CONTRACTS: THE WRITING IS THE KEY

When two or more parties exchange property (including money) or promises, they create a contract. These exchanges can take many forms. For example, when one person buys a book from another for cash, they have created (and fully performed) a contract. When an author promises to write a book in exchange for and receives a fee, the author and publisher have created (and partially performed) a contract. Finally, when an author promises to write a book in exchange for an advance plus royalties, the author and publisher have created (and not yet performed) a contract. Contracts that are not in writing are called oral contracts. As discussed below, contracts should usually be in writing.

Written contracts have been in use since the time of the Romans, and with good reason. A written contract helps eliminate potential disputes. With a written contract, both sides know the subject matter, terms, and conditions of their transaction.

Any written contract should include four key provisions:

I. The parties' names

II. The parties' obligations

III. Any event that would excuse performance

IV. The consequences of an unexcused failure to perform

Most states have a law called the Statute of Frauds. This statute was enacted to reduce fraud by requiring signed, written contracts. Generally, this law provides that if a transaction cannot be performed within one year or if it involves more than $500, it may not be enforceable without a signed, written contract.

Written contracts are particularly important in publishing due to the work-for-hire rules within the Copyright Act. Without a written contract that says otherwise, employers are deemed to be the authors of works that their employees create within the scope of their employment. In contrast, independent contractors are deemed to be the authors of works they create for their principals. Thus, employers or writers may need to make appropriate provisions in a written contract to avoid these rules.