Sauer Scribbles Presents:

Teacher Knows Best

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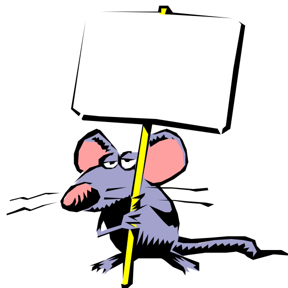
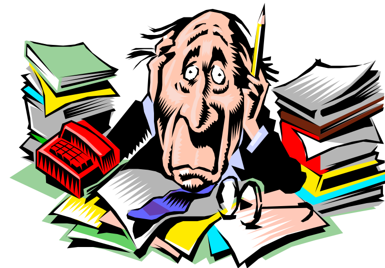
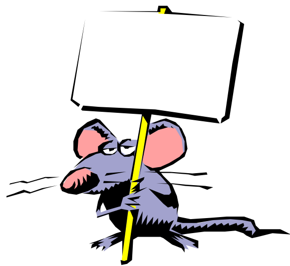


"After running a magazine, and a law office, now I have to be Superintendent of Schools?



"If you think the nuns were strict, you ain't seen nuthin'!"



"Class is called to order!

TEACHER KNOWS BEST

I just discovered something the other day. Having reached the ripe old age of fifty-five, I can't make heads or tails of most of what is going on in the world today. When I was a kid, there were only forty-eight states (for awhile, at least), fewer than three billion people lived in the world, cars were cheap and you could get gas for less than thirty cents per gallon. (For the youngsters reading the last statement incredulously - God's honest truth!)

Back in those days, horsepower was very inexpensive and you could get a big engine in nearly every full size car. And, it was as recently as 1973 that I read an ad in the Boston Globe – Peter Fuller, I think – which said that you could still get a Cadillac for less than seven thousand dollars. Having looked at the Cadillac website recently, it is pretty clear to me that you can't get a Cadillac today at *any* price – defined, as we fondly remember them, as a mile long, everything chromed. When I got emancipated in 1974, you could buy a brand new split level house in the best part of my town for thirty-five grand. Be closer to half a mil today.

The TV was so much better back in the fifties. (***ED.*** This is starting to read like Andy Rooney.) Men weren't routinely ridiculed the way they are on sitcoms today. Today, any white man, formerly a societal object of some respect in most circles, is treated like he is a joke, an anachronism. Not only can he not dance or shoot baskets: he can't do virtually *anything* else as well as his wife can. In fact, old fashioned as it may seem, men and women, in those days, seemed to just marry – for whatever reason - each other. There was this old Book in those days that maybe everyone read a bit more than they do today.

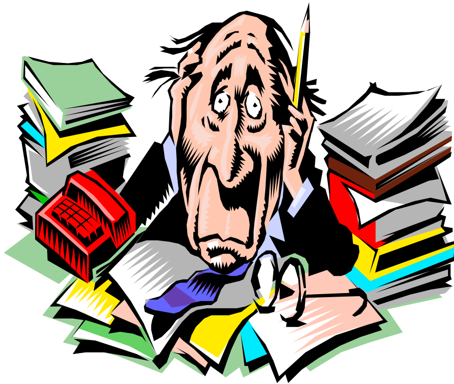
Remember when "Father Knows Best" was on and people paid more than mere lip service to the idea? "My Three Sons," a show where a single father attempted to really raise his kids properly, wearing a sweater and judiciously smoking a pipe all the while. Even Lucas McCain in "The Rifleman" did a far better job as a father than the vast majority of nitwits so pretending to do so do in today's shows. Today, the image of a man – a *hero* - is likely that of someone like Vic in "The Shield," who comes to mind because this is being written on the first day of the new season. Haunted, crooked, a liar, with women (but no wife) too numerous to count. Not happy. Not fulfilled. Not enjoying life. (Cool bald head, though) A Massachusetts guy and former neighbor to Jay Leno in Andover)

This issue is about questions. Here's one. Do you ever long for the old days when things seemed to make more sense? I do. So, for this issue, let's pretend that the writer mostly knows what he is talking about and is trying to write out a prescription for your business success. ***Your*** success. Read

attentively, as if someone is really trying to help you, looking for nothing in return. (In all these years, we have never raised the subscription price for ***Scribbles.***)

So, sit in a comfortable chair. Loosen up your belt, if it is too tight. Read this issue with notepad and pen in hand, taking lots of notes. Do what it says and maybe some day you'll be stinking rich! (Sorry. I guess modern ideals and values still poke their little materialistic heads into our consciousness, once and awhile! Hell, someone at my house has both a Town Car and – ***Ha!*** - five motorcycles!)

And – *But* - remember, that **Teacher . . . . . Always . . . . . Knows . . . . . .** ***Best.***



"My shrink knows me best."

Fourteen Things About Construction Law Every Successful Contractor Needs To Know*

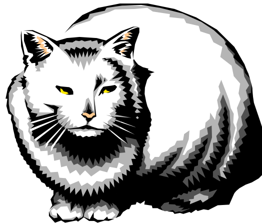
By Jonathan P. Sauer

I recently gave an all day seminar for one of my clients, whom I shall refer to as Real Smart Subcontractor (Real). Real sells both paving materials and does pave itself, working, at various times, as a supplier to a subcontractor or as a subcontractor or as a general contractor. Real uses both lump sum contracts and unit price contracts. They are very successful and even idioms and modern sayings have been made up about their success, such as in 'Get *Real*!' Having represented Real for a number of years, I saw that there were some continuous and consistent problems Real was experiencing. As our friend Mr. Berra would observe, too many times a variety of files were 'déjà vu' all over again. I suggested to management that we have a seminar for the various foremen, superintendents and project management personnel. The president of Real, a wise and sagacious individual who basically just does construction to get some rest (and healing) from his true calling as a kick-boxer, thought this was a good idea. So, the following was recently prepared and given by the Law Offices *gratis,* assuming you don't count the two pieces of pizza for lunch! (Given our esteem for this client, that was enough dough!)

The way Real set it up was to write down the basic questions which Real felt its employees didn't understand and have me present on them. There were fourteen questions among the foremen, supers, project managers, the money people and management, with two seminar sections, one with the field people and the second with the financial people and management.

Here are the questions and answers:

1. What are the differences among an individual d/b/a/, an LLC and a corporation as a customer or a vendor and what things should you have or watch out for when doing business with each?



"What are the differences between Calo and IAMS? I'm sure I wouldn't know."

This information is available through the Secretary of State's Office. Go online and in your browser type in 'Massachusetts Secretary of State'. You will get a reference for this site. Go to it. On the first or second screen you will see 'search corporate database'. Go to that. You can now search corporations and LLC's by putting in the company's name or the individual you believe is a key person. If you do it through the person, you will see whatever other entities he or she has or has had. Particularly for developers, the more names you see, the greater the chance we could have collection problems down the line.

A corporation is an 'artificial person' under the law (as compared with people, who are 'natural persons', except for an in-law here and there.) One should understand, however, that a corporation - as an artificial person - is as real as a natural person for legal purposes. Under a corporate form of doing business, the individual owners, directors and employees are not generally liable for corporate debts incurred as contractual debts. E.g. 'Deadbeat Corporation' (a frequent Real Smart Subcontractor customer in the past!) rents a copier and stops the payments. Provided the lease is in Deadbeat Corporation's name, no owner, director or employee will be liable for it unless there is a personal guarantee and with one other exception. That is that corporate employees are liable for their own 'Torts', which are defined as 'Civil Wrongs'. So, if an officer or an owner fraudulently induces the copier corporation to send over a copier - defined as leasing it with the knowledge that the corporation can not pay or, God forbid, for the purpose of selling it - that individual can be liable. Also, if, any employee has an auto accident on company business, he/she is still personally liable for the accident, as the law doesn't distinguish between what your status is in that matter as an employee or not. (Of course, the corporation would also be liable for your auto accidents 'arising out of and in the course of your master's (employer's) business.' Provided, the trip in question is not a 'personal lark', ordinarily, the individual employee will be covered by the employer's insurance.

"Oh joy! Mr. Hoity-toity again"

An LLC is similar to a corporation in many respects. Here, the Owners are referred to as 'members'.

Under Massachusetts law, a member is not ordinarily liable for LLC debts. This entity was created to avoid the double taxation that corporations and their owners go through. For many LLC's, they are taxed as partnerships, so the members (read, general partners) are only taxed once.

Beyond that, there are basic differences between a corporate form of doing business (corporation or LLC) and an individual form. For one thing - quite practically - if a person is in business under his own personal name, this mean that he is constantly risking his house, his retirement, his savings account and, quite likely, his marriage on whether or not the jobs he does, he does well. Considering that there are services that incorporate one for a few hundred bucks and the fee to the state is only two hundred dollars or so, to work this way means that one is incomparably stupid or incomparably sure that he/she is judgment - proof and unable to pay, if the pedal were put to the metal, so to speak. If we are going to do business with just an individual, having a credit application in signed, original ink with a notarial seal becomes more like a necessity, as compared with corporations who were in last year's phone book.

Finally, be sure to have the *exact* name of the corporation or LLC. Many of these have very similar names and sometimes this is intentional. Also, if I were doing business with an individual, I would want his last home address, present home address, social security number and DOB - even if we don't insist on a credit application *per se* - because once these cowboys mount up and start to gallop, it can be very difficult (and expensive) to lasso them without this information.

