

Get it in writing

How to incorporate agreements and promises into written contracts

Parties often have lengthy negotiations before they enter into a final written contract.

Various promises and representations are made and relied on during those negotiations.

“Be sure to incorporate all important terms and promises into the final written contract,” says Shelby Drury, of counsel with Novack and Macey LLP. “Later, if there is a dispute that results in litigation about the contract, the court is unlikely to allow either party to introduce evidence of promises or representations that are not stated in the written contract.”

Smart Business spoke with Drury about the admissibility of promises or agreements that are not stated in the final, written contract and how to draft a contract in a way that makes it clear whether or not the parties intend to incorporate prior or contemporaneous agreements.

How do courts determine the contracting parties’ intent?

Illinois courts generally follow the ‘four corners rule,’ which provides that a written contract speaks for itself and the intent of the parties is to be determined from the language used in the contract without looking at outside evidence.

What if a party relied on earlier promises or agreements that are not expressly stated in the final, written contract?

Generally, parties are bound by the contract as written and may not bring in evidence of additional promises or agreements. The ‘parol

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evidence rule’ bars evidence of prior or contemporaneous oral or written agreements and discussions or promises offered to explain or contradict the plain, unambiguous terms of a written contract. Significantly, the rule bars evidence of promises or agreements that contradict a written contract as well as evidence of additional consistent terms. The reason for this was explained by Illinois Supreme Court, which stated, ‘when parties sign a memorandum expressing all the terms essential to a complete agreement, they are to be protected against the doubtful veracity of the interested witnesses and the uncertain memory of disinterested witnesses’ concerning its terms.

Are there exceptions to the parol evidence rule?

Yes. If the court finds that the contract is unclear or ambiguous because its language is susceptible to more than one meaning, then the court may allow parol evidence to help resolve the ambiguity. Also, if the contract is incomplete, the court may allow evidence of additional consistent terms to supplement or explain it. Additional exceptions apply to contracts that are covered by the Uniform Commercial Code.

Is there anything that contracting parties can do for extra assurance that prior agreements or promises will not be admissible in a lawsuit concerning the contract?

It is wise to include an ‘integration clause’ in the final contract to make clear that the parties agree that:

- 1) the contract is complete.
- 2) negotiations and representations made prior to the written contract are not part of the agreement.
- 3) the parties intend that the contract be interpreted solely based on its plain language.

A typical integration clause provides: ‘This agreement constitutes the entire understanding between the parties hereto and supersedes and cancels all prior written and oral negotiations, understandings, representations or agreements with respect to the subject matter of this agreement.’

What if the parties want to include terms not included in the contract?

In that case, the parties should expressly incorporate such other agreements by reference in the final, written contract. They should do this by identifying the title and date of such agreements and expressly stating in the final, written contract that such agreements are incorporated by reference. ●