Berkeley Law
Berkeley Law Scholarship Repository

Faculty Scholarship

1-1-1996

A View from the Tower

Justin Sweet
Berkeley Law

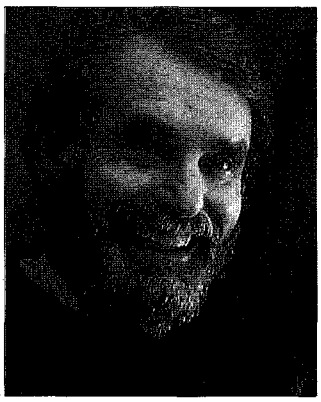
Follow this and additional works at: http://scholarship.law.berkeley.edu/facpubs

 Part of the Law Commons

Recommended Citation
Justin Sweet, *A View from the Tower*, 16 *Constr. Law.* 49 (1996),
Available at: http://scholarship.law.berkeley.edu/facpubs/2167

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

A View from the Tower



Justin Sweet

In my last Berkeley visit I saw an item in the *San Francisco Chronicle*. It announced the enactment of the A.B. 969, the first law requiring that contracts between architects and their clients be in writing. This was very exciting news for me. I saw in it the tie-in of two strands of my professional life. One was my generation of teaching contract law in Berkeley. The other strand has been a professional commentator on construction law, with special reference to keeping an eye on documents published by the AIA.

In my early years of teaching contract law we spent quite a lot of time on the Statute of Frauds. Professor Corbin's magisterial work on contract law originally included six substantive volumes. One was devoted to the Statute of Frauds. He attacked the Statute for failing to bring us the certainty we expected from rules of form. We operate quickly and often informally in routine commercial transactions. Rules which require us to take a breath, sit down, think about the deal we are making and put it all in one final complete writing do not appeal to us, he said. Legislatures keep enacting more such statutes while the courts seek ways around them, he noted.

But this was the period before the sociologists, the economists, and the feminists brought their approaches to the teaching of contract law. That was also before we dissected adhesion contracts, and trumpeted unconscionability and good faith as swords to batter outrageous contract terms and egregious performance tactics. In those days we had the time to try to find the law, to analyze it, try to make some sense out of it and to offer genteel reform proposals.

In those "The Way We Were" days we had time to study the Statute of Frauds. Which transactions required a written memorandum? (Remember the writing could come later.) When was a memorandum sufficient? Did any of the exceptions, such as part performance and most important, estoppel apply? Those were the old days, friends!

The first thought that entered my mind was whether the body of jurisprudence that was built around the Statute of Frauds would apply to A.B. 969. Would a subsequent memo work? Would the exceptions, principally that of estoppel, be applied? All of this was, of course, before I saw A.B. 969 itself.

When I read A.B. 969, enacted as chapter 117, I was surprised. I was not surprised to find it in the Business and Professional Code (B&P Code), that huge California ragbag of any law that can be connected to a specific business or profession. But I was stunned to discover it was not a classic statute of frauds at all! It does not state that validity required a written memorandum. A.B. 969 simply said that the architect "shall use a written contract when contracting to provide professional services to a client. . . ."

A.B. 969 also stated the contract must include provisions as to services, compensation, procedures for additional services and termination, the sensitive issues in the architect-client relationship. Not only is it *not* a classic Statute of Frauds but, based upon a quick review of the B&P Code, there appear to be no sanctions, such as license suspension or revocation, for violation of A.B. 969. The legislature is telling architects to "get it in writing" as part of good professional practice. But there is more to it.

I was informed that many disputes between architects and their clients are brought to the California Board of Architectural Examiners (CBAE) through client complaints. Clients often do this to hold the club of license suspension or revocation over architects and, in the process, avoid cost of litigation by getting a settlement. In "handshake" contracts the CBAE felt it was not competent to resolve credibility issues. In this case, it would suggest litigation. If the architect can back up his position with a written contract, often the complaint can be dismissed and litigation likely avoided. (Obviously, it helps in litigation, too.) Although the rationale of A.B. 969, avoiding credibility disputes, is related in some ways to the Statute of Frauds, A.B. 969 does not use the validity approach. My two strands were not joined.

Let me make one final comment. What about national AIA, the organization I watch most in my second strand? They were not involved in A.B. 969. I have been told national was not aware of it until A.B. 969 was enacted. It was purely a local affair.

The AIA has always been against handshake agreements. It has published B 151 in still long and legalistic. I have been informed that the American Institute of Architects California Council (AIACC) has developed a one-page contract which will comply with A.B. 969. Will California architects use this "one-pager" not only in "handshake" deals, but where they might have used B 151 or even B 141?

If I were at national AIA I would watch the sales of the national and AIACC forms. If the AIACC is used a great deal (and national forms drop), this may signal national AIA that its documents are frighteningly detailed and too "legalistic" in the eyes of architect users.

More important, if other states follow California and enact similar legislation, this can adversely affect the use of national documents, such as those put out by the AIA. In the long term, with more states enacting legislation on construction contracts, particularly relating to payment, this can cause users to choose state forms, if they develop, in preference to national ones. This must be watched.