*(**Teacher Tales.** When the man in the street says: "If it ain't broke, don't fix it," the lawyer writes: "Insofar as manifestations of functional deficiencies are agreed by any and all concerned parties to be imperceivable, and are so stipulated, it is incumbent upon said heretofore mentioned parties to exercise the deferment of otherwise pertinent maintenance procedures.")*

2. What are the legal bare minimums for what constitutes a contract?

"I prefer the bare minimums on a Braziliam beach!"

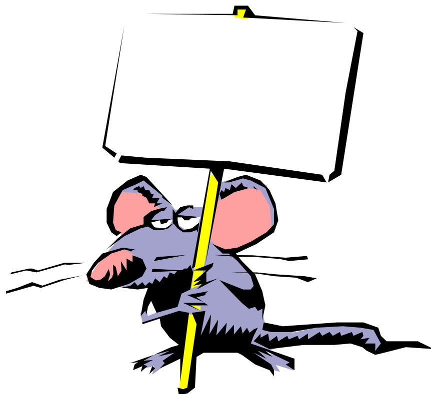
A contract requires an 'offer' and an 'acceptance'. Furthermore, there must be agreement as to all key contract items. This could be put, another way, as agreement on 'scope and price'. Thus, we needn't have agreement on every last little term: when the work is going to be performed (unless that is a material term).

Please note that, technically, construction contracts in Massachusetts are enforceable in any amount if they are oral, provided the work necessarily will be performed in one year or less. Here is what the law says on this subject:

Chapter 259, Section 1 of the General Laws provides in pertinent part as follows:

"No action shall be brought: . . . Fifth, Upon an agreement that is not to be performed within one year of the making thereof; Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized."

Yo, dude! Oral contracts really stink!



"That's funny! In the seminar hand-out, oral contracts sucked!"

The reason they are less than cool is that by the time you are in any kind of dispute, your contracting party's recollection of your oral deal is different than yours. In other words, one or both of you is now *lying*. And, in a 'he said, she said' type of situation, the better liar is more likely to be believed. Put another way, oral contracts are worth the paper they are *not* printed on. Meaning, they may not be worth a lot, when it is time to belly up to the bar and some one doesn't like what is being served.

One of the biggest observations I have about contractors - note, root word is 'contract' - is that they get all uptight about putting the deal to paper. The following is a legal contract in Massachusetts, in my opinion.

"CONTRACT

Real Smart Subcontractor will pave the parking lot at Dunkin Donuts in Easton for John Jones Corporation as indicated on the drawings dated March 8, 2005 as prepared by Bow Tie Architects for thirty thousand dollars.

____

Real Smart Subcontractor

____

John Jones Corporation"

What is so hard about *that*? The fact that contracts can have twenty pages of text, fifty pages of general conditions, twenty pages of supplementary conditions and five pages of special conditions does not mean that *your* contract has to have this.

Would it be good to have start and end dates in the sample above?

Probably. But, even adding them in, this is all that document has to say:

"**PURCHASE ORDER**

Real Smart Subcontractor will pave the parking lot at Dunkin Donuts in Easton for John Jones Corporation as indicated on the drawings dated March 8, 2005 as prepared by Bow Tie Architects for thirty thousand dollars, said work to commence on or before April 15, 2005 and to be completed by June 15, 2005.

____
Real Smart Subcontractor

____
John Jones Corporation"

Do we want to incorporate the terms and conditions of the standard Real Smart Subcontractor proposal form in this sample? !*No problemo!*:

"ORDER ACKNOWLEDGMENT

Real Smart Subcontractor will pave the parking lot at Dunkin Donuts in Easton for John Jones Corporation as indicated on the drawings dated March 8, 2005 as prepared by Bow Tie Architects for thirty thousand dollars, said work to commence on or before April 15, 2005 and to be completed by June 15, 2005. Work performed hereunder will be performed in accordance with Real Smart Subcontractor's standard Terms and Conditions, a copy of which is attached hereto and incorporated herein.

____
Real Smart Subcontractor

____
John Jones Corporation"

This still won't break a typewriter***!*** By the way, did you notice that the *title* of each of these three documents is different? It doesn't matter what the title is: a court will interpret/identify what the document is by its *content.* That is why I have taught in the past avoiding the use of the word 'contract'. As we say in Italian, that word alone tends to give people the *agita*. So, use a different word! 'Purchase Order' would be one. 'Order Acknowledgment' would be another.

"Did we just pass a dump? No, I see, instead, that Black Kitty has entered my universe."

I had a job once where a pretty smart employee told me that whenever he calls in sick and they ask him what he's sick with, he invariably says 'diarrhea'. He found that there was usually no *further* questioning about the illness at that point. I submit that by telling your customer that the computer controls the shipping of any materials or the allocating of labor to any particular job and that jobs without 'order acknowledgments' simply don't exist as far as the computer is concerned, how many people are going to inquire further? After all, who really understands computers? It is widely known and accepted that men don't ask for directions, irrespective of how hopelessly lost they might be. Similarly, it will be the rare individual who will ask you to explain what

computer program you use and what aspect of that program requires that information.

(***Teacher Tales.*** *A Mexican bandit made a specialty of crossing the Rio Grande from time to time, robbing banks in Texas. Finally, a reward was offered for his capture, DEAD or ALIVE! A trigger happy, young, enterprising Texas Ranger decided to track down the bandit on his own and collect the reward. After a lengthy search, the Ranger tracked the bandit to his favorite cantina and snuck up behind him. At the sound of the Ranger's guns cocking and preparing to fire, the surprised bandit sped around only to see both of the Ranger's six-shooters bearing down on him. The Ranger announced, "You're under arrest! Tell me where you hid the loot or I'll drop you where you stand," his finger becoming itchy on the trigger. However, the bandit didn't speak English and the Ranger didn't speak Spanish. Fortunately for the Ranger, a bilingual lawyer was present in the cantina and translated the Ranger's demand to the bandit. The terrified bandit blurted out, in Spanish, that the loot was buried next to an old oak tree behind the cantina. "What did he say, what did he say?," the Ranger hurriedly asked. To which the lawyer replied, "Well, the best I can make out he said ... DRAW!"*)

"Oh, White Kitty! You've got this clump thing at the base of your tail!"

3. What is the difference between a letter of intent and a contract and at what point is the customer and the subcontractor or vendor bound?

We all know what a letter of intent is supposed to be. This is something you receive before you actually get a signed contract telling you it is coming your way and your contracting party may hope like hell that you will commence performance of the work before you have the signed contract. Where the letter of intent is clearly preliminary - other material terms to be negotiated, both parties expect to sign a contract, the form of which may have to be negotiated - then this is not usually an enforceable obligation. However, if price and scope are agreed to, even if a contract is anticipated being signed - but on an industry-accepted or customary form - there may be liability on the letter of intent as a contract.

Haste makes waste. The Good Book says that boys and girls shouldn't do certain things without benefit of matrimony. The Book of Construction Life says, similarly, that when people start getting busy in performing construction work without benefit of a signed contract, tough things can happen.

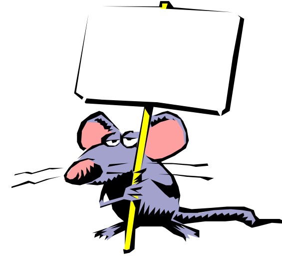
War story. For years, my largest client was a certain steel fabricator. They did one or two small jobs with a certain steel erector, which turned out alright, although nothing to write home about. Then, my client signed four jobs with various subcontractors, which it gave all at once to this erector. As to two of them, there never was a signed subcontract between the parties - between the fabricator and the erector. However, the erector was taken to some preliminary job meetings

with the general contractor, introduced as the erector. The erector did some initial drawings. In fact, for one of the jobs, the fabricator gave the erector a change order, listing the 'contract amount' and the amount of the change on an AIA change order form. Problems developed on two of those jobs with contracts, leaving the other two larger jobs without contracts to be performed but still without any signed contract. Purportedly, the erector's principal threatened the fabricator's principal over money – 'I'll come up there and show you something,' (talking about attempting to get paid for some of the other work). And, on the larger job, the erector refused to incorporate by reference certain general conditions controlling his work that the fabricator's contract had with the general contractor. Considering the fact that the erector had performed poorly on the two smaller more recent jobs, the fabricator promptly terminated the erector as to the two larger jobs, neither of which had a signed subcontract with long-standing and ongoing battles over forms and content.

The erector sued the fabricator for the anticipated lost profits on the two larger jobs, a claimed amount of something less than five hundred thousand dollars. The erector tried to attach these jobs under a reach and apply action and was unsuccessful, although this could have gone the other way. After three years of reasonably expensive litigation, the case was settled for about forty thousand dollars which my client, the fabricator, by that point was tickled pink to pay. The fabricator's in-house general counsel told me after it was all over that she used to have nightmares about this case.

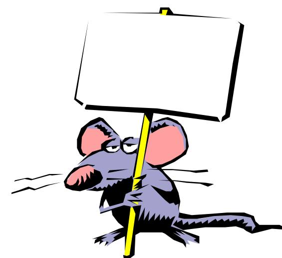
Here's some law on letters of intent.

For an enforceable contract to be created, parties must have progressed beyond the stage of imperfect negotiation. Situation Management Systems, Inc. v. Malouf, Inc., 430 Mass. 875, 724 N.E.2d 699 (2000).



"I have been chosen as the AAA arbitrator for White Kitty v. Black Kitty, C.A. No. MICV052114-0098."

