

How Design Professional Service Contracts Work

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Forward

If you have ever had a Will prepared you know that the process involves a great deal of formality. You sign your name in numerous places and witnesses are also present to confirm that you have acknowledged the document as your own. Aside from the fact that such an occasion is deserving of pomp, there is another good reason for all of the ceremony. The reason is that if a dispute were to arise as to the disposition of your estate, you would not be around to clarify your intent.

It is not exactly the same with professional service agreements, but at times parties differ as to what was meant when a contract was signed. Differences of course are more likely to exist when there is no written contract, but Written contracts can be subject to different opinions as well. Professional societies and organizations such as the AIA and EJCDC have created extensive sets of carefully drafted contract documents. One of the primary objectives is to avoid disagreements as to the meaning of the words contained in those documents. Notwithstanding the wide availability of quality contract forms there is the ever-present pressure to accept a client's contract or to agree to modifications to an accepted industry form. The purpose of this paper is not to tell you why that is not a good idea because you have heard that before, but to explain what happens when a third party like a judge, arbitrator or jury is empowered to decide for you what you meant when you signed on for the job.

How Design Professional Service Contracts Work

A design professional's agreement for services is a living document. Not unlike our Constitution which was drafted in the abstract and then applied over time to life's unpredictable complexities, a professional services contract cannot be expected to provide clear and detailed answers to all of the questions which

will inevitably arise during the course of a project, and rather must be adapted to circumstances as they develop. When disputes arise, contracts must be read in the context of their formation and the particulars of their pre-dispute performance; and no lawyer can "decode " a contract out of context saying With certainty what the words used "really mean. " Anyone who earns their livelihood performing professional service contracts is well advised to understand how these contracts really work, which is to say how some judge or arbitrator is likely to determine what they require in a particular situation. The purpose of this article is to discuss in a simplified and practical way the basic legal rules by which a professional services contract can change and be adapted as a project progresses. Interpretation and amendment are the related legal processes by which a professional services contract is typically adapted to the evolving real-world circumstances of an ongoing project.

In extreme cases, a party unhappy with a contract may challenge its very existence; and the law provides a number of rules enjoyed by academics, but rarely used by lawyers, to avoid a contract's binding effect. For example, a party might claim that a contract was not effectively formed in the first place because its contracting agent lacked sufficient authority, or because of some profound factual mistake, or perhaps even because of fraud or duress. Similarly, a party might claim that an originally valid contract has been effectively terminated by, for example, an uncured material breach, or perhaps by some profoundly changed conditions. Assertions such as these are sometimes made by desperate parties or posturing lawyers, but are not often proven. Most of the time the parties do not dispute the existence of a valid contract, but simply differ as to what that contract requires in the context of project developments over time.

Interpretation

Interpretation is the legal process for the ascertaining of a contract's "meaning " (i.e., at least in theory, what the parties intended to agree to do at the time of contracting). The purpose of interpretation is not to impose unintended consequences by the clever use of arcane technicalities, but rather to bind the parties to the fair and appropriate consequences of their agreement. For purposes of this article contract interpretation is best understood as the body of rules recognized by lawyers and judges as appropriate for supporting arguments as to what the parties intended at the time of contracting; and the most generally accepted and legally persuasive of these rules are discussed below.

Contractual Language

For the most part, a contract generally means what it says. The overriding goal of the law is to give effect to the mutual intentions of the parties at the time the contract was entered into, and the most obvious manifestation of that intent is the plain meaning of the words they used. It is important to note that in the event of litigation, the judges who usually interpret contracts have little or no background in the world of the design professional. Therefore the importance of clearly stating the parties' intentions in plain language cannot be overstated.

Technical Terms

Technical terms may well be given their technical meaning when used between knowledgeable parties dealing in the involved technical area, but not otherwise -- the issue being not what the words mean, but rather what the parties meant. Especially when dealing with unsophisticated clients, design professionals should resist the temptation to "talk the talk " of the construction industry, and instead should strive to

express their intentions in layman terms. Even when the parties have, or think they have, a common understanding of the technical terms at the time of contracting, use of undefined technical language or terms of art can fuel subsequent disputes. For example, the meaning of "design development," "submittal approval," "phase one investigation," "construction observation," and "coordination," may be obvious to a design professional, but are not necessarily uniformly understood within the construction industry, and have little or no meaning to those outside of the industry.

