



## *Managing Your Risk...*

A Top Ten List on How Best to  
Avoid Spending Time with Lawyers!

Michael P. Sams, Esq.  
Kenney & Sams, P.C.  
45 School Street  
Boston, MA 02108  
(617) 722-6045



## **Top Ten Ways to Avoid Legal Intensive Care**

1. A handshake is not enough.
2. Avoid Construction risk.
3. Obtain indemnification protection.
4. Obtain additional insured status.
5. Manage the risk of payment disputes.
6. Manage the potential cost impact of delay.
7. Define the claims process.
8. Do you really want to require arbitration for dispute resolution?
9. Watch what you say during hiring.
10. Review your employment relationships.



## Require A Written Contract

Handshakes are a fine way to say “Hello” ... but they don’t define a legal relationship.

1. The written contract will explain all rights and responsibilities – not all are the same.
2. Should be unambiguous.
3. Should contain a merger clause and a provision requiring that any future changes be in writing.
4. Review any incorporated documents to assess your risk.



## **Require A Written Contract**

- payment amount and process
- the work
- claims process
- termination process



## **Avoid Construction Risk**

1. Periodic inspections.
2. Even if supervising, don't warranty the construction.
3. Means & methods.
4. Can you get relief from some design risk? (§3.2.2, 3.5.2)



## Indemnification

1. How it works?
2. What indemnification language is too broad and why should you care?  
(c. 149, §29C; savings language)
3. Savings language – “To the fullest extent permitted by law.”
4. Recent development
  - “but only to the extent caused by...”
5. Indemnifying the architect/engineer?
6. Will a contractor agree to indemnify the architect?
7. Do you still need to carry insurance if you’re protected by indemnification language?



## Become an Additional Insured

1. The financial benefit of being an additional insured.
2. Why additional insured status is different than indemnification.
3. “Other insurance” – making the other policy primary if you’re the additional insured – “Primary and non-contributory.”
4. How to confirm you’ve been added? Get a certificate saying so and be added as a certificate holder.
5. Why the contractor pushes back on adding the architect/engineer as an additional insured.



## Manage the Risk of Payment Disputes

1. Contingent on owner financing?
2. Do you get paid if the general contractor is wasting your time?
3. What you need to know if you are the owner's consultant.
  - a. Lien protection
    - The blanket bond
    - The target bond
  - b. Pay when paid.
  - c. Lien waivers.
  - d. Indemnification.



## **Manage the Potential Cost Impact of Delay**

1. Regular Schedules
2. Liquidated Damages
3. Responsibility for making up delay



## **Define the Claims Process**

1. What is a claim?
2. What is the architect's role?
3. How is the claim made?
4. To whom does it apply?
5. What happens if the claim process is not followed?
6. What happens if a party rejects/disagrees with the decision rendered on the claim?



## **Arbitration... Are you sure?**

### Pros:

1. Faster process.
2. Discovery during arbitration.
3. Finality of result.

### Cons:

1. AAA is expensive.
2. Choosing the arbitrator.
3. Discovery during arbitration.
4. Continuity of the hearings.
5. Finality of result.

### Conclusion:

1. Good as an option but not necessarily as a requirement.



## **Watch What You Say During/After Hiring**

- Discrimination liability can occur during the interviewing / hiring process through the questions you ask.



## **Reassess Your Employment Relationships**

- Employee or Independent Contractor?
- You may be surprised.



## The Three-Step Test

- **Pre-Amendment Step 1**
- Such individual has been and will continue to be free from control and direction in connection with the performance of such service under his contract; and
- **Amended Step 1**
- No change to Pre-Amendment Step 1.



- **Pre-Amendment Step 3**

- Such individual is customarily engaged in an independently established occupation, profession or business of the same nature as that involved in the service performed.

- **Amended Step 3**

- Such individual is customarily engaged in an independently established **trade**<sup>1</sup>, occupation, profession or business of the same nature as that involved in the service performed.

<sup>1</sup>Emphasis added to show the only change in this step.



- **Pre-Amendment Step 2**

- Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all places of business of the enterprise; and

- **Amended Step 2**

- Such service is performed outside the usual course of the business of the employer.



## Manage Your Risk

- This was not an exclusive list.

Understand and minimize your risk now. This will increase your legal health and help you avoid lawyers later.