

Is Backdating Legal?

by Stephen Forster - s.forster@tamimi.com -

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I am sure that from time to time we have all come across the vexed question of backdating documents.

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A client or, in the case of an in house lawyer colleague (who for the purposes of this article will also be considered a client), asks you to prepare a document and then your heart sinks as he says “oh and it has to be dated” and gives a date which has already passed. Is it legal to comply with the request or must it always be refused outright? Alternatively, is there a way of legally trying to achieve the required objective?

If the document is putting in place something which “should have been done” but hasn’t been, usually for tax or similar reasons, then the position is straightforward. For example, if a seller had sold his house in December then the seller could have taken advantage of certain tax benefits. However, he only realizes this in January and so wishes to backdate the document to December. The event did not happen during the time period required for the benefit so an attempt is being made to pretend that it did. This is a fraud on the tax authorities, a criminal offence and is likely to get the lawyer who prepared the document disciplined by his regulator and possibly also charged as a co-conspirator. For obvious reasons, any request to backdate a document for these reasons should be flatly turned down.

However, an explanation often given by the person wanting to backdate the document is that the document is merely meant to reflect an oral agreement that has already been made and that this is just a way of documenting it. In theory, this would appear on the face of it to be a reasonable request, as it is just a private arrangement between two parties. The argument is obviously not valid if the transaction is one which is required by law to be in writing such as a transfer of land. This is not an agreement that could have been made orally. However, even if it is an agreement that could have been made orally the lawyer preparing the agreement has no way of knowing whether that is actually the case and that the agreement to be fully documented by him is the one that was reached at the earlier date. He also has no way of knowing whether the backdating will be scrutinized by a regulatory authority or even a Court. For example, will the document be provided in support of the party’s tax position giving the impression that a signed legal contract was in place before it was?

The difficult question for a lawyer to answer is to what extent does he have to enquire into the veracity of his client’s statement that the document “is just recording an earlier agreement”? Does he need to check to see whether that was actually the case or can he take an ostrich-like position and put his head in the sand and not ask any questions? Is there an obligation on the lawyer to make at least reasonable endeavours to confirm that he is being told the truth? Unfortunately, there is no simple or straight forward answer to this and it comes down to how comfortable the lawyer will be defending his position in agreeing to backdate the document if his judgment was wrong and the authorities challenge the document, possibly in a criminal complaint against the client. What confirmation of the earlier agreement did the client or the company for which the client (and lawyer) works provide? Is the client a longstanding one who has always acted properly in the past? How well does the lawyer know the client? These are questions he will probably be asked by the judge or regulator if things go wrong and to which he will need convincing answers.

There are some ways in which the lawyer can give himself some protection in agreeing to such a request but they are not foolproof. For example, if one wishes to backdate a document for the purposes of recording an earlier oral agreement, it should nevertheless still be drafted in such a way so as to avoid giving the incorrect impression that it was actually signed on the date stated. The best way to achieve this is to state openly in the document that it is recording an earlier oral agreement made on, and so is with effect from, a particular date and then date it the actual date it was signed. The position is then clear to all who subsequently look at the document. Another way is to state at the beginning of the document that it is made "as of" the required date. However, the actual date of signature should nevertheless be set out in the attestation clause at the end to avoid any claims that the document was intentionally misleading. Needless to say, even these methods of "backdating" a document should not be used when there was no earlier agreement and the document is just an attempt to give a false impression that something occurred on an earlier date than it did. Because even putting "as of" a certain date will not protect the lawyer from implication in a criminal act if the purpose of the backdating is actually to defraud or mislead the taxman, any regulatory authority or even any other individual and the lawyer knew or should have known that this was the case.

So as can be seen, the issue of backdating can be a contentious one. It is not straight forward and can give problems to any lawyer that agrees to backdate a document, even if he makes it clear on the document that it is backdated, as he must be careful to make sure that he knows why the document is being backdated and that it is being done for a legitimate reason. Therefore, if in doubt it is best to say "no" or to take external legal advice if appropriate.