

THE ELEVEN ESSENTIAL COMMANDMENTS FOR CONTRACTOR SURVIVAL
by Jonathan Sauer

Introduction

I am now in my thirty-first year of being a lawyer. At fifty-seven years old, I am literally hoary with age. (Not to worry: Sally, my wife, knows about this and has no problems with my 'hoariness'!) I am so old that when God and I speak - we discuss Patriots' matters frequently, particularly in-season and around the April draft and in recently discoursing on why Laurence Maroney did not live up to his pre-season potential - he refers to me as "Mr. Sauer"! Once I caught him saying "Methuselah" under his breath, a reference to the person who lived the longest in the Old Testament: approximately 969 years. (Later in the Old Testament, when God ruminated on how tiring and boring people got to be, he limited life to a more reasonable 120 years!)

Those of a similar age probably suffer some of the same indignities of age. They, like me, go into a room and, once there, have no idea why they are in that room. Or, they'll pick up a piece of paper to do something with it and thirty seconds later have no idea where they put it. Or, they'll see a face on television - someone they've known for years - and can't remember the person's name for ten or fifteen minutes. I am told that there are other problems having to do with little blue pills, although this is something I personally haven't looked into (yet)! At the same time, much as Doug Flutie never realized that he was too small to play football, I still basically feel like a young man. Sitting on my new Kawasaki ZX-14 - the fastest motorcycle on the planet (until next year!) - I tend to feel pretty young. (One better be young as these things do 186 mph right out of the box!) This type of bike is frequently referred to as a 'crotch rocket'.



Parenthetically, like most older riders, I also ride a Gold Wing, a ‘Japanese’ bike which happens to be built in Maryville, Ohio. My younger son, like many other young people, referred to this as an ‘Old Man’s Bike’ until after he rode it the first time and nearly buried himself in a turn after grabbing too much throttle. There is enormous torque in its six cylinder engine. Its cruise control is factory-designed to be set between 30 and 100 mph!

These bikes are quite large and very luxurious. These have unusual nicknames with geriatric overtones, tied into various engine sizes along the years. (It has been built for more than thirty years.) Four cylinder models 1200 cc and smaller are referred to as “Old Wings”. The smaller 1500cc six cylinder model is referred to as a “Wingabago”. And, the larger 1800cc six cylinder model - the one I ride - is referred to as a “Couch Rocket”!) The new ones even come with air bags!



There is, however, compensation for age and experience and that is what one *learns* from all of these accumulated years and experiences. Speaking as an attorney, I have to think that the individual legal matters I have handled must number in the thousands. The majority of things I do today are things I have done many times previously in the past. Past experiences, then, give us a basis for comparison against other experiences and outcomes as an indication of how any particular current matter might be handled.

So, fair warning, this article may be a fit folksier than previous articles. Doubtlessly, I have been influenced in these regards by Garrison Keeler in his wonderful recent movie “A Prairie Home Companion”, which I enjoyed and heartily recommend. Blame it on him!

In this movie, there is a wonderful monologue he gives, clearly indicative of and influenced by the Minnesota Scandinavian and extremely cold-weather view of the world, which applies to our business. It goes something like this: “If suddenly you find yourself with things going well, be patient, and the situation will return to normal soon enough”!

There are attorneys out there who have a client bring a matter in and, after a fashion, say something like this: “Give me X dollars and I’ll get started on this.” I, personally, don’t see this as doing the job. I try to look at a potential file and imagine what it is going to look like when it is over. In contract litigation, there are not generally Perry Mason - like surprises in the courtroom. As Bill Belichick says, you play in games as you practice all week. Meaning, in a legal context that since a matter has certain facts, documents, witnesses and applicable law at its beginning, assuming that none of these changes in any material way, how a particular matter is going to turn out can be predicted fairly early on *in most cases*. I hasten to say that situations change when people die, when companies go out of business, when a particularly poor lawyer is substituted for a particularly good one and things of that nature. Since there are always exceptions to prove the rule, I’ll give you three. (If you find ‘war stories’ boring, skip over to the other pictures of bikes or the jokes.)

