

Speak Softly and Carry a Big Shtik: Litigating the Oral Contract in Washington

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In order to understand a contract, you must understand its context. In Washington, that often means the commercial litigator must use parole evidence to understand and ultimately explain that contractual context to the court. Under *Berg v. Hudesman*,¹ parole evidence can also be used in certain circumstances to add to or to explain the written contract evidence.²

When the dispute concerns an oral agreement, however, the lawyer's challenge is more difficult. Unlike the common written contract, an oral agreement may be constituted completely of parole (or otherwise extrinsic) evidence, and there may be no bright boundaries between the "context" and the "contract" itself. Moreover, the courts are loathe to summarily deal with disputes over the existence of oral contracts because so much can depend on the credibility of witnesses.³ Thus litigating how to interpret an oral contract — or more usually, whether there even is an oral contract — can seem like shadow-boxing with Jello, in the fog, by moonlight.

There are certain legal principles the litigator can bear in mind that will help dispel the fog -- or, depending upon your objectives, tactics that will make the murk almost impenetrable.⁴

Is There a Contract?

Go back and read your class notes from Contracts 101. Whether a contract is written or oral, you do not have one unless the standard criteria are satisfied. Therefore, just like your preliminary analysis for any written contract, your analysis of an oral contract begins with the threshold question: Is there a contract at all? This question touches on all the basic goodies -- consideration, capacity to contract, legality of the contract, mutual agreement, and so forth.

Paradoxically, it can be easier to keep a purported oral agreement alive until the time of trial than if a written agreement were at issue. Of course, any "oral contract" can be bounced out of court on a CR56 motion if its proponent can muster no more than bare assertions that the oral contract exists.⁵ In addition to bald-faced assertions that there is an oral contract, there must be some outward evidence of the parties' mutual intent to enter into an agreement.⁶ "An agreement to negotiate a contract in the future is nothing more than just negotiations."⁷ In a nutshell, if all you have is one party's bare assertion that "we have a verbal agreement," and no other evidence of the other party's intent to make that verbal agreement, then you have nothing at all. Nevertheless, it is still substantially less difficult to conjure "evidence" of the other party's intent to enter into an oral agreement than it is to prove he intended to be bound by a written agreement when the signature line is blank.

If you are satisfied that there really is a valid contract, remember that oral contracts have a different statute of limitations than written contracts. Generally, an action to enforce an oral contract in Washington must be brought within three years of the alleged breach.⁸

Because consideration can be so minimal, it is usually not an issue. Capacity, legality and other issues are relatively easy to determine with reference to case law or statutes. The absence of

agreement is a given, of course, or why else would there be litigation? Thus, the central issue in a dispute over an alleged oral contract can often be whether the parties actually agree on the material points of the contract. If they do, they can join battle over what it all means. If they do not, then the inquiry ends there.

A contract means a meeting of the minds. While the failure to agree on mere details will not vitiate a contract, the failure to agree on material terms will.⁹ What is "material" depends on the subject matter of the particular dispute. However, it is a matter of law whether a term is material. This is one of those mixed fact-and-law questions which, in the final analysis, a judge must decide because there is no other practical option. Thus, whether the parties to a purported contract have or have not agreed on its material terms can be decided on a summary judgment motion or on a motion for a directed verdict.¹⁰ Otherwise, a jury of lay people could be placed in the incongruous position of either studying Corbin's hornbook on contracts as their jury instructions or writing the missing material terms of the contract for the disputants. The common-sense test is that if a jury gives a simple "thumbs up" to the question of whether there is a contract, would the parties be able to implement it without going back to the court to fill in the blanks? If not, the "thumbs up/thumbs down" issue should not go to the jury in the first place.

