is the ability to prevent third parties, such as a contractor or a tenant, from gaining the standing they need to sue you and/or your client based on a contention that they are third-party beneficiaries of your agreement. If your agreement with your client is verbal, the third party may enjoy an advantage. Juries are often sympathetic to third parties, especially those with whom they can readily identify as "the little guy." Your written agreement with a client can address unauthorized third-party reliance, and can be attached to appropriate deliverables (such as reports) to help ensure any third party reviewing them understands the contractual limitations (scope, schedule, fee, general conditions) affecting them. A verbal agreement contains no such limitations and is difficult to defend.

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### **One More Argument for a Written Contract**

You may point out to your client that, if anything happens to either of you, or one of the parties to the verbal agreement leaves his or her firm, the project will be affected, problems will be likely, dollars will be involved and disputes will arise.

Explain, “A written contract will tell others what we intended to do. They won’t know about our verbal understandings. They need that guidance in writing.”

### **Is It Insurable?**

Suppose you and your client enter into a verbal agreement and later have a dispute you can’t resolve. You go before a judge or jury who, based solely on your verbal testimonies, issues a judgment in your client’s favor. Your client should be happy, right? Well not necessarily.

Suppose the wording of the judgment, written by someone not well versed in laws and standards governing the design and construction industry, is perceived by your insurer as an uninsurable liability. Your client won the battle, but he or she may have just lost the war. Unless your firm can cover the damages, the client may have just lost your services and jeopardized the project from a financial standpoint.

Tell your client: “Bill, I have a great insurance company, solid coverage and a fantastic agent. She can help us review our written agreement and assist us in making sure that it’s insurable. This benefits you as much as me. An uninsurable agreement, verbal or otherwise, doesn’t do either of us any good.”

### **Short Is Not Always So Sweet**

Some clients will grudgingly agree to use a purchase order, proposal or similar “short-form” contract, but they remain averse to long agreements that require more time to draft and review. The problem is that short-form agreements are, by nature, silent on a number of important issues. Once again, outside triers of fact are asked to resolve disputes without the benefit of a comprehensive written agreement.

Tell your client who only wants to offer a purchase order: “Bill, what is the harm of having a long contract rather than a short one? A long one serves to cover a broad range of important issues. As long as the contract is well written in reasonably understandable terms, what is the drawback? Some detail in our agreement might be relevant to a pressing issue, and we’ll be glad we took the time to address it. And if the issue doesn’t come up, no harm, no foul.”

You might also add:

“A big advantage to drafting and reviewing a thorough contract is that it allows us to discuss the ‘what-ifs’ and address potential solutions. The more we know about the project and reach agreement on various issues, the more we set out what we expect from one another. That’s not a bad thing.”

If you provide repeat services to a contract-adverse client, consider using a continuing service or “master” agreement. This document sets general terms and conditions that apply to all of the projects conducted over a particular period of time. Then you can develop just the scope, schedule and fees for each individual project. Your professional association may offer standard forms for these master agreements.

### **True Value**

Arguably, the greatest value of drafting a comprehensive contract comes not from the words that go onto the paper, but from the process through which important issues are identified and discussed. The client gains a better understanding of project risks and what the two of you can do to manage them. The client also learns what the both of you can do to lower the likelihood of errors or omissions. And you can both set up a framework in which any problems that do arise can be addressed in a fair and equitable manner that focuses on problem resolution rather than finger-pointing and disagreement as to what you had verbally agreed to.

The contract-formation process, more than any other aspect of your project involvement, gives you the opportunity to demonstrate your professionalism and generate the communication, coordination and cooperation required for project success. And that’s something every client can give a thumb's up to.

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Finally, if a client continues to refuse to enter into written agreements perhaps this isn't the type of client you should be doing business with. A client who will not commit to fees, schedules and other commitments in writing may not intend to live up to those commitments.

**Can We Be of Assistance?**

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*