One example is that I had a situation a couple of years ago where a subcontractor had a six figure payment bond claim against one of my generals and the subcontractor had an excellent attorney. We went in for trial assignment and, arriving early, I spent a few minutes shooting the breeze pleasantly with the female clerk. When the matter was called, the plaintiff’s lawyer asked for assignment for trial for about two months out, which would be unusually quick for a superior court case in this county. In the conversation about the date, I said something like this: “Well, we all know how superior court judges *love* construction cases!” She looked at me and said “trial in seven months”, which is an unusually *long* period of time to wait for a trial. About three months later, the subcontractor closed his doors. Then, a financing bank, which owned the corporation’s receivables, had their own attorney enter an appearance for the withdrawing personal attorney. After a period of time, the case was settled for extremely short money. You see, the subcontractor wanted to get what he perceived as his contract balances, notwithstanding that there were some significant and legitimate backcharges. The bank was only interested in what *salvage* it could get, without any particular concern about the merits of this particular *contractual* matter. My particular suspicion is that the first attorney knew that the subcontractor was going to close in two or three months or was likely to close. He wanted to get his case in before that event as his attorney’s fee was guaranteed by the payment bond and applicable

payment bond statute. The trial assignment made that impossible. (As an aside, at Sally's swearing in for the bar, the Clerk of the Supreme Judicial Court told the new admittees that: "Judges can hurt you but clerks can *kill* you"! While most of the 'newbies' laughed, she was telling the truth.)

Sometimes the change is due to a change of status of the corporation. I had the two small principals of a painting company come in one time. They were being sued by their workmens' compensation carrier based on a several year audit of their employee classifications. They painted bridges and, for the uninitiated, this is a fairly complex business due to an overwhelming number of OSHA and other regulations having to do with the fact that bridges are painted with lead paint. (A bridge painter I represented once received an OSHA citation because one of its bridge painters had a beard, which caused the mask to not fit as well.) It seems that this company had classified some of its painters as office workers which achieved for it, to be sure, significant premium reductions on its workmens' compensation insurance. The insurance company was suing for a quarter million dollars and the complaint was filed by a fancy Boston firm and was accompanied by mounds of paper, such as interrogatories and document requests, maybe other things.

The only thing is that the two individuals were closing the company down and going their separate ways. As will be discussed below, individual owners are not generally liable for corporate debts. An exception, however, is fraud and one can argue that the two business owners *might* be personally liable for fraud. A court might find that the misclassification of the bridge painters as office workers was something more than simple negligence and, consequently, the two owners might have to personally pay this gargantuan bill.

(ED: The Triumph Rocket III has the largest motorcycle engine in the world - 2300cc - in a three cylinder engine, which is an unusual configuration. Surprisingly smooth, notwithstanding. Breathtakingly powerful. When a factory representative was asked by a bike magazine writer how fast the bike is, the answer was 155 mph. The rep added: "After that speed, our rider could no longer hold on!")



The corporation was dead and it had no assets. I was only concerned about the potential personal liability of the two owners. So, I told the insurance company's attorney that I would give him a judgment against the corporation for a quarter million dollars without a fight. As consideration for that, I wanted him to release the two business owners for a payment of five thousand dollars apiece. I was able to convince him to do this. (Keep in mind that releases typically contain the wording "for valuable consideration" and releases that are not accompanied by money paid may be less likely to be enforced in court.) And, we never heard from the lawyer again and, presumably, both former painters are living happily ever after.

A third case goes back to the 1970s'. A client brought in a case on a VA Hospital. There was a requirement in the specifications that: "The contractor shall completely fill all underground oil tanks" as part of the contract. There were four thirty thousand underground tanks and the price of oil had just sky-rocketed. So, the contractor wanted to put it in as a claim. His argument was that since the clause didn't actually say he had to *supply* the oil, his interpretation was that if the Government would only back *its* trucks up to the tanks, the contractor would stick the nozzle into the tanks and fill them!

When I first heard this, I raised my eyebrows. (In fact, thirty years later, I *still* do.) We tried the case for several days before the Board of Contract Appeals for the Veterans Administration and a Judge awarded us full compensation for the value of the oil plus interest. This was the only case the Government's lawyer ever lost and he subsequently went on to become a judge.