When it comes to contracts relating to real estate, the courts expect a substantial degree of precision. *Kruse v. Hemp*,¹¹ for example, citing the earlier case of *Hubbell v. Ward*,¹² describes no less than 13 material terms essential to the formation of an enforceable real estate contract. Essentially, "agreements to buy and sell real estate 'must be definite enough on material terms to allow enforcement without the court supplying those terms.'"¹³ Non-real estate contracts may require less precision, but they too may fail for lack of agreement on such material terms as the exact subject matter of the contract or its price.¹⁴

The courts are particularly loathe to force a party to specifically perform a purported contract when some of its terms are missing or ambiguous. To warrant a decree of specific performance, a contract must be definite and certain, and free from doubt, vagueness and ambiguity in its essential elements and material terms. The terms of the contract must be clear, definite, certain and precise. The terms must be so sufficiently free from obscurity or self-contradiction that neither party can reasonably misunderstand them. The terms must also be sufficiently clear so "that the court can understand them and interpret them, without supplying anything or supplanting vague and indefinite terms by clear and definite ones through forced or strained construction."¹⁵

The Statute of Frauds

Contrary to rumor, the statute of frauds is alive and well in Washington. It plays a particularly significant role in the litigation of oral agreements. The statute of frauds is not "a doctrine in equity, it is a positive statutory mandate which renders void and unenforceable those undertakings which offend it."¹⁶ There is a general "statute of frauds," a version codified in the Uniform Commercial Code (UCC) and various subrules, as well. Other than the UCC version of the rule that applies to the sale of goods, the rule generally nullifies oral agreements that are not capable of being performed within one year.¹⁷ There is a slightly different rule for real estate transactions. Every conveyance of or interest in real estate, and every contract creating an encumbrance on real estate, must be accomplished by a written deed, signed and acknowledged

by the appropriate people.¹⁸ The purpose of the real estate statute of frauds is "the prevention of fraud arising from the uncertainty inherent in oral contractual undertakings."¹⁹

When it comes to oral real estate transactions, you need more than just misleading conduct to take the "agreement" out of the statute of frauds.²⁰ You need "part performance." *Kruse v. Hemp*²¹ describes the passel of issues that should be considered when partial performance of an oral real estate contract is an issue. The doctrine comes into play when (1) there has been delivery and assumption of actual and exclusive possession of the property; (2) consideration has been paid or tendered; and (3) there have been permanent, substantial and valuable improvements related to the contract.²² Thus, the doctrine applies only in very special circumstances.

The statute of frauds also applies to employment agreements.²³ Generally, an employment contract must be in writing if, by its own terms, it cannot be performed within one year.²⁴ The emphasis is on whether the oral agreement can possibly be performed within a year. Thus, your oral agreement to hire the neighbor's kid to mow your lawn for the next three months is a valid and binding contract — it can (and will) be performed within a year. The same agreement for an 18-month period, however, is not binding unless in writing. Likewise, your oral agreement to employ a new associate until the end of the year or you drop dead from overwork is a valid and binding contract because, no matter when you made the agreement, it can be performed within a year or less. If you orally agree to give your employee stock options in your new dot.crummy company that she can have after 24 months of employment or when the company first turns a profit, that oral agreement also survives the statute of frauds. The reason is that as unlikely as it seems, it is remotely possible that your dot.crummy company could possibly turn a profit within a year, thus allowing your employee to purchase her stock options. On the other hand, an employment contract for a fixed period of more than a year must be in writing even if the employer has the option to fire the employee in less than a year's time.²⁵

Although the one-year limitation for oral employment agreements might seem arbitrary, the concept of the rule is not. The law simply requires that if a person would indenture himself to work for someone for more than a reasonable period of time, then there is every reason to require that the agreement be in writing. Like every writing, a written employment agreement requires more thought and more effort than an oral agreement — which is exactly why the law requires that something as potentially abusive as a lengthy period of contractual employment be reduced to writing.

Unlike real estate contracts, the doctrine of part performance emphatically does NOT apply to contracts for personal services otherwise within the statute of frauds.²⁶ Although the doctrine of part performance does not apply to verbal contracts for personal services, the doctrine of promissory estoppel may apply under certain circumstances.

In *Klinke v. Famous Recipe Fried Chicken*,²⁷ the court held that "a party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the statute of frauds, and then breaks that promise, is estopped to interpose the statute as a defense to the enforcement of the contract by another who relied on it to his detriment."²⁸ The essential fact in *Klinke*, however, was that the parties had agreed upon every essential element of the contract.

The parties understood that even the form of the contract — a franchise agreement for a fried-chicken restaurant — would be just like those used by the franchiser in other locations.

