Legal Corner

Contracts by Fax: Are They Legally Binding?

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Modem technology has brought with it the facsimile machine. The use of the fax machine has become so commonplace that by the year 1993, it is estimated that 7 million units will be in use in the U.S. alone. The fax has been of great benefit to both the public and private sector in carrying out transactions. However, if there is a downside to the fax, it may lie in its enforceability under law.

Today, when faxing a legally significant document, such as a signed contract, the custom among cautious users is to mail the fax recipient the original paper as well. But the practice has two shortcomings. First, it doubles the paperwork. Second, the practice may raise some ambiguity. After sending a fax, dishonest persons might try to disavow the document before the original is mailed. They might argue that the necessity of mailing implies that the deal is not final until the paper is in the mailbox. As a result, the faxed contract has only served as being temporarily binding.

With the fax’s incorporation into mainstream business, many users are now questioning whether sending the original is really necessary. The answer to that question is not clear. As of yet, no court of law has directly ruled on the enforceability of a faxed contract, though the courts have hinted it is allowable.

With conventional telex, an older but similar technology, these problems seem to have been solved. Certain industries, such as shipping, consider a telex message sufficiently legally binding to stand on its own. Likewise, some government agencies are beginning to accept faxes for official filings without requiring the original documents to be mailed.

In order for a contract to be enforceable, the statute of fraud requires that it be in writing and signed by the party to be charged. Determining whether the fax meets both these requirements has been a source of much debate. The problem stems from the fax’s vulnerability to alteration before transmission and thus fraud.

Until there is a direct ruling on this issue, there are precautions the fax user can take short of sending the original, that theoretically should hold up in court. A solution to the writing issue might be for sender to state in faxed documents that the printout is a writing. This would preclude senders from arguing that the commitment was not in writing; however, it does not necessarily bind the recipient unless they sign the fax and send it back.

The signature requirement of the Statue of Frauds is not resolved so readily. Generally speaking, a signature is any mark that the signer intends to be a signature. Possible replacements for normal signature are the user’s use of network access code or password, confirmation by an answerback feature, or simply the inclusion of the sender’s typewritten name at the close of the message. This last method is the most desirable. It should serve as an indication of the intent to be bound by the contract terms.

Another way to deal with the signature issue might be for signers to state in their faxed documents that they adopt the signature printed by the receiving fax machine as an original signature: “Sam Smith intends the facsimile of this autograph printed by the receiving fax machine to be this original signature.” That may preclude any dispute over whether the fax printout is signed.

In addition, the sender could have the original document notarized before faxing it and have the notary document the event in his official records. Thus, originators could keep dated and notarized copies of all faxes so that they could prove which faxed documents they did and did not sign. What’s more, if there is a dispute over the genuineness of the notarized signature on a fax printout, a court could check the notary’s records to see if the signer did indeed come before the notary on the indicated date. If there was no record, then the validity of the signature would be suspect. Another step the recipient can use to further enhance reliability is by signing the fax, having it notarized and faxing it back. The originator can then compare the return fax against the original.

However, a technical principle of evidence law, called the best evidence rule, may come into play. It prefers that the original, rather than a copy of a document, be admitted. And it may appear that the fax printout is only a copy of the original. Therefore, the best evidence rule might impede a fax recipient trying to admit a fax printout into evidence. One way to bypass the best evidence question might be to state on the document that the sender intends the received fax printout to be an original counterpart.

Though the issue of the enforceability of a faxed contract is not yet decided, the trend by the courts toward permitting contracts by other electronic mediums would seem to indicate that faxed contracts should survive scrutiny under the Statute of Frauds. Until such time, the prudent fax user would be well advised to use the precautions I’ve discussed here.