So, happenstance - and good lawyering - can sometimes affect the above-stated rule that a case is pretty much going to try and achieve the same result as it would appear to as of the first day one looks at the file. So, taking a look at the basics is more than worth the effort.

In thirty years, I have participated in more bankruptcies than an organized crime family's leader has attended funerals. That's enough to depress anyone; look at Tony Soprano! It is, actually, a *very* apt comparison, as a bankruptcy represents the death of a company and of its owners' dreams and hopes (and of their family's dreams and hopes.) Frequently, there are tax liens and suits by financing company banks and bonding companies when a business fails. It is axiomatic that business failure, sadly, is often accompanied by divorce of the principals. While life does inexorably go on, for those who have been through this process, happy times seem to be in the *very* distant future, if then.

In the past fifteen years or so, I have given seminars too numerous to count, have written portions of three books on construction law, have put out *Scribbles* and have the most information-packed lawyer's website that I have ever seen in the entire United States. (If you want to see for yourself, go to www.sauerconstructionlaw.com and click on "Articles".)

The thought has been and remains that in construction contracting, much as in most other areas of life, an ounce of prevention is worth a pound of cure. I have done these things - at great cost - not so much as to market the firm but as to help organize, guide and protect and give back to the industry which it has been my honor and privilege of representing for the past near third of a century.

Numerous legal codes have tried to organize and control human behavior. These include codes such as the Napoleonic Code, the Code of Hammurabi, the Magna Carta and the Mayflower Compact. More recently in America, we have the Declaration of Independence and then the Constitution. The Ten Commandments is at the very core of two large religions and describes how one can lead a better and easier life.

(ED: Any rider over 40 *has* to have a Harley. In 2004, the engine was, for the first time, rubber-mounted, and the Sportster became overnight a lot more rideable. And, *no*, the Sportster is not *just* a 'girl's bike'! Anyone who so alleges has simply never muscled one of these beasts around a corner!)



How can a construction business survive, even prosper. Here are eleven essential rules to live by. Not only read them: *engrave them on your hearts!* Like most of my other articles, the legal references are specifically to Massachusetts law. The principles are, however, nearly universal in application.

1. How you operate as a business

I know of many individuals who have lost their homes because they had not incorporated. From a legal standpoint, “John Jones” is a different entity and person from “John Jones Construction Corporation”. From a legal perspective, provided the corporation operates as a corporation and separate entity - i.e. bills aren't paid from the owner's personal bank account - generally speaking, no individual officer, director or owner of a corporation is liable for the corporation's debts absent fraud or the officer's committing of a tort or other business wrong himself. Here is what the cases say about corporations:

A corporation is an independent legal entity, separate and distinct from its shareholders, including corporations that hold shares in other corporations. Spaneas v. Travelers Indem. Co., 423 Mass. 352, 354, 668 N.E.2d 325 (1996). The general principle is that corporations are generally to be regarded as separate from each other and from their respective stockholders.

Marsch v. Southern New England R.R., 230 Mass. 483, 498, 120 N.E. 120. Corporations are generally to be regarded as separate from each other and from their respective stockholders where there is no occasion to look beyond corporate form for purpose of defeating fraud or wrong, or for remedying of injuries. My Bread Baking Co. v. Cumberland Farms, Inc., 233 N.E.2d 748 (1968). The rule in the Commonwealth of Massachusetts is that corporations are to be regarded as separate entities where there is no compelling reason of equity to look beyond corporate form for purpose of defeating fraud or wrong, or for remedying of injuries. Gottlin v. Herzig, 662 N.E.2d 706 Mass.App.Ct.,1996.

As to limited liability companies, which have been available as a business form of organization since 1996 in Massachusetts, this is provided for by Massachusetts statute:

M.G.L.A. 156C § 22. Debts, obligations and liabilities of limited liability company

“Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company; and no member or manager of a limited liability company shall be personally liable, directly or indirectly, including, without limitation, by way of indemnification, contribution, assessment or otherwise, for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.”

Now, under either form of business organization, you have some - probably *a lot* - of personal protection. Organization costs are fairly minimal. The last corporation I formed had a filing fee to the Commonwealth of \$200. Limited liability companies are probably more.