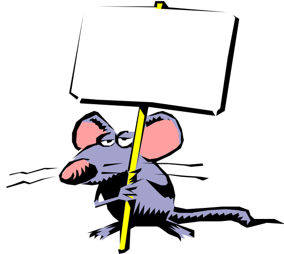
Whether preliminary agreement which contemplates execution of further documents represents understanding of parties on all essential terms cannot be read from text of preliminary paper alone, as provisions of subsequent agreement, or subsequent events, may expose disagreement between parties about significant business terms. Vickery v. Walton, 26 Mass.App.Ct. 1030,533 N.E.2d 1381 (1989).



"I will charge those pussies obscene amounts of money."

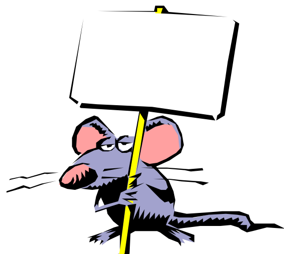
A purported contract which is no more than an agreement to agree in future on essential terms or one which does not

adequately specify essential terms ordinarily will be unenforceable. Air Technology Corp. v. General Elec. Co., 347 Mass. 613, 199 N.E.2d 538 (1964).



"I will harass them continuously and demand payment before services are performed."

Even though an action may be brought upon a contract which contemplates another more formal contract, agreement to enter into a contract which leaves terms of that contract for future negotiation is too indefinite to be enforced. Caggiano v. Marchegiano, 327 Mass. 574, 99 N.E.2d 861 (1951).



"And, at the end, all I will rule is that they both must be split in half."

There is a commercial that says: 'life is messy: clean it up!' While (they tell me) it is hard to be a little bit pregnant, it is not hard to have some elements of a contract but be missing, at the same time, some elements of an enforceable or clearly-understood contract, as well.

How does one avoid this type of problem? The appellate courts have indicated what language should be used in a letter of intent which is intended to remain a letter of intent.

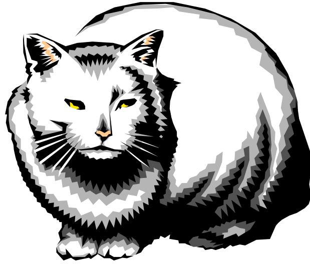
In Goren v. Royal Investments, Inc., 25 Mass.App.Ct. 137, 140, 516 N.E.2d 173 (1987), on pages 142-143, the Appeals Court gave some suggested language for parties trying to make it clear the letter of intent is not final:

"A proviso of that sort should speak plainly, e.g., "The purpose of this document is to memorialize certain business points. The parties mutually acknowledge that their agreement is qualified and that they, therefore, contemplate the drafting and execution of a more detailed agreement. They intend to be bound only by the execution of such an agreement and not by this preliminary document.""

*(**Teacher Tales**. Johnny appeared as a witness in a lawsuit. The attorney asked, "Where were you on the night of July 10?" "Your Honor, I object," yelled the counsel for the defense. "That's all right, go ahead and ask me," said Johnny. The prosecutor repeated the question and again the defense objected. "Hey. Why shouldn't he ask me?" said Johnny. "I'll answer." The judge said, "If the witness insists on answering, there is no reason for the defense to object." So the attorney again repeated the question, "Where were you on the night of July 10?" Johnny said, "I don't know.")*

4. Do You Need a Contract for the Purposes of Placing a Mechanic's Lien or Filing a

Payment Bond Claim on a Project?



"I hate to admit it but that tomcat was right. Tail care is *very* important!"

In Massachusetts, to file a mechanic's lien, one needs a 'written contract.' This is stated in the following statutory section of the mechanic's lien law (Chapter 254 of the General Laws):

"2A.Written contract; substantial completion; definitions; notice; filing; form; certified mail as used in this chapter the following words shall, unless the context clearly requires otherwise, have the following meaning: . . . . . "Written contract", any written contracenforceable under the laws of the commonwealth."

There have been three recent Appellate Division cases, which shed some light on what a 'written contract' is.

In the first, National Lumber Company v. Fort Realty Corporation , 1999 WL 778203 (Mass.App.Div.), the Court found that there was **not** a written contract with the following particulars:

"We concur with the judge that adequate notice of the sort of specifics to enable the owners to protect their interests was palpably lacking… Illustrative of the deficiencies are the following. There was nothing in the "sales agreement" that specified the maximum cost or expected cost either by way of a price stated or by description as to quantity and unit prices. The "quotation" which accompanied the sales agreement was also deficient as to information concerning price or quantity of materials to be supplied.

"With all of the talk about 'E. Coli,' you'd think White Kitty would be more hygienic."

The general statement "All lumber goods and materials per agreement between the parties in regard to the erection, alteration, repair or removal of a building or structure located at the above lot," with no other particulars supplied does not suffice. There was language at the bottom of the quotation advising that "... to accept the offer the customer must sign, date and return the sales agreement." While there was an illegible signature, it was not in the proper place designated for signing. The document contained no statement of price or statement of a formula to determine the price. Affidavits of employees of plaintiff described the "sales agreement" as a "mere formality."

A number of invoices were submitted as part of the plaintiff's summary judgment motion. While the

invoices refer to the lots in question, there was no evidence on the invoices of a signature or other indicia of acceptance by any agent of Fort Realty. The "credit application" discloses no information as to type, quantity or price of materials to be delivered. Although "take off" lists were submitted showing what materials were designated for each job site, no reference was made in either the sales agreement or the quotation to these "take off" lists.

We agree with the motion judge that there was insufficient evidence of a nexus between these "take off" lists and the sales agreement and that therefore there was not a sufficient showing of a written contract for purposes of the statute. Reference is made to National Lumber Company v. Suburban Builders Corp., et al., an unpublished memorandum and order agreeable to Rule 1:28 dealing with a similar factual pattern. See 45 Mass.App.Ct. 1109, 700 N.E.2d 854 (1998)."

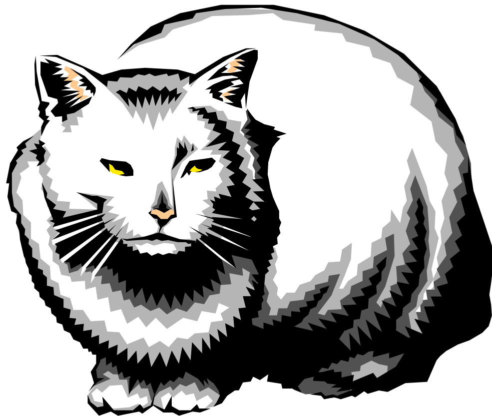
In the case of Noreastcodoor & Millwork, Inc. v. Vahradahatu of Massachusetts, Inc., 1999 WL 799337 (Mass.App.Div.), the Court found that the following is **not** a written contract:

"The crucial element of Noreastco's claim is the existence of a written contract, for without it, the mechanic's lien is unenforceable. Gettens Electric Supply Co. v. W.R.C. Properties, Inc., 21 Mass.App.Ct. 658, 660, 489 N.E.2d 217 (1986)…. The statute was recently amended by St.1996, c. 364, taking effect on February 7, 1997, to define "written contract" as "any written contract enforceable under the laws of the commonwealth." Here, the trial judge correctly found that no written contract existed. The faxes which were exchanged here provided no specific information about the types or quantity of materials to be provided. At best, they evidence some earlier oral discussions or course of dealing in which no term of any contract can be identified. No price terms are set nor is the quantity of doorframes, hardware, or accessories apparent. Noreastco attempts to rely on the architectural plans prepared by the architect to fill in the gaps in the details of what was to be purchased. But, those plans refer to a variety of items which are not referenced in the faxed memos and the memos do not incorporate the plans by reference.

"Too many cases! The only case I have I carry around a shrunken head in."

None of the documents offered by Noreastco to establish a "written contract" have the quantity or type of materials to be furnished even though those documents are some evidence of the possibility of a contract…. Thus, the court was correct in finding that the alleged contract did not contain essential terms sufficient to satisfy the requirements of the mechanic's lien statute…."

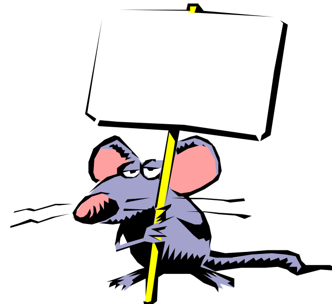
The last case is more helpful for our present purposes. This is the case of Donald M. Harris v. Moynihan Lumber of Beverly, Inc., 1999 WL 788621 (Mass.App.Div.) Here, a number of separate papers were found to be a contract for lien purposes. As stated by the Court:



"In my defense, I don't think the maid changes the litter frequently enough."

" … In Chapter 364 of the Acts of 1996, the Legislature addressed this and several other issues in a major, to use a construction term, renovation of Chapter 254. Among other changes, the Legislature defined "written contract" as "any written contract enforceable under the laws of the commonwealth." G.L.c. 254, S 2A, added by St.1996, c. 364, S 3. The homeowner's interest, we note, is protected by statutory language providing that the subcontractor's lien "shall not exceed the amount due or to become due under the original contract as of the date notice of the filing of the subcontract is given by the subcontractors to the owner." G.L.c. 254, S 4. In interpreting the new definition of "written contract" as "any written contract enforceable under the laws of the commonwealth," we are guided by the recognition in the revision of c. 254 that 'the true financiers of a construction project are the contractors and suppliers who provide labor and materials well before they are paid.' 81 Mass. L.Rev., supra at 168.

Applying these considerations to the present case, we consider the documents ("Sales Contract," credit application and price quotations) and circumstances outlined above. **It is certainly true that the requisite memorandum need not be a single document.** Colt v. Fradkin, 361 Mass. 447, 453, 281 N.E.2d 213 (1972); Clark v. Ole-jnik, 240 Mass. 215, 217, 133 N.E. 197 (1921). The notation "Estimate only. Good for 7 days" on one of the quotations was a common type of provision designed merely to protect Moynihan from price fluctuations.