Thus, in *Klinke*, the prospective franchisee had already taken significant steps in reliance on the franchiser's promises, and, when the rug was pulled out from under the franchisee's fried-chicken feet, the only thing that truly remained uncooked was the final written agreement to be signed. Significantly, it was the franchiser who was supposed to draw up the agreement for all parties' signatures, and when he did not do so, that same franchiser tried to hide behind the statute of frauds. This clearly fried our fair-minded court. It called a fowl, and clunked Famous Recipe Fried Chicken over the head with a drumstick called promissory estoppel.

Klinke is that special case, however, when all the essential terms of the contract have been agreed upon. However, if all the parties have agreed upon is that, in the future, they will negotiate a final contract, then they do not yet have a contract.²⁹ Thus, if all you have is an agreement "which requires a further meeting of the minds of the parties and without which it would not be complete," you do not have a final, enforceable agreement at all.³⁰ Likewise, "preliminary negotiations and agreements do not constitute a contract" if the determination of definite details abides the drafting of the final written contract.³¹

In sum, although there are exceptions, and exceptions to the exceptions to the statute of frauds (and far more than are described in this article), the starting point is to ask the question whether it might apply, then determine whether there are subrules or exceptions that need to be considered.

The Uniform Commercial Code

Washington has adopted the Uniform Commercial Code (UCC) and codified it in RCW 62A. Although a lawyer should always reread this section several times when the issue arises, RCW 62A.2-201 broadly provides that "a contract for the sale of goods for the price of five hundred dollars or more" must be in writing. You can always wrestle with the code and the caselaw about whether your particular contract is for the sale of "goods" or whether the "price" was or was not within the \$500 limit. However, the purpose of the code is clear. It is meant to enhance trade by minimizing the friction and confusion that could result if "large" transactions for the sale of goods are not required to be in writing. Like the real estate statute of frauds, the UCC's purpose is to prevent fraud arising from the uncertainty inherent in oral contracts. The writing itself need not be of one piece, nor is it form specific. The minimum contractual elements of who and what, on what terms, and on what conditions must be in writing.³² Beyond that, it is fun-and-games time.

RCW 62A.2-209 governs the situation when there has been an alleged oral modification of a written agreement for the sale of goods. First, if the original written agreement provides that the agreement cannot be modified or rescinded except in writing in a prescribed manner, then you cannot modify or rescind the agreement except in writing, as prescribed. Second, RCW 62A.2-209 provides that any modification of the original written agreement must satisfy RCW 62A.2-201 (the statute of frauds) if "the contract as modified is within its provision."

Thus, if you entered into a verbal deal for the sale of a widget worth less than \$500, and then verbally modified the agreement to either increase the price up to (or beyond) the \$500 threshold

(or modified the agreement to sell multiple widgets for a cumulative price that exceeds the \$500 threshold), then your modified verbal deal is unenforceable. It must be in writing. With lawyers, however, there always has to be something "on the other hand," and here it is. On the other hand, if the original contract was in writing and satisfied the statute of frauds, then the modification to the written contract does not have to be in writing.³³

While many states may require that every modification of a written contract also be in writing, Washington does not.³⁴ On the third hand, however, the statute of frauds codified at RCW 62A.2-201(1) specifies that "[a] writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing."³⁵ The bottom line is that, at least in Washington, the parties can orally modify a written contract for the sale of goods that otherwise is within the statute of frauds, except that they may not orally modify the quantity of the goods specified in the original written sale agreement.³⁶

In Washington, the UCC restrictions on oral modifications of written contracts is only a special and limited statutory abrogation of the common law. In *Pacific N.W. Group A v. Pizza Blends, Inc.*,³⁷ the court held that even the written provision that a contract cannot be modified except in writing can itself be orally modified. "A paradox of the common law is that a contract clause prohibiting oral modifications is essentially unenforceable because the clause itself is subject to oral modification."³⁸ The theory behind the common-law paradox is that parties should be able to quickly verbally modify their obligations in exigent circumstances. Thus, as matters now stand in Washington, contracts that are subject to the UCC for the sale of goods may only be modified as the UCC permits; contracts not subject to the UCC, on the other hand, still fall within the common-law paradox.