Of course, you will have legal fees and expenses. Just answer some questions, if you have a problem with this:

- How much did you pay for your house?
- If someone were to take it away from you, where would you and your family live?
- (Partially tongue in cheek) what will happen to your *pet* if you go into an apartment?

I say the last only partially tongue in cheek because I had a situation where two homeowners bought a new house together to start their second marriage. Sadly, the house, which was quite nice, actually, and a pretty good value, had been built on a lot that, in its present condition, was not buildable in that it was built over essentially a large pile of dirt which had no structural strength. The house began to actually sink and badly. Cracks appeared in the walls and in the concrete floors. The front steps sank so far as to no longer be steps. The back deck ripped away from the house because of the settling. The outside electric meter literally pulled away from the house. The couple wanted to sell the house but I advised them that I thought that by doing so, they might be incurring some potential liabilities and exposures from the new owner(s). Quite simply, the house was not in marketable condition.

After forcing the original developer to buy back the house for what was paid for it - giving my folks a couple of years rent-free - the couple, unfortunately, divorced. The wife

bought a new condominium which she loved. However, that condominium's rules - which she didn't learn about until after she closed and was actually living there - prohibited in no uncertain terms dogs. She had this absolutely cute elderly pug, who was not likely to live more than another couple of years. Notwithstanding, she moved rather than give up her beloved pet!

Parenthetically, on the date I met with the developer at the house to convince him to take the house back, I was all alone in the house for hours with that pug. I had never met a dog like this pug before. A pug is a massive dog (in a small dog's body), which thinks of itself as a large dog. It has very human expressions in its rounded almost monkey-looking face and is loving and a lot of fun! I almost ran off with that dog and that very night, went to a pet store and slapped down an obscene amount of money on a pug we still have ten years later! His name is Pig. (Pug owners will understand.)

If you think that paying a couple of grand for this protection is not a good value, thirty years' experience suggests that perhaps you may not have the right frame of mind to be in business for yourself. Don't take this personally; it's not a value judgment. There are people who are destined to be business owners. Most folks are destined to being employees. A lot of people in business for themselves simply couldn't find the right job or *keep* the right job.

(ED: When I grew up, a BMW was about the classiest and most exclusive bike one could ride. It has had the same essential engine design for the last seventy years. They last forever and the new ones pack 110 hp into two 'boxer' cylinders. Below is the Rockster. This bike comes with heated grips and power, ABS brakes.)



2. Put a homestead on your house

Now, we start with the premise that doing business as a corporation or as a limited liability company gives you some protection against personal liability for your business debts. However, as pointed out, claimed fraud is an exception. There can be personal tax liability for business owners with regard to withholding taxes. And, for certain creditors, you are going to have to personally guarantee your company's credit, such as banks (line of credit), bonding companies (surety bonds) and some material, supply and equipment rental companies (particularly for new businesses).

So, there is a good chance that someone may find a way to get at your personal assets for something related to your business.

Everyone's biggest investment is in their home. Massachusetts offers \$500,000 of **free** asset protection for your house for the cost of a thirty dollar filing fee at your local Registry of Deeds:

Chapter 188. Homesteads § 1. Right to acquire homestead; exemptions; definitions

“An estate of homestead to the extent of \$500,000 in the land and buildings may be acquired pursuant to this chapter by an owner or owners of a home or one or all who rightfully possess the premise by lease or otherwise and who occupy or intend to occupy said home as a principal residence. Said estate shall be exempt from the laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies except in the following cases:

....

(2) for a debt contracted prior to the acquisition of said estate of homestead;

.....”

Now, there are other exemptions. But the one I have given - number two above - makes it clear that a homestead doesn't cover antecedent debts. In other words, once you are seriously deep into the cow patties, it may very well be too late to file an *effective* homestead. (You can, of course, still file one; the Registry of Deeds is always happy to take your money.) But, the homestead may be susceptible to being set aside.

Folks, this one is a no-brainer. If you don't have one, stop reading this article and go and file one *right now*. The Registry has a form and you simply have to fill in the various blanks and hand them a fairly modest filing fee. For those from states other than Massachusetts, consult your local laws on homesteads, as they vary from state to state and are, generally, statutory.