"Get a distaff letter of intent before you kiss a girl for the first time or get to meet her lawyer."

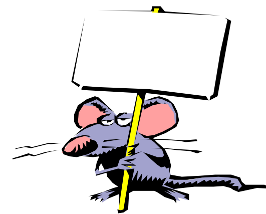
It was no barrier to the Contractor's later written acceptance of the quotes, subject to Moynihan's re-approval as manifested by its delivery of the goods. Indeed, even a letter of rejection may, in some circumstances, satisfy a portion of the memorandum requirement. Waltham Truck Equip. Corp. v. Massachusetts Equip. Co., 7 Mass.App.Ct. 580, 583, 389 N.E.2d 753 (1979).

A memorandum of a contract need only give assurance that the contract enforced was in fact made and provide evidence of its terms. It may consist of several separate documents, even though not all of them are signed and even though no one of them is itself a sufficient memorandum. At least one must be signed by the party to be charged, and the documents and circumstances must be such that the documents can be read together as "some memorandum or note" of the agreement…. The connection between the papers may be established by oral evidence which, together with the content of the documents and the surrounding circumstances, shows that all of the different papers which are so to be considered together were brought to the attention of both parties, and were linked together in their minds, so that the parties themselves may be found to have adopted all the papers as the expression of their purpose. Nickerson v. Weld, 204 Mass. 346, 356, 90 N.E. 589 (1910). Compare Andre v. Ellison, 324 Mass. 665, 667, 88 N.E.2d 340 (1949).

The documents in this case would be unassailable as a memorandum of contract if they were stapled together. They do, in any event, all refer to the "Harris" project and/or "15 Galeucia Drive Middleton." **We conclude that the written quotations and the signed, if incomplete, contract in this case are sufficient to satisfy the Statute of Frauds. Accordingly, they are sufficient to serve as the foundation for a lien under G.L.c. 254, S 4.** (*Emphasis added*)"

There is no specific requirement that I am aware of that specifically requires you to have a written contract to recover under a Massachusetts private or public payment bond (assuming, at minimum, you have an enforceable oral contract.)

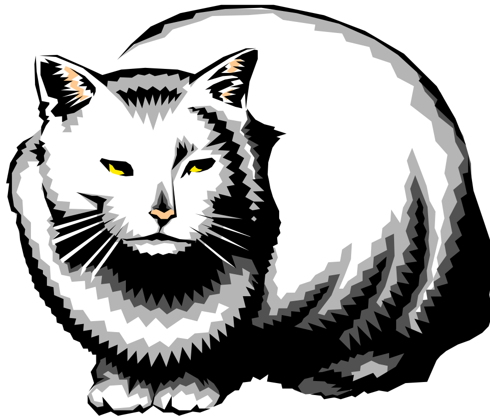
How*evuh,* there is *no* sensible business reason *not* to have written contracts, accepting that they can be as minimal as indicated above. Also, when bonding companies have principals go into defaults, they automatically assume that their material suppliers will attempt to pile bills on unbonded jobs onto the bonded jobs. Those contractual arrangements where everything is oral will almost necessarily mean that it will take much longer to figure out what goes on the bonded job and what goes on the unbonded job. That is why they call the statute which requires written contracts the *statute of frauds.* Without written contracts, people cheat and cheat more than they otherwise do.



"You getting this stuff all down?"

*(**Teacher Tales.** In the rest room an accountant, a lawyer and a cowboy were standing side-by-side using the urinal. The accountant finished, zipped up and started washing and literally scrubbing his hands...clear up to his elbows....he used about 20 paper towels before he finished. He turned to the other two men and commented, "I graduated from the University of Michigan, we were taught to be clean." The lawyer finished, zipped up and quickly wet the tips of his fingers, grabbed one paper*

towel and commented, "I graduated from USC California and they taught us to be environmentally conscious." The cowboy zipped up and as he was walking out the door said, "I graduated from the University of Oklahoma and they taught us that even 'aagies shouldn't pee on their hands.)



"What, now I get to grace mere bathroom humor?"

5. What kind of quotes are the best for our business?

That's easy: the ones that make money! (Just to think that I had to take that correspondence course for three months at the ACME Law School to answer that one. Best investment of fifty-nine dollars I ever made!)

I think the best types of quotes are to have a proposal form that contains all of the good stuff (some of which is mentioned below) and requires only a counter-signature by your customer to become effective.

What is the good stuff? There are a lot of things:

- That the proposal is limited to a short period of time to be effective in terms of being able to be accepted at this price.
- That you are entitled to interest and attorneys' fees if you have to sue to collect.
- That by accepting the proposal, the customer agrees that there will be no cause of action or claims against Real Smart Subcontractor for failing to pave if in its unilateral exercise of judgment - not an objective standard or reasonable man standard - Real Smart Subcontractor determines either by way of lack of preparation of the site or by temperature that paving can not be performed that will have the normal, estimated paving life and use.

Here's a secret! After nearly thirty years as a lawyer, I am convinced that hardly anyone *really* reads all of the contractual language before signing. Contractors look for scope and price and once they have identified that, they frequently sign without understanding or reading the rest of the language.

The best kind of quotes are those that anticipate problems that might be encountered and resolve them in a way that is favorable to Real Smart Subcontractor's interests, particularly in such a way that the need for additional paperwork - change orders - can be limited.

Folks, the point of the matter is is that courts interpret and enforce contracts based on the words that the parties use and would only refuse to enforce the contract if it violates some affirmative principle of law or public policy. *Examples*. You can't enter into

a legal contract in Massachusetts to: build a home for ladies of easy virtue (even though they doubtlessly get tired); violate the child labor laws; violate the prevailing wage laws on public work; paint apartments with lead paint; kill someone. (That is why Rocco and Luigi of my office are deliberately pre-cognitive, having absolutely no use for pen and paper except maybe to, uh, scratch themselves (with the pen).)

So the better question is not to ask: "What should we put in there?" The better question is to ask: "What do we *want* to put there?" Assuming no violation of law or of public policy, you can put *anything* in there, assuming that having any particular requirement is something that you might give up if you have customer resistance or is something that you need to make business make more sense for you, recognizing that some business may be lost in the process.

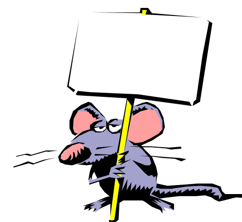
*(**Teacher Tales.** A golfer hooked his tee shot over a hill and onto the next fairway. Walking toward his ball, he saw a man lying on the ground, groaning with pain. "I'm an attorney," the wincing man said, "and this is going to cost you $5000." "I'm sorry, I'm really sorry," the concerned golfer replied. "But I did yell 'fore'." "I'll take it!" the attorney said.)*

6. What are our obligations with a unit price quote incorporating a good faith (non binding) estimate. of quantities?
7. *Should we be using lump sum proposals? What are the risks and the benefits of both?*

As these subjects are similar, I'll try to answer them together.

Contractual obligations are going to depend on the language employed. Really, the answer will be how clearly and succinctly the proposal identifies whether the fundamental basis of the contract is/will be 'unit prices' or 'lump sum' and to what extent any warranty of quantities is made.

Thus, a proposal to "pave Dunkin Donuts parking lot in Easton, MA, +/- 10,000 sq. feet for thirty thousand dollars " is, in all likelihood, a 'lump sum, fixed price' proposal, where Real Smart Subcontractor assumes the risk of the units varying by being greater. (It also makes a better profit if the actual units turn out to be fewer than estimated.)



"All this talk about Dunkin' Donuts is making me thirsty!"

However, if the proposal reads to "pave Dunkin Donuts parking lot in Easton at the rate of ten dollars per square foot for binder and fourteen dollars per square foot for top coat, the

estimated quantity of paving being ten thousand square feet", this is more in the direction of a unit price contract.

You can have it both ways, to some extent. Let's start off with the premise that we are quoting on a lump sum project:

"pave Dunkin Donuts parking lot in Easton, MA, +/- 10,000 sq. feet for thirty thousand dollars"

However, now let's add in *some* unit price protection in case someone has grossly erred/misrepresented the quantity to be paved:

"pave Dunkin Donuts parking lot in Easton, MA, +/- 10,000 sq. feet for thirty thousand dollars with Real Smart Subcontractor entitled to unit price adjustments per square foot when the actual paved square feet exceed the represented quantity by five per cent, at the rate of ten dollars per square foot for binder and fourteen dollars per square foot for top coat as to each unit exceeding five percent of the represented 10,000 sq. feet."

A problem on lump sum contracts is that there is case law that says where there is language in the contract/contract documents which says that quantities are not guaranteed, an increase in quantities from what is represented may not be compensable.

In D. Federico Company, Inc. v. Commonwealth, 11 Mass.App.Ct. 248, 251-252, 415 N.E.2d 855 (1981) the Appeals Court discussed issues involving warranty of quantities:

"(2) The second theory is that the Commonwealth impliedly warranted the accuracy, not to the precise yard but as fair approximations (compare Muir Bros. Co. v. Sawyer Constr. Co., 328 Mass. 413, 104 N.E.2d 160 (1952)), of its estimates, and that the plaintiff is entitled to damages for breach of that warranty. The provisions of the contract, however, explicitly preclude such a warranty: the provision mentioned earlier, to the effect that the estimates were furnished for bid-comparison purposes only, goes on to state that "... (e)stimated quantities shown for unit price items ... are not guaranteed;" another provision requires the bidders to declare "that in regard to the conditions affecting the work to be done and the labor and materials needed, this proposal is based solely on their own investigation and research and not in reliance upon any plans, surveys, measurements, dimensions, calculations, estimates, borings or representations of any employee, officer or agent of the Commonwealth."