Signposts for the Confused and Beleaguered

Litigating oral contracts can feel like you are drowning in the Okefenokee Swamp. There is no firm ground to stand on, you grasp at vines that slip through your grasp, you struggle to grab at anything firmly connected to something while you slowly sink beneath an ooze of indefinite testimony. All around you are the law birds screeching at you about the UCC or the statute of frauds or its exceptions upon exceptions, and nothing makes any sense as the murk rises above your chin. So here are some signposts to help you avoid the swamp.

- **Understand the facts of your case before you file suit.** This may sound rudimentary, and it is. In lay language, the rule is "look before you leap." Nevertheless, many experienced lawyers still trip over this basic principle. They usually stumble because (a) their clients have not told them the whole story, and/or (b) their clients have waited until the last minute to see their attorneys, and/or (c) the lawyers buy into their clients' version of the facts without the necessary detachment and rational assessment.
- **Collect your nonverbal, extrinsic evidence.** Eventually, you will have to buttress (or rebut) the claim of an oral contract with something more than the conflicting testimony of the feuding parties. As early as possible, you need to collect and categorize the extrinsic evidence that supports your case (and the other side's, too). That includes letters, memoranda, phone logs, drafts, paper napkins and tablecloths bearing any written notes

or scribblings or evidence of the parties' intentions. It likewise includes any records that substantiate how the parties acted, or refrained from acting, on the basis of the alleged oral agreement.

- **Remember that you are still in Berg-land.** *Berg v. Hudesman*³⁹ applies to oral contracts as well as written ones. The touchstone of Berg is the parties' intentions. And the key to any sensible interpretation of the parties' alleged oral contract is "what makes sense." Even when it comes to the statute of frauds, the courts will bend over backwards to do what is fair and right under the circumstances.
- **The statute of frauds is alive and well in Washington.** Read the statutes and the cases before you file. Understand what exceptions may or may not apply. If you are contemplating using the statute of frauds as a defense, remember to affirmatively plead it.⁴⁰
- **Who will testify?** Presumably, the parties themselves will be the principal witnesses in their battle to determine who said what to whom, and what it all meant, if anything. Sometimes, however, the parties' lawyers are themselves entwined with the purported "deal." Whenever lawyers will — or might — testify in a contract dispute, you need to consider the issues of disqualification and blown attorney-client privileges. The time to get out of that blackberry patch is before you ever step into it.
- **What will your jury instructions look like?** Generally, your jury can decide issues of credibility and weight, as well as what the "facts" are. It is unreasonable to expect jurors to decide whether the statute of frauds or its various permutations and exceptions apply. If your jury instructions resemble the Restatement (second) of Contracts, then it is probably error to let the case go to the jury in the first place. The situation is murky when everything is a mixed issue of fact and law; but then at least the "law" part of the mixture should be decided by the judge.
- **What will be your tactics?** Depending on your objectives, your client's interests may be best served by clarity and compartmentalization of the facts. Or, your client's objectives may be better served by a fuse-blowing overload of information that, through sheer mass and volume, discourages anyone from trying to figure out what is really going on. Whichever route you choose, you need to choose early because clarity and obfuscation are two incompatible paths to trial, and it is difficult, and late in the day to jump from one pathway to the other.
- **Does your story make sense?** Whether your audience is a judge or jury, your story about your oral contract has to make sense. This is your "shtik."⁴¹ Depending on whether you are appealing to 12 Boeing engineers, a dozen blue-sky salespeople, or a black-robed judge, you have to tell a compelling, consistent and fair story. You need to understand your own story and tell it convincingly. Because so much of the litigation of oral contracts is a hybrid of fact and law, your story must appeal to your particular audience sufficiently so that it will want to find a way to rule in your favor.

Conclusion

There are many legal hurdles to enforcing (or defending against) an oral contract. If those legal hurdles are surmounted, side-stepped or merely delayed until the last possible moment, then litigating the oral contract can be a gargantuan headache for lawyers and courts. The mere allegation of the existence of an oral contract implies aerosols of facts suspended in a mist of subjectively interpreted events sprayed over difficult legal concepts.

Patience, diligent homework and perseverance are great assets. As important, however, is a coherent, plausible and fair story line — your "shtik." When litigating the oral contract, remember to bone up on the law; study your facts; stay calm; and keep your story simple, compelling and easy to understand. Speak softly and carry a big shtik.