3. When you bid a job, make sure you have all of the bidding documents

The most important thing from a legal standpoint is to make sure you have all the bid documents. By my experience, it is not uncommon for particularly subcontractors to only get their specification section and appropriate plans.

The problem is that, as a matter of law, someone who signs a subcontract or a general contract and has not read all of the documents is bound by them if they are listed in the contract as contract documents. This is known as the ‘incorporation by reference’ doctrine. So, it isn't a defense that you can't get all of the documents or the general (or owner) won't give you all of the documents. If they are listed in the subcontract or general contract and you sign it, then you are bound.

Here's the law on this:

In absence of fraud, person who signs written agreement is bound by its terms regardless of whether person reads and understands those terms. Tiffany v. Sturbridge Camping Club, Inc., 32 Mass.App.Ct. 173, 587 N.E.2d 238 (Mass.App.,1992). In absence of fraud, one who signs a written agreement is bound by its terms whether he reads and understands it or not, or whether he can read or not. Cohen v. Santoianni, 330 Mass. 187, 112 N.E.2d 267 (Mass.,1953) Where what is given by one to another purports on its face to set forth terms of a contract, one who receives it, whether he reads it or not, by accepting it assents to its terms and is bound by any limitation of liability therein contained, in absence of fraud. Kergald v. Armstrong Transfer Exp. Co., 330 Mass. 254, 113 N.E.2d 53 (Mass.,1953) Ignorance through negligence does not relieve a party from his contractual obligations, unless the negligence is not inexcusable. Century Plastic Corp. v. Tupper Corp., 333 Mass. 531, 131 N.E.2d 740 (Mass.,1956). Where what is given to a person purports on its face to set forth terms of a contract, a person assents to its terms by accepting it, whether he reads it or not, and is bound by any limitation of liability therein contained, in absence of fraud; but where what is received does not purport to be a contract the person receiving it is not bound by limitation of liability unless actually known to him. Polonsky v. Union Federal Sav. & Loan Ass'n, 334 Mass. 697, 60 A.L.R.2d 702, 138 N.E.2d 115 (Mass.,1956).

Not reading your contract or looking at all of the documents creates zero defense for you when, down the road, someone demands performance according to those portions of the contract you have never even seen. The old maxim 'ignorance of the law is no defense' is quite true, particularly in this context.

A final word to filed subbidders. There is a case which is regarded as saying that a filed subbidder is only required to look at his specification section and referenced drawings. The problem with this is that this is not what the case *actually* says. The case doesn't go that far. Any reader who wants to actually read the case - John F. Miller Company, Inc. v. George Fichera Construction Corporation, 7 Mass. App. Ct. 494, 498-500 388 N.E.2d 1201 (1979) - call me and I'll fax it to you.

(ED: A Kawasaki Vulcan Nomad looks like a 40's Harley dresser but has very modern technology. High on torque but low on horsepower, it's a highway cruiser to be ridden leisurely. Very comfortable ride.)



4. Read the contracts you sign

It seems sadly axiomatic in the construction and construction law business that folks tend to only *really* read the contracts they have signed when a problem appears that will not seem to go away. Particularly smaller subcontractors are interested primarily in scope and price. The more sophisticated subcontractors - and general contractors - additionally are interested in time and schedule issues. Reading your entire subcontract is as important as making sure you have all the bid documents before you bid based on exactly the same legal principles as indicated above.

It's *all* important. Of particular importance, read the "changes" and "disputes" clauses to be sure you understand how to process changes, disputed or not, *before* the problem develops.

5. Put things in writing.

When things go wrong on the job - as they inevitably will do - document these things in writing. Send more letters. Don't rely only on telephone calls. Emails are better than telephone calls but not quite as good as letters on letterhead.

When the case arising out of these circumstances actually gets tried three years from now, there is a good chance that key employees will no longer be available to assist you with their knowledge of the situation. Or, they may be actively hostile to you. (A good proportion of employee terminations don't end well.) And, when things are only (or basically) oral, it's funny how when disputes ripen, the other side's version of those conversations is diametrically opposed to your own. The statute which requires most contracts in writing is called the "Statute of Frauds".