"Maybe White Kitty is an object of bathroom humor because all the weight he's been gaining recently is making him look flushed."

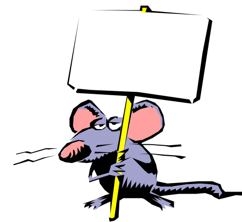
The master dismissed the latter provision as "inconsistent with the express approximations" (i. e., the estimates in question) furnished by the Commonwealth "for bidding purposes",

and found that it was "impossible" for bidders, who had three weeks to prepare their bids, to do independent test borings; but that misses the point that the object of such a provision, one to which the plaintiff assented by bidding and contracting, was to preclude a warranty of the accuracy of estimates and to place on the bidder the risk that subsoil conditions might be more adverse than the parties had hoped.

Our cases have recognized the possibility of an implied warranty of estimates in some circumstances (see, e. g., M. L. Shalloo, Inc. v. Ricciardi & Sons Constr., Inc., 348 Mass. 682, 686-688, 205 N.E.2d 239 (1965); Alpert v. Commonwealth, 357 Mass. 306, 321, 258 N.E.2d 755 (1970)), but not where the contract terms specifically precluded warranty of, or reliance on, the furnished estimates. See, e. g., Benjamin Foster Co. v. Commonwealth, 318 Mass. 190, 201-202, 61 N.E.2d 147 (1945); Daniel O'Connell's Sons v. Commonwealth, 349 Mass. 642, 647, 212 N.E.2d 219 (1965). There was no suggestion in the master's findings that the Commonwealth concealed the existence of borings reports or soil analyses which would have revealed the subsoil conditions or shown the unreliability of the estimates, as was the fact in the Alpert case, 357 Mass. at 319-321, 258 N.E.2d 219."

In 1996, the Appeals Court had this further to say concerning warranties of estimates in the case of J.F. White Contracting Company and Dependable Masonry Construction Company, Inc. v. Massachusetts Bay Transportation Authority, 40 Mass.App.Ct. 937, 938, 666 N.E.2d 518, 519 (1996):

" [2] White's argument that the estimates provided by the MBTA of allowance item costs were intended to be relied upon by the contractor is without merit. The clear terms of the contracts provided that the actual costs incurred by the contractor for the allowance items could exceed the estimates furnished by the MBTA for such work, and that the contractor would be reimbursed for all valid allowance item costs, even those beyond the MBTA's estimates.



"I love being an arbitrator. I get to charge *way* beyond anyone's estimates. Suckers!"

Therefore, the contracts' terms precluded any reliance by White on the furnished estimates. Further, such language also eliminated any possibility of an implied warranty that they were even approximately correct. See D. Federico Co. v. Commonwealth, 11 Mass.App.Ct. 248, 252, 415 N.E.2d 855 (1981). Compare Richardson Elec. Co. v. Peter Francese & Son, Inc., 21 Mass.App.Ct. 47, 51-52, 484 N.E.2d 108 (1985) (failure in specification to warn subcontractor of need to dig 11,000-foot trench across rocky terrain to accommodate a cable entitled subcontractor to additional reimbursement)."

So, if you are going to enter into lump sum contracts, try to determine - particularly on larger contracts - whether or not the quantities are guaranteed. To the greater extent that language is used

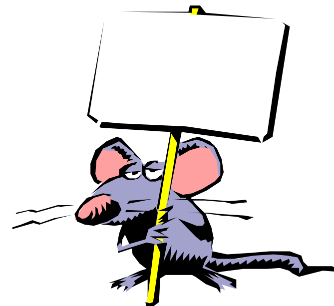
by the Architect or contractor distancing himself/itself from warranting the quantities, the harder it will be to get a change order for variations. In these cases - particularly, for larger jobs – wise contractors are going to have to do more field measurements as part of the estimating process or go in higher than otherwise.

One advantage on unit price contracts. There is some case law that says the actual execution of change orders may not be necessary when there are variations in quantities on unit price contracts.

In the case of J. D'Amico, Inc. v. Town of Saugus, 9 Mass. App. Ct. 809 (1980), the parties had a unit price contract with estimated approximate quantities with a provision that the defendant town reserved the right to increase or decrease the amount of any item of work as might be desirable or necessary. The master found that the actual quantity used was determined by the field conditions found to be desirable or necessary during the carrying out of the construction work. As stated by the Appeals Court on page 880 of the decision, "In these circumstances written change orders were neither contemplated nor required to authorize the use of materials in quantities greater than those amounts initially estimated for the construction of the facility; provision for such additional quantities and the unit price to be paid for them was incorporated in the work plan by the contract documents."

Important to the Appeal Court's holding in the *D'Amico* case is the finding that the item increases were not deviations from the contract specifications but were consistent with them.

Another advantage to unit price contracts, candidly, is that where a contractor exceeds the requirements of the contract - paving layers are thicker than required, areas are paved which are not indicated on the drawings as requiring pavement - one may have a better chance of getting paid for this work on a unit price contract because the contractor actually incurs the units. Work with the same facts wouldn't likely represent a compensable change for a lump sum contract.



"I heard White Kitty saying that in his social strata, he would be called 'portly,' not fat."

8. Our paper vs. their paper. How do we incorporate our paper into their subcontract agreement in order to protect ourselves?

Always your paper should be part of it! Remember, that when a court is trying to figure out what the *final* contract is - the final expression of the parties' wishes - it is ordinarily going to look to what is the last document and/or the document the parties signed, the assumption being that the final document is closest to what the parties

actually intended and, hopefully, represents those intentions.

Here's the scenario. One gives a customer a quotation which, possibly new and improved, has every desired term that Real Smart Subcontractor generally wants. The customer *does not sign* this form. However, the customer *does* give you *his* form which states the deal from his perspective and with his terms and conditions which completely disregards (or is silent on) the Real Smart Subcontractor form.

If this document is silent in terms of sufficiently incorporating by reference one's proposal *as a contract document,* in all likelihood, that proposal loses its identity and has *no* remaining contract significance once a subsequent subcontract is signed.

In other words, the terms and conditions that the contractor has to perform to are those the customer selects, not those Real Smart Subcontractor has spent time and effort in formulating as part of its business and pricing plan.

I had a subcontractor go out of business on just this point. The subcontractor had an excellent, aggressive proposal. However, the general contractor would typically send his/its own form of contract which was silent on (ignored?) the proposal, which form the subcontractor dutifully signed.

Issues would arise and the subcontractor would pull out his proposal only to find that it lacked any significance with regard to the job at hand. This happened *a lot of times.* The subcontractor was a tiger in submitting the proposal but a pussy cat in actually negotiating the contract.

"The Father Knows Best little girl was called 'Kitten,' just like me!"

Finally, these folks finally lost enough money to do a *'no mas'* and moved on to other endeavors.

To prevent this from happening, seriously, ladies and germs, you need to do ***two*** things. *If* you end up signing the other guy's form, then the following language must be added into his form:

"Real Smart Subcontractor's proposal dated October 2, 2004 is included into this Subcontract as a contract document."

That sentence keeps the proposal 'alive'. But, in and of itself, that is not enough. You have to add an *additional* sentence:

"In the event of any discrepancy or contradiction between the terms and conditions of Real Smart Subcontractor's proposal dated October 2, 2004 and the terms and conditions of this subcontract form, the terms and conditions and express language of the Real Smart Subcontractor proposal will control and represent the agreement of the parties."

9. Additional work required at the jobsite: how do we make sure that we get paid for change orders?

If I knew the answer to this one, I'd be rich as Croessus, that famous old Greek king. (Wait a minute! I am a lawyer. I *am* rich as Croessus!)

How do we make sure we get paid for extra work? First of all, let's do 'em in order.

Does the other side acknowledge that you have a changed condition? In any contract claim, there are two elements: liability and damage. You can't get paid for an extra unless both sides acknowledge that this is an extra. I wouldn't do any extra work unless I had some kind of written acknowledgment by the contractor that the extra work was, in fact, extra work and not included within the contract, unless the contractor was known to be honest or the matter was relatively insignificant in terms of money.

"White Kitty wants to be called portly, not FAT?? What, portly, as in that's where they park the Queen Mary?"

Once the liability is agreed to in writing, try to tackle cost. Most contracts require change orders before extra work is done and the more difficult (read, unscrupulous) general contractors then do everything in their power to get you to do the work with nothing in writing.

What does one do if push comes to shove and the work needs to be done in the next couple of days and you have nothing in writing? *At minimum,* send a fax to the project manager saying something like this: "Your super has ordered us to pave additional areas - areas 6 and 7 - on the drawings, which the drawings don't require to be paved. This is extra work and Real Smart Subcontractor will pave these areas for seventy thousand dollars, to be paid in accordance with the contract. If we don't hear from you in the next three business days, we will assume that these terms are acceptable to and authorized by your company."

Since the law requires those who have an affirmative duty to speak to speak when they don't agree with something important said to them, assuming you have nothing back from them objecting in three days, such a fax is at least a *little* protection. It is not as much protection, however, as following to the letter whatever change order mechanism your written contract has.

A last word on changes. Most contracts require - and the law favors - notice to your contracting party *in writing* of any changed condition or differing site conditions within a very short period of time of your discovery of the same.