Language Taken as a Whole

Because professional services contracts tend to be lengthy and are often composed of various components (e.g., a client's form contract incorporating by reference the design professional's proposal, and perhaps even various industry form documents), it is important to note that the law calls for contracts to be interpreted as a whole. Self-serving cherry picking of a phrase or clause to the exclusion of others is a common mistake that can lead to untenable interpretations. On the other hand, all language is not necessarily created equal, and the law recognizes certain priorities:

- *Specific terms trump general language.*
For example, a claim that a particular task is included within a broadly worded basic services scope might be turned aside by a specific reference to that task in the contract's additional services provisions. Similarly a general statement that the design professional will maintain familiarity with the progress and quality of the work can be effectively superseded by the careful delineation of what the design professional agrees to do.
- *Specifically negotiated or added terms trump boilerplate language.*
A handwritten last minute interlineation, therefore, is likely to carry the day against an inconsistent previously prepared typed provision. Thus, a mandatory arbitration clause might be made merely optional by striking out the word "shall," and inserting instead the word "may" and then having both parties initial the change to evidence their agreement.

Contractual Context

The law recognizes that contract language is not drafted in the abstract, and therefore provides that a contract is to be interpreted in light of all the surrounding circumstances. While the list of arguably relevant circumstances is as limitless as a lawyer's imagination, some particular categories of such circumstances deserve note here.

Previous Dealings

A course of dealing established between the parties before the formation of a particular contract can be quite persuasive in the interpretation of that contract's requirement. For example, uncertainty as to the design professional's scope of services could be resolved by the reference to the particulars of whatever services were provided, and accepted concerning prior similar projects. If the client has accepted construction documents in the design professional's customary format and level of detail on earlier projects, then arguably their current contract requires no more.

Industry Customs

Established industry customs and practices can be quite persuasive both in explaining the meaning of contractual language and in implying the substance of omitted contractual terms. For example, if a judge were given to understand that customarily the submittal review process is conducted in accordance with the provisions of the AIA A201 general conditions, then those provisions could be used to fill in the blanks left by a vaguely defined submittal review scope. In this same vein, conceivably well recognized industry practices concerning "coordination" could be used to remedy the common failure to define this difficult-to-define term.

Mistakes

The law recognizes that mistakes happen, and therefore provides that if by mistake a contract does not correctly state the intentions of the parties, then its interpretation may involve the disregarding of erroneous verbiage or the implying of reasonable terms to fill in provisions which have been inadvertently omitted. In some situations, the contract language itself can be formally changed, or "reformed." Just as there is no perfect set of construction documents, all professional services contracts contain some glitches, especially when they have been hastily cobbled together from bits and pieces of boilerplate forms by non-lawyers more focused on delivering a successful project than on drafting a legal document. While it would be poor practice to rely on subsequent legal interpretation as a substitute for careful drafting, it is important to understand that erroneous provisions need not necessarily be taken at face value.

Integration

A formal contract may well be made in the context of prior interim agreements or contemporaneous side agreements, and questions sometimes arise as to the parties' intentions as to such other agreements. If it is concluded that the parties intended for their formal contract to be the complete and exclusive statement of their agreements concerning a particular subject, then the contract is considered to be "integrated," and any interim or side agreements are considered inoperative. Standard boilerplate language often contains an "integration clause" stating that the contract constitutes the entire agreement of the parties so that any collateral agreements are to be of no effect; but as with other contract provisions, such a clause may not be conclusive. In any event, in order to avoid any future misunderstandings, real or feigned, it is generally good practice to include all related agreements in a single formal contract, and very poor practice to be induced by "off the record" representations of future leniency or favors into signing a contract which does not accurately state what you intend.

Interpretation Against the Party Causing Uncertainty

In cases where there is more than one reasonable interpretation, the law generally disfavors the party that provided the unclear language. If the parties jointly participated in the drafting of the language, then this rule has no application; but where, for example, one party has imposed its standard contractual language upon the other, then any ambiguities and omissions are likely to be interpreted against that party. Therefore, if a design professional contributes standard boilerplate basic services provisions to a contract, then those provisions are likely to be interpreted broadly in favor of the client; and if a client imposes its standard boilerplate terms and conditions upon a design professional, then those terms and conditions are likely to be interpreted strictly against the client and in favor of the design professional.