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NOTES

¹ 115 Wn.2d 657, 801 P.2d 222 (1990).

² See, Steven A. Reisler, *Dr. Strangelaw or How I Learned to Love the Berg*, *Washington State Bar News*, Sept. 1999 (page 22).

³ *Crown Plaza Corp. v. Synapse Software Sys. Inc.*, 87 Wn. App. 495, 501, 962 P.2d 824 (Div.1 1997), *Duckworth v. Langland*, 95 Wn. App. 1, 6-7, 988 P.2d 967 (Div. 1 1998).

⁴ This article points to certain legal issues and case law. It is not intended to be a comprehensive overview of the law governing oral contracts.

⁵ *Saluteen-Maschersky v. Countrywide Funding Corporation*, 105 Wn. App. 846, 855, 22 P.3d 801(Div 1 2001).

⁶ *Id.* at 855.

⁷ *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 608 P.2d 266 (Div. 3 1980) (emphasis added).

⁸ RCW 4.16.080(3).

⁹ *Sea-Van Investments v. Hamilton*, 125 Wn.2d 120, 128, 881 P.2d 1035 (1994).

¹⁰ *Id.* (generally).

¹¹ 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

¹² 40 Wn.2d 779, 785, 246 P.2d 468 (1952).

¹³ *Sea-Van*, 125 Wn.2d at 129, (citing *Setterlund v. Firestone*, 104 Wn.2d 24, 25-26, 700 P.2d 745 (1985)). See also, *Ecolite Mfg. Co. v. R.A. Hanson Co.*, 43 Wn. App. 267, 272, 716 P.2d 937 (Div. 3 1986) (in which the court affirmed the summary dismissal of an action to enforce a "contract" where the parties had not reached a final agreement on such material terms as the property description, forfeiture and default provisions, tax liabilities and protective covenants).

¹⁴ *Shuck v. Everett Sports Cars, Inc.*, 12 Wn. App. 28, 31, 527 P.2d 1321 (Div. 1 1974) (the parties did not agree on the price for the sale of a sports car).

¹⁵ *Osterhout v. Peterson*, 198 Wash. 166, 173, 87 P.2d 987 (1939).

¹⁶ *Smith v. Twohy*, 70 Wn.2d 721, 725, 425 P.2d 12 (1967).

¹⁷ RCW 19.36.010.

¹⁸ RCW 64.04.010 – 020. The statute is explained and clarified in *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 890-92, 983 P.2d 653 (1999) (Sanders, J., concurrence).

¹⁹ *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971).

²⁰ *Id.*

²¹ 121 Wn.2d 715, 724-25, 853 P.2d 1373 (1993).

²² *Id.* at 277.

²³ RCW 19.36.010.

²⁴ *French v. Sabey Corp.*, 134 Wn.2d 547, 951 P.2d 260 (1998).

²⁵ *Id.* at 553.

²⁶ *Id.* at 556-57, *Trethewey v. Bancroft-Whitney Co.*, 13 Wn. App. 353, 359, 534 P.2d 1382 (Div. 1 1975).

²⁷ 94 Wn.2d 255, 616 P.2d 644 (1980).

²⁸ *Id.* at 259 (emphasis added).

²⁹ *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552,556, 608 P.2d 266 (Div. 3 1980).

³⁰ *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957).

³¹ *KVI, Inc. v. Doernbecher*, 24 Wn.2d 943, 967, 167 P.2d 1002 (1946) (emphasis added).

³² A. Corbin, *Contracts* §507 (1950).

³³ *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 78 Wn. App. 637, 643-645, 898 P.2d 347 (Div. 1 1995).

³⁴ *Id.* at 644.

³⁵ RCW 62A.2-201(1) (emphasis added).

³⁶ *Costco Wholesale Corp.*, at 645.

³⁷ 90 Wn. App. 273 (Div. 1 1998).

³⁸ *Id.* at 277-278.

³⁹ 115 Wn.2d 657, 801 P.2d 222 (1990).

⁴⁰ CR 9.

⁴¹ Shtik: a Yiddish word that means a "routine," like a "comedy routine," or a "gimmick."