Your failing to do so can jeopardize an otherwise compensable piece of extra work, particularly where your lack of notice - or late notice - prejudices the general contractor in getting paid for the same from the owner (when this is a pass-through claim.)

"Computers are a real change from hammers and chisels."

While written change orders are desired and are the goal, there have been some cases allowing for collection on 'oral change orders.'

In the case of M.L. Shalloo, Inc. v. Ricciardi & Sons Construction, Inc., 348 Mass. 682 (1965), one of the issues involved was what would be the result when there was a provision in the plaintiff's subcontract that: "no extra work . . . under this contract will be recognized or paid for, unless agreed to in writing before the work is done . . . ."

The Supreme Judicial Court commented on the fact that either the general contractor (the defendant) or the owner's architect directed the plaintiff subcontractor to do each of the first four items of extra work and that the general contractor know of such extra work. As stated by the Supreme Judicial Court of page 685 of the decision:

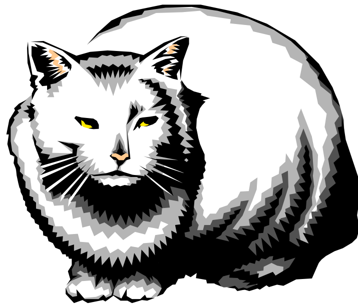
"Paragraph Fifth of the subcontract "obviously could not prevent oral contracts for extra work, for the parties had power to waive or alter that provision orally at any time."

The Appeals Court essentially held the same thing nine years later in the case of General Electric Company v. Brady Electrical Co., Inc., 2 Mass. App. Ct. 522 (1974). As stated by the Appeals Court:

"The trial judge found that on three occasions Brady performed extra work on oral orders from Rugo and credited Brady in the amount of $3,439.28 by reason thereof. Rugo and Maryland do not question the amount of this credit, but rather contest it on the ground that the contract between Rugo and the Authority, as incorporated by reference in Brady's subcontract, permitted payment for extra work only when authorized by written change order. Their argument overlooks the fact that such formalities may be waived (cases cited) . . . The judge found that Rugo did waive the requirement that extra work be the subject of a written order in these instances, and that finding is not contested in this appeal."

Please remember, though, that the only sure protection for claims for extras is to follow the contractual requirements applicable to the same *exactly.*

(***Teacher Tales.*** *A man is out shopping and discovers a new brand of Olympic condoms. Clearly impressed, he buys a pack. Upon getting home he announces to his wife the purchase he just made.*
"Olympic condoms?" she says, "What makes them so special?"
"There are three colors, " he replies, "Gold, Silver and Bronze." "What color are you going to wear tonight?" she asks.
"Why, Gold, of course!" says the man proudly.
The wife responds, "Why don't you wear Silver. It would be nice if you came in second for a change!")



"By comparison, Black Kitty wouldn't be allowed entry to a sinking rowboat."

10. What authority does our customer's construction super have to authorize or order extra work from us?

There is case law that very strongly suggests that a general contractor's superintendent does not ordinarily or implicitly have the authority to authorize extra work for a subcontractor.

In the case of Chiappisi v. Granger Contracting Co., Inc., 352 Mass. 174 (1967), the plaintiff brought an action against the defendant general contractor and against the general contractor's surety. It became clear fairly quickly that the plaintiff would need to provide more materials than had been estimated due to an arguable error in the drawings. The plaintiff's principal went to the school in question and told Granger's job superintendent that as to the additional materials "this is an extra." The superintendent - a wise and sagacious individual - told the plaintiff that this would have to be taken up with "the office." The plaintiff subcontractor put more material on the project and after the work was done wrote to Granger seeking additional monies. This was the first notice to Granger other than to the job superintendent that the plaintiff intended to make a claim for the extras.

Under Article 16 of the general conditions, written notice must be given to the architect "within a reasonable time" after receipt of "instructions by drawing or otherwise" concerning work claimed to constitute extra work. The Supreme Judicial Court held on page 178 that: "There was no emergency requiring Chiappisi to proceed at once without giving written notice. Because Chiappisi proceeded without such notice and postponed until after the work was completed all written mention of any claim for extra work, there can be no recovery."

"If the rowboat sinks, it's only because White Kitty was in it."

This case is generally read (interpreted) as holding (or meaning) that part of the reason the Plaintiff lost is that the Court found that comments to a superintendent are not the same thing as giving notice to his employer, essentially meaning that the superintendent is not seen as playing a part in the formulation of change orders.

A similar result - although the case was sent back for retrial on other grounds - is the case of Farm-Rite Implement Co. v. Fenestra Inc., 340 Mass. 276, 291-292, 163 N.E.2d 285 (1960). In this case the Court said:

"In the case brought by Clark against Construction, the master found that, apart from a charge back for refinishing the windows, Construction owed Clark a balance of $17,035.85. Against this, Construction charged back to Clark $14,018.53, part of which was the amount paid to Pikens for refinishing the windows. The master also found (a) that Clark actually performed for Construction extra work in the sum of $2,640 which 'Clark testified he did' on oral instructions of Construction's superintendent, and (b) that this work was 'not * * * in accordance with the * * * contract * * * as Clark * * * did not have a written order from the architect and * * * Construction * * * in turn was not paid for these items by the Commonwealth.' In these circumstances, the master stated that he was 'compelled to find that * * * Construction * * * owes Clark * * * nothing.'"

This issue of "authority" comes from the law of agency. Here's a practical example I use in my seminars. A secretary is presumed to have authority to call up Staples and order a couple of hundred dollars of typical office supplies. Thus, the corporation has to pay for those materials, as it put the secretary into the position of having ostensible or apparent authority to do that type of activity: to order materials. (It gave her access to a desk and its phone lines.) However, while it is assumed - and *can* be assumed - by a creditor that a secretary has authority to buy folders and, well, *staples* from Staples, no right-thinking person would believe that she has authority to bind the corporation to the purchase of a thirty thousand dollar copier. Again, the reason being is that where this is really a capital purchase, someone in management can only be assumed to have that kind of presumed power.

In the construction context, I believe that the lowest corporate management type who has apparent authority to order extra work is the project manager. Of course, there is an easy fix to this problem: have the written contract specifically designate representatives from each party who have the authority to order or accept extra work.

What do I do if the super tells me to do something extra and there isn't much time? Assuming that this customer is believed to be a good customer, I would suggest that if it is a small amount for your business and this type of work ***and*** there is any prior history of this customer's paying under similar circumstance, do it, recognizing that there is some chance of a problem in collecting. However, if the item ordered is significant money-wise, I would say not to do it without written direction from the corporation's office (presumably, from a project manager or corporate officer) or at least until you sent the kind of fax described above.

"Those pussies are disturbing my sleep."

11. What do we do if our customers tell us to do something in the manner of performing work or furnishing materials that we know is incorrect?

Believe it or not, this is an easy one, although it may not appear so at first blush. "***Don't*** do it!"

Generally speaking, there is a body of law which says that unless a contractor knows based on its superior knowledge in the trade or is chargeable with such knowledge by any applicable code that a set of plans and specifications are unbuildable or improper, the contractor may be entitled to be paid for its work even if the work fails. (Obviously, this doesn't work as well for design build contractors.)

By case law in Massachusetts, a failure to comply with regulations (such as, for example, the State Building Code or OSHA requirements) may be evidence of negligence. And, once we get into the area of negligence, the fact that your contracting party told you to do something wrong – in the context of the performance of your contract - will be no defense whatsoever in a *tort* action, particularly with regard to third party personal injury claimants, who didn't join in on the hanky-panky.

So the only safe answer is: "Don't". And, yes, I ***really*** mean it.

War story. I was discussing with Real's management some years back a certain Wal-Mart job that the customer, One Tough Site Contractor (One) insisted we pave, even though we knew the subbase wasn't right. Some of the pressure was to pave to get the store open by a certain date. Real Smart Subcontractor paves a lot of Wal-Marts. I said that if we pave the lot wrong, when it fails down the road, we'll be all out there alone. No one will remember that we heroically paved quicker than we wanted to in order to help out old Sam (who has moved on to greener pastures, viewing the possibilities most optimistically.) Rather, anyone hurt in the parking lot will sue Real for personal injuries and property damage, if cars are damaged. And, if Wal-Mart decides to close down for Real to repave, there will be a business interruption claim that could literally croak Real. Moreover, Real might get kicked off the list of acceptable vendors. My advice - which was taken - was that if Real is going to get sued by *someone,* let's get sued by the smaller claimant, particularly where Real was on the side of the angels in refusing to do a bad job. And what, you ask, ever happened to that earnest young lad in Real Smart Subcontractor management who made that decision? Gosh, I think they made him *President.*

"Only a Boxer could arbitrate White Kitty v. Black Kitty."

(**Teacher Tales.** *It seems there was this circuit court judge up in the Bronx who was prone to "having a few" on his way home from work. Well, after a particularly stressful day, the judge went a little overboard and passed out in the subway. When he woke up, he discovered that he had puked all over his overcoat. The judge was quite embarrassed, and when he finally made it home, he told his wife that a wino had puked on him on his way home. His wife was growing tired of his late night cavorting, so she just paid no attention to him. The next night, on his way home, the judge got to thinking that his wife really didn't believe his little lie about the wino, so he came up with a brilliant little "back-up" story to bolster his case. "Honey, you won't believe this!" he said as he burst through the door, "I just had the most incredible stroke of luck. You remember the wino that puked on my overcoat?" "Yes" she said without looking at him. "Well, I had him in my courtroom today. He was up on vagrancy charges, so I threw the book at him! I sentenced him to 60 days in jail!" the judge said proudly. "Sixty days!?!" his wife answered. "I'd say you let him off kinda easy." "Why do you say that," the Judge inquired. " Not only did he puke on your coat, he shit in your pants, too," his wife replied.)*

12. With regard to requested releases and waivers for poor subgrade or poor weather, are we still obligated to do the work when they won't sign?