6. Understand what the local requirements are for filing payment bond claims and mechanic's liens.

This information is available on my website. One can have fairly short durations in terms of filing bond claims and lien claims, particularly lien claims. Subcontractors and suppliers to subcontractors have dramatically reduced lien rights if they don't use the 'notice of identification' procedure, which is completely explained *with a form* on my website. And, although subcontractors mistakenly feel that writing the bonding company in time somehow obviates their notice and statute of limitations problems, generally speaking, this is not true.

7. Get legal advice before you are in trouble or concurrently with getting in trouble for best results

Vince Lombardi has the reputation for being one of the best professional football coaches ever. Indeed, the Super Bowl Trophy is called the Vince Lombardi Trophy.

Vince died when he was 56 or 57 years old. Reportedly, he weighed about one hundred pounds at his death, although a stocky, vigorous-looking man until he got sick. You see, Vince Lombardi refused to get a colonoscopy. He is reputed to have said something like: "You think

I'm going to let them shove a pipe up my ass?" Well, he didn't and, unfortunately, he died of colon cancer. When I finally got around to getting mine, I got wheeled into the room, a little woozy from some tranquilizer they had given me. Before the BIG moment, the doctor, who was, for some reason, standing behind me, said "picture yourself on a deserted island". The next thing I knew, I was in the recovery room feeling fine.

Cancer is best dealt with if caught early, which isn't dissimilar from any number of legal problems. If you are uncertain about taking a certain action and there are potential serious contractual or cost consequences if you do and take the *wrong* action, get some advice while the situation is fluid. All too often, I have potential new clients come in and tell me their two hour story only to find out that some essential act was not taken which irrevocably damaged their claim or their defense to a possible claim. In no small way, many days I *feel* like an oncologist, when the facts, documents and circumstances require me to tell someone they have no chance.

At least twice in my career, I was called on the very day a statute of limitations for a payment bond case was to expire. In both cases, we were able to get a complaint filed and, in both cases, the contractor ended up getting paid. The very day before I commenced writing this article, a contractor who built an addition for a homeowner called me up for the purposes of discussing the filing of a mechanic's lien. He said that he had been discussing this with the homeowner for a few weeks but that she suddenly became unavailable and distant. You see, the notice of contract had to be filed by the day *before* he called me. Without the lien, the case was going to look quite a bit different, particularly in terms of how long it was likely to go. (Many cases with mechanics liens get resolved relatively quickly because of the impact the lien has on the financing bank, the owner's title, etc.)

I tell clients that their best investment in legal fees and expenses is *before* the problem gets all out of hand and unmanageable. A good attorney is a 'risk manager'. In other words, he or she takes a certain situation, considers the facts, evidence and law and tries to chart a course through whatever minefields there might be. A client's opinion of its/his/her rights can be based on the wrong information and that information and result might not be right if it hasn't been measured against any applicable legal precedent.

People who aren't that familiar with the legal system seem to assume that "going legal" irrevocably commits them to an expensive trial. From the last available statistics, only *one percent* of all superior court civil cases actually goes through a complete trial. (Arbitrations are another story.) More likely than not, your dispute will not be tried. You can improve the odds by making sure that you have preserved evidence, given appropriate notices and met applicable statutes of limitations.

(ED: Arguably the first Japanese hot rod, the Yamaha VMAX, essentially unchanged over the last twenty years. However, a vastly overhauled model is rumored to come out shortly. Other than the ZX-14, it has the prettiest throttle sound over four grand rpm: a wonderful growl!)



8. Have your super make good daily reports.

This one is very important. When a typical construction breach litigation is tried, the two most important documents are daily reports and dated pictures and videos. As long as it is your habit and custom to have these documents on all of your jobs, they are completely admissible into litigation as “business records” in Massachusetts. Suppose it is essential to establish how many workers were on site for a particular trade, what the weather was, who visited the job, what was accomplished during the day. So, was it too cold to paint or pour concrete? What temperature is listed on the form? Whatever is listed in the daily reports will go into evidence as *prima facie* evidence, which means that it is sufficient to prove whatever points are made subject to the other side’s being able to offer rebuttal evidence. So, if you have temperatures for six am and twelve pm and four pm and you are fighting a delay claim, that might tend to indicate whether or not it was too cold to work. Similarly, crew size may be very important in delay or acceleration claims. Sometimes, a delineation on a daily report as to what was ‘contract’ work and what was ‘changed’ work may be one of our best sources of information to price the claim if it gets tried later. Similarly, crew size as listed on daily reports can be important for the purposes of delay. Comparing crew size for the mechanical trades can be useful in presenting and defending against delay claims and in establishing concurrent delay. Statements contained in daily reports may be admissible *in this form* even though they might otherwise be excluded from the evidence as hearsay testimony.