Legal Particularities

Every jurisdiction has its own legal particularities that may influence the interpretation of a contract, or perhaps even dictate certain specific terms without regard to the parties' intentions. For example, but just by way of example, certain indemnification provisions are prohibited in some jurisdictions; some jurisdictions automatically make even one-sided attorneys' fees clauses apply equally to both sides despite clear unilateral language; mechanic's liens rights are unwaivable in some jurisdictions; limitation of liability clauses are expressly authorized in some jurisdictions; and even within a jurisdiction, some courts are more inclined to declare unfair "take it or leave it " contracts void as "unconscionable, " or to use a contract's implied "covenant of good faith and fair dealing " to effectively add protective provisions not expressly set forth in the contract itself. In general, therefore, before an unfair contractual interpretation is accepted as inevitable, legal counsel experienced with the controlling jurisdiction's laws and practices ought to be consulted

Amendment

Ideally, when project developments affect the design professional's contract by, for example, requiring services beyond the basic scope and a corresponding fee adjustment, the need to amend the contract is identified promptly so that a thoughtfully negotiated and duly documented change order or addendum is generated. In practice, however, the parties are often overtaken by circumstances such that services proceed in the absence of a formal contract amendment. This might occur even though the design professional's contract contains a provision that prohibits any additional compensation absent prior written authorization. When this happens, various legal notions may be brought into play including both basic contract rules for amending written agreements by conduct, and related equitable rules for avoiding results which are technically correct but unjust. Exactly how a case for amending a contract should be made in any particular situation will necessarily turn on any number of factual and legal considerations; but at the risk of oversimplification, the following generalizations should be considered

Express Agreement to Amend a Written Contract

If the parties have proceeded pursuant to a verbal agreement to amend a written professional services contract, then -- even if the contract expressly states that an amendment can only be made by a duly executed writing -- the verbal amendment is probably effective at least to the extent that it has been performed and in any event the party resisting the verbal amendment may well have waived any right to do so. As a practical matter, however, even if for whatever reason the parties proceed with only a verbal amendment, then the thoughtful preparation of at least some contemporaneous documentation, say meeting minutes or a confirmatory letter or memo, is very much advisable. Problems of proof may well breathe life into the old Samuel Goldwyn cliché: "A verbal contract is not worth the paper it is written on."

Implied-in-Fact Agreement to Amend a Written Contract

Just as the fact of the formation of an original contract can be implied from the parties' conduct, so can the existence of an agreement to amend a written contract. If it can be established that the parties in fact intended to proceed pursuant to an amended contract, then that agreement can have the same effect as an express verbal agreement discussed above, the technical difference between an express contract and

an implied-in-fact contract being simply the manner in which the parties actually manifest their contracting intent.

Implied-in-Law "Agreement" to Amend a Written Contract

In order to avoid Draconian results that in many cases would follow the mechanical application of basic contract rules to complex and changing real world situations, the law sometimes implies obligations not for the purpose of giving effect to the parties' intentions, but rather to reach a fair result. These are referred to as "quasi-contract" obligations and are typically used in situations involving "unjust enrichment" in which one party has received benefits from another, but for some reason there is no binding contractual obligation to pay appropriate compensation. Thus, when professional services have been provided in a context in which compensation was reasonably expected the law can provide for the side stepping of technical contract defenses by allowing recovery for the reasonable value of the services rendered

Similar to quasi-contract, the law provides that a party which has intentionally led another to act on a particular belief, such as that fair compensation would be forthcoming, maybe "precluded" to dishonor that belief.

While these legal doctrines provide potentially powerful legal arguments for avoiding unjust consequences of contractual technicalities, it is important to note that their application is by no means guaranteed in all situations, and can be particularly problematic in situations in which the design professional's contract is the subject of public contracting statutes; and again, while a general understanding of the notions may be helpful, their application in any particular situation should involve appropriate legal consultation.

Conclusion

In conclusion, contracts often appear, and sometimes are, ironclad; and unfair contracts should not be entered into lightly with the notion that their consequences can be avoided. Contracts often mean what they say; and given that litigation is notoriously uncertain and expensive, even a successful legal challenge to a bad contract can be a losing proposition.

On the other hand the law recognizes that contracts are often poorly drafted and that even a well drafted contract simply cannot anticipate all possible future developments, and therefore provides an array of rules designed to result in fairness. Before a contract provision is allowed to result in an unfair or inappropriate consequence, careful consideration should be given as to how these rules might be used to reach a better result, ideally in consultation with experienced legal counsel.

In the final analysis, a design professional may well be bound to a bad bargain as the law provides little protection against poor negotiating and bad judgment; but by the knowing use of the rules of interpretation and amendment, even a cryptic and less-than-thorough professional services contract can be made to require even an overreaching client to deal with unintended consequences and unanticipated project developments fairly.



ProNet Practice Notes

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