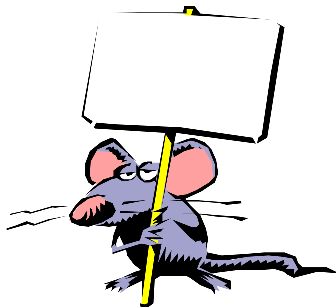
Probably. The reason is that from a contractual standpoint, a weather waiver or release is essentially a change order. From a purely contractual (and legal) standpoint, contracts are "bilateral", which means (hopefully) negotiated with each side having a say as to the final contract. The law recognizes that there are going to be situations where the negotiations are not completely equal "arms length transactions" and situations where each party is not equally important and equally able to affect the terms the contract will include. Nonetheless, contracts are generally enforceable as written because if it were not done, then there never would be any final and enforceable contracts. Since any contracting party has the right to say "no" - in terms of entering into a contractual relationship or not - this is, essentially, 'good enough' for court purposes.

Therefore, the *only* way that this situation can be handled is to include provisions concerning not performing under bad weather provisions and not performing when the subbase is improper in the proposal, as is suggested earlier in this paper. Something like:

"All other provisions of this Proposal notwithstanding, both parties hereto this accepted Proposal agree that

the final arbiter as to whether or not any particular location, area or job is ready for paving is Real Smart Subcontractor with regard to questions such as the suitability of the subbase, the level of compaction, the use in the subbase of appropriate materials and whether the weather is sufficient or not for paving. Further, both parties hereto agree that Real Smart Subcontractor's unilateral, good faith determination of the readiness or non-readiness of any particular location, area or job for paving shall be final and binding on both parties hereto with no further recourse against Real for any good faith refusal to pave."

(***Teacher Tales.*** *The Lone Ranger and Tonto went camping in the desert. After*



"Geez, don't let Spielberg read this one!"

they got their tent all set up, they fell sound asleep. Some hours later, Tonto wakes The Lone Ranger and says, "Kemo Sabi, look towards sky, what you see?" The Lone Ranger replies, "I see millions of stars." "What that tell you?" asked Tonto. The Lone Ranger ponders for a minute, then says, "Astronomically speaking, it tells me there are millions of galaxies and potentially billions of planets. Astrologically, it tells me Saturn is in Leo. Time wise, it appears to be approximately a quarter past three in the morning. Theologically, it's evident the Lord is all-powerful and we are small and insignificant. Meteorologically, it seems we will have a beautiful day tomorrow." Turning to his trusted friend, the Lone Ranger asked, " What's it tell you, Tonto?" Tonto is silent for a moment, then says, "Kemo Sabi, you real dumb shit. Someone has stolen the tent.")

13. What are the bare minimum requirements we have to meet for public and private bond claims and mechanic liens in Massachusetts?

"They named part of the Capitol after White Kitty – the Rotunda!!!"

As to Massachusetts mechanics' liens, here are the steps to file. A party must file the notice of contract - the first step - not later than the ***earliest*** of: (1) sixty days after the filing or recording of the notice of substantial completion; or (2) ninety days after the filing or recording of the notice of termination; or (3) ninety days after the last date a person entitled to enforce a lien under section two of the new act - relating to general contractors - or anyone claiming by, through or under the general contractor performed labor or materials or performed or supplied both labor and materials to the project. A party must file a statement of account - the second step - within the ***earliest*** of ninety days after the recording of the notice of substantial completion or within 120

days after recording the notice of termination or within 120 days after the last furnishing of labor or materials or rental equipment or tools by or through the general contractor. The suit to enforce the lien in the superior or district court - the third step - has to be filed within 90 days after filing the statement of account. An attested-to copy of the complaint has to be filed at the Registry of Deeds within 30 days of the commencement of the civil action.

For Massachusetts actions against private job payment bonds - general contractor and subcontractor - since suit must be filed by statutory provision "in accordance with the terms" of the bond, no generalizations are capable with regard to the "when" or even "where". Get the bond *pdq!*

For Massachusetts actions against general contractor payment bonds on public jobs, generally, suit must be filed within one year of the claimant's last supplying labor and materials for which claim is made.

Real Smart Subcontractor often works as a 'second tier' supplier. Thus, it ordinarily will have additional steps to take to protect its rights. For mechanic's liens in Massachusetts, it will have to serve (mail), certified mail, return receipt, a "Notice of Identification" to the general contractor within thirty days of commencing its performance on the job. Otherwise, while still having lien rights, the amount of money potentially available to satisfy its lien will be reduced from the amount the owner still owes the general at the time Real Smart Subcontractor files its lien to the amount of money the general still owes Real Smart Subcontractor's subcontractor customer at the time Real Smart Subcontractor files its lien.

For public payment bonds, there is another step when Real is second tier. Other than suing within one year of last supplying materials and labor for which claim is made, for Massachusetts public work, Real Smart Subcontractor has to give written certified mail, return receipt notice to the general contractor of his claim (identify the job, for whom worked, amount owed) within sixty-five days of Real Smart Subcontractor's last performing on the job. For the general contractor's bond on public work for the federal government, this time period is ninety days.

(***Teacher Tales – with a nod to Wayne's World*** . *Three couples decide to go on a religious retreat, an elderly couple, a middle-aged couple and a newly-wed couple. In preparation for the retreat the priest tells all three couples that they must abstain from sex for a full week.*

"Not a problem for me. Caviar, however ..."

After this announcement he asks that all three couples be back next Saturday morning to board the bus for the retreat. After a week the three couples meet the priest by the bus at which point he asks each couple if they have abstained from sex as required. Priest to the elderly

couple: "Were you folks able to abstain from sex this past week in order to prepare for the retreat?" The elderly man in a convincingly mature voice replies: "Of course we abstained, Father, we have been married for forty-five years. As a result we have learned self control and abstinence that has helped make a strong marriage."

The priest smiled gently and told the couple to get on the bus. Priest to the middle-aged couple: "Were you folks able to abstain from sex this past week in order to prepare for the retreat?

The middle-aged man responded, "Father, it was difficult but we made it. We didn't have sex this week." The priest thanked them for the effort and told them to get on the bus. Finally the priest comes to the young newly weds. In a kind and fatherly voice the priest says:

"Were you two able to abstain from sex this week?" The young woman lowered her eyes and turned away from the priest, her face bright crimson, as her young husband began to speak in a small voice: "Father we tried, we really did!

After a couple days we thought we were going to make it, but toward the end of the week it all fell apart. I saw my wife bend over to pick up two gallons of paint and that was it. I had to have her right there and then! We are sorry Father." The priest took a deep breath and then sighed "I'm sorry too, my son, but you can't get on the bus".

In a low, pained voice, the young man said " that's OK Father, we can't go back into Home Depot anymore either!")

"I hate a hoity-toity pussy!"

14. What are the fundamentals of lien waivers and releases and what are the trouble areas to know about each?

One of the day to day issues in construction that is both so terribly important and so greatly misunderstood is getting and signing lien waivers and other releases. Subcontractors and material suppliers often sign these documents without knowing what they mean and to the extent that they can foreclose substantive rights. The law provides:

In the absence of fraud, a person who signs a 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). Therefore, if you sign something in a language you don't understand: you're probably bound. You don't read what you sign: you're probably bound. And if someone (wanting you to sign it) explains to you what the document means - or what he or she wants you to *believe* it means – which proves to be at variance with the correct legal interpretation of the document's meaning, you are probably

bound if you sign the document in the ordinary case.

Now, what are the questions with regard to lien waivers and releases?

"That Ruby Boxer dog reminds me of a prehistoric beast."

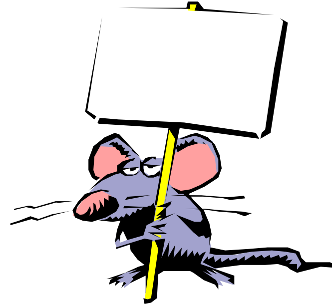
I. What is a 'lien waiver'? A lien waiver is simply a document giving up the right to file a mechanic's lien. Now, in Massachusetts, that right exists only as to private land. This is because of the specific statutory provision contained in the Massachusetts General Laws:

CHAPTER 254, 6. Public property; exemption

"No lien shall attach to any land, building or structure thereon owned by the commonwealth, or by a county, city, town, water or fire district."

As statutes go, this provision is short. However, it is clear and unassailable and not capable of more than the plain meaning these words hold. As a matter of statute and of public policy in Massachusetts, there are no mechanic's lien rights on public lands. Therefore, when someone attempts to get you to sign a lien waiver on a public job, this is an act that has no legal significance, at least in terms of the mechanic's lien law. For, you can not release a lien that you never could have filed in the first place!

Therefore, to the extent that documents/contracts pertaining to public jobs discuss/describe/require lien waivers, what is really being required - to one extent or another - is a *release.*

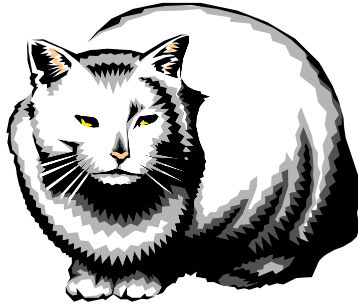


"I admit it. I like a good release now and then."

Now, a lien waiver - reduced to its bare minimum - is *only* a document in which the releasing party releases *mechanic's lien* rights. Therefore, if you have carefully qualified your lien waiver, you have still reserved whatever contractual and bond rights that may be available to you, if applicable. Also, in a carefully-worded lien waiver, you have not foreclosed other rights that may be available to you to collect your debt such as, for example, trustee process (bank account attachment to fund your expected recovery, if the matter goes to suit) or reach and apply actions (attaching your contracting party's other contract receivables to fund your expected recovery, if the matter goes to suit).

Issues with regard to lien waivers

Initially, inasmuch as lien waivers frequently overlap



"Do I overlap?"

with releases (and their issues) and where sometimes through inadvertence or intentionally the party giving you the lien waiver to sign *really* intends for you to execute a release, to fully understand lien waivers, you have to understand releases and issues pertaining to releases.

A. Make sure the lien waiver is specifically limited to time and lists its consideration One of the biggest problems with lien waivers is that they are too broadly written. And, why not? Since they are prepared by either the Owner or the general contractor, each party is interested in getting the maximum amount of protection that is possible, the biggest bang for parting with the fewest possible bucks. When you are executing a lien waiver, make sure that it is limited to whatever requisition period you are currently involved with.

To the extent that the lien waiver is given in advance of the payment - usual situation - make sure that there is language in the lien waiver to the effect that this lien waiver is given "in consideration of a future payment in the amount of X" and include language that said lien waiver will only take effect upon the actual receipt of said payment.

With regard to retention and claims, see the last paragraph of the materials describing releases as follows.

2. What is a 'release'? A release is, to one extent or another, a sale of some or all of your possible claims. In other words, think of a release as a bill of sale of whatever claim is contained therein. (In fact, when you sign a bonding company release, that form usually is titled "Release and Assignment" in that the claim you are releasing against the principal is sold to - or 'assigned' - to the bonding company.) A release is more global in nature than a lien waiver, when each document is tightly and narrowly drafted. A lien waiver, at bare minimum, only indicates that you give up your lien rights, partially or fully. A release indicates that you have given up the underlying cause of action, partially or fully.

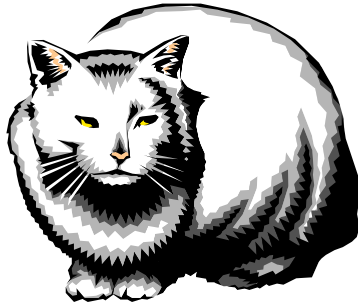
Therefore, a release is far more serious than a pure lien waiver, keeping in mind that savvy generals and owners often include release language in a lien waiver or simply title their releases as lien waivers. Please keep in mind that when a court construes the import or legal significance of a document, it is more concerned with its content than with its title.

Therefore, you may be executing a release even though the document is titled 'lien waiver' and the document will be construed by the Court as a release, people often losing very big in the process.

Issues with regard to releases

A. Is it a complete release? First of all, is it a complete release of any and all claims and not just limited to a specific job?

If that is the case, then most forms for release indicate that the release is a release of all claims "from the beginning of the world to the date executed". While this may seem somewhat hyperbolic, the key to good legal drafting of this kind of document is to leave *no wiggle room.*



"I hate to admit it, but maybe there is no wiggle room left in my favorite tuxedo."

Therefore, if you are looking for a 'final release' of any and all possible conceivable claims the party you are paying may have, make sure the release has this type of language in it.

B. Is the release authorized/ratified by the company giving it? Remember that as a matter of corporations' law, the authority of a corporation is vested in the board of directors only. The corporate seals that many of you may have in your 'corporation kit' is evidence of the authority of the board of directors in that the board of directors is presumed to only make the seal available to those acting on its behalf and with its authority. Therefore, and particularly on larger/more troublesome matters, make sure that the release is embossed with the corporate seal of the corporation giving you the release. Otherwise, if something 'new' comes up and the party signing the release attempts to wiggle out of it, you don't want to give the corporation the possibility of raising the argument that the execution of the release was not an authorized act of the corporation - a so-called '*ultra vires*' act. If the party giving you the release claims not to have a corporate seal or that it isn't available, insist on a "Corporate vote", which would be a document evidencing a meeting of the board of directors, signed by the secretary or clerk of the corporation, authorizing the signatory to sign such a document.

C. Don't release too many parties. Many times, releases include a whole kitchen sink worth of people: owners, architects, consultants, lawyers, etc. Check to see *who* you're releasing and be sure that you intend on releasing all those indicated. Remember, that a release executed as "a sealed instrument" may deprive any court considering the legal effect of the release from looking into the question of whether or not there was adequate - or *any* - consideration (something of value) flowing from the parties released. (A sealed instrument is a document bearing language such as 'witness my hand and seal' or 'executed as a sealed instrument (or contract)'.)

D. If the release is given with regard to a litigation - a lawsuit - make sure that there is language in the release to indicate that the release covers all claims (or counterclaims) that are contained within a certain case in whatever county bearing whatever docket number (court file number) which is associated with the name of the case.

E. If the release is ***partial*** *only, make sure it is titled that way and that*

*the claims not released are specifically identified and **excepted** from the release.*

Many times releases may not contemplate situations where retention has not been paid and may not be paid for a period of time *after* the giving of the release. In that case, the release should clearly indicate that "specifically exempted from this release is undersigned's claim for retention in the amount of X". Or, there may be a claim (for example, for an extra or equitable adjustment) pending or to be asserted later. To the extent that some claim is not resolved - or may even be asserted after the release is given - this claim or right to make a claim should be reserved and clearly identified in the release. Otherwise, it may be lost.

(**Teacher Tales.** *Two hillbillies walk into a bar. While having a shot of whiskey, they talk about their moonshine operation. Suddenly, a woman at a nearby table, who is eating a sandwich, begins to cough. After a minute or so, it becomes apparent that she is in real distress. One of the hillbillies looks at her and says, "Kin ya swallar?" The woman shakes her head no. "Kin ya breathe?" The woman begins to turn blue and shakes her head no. The hillbilly walks over to the woman, lifts up the back of her dress, yanks down her drawers and quickly gives her right butt cheek a lick with his tongue. The woman is so shocked that she has a violent spasm and the obstruction flies out of her mouth. As she begins to breathe again, the hillbilly walks slowly back to the bar. His partner says, "Ya know, I'd herd of that there "Hind Lick Maneuver," but I ain't never seed nobody do it."*)

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"***Scribbles*** is a publication of Sauer & Associates, whose mission statement includes the education of its readers on matters pertaining to construction law, hopefully providing a smile here and there but is not engaged in the business of giving specific legal advice by way of this magazine. Accordingly, whether in its legal articles or in ***Scribbles*** *Squibs*, the information provided should be considered only as general educational materials and not as specific legal advice. For that, ***Scribbles*** suggests seeking competent legal counsel of your choosing." ***In the interests of full disclosure, Scribbles is a wholly-owned entity of White Kitty Enterprises, LLC, chartered in 1993 in the Cayman Islands, (along with the Founder's other bank accounts)***

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**Actually there are only thirteen things you have to know to be successful. We thought leaving it at thirteen - an unlucky number - was a bad idea. Your job, then, Mr. Phelps, is to figure out which question we put in there just to inflate the numbers? And, which question did we put in to, you know, just to mess with ya'?*

CONTRACTORS, MATERIAL SUPPLIERS & SUBCONTRACTORS WORKING IN MASSACHUSETTS:
How would you feel about quickly learning techniques to reduce your accounts receivables, have better contracts and preserve and present change order claims better?

Jonathan Sauer of *Sauer & Associates*, a Massachusetts attorney and writer for Massachusetts bonds and liens for the new NACM publication Manual of Credit and Commercial Laws (95th Edition)), is giving three one half-day (morning) Saturday seminars in four different geographic locations in Massachusetts during the months of March, April, May and June of 2005 dedicated to assisting those who answered the above question in the affirmative! Each seminar, dealing primarily with Massachusetts law, will attempt to deal with timely issues affecting financial and contractual issues affecting your business and will come with a helpful course book to take home. These seminars are:

"How to File a Payment Bond Claim/Mechanic's Lien"

As to payment bonds, attendees will learn: what does it mean to 'file' on the bond and how do you do it; how to get a copy of the payment bond; how to read the payment bond; what are the three important provisions in the payment bond; how do you write to the bonding company - what documents do you send and why; how long do you give the bonding company to settle your claim; how do you motivate the bonding company to settle your claim; how bankruptcy of the bond principal affects your payment bond claim; what are the particular provisions as to private and public (state and federal) work; the 'other' payment bond to be aware of; and, what to do when the payment bond claim gets messed up.

With regard to mechanic's liens, first, we'll discuss what a mechanic's lien is (and isn't) and on which jobs they can be filed. We will discuss Massachusetts lien law and explain how one files a lien, when, where and who has to get notice. We will discuss the 1996 lien law revisions and how they change prior lien practice and what the differences are between the 'old' and the 'new' laws. Various forms are included, including the "notice of identification" and new forms for the "notice of contract" and the "statement of account". The thrust of this seminar is to assist the attendees in better understanding how to file, protect and enforce payment bond and mechanic's lien rights.

To be given at the following times and locations:

- **Mass Bay Community College, Wellesley, MA , Saturday, April 2, 2005 - nine am to one pm**

- **Holiday Inn, Worcester, MA, Saturday, April 