A super is in the best position to protect corporate interests because he is the one representative on site *every day*. Project managers may only visit the job once a week and don’t have the detailed knowledge that the super should have. So, if a general tells a sub to do a particular construction activity ‘this way’ and this goes against what the submittals and/or good industry practice would indicate, the super - or *someone*- has to ‘put it in writing’ to the general attempting to reserve rights and defenses. I have a case getting ready to go to trial where a subcontractor is looking for eighty thousand dollars. The general told the subcontractor to do a piece of work at variance with accepted norms within the industry. The super told the general this *orally*. Of course, no one remembers that conversation at this point. And the work, as done, is alleged to be insufficient. When I asked the super why he didn’t send a note to the general pointing out the variance, he rather caustically answered: “Do I look like a secretary to you?” Had I responded in kind, I might have said: “No you surely don’t. But you *do* look like an employee who might have cost his employer a great deal of money.”

If your super doesn’t turn in good reports, warn him or her once or twice. Then fire him or her. For, if enough supers on enough jobs don’t give you good daily reports for potential claims and defenses to claims, you may have to eventually fire them anyway. For that matter, *you* might be looking for a job *yourself*.

9. Take a lot of pictures and videos

A picture is worth at least one thousand words, maybe more. Does one side to a dispute claim that the job is substantially complete? Take a complete video of the job site. Is the appearance of something objectionable? Take a picture. If you are a mechanical sub and the general claims that you are delaying the job, take pictures and videos of the progress of the other mechanical subs to either defeat such a claim or so that you have the evidence to plead concurrent delay.

From an evidentiary standpoint, pictures are admissible into evidence provided that they are a “fair and accurate depiction of what they attempt to portray”. That is another way of saying that the picture wasn’t staged to exaggerate a situation but shows what whatever is in the picture looked like when it was snapped.

The very best project manager I have ever known videos each job he works on once a week after working hours. Remember, if it is on television, it has to be true, doesn’t it? Civil trials are getting more and more visual all of the time.

10. Manage your risks and claims

If you take any given business - let’s say, a general contractor - once that business has any significant level of business, over time it will have claims against third parties and third parties will have claims against it. Put more simply, subcontractors will claim that you owe them money. You will claim that owners owe *you* money. Owners will claim that *you* owe them money due to defects in construction. People are going to file liens. Others will make bond claims.

Folks, if you are going to be in business, these things (eventually) will happen to you irrespective of whether you are a nice guy or conduct your business ethically. Your best bet may be to try to manage these things from the first hint of trouble until it is terminated.

If such problems have any chance of ‘going legal’ then do it sooner rather than later. For, if you let too much time go by, ‘notice’ periods may have expired. The time for filing bond claims or mechanic’s liens may have expired. Backcharges sometimes have to be given within a certain period of time to be effective. Terminations, particularly under the AIA general conditions are complicated and take a number of letters to properly accomplish.

If you are not completely sure what you are doing, contractually or legally, get help. Remember that old FRAM oil filter commercial: “You can pay me now or pay me later.” The bill is often cheaper earlier and the work is more likely to actually help you avoid a litigation down the road.

11. Read what is available to you for nothing or run the risk of getting nothing on your claims

Here is a current listing of the articles available on my website,
www.sauerconstructionlaw.com:

1. Claims Against Payment Bonds: The Advanced Course
2. Collecting on that Bid or Performance Bond
3. Credit Application – a Model Form
4. Delay Damages – Selected issues
5. Demand for Direct Payment
6. Employment Agreement for Key Employees
7. Joint Check Agreements
8. Leaning Over the Precipice – Prevailing Wages
9. Limiting Liability Exposure
10. Making Sense of Lien Waivers and Releases
11. Submitting the Payment Bond Claim to the Surety
12. Termination for Convenience
13. The Disappointed Bidder on Public Work
14. The New Mechanics Lien Law
15. The Why's and Wherefore's of Bid Protests
16. Understanding and Negotiating Subcontracts
17. The Litigation Process
18. Ice Box Payment Bond Claims
19. Joke Pages
20. Does the Contractor have the right to pull off if not paid
21. Differing Site Conditions, Changes and Delay
22. Municipal Liability
23. Changed Conditions and the Problem of Notice
24. Architectural Liability to Contractors
25. Mechanic's Lien Forms – Notice of Contract
26. Mechanic's Lien Forms – Statement of Account
27. Mechanic's Lien Forms – Dissolution of Lien
28. Mechanic's Lien Forms – Notice of Identification
29. Mechanic's Lien Forms – Sample Complaint
30. The Recoverability of Interest and Attorneys' Fees in Massachusetts' Construction Litigation.

Folks, they say that those who don't know the lessons of history are doomed to repeat them. (That's akin to the Chinese curse: 'May you live in interesting times!') In similar manner, if you as a contractor don't understand payment bonds, mechanic's liens, contracts, change orders, lien waivers, releases, the bid laws (if you do public work), the litigation process and other areas *which can and will affect your profitability*, here's an opportunity to understand and to know some of the things which, in all honesty, you should *already* know. You can read this on your own time and at your own pace. And, getting this information costs you nothing.

There is a saying: 'you can lead a horse to water but you can't make it drink.' This is one of the older proverbs in the language and dates back to at least 1546 when it was included in John Heywood's "A dialogue conteinyng the nomber in effect of all the prouerbes in the Englishe tongue" Of course, it read somewhat differently in *those* days: "A man maie well bring a horse to the water, But he can not make him drinke without he will."

Once you accept the suggestion that you might be a horse - allegorically speaking, of course - what are you going to do? Just stare at the water and wonder how you will get around it? Or through it? Or whether it is going to wash you away? But, if you are thirsty, isn't it wonderful that it is there?!!

Put simply, if you don't know these things, it is quite likely that one or more of them will bite you on the ass someday, possibly causing you to lose some money, possibly, a great deal of money. Listen carefully: the best lawyer in the world can't manipulate established facts, documents and witnesses. But, with some foreknowledge on your part and with professional assistance when it is required, difficult situations can usually be minimized.

Conclusion

I've listed eleven things to think about. I could list several dozen more. (And, since this is a continuing series, I probably *will* list several dozen more before I cease my writing days.) You see, my being long-lived is almost guaranteed: I *had* the colonoscopy!

Study these rules. Read the articles on the website. When you have an opportunity to go to seminars, go. Then, if the seminar presenter seemed to know what he or she was speaking about, when you go home, read the seminar manual. (Most of our seminars come with forms of one kind or another, which you can use.) *Scribbles* is sent to you free of cost. The website, which has more material on it than any other law firm site I have ever seen, while it costs us plenty to host and to write all of those articles, it comes to you at no cost. If your current lawyer doesn't provide you this much service and information *for free*, perhaps a good question to ask might be: why not? As one of the insurance commercials currently running on television says, 'if we take such good care of you *before* you are customers, imagine what care you will get once you are!' Sauer & Associates is always looking for quality clients.

No experienced mason goes to work each day enamored of the opportunity to build another block wall. Go ahead: ask his two rotator cuffs and his aching lower back! And, no site contractor goes to work each day solely for the love of moving dirt. No electrician is willing to handle 240 or more volts unless there is something in it for him other than a shock.

You do what you do because you are trying to make money to support yourself and your family with hopefully some left over. Not knowing what you need to know to conduct the business-side of your business can damage your rights and claims long before you go to the lawyer with the problem at a boiling point. The best barn manager in the world can't lock up Mrs. O'Leary's cow if the cow left hours before. If it weren't for the opportunity to make money, I suspect you'd do something else.

Me? I'd stay home and ride my seven motorcycles, uh, one at a time. Or, for that matter, play with the pug. He is, after all, like me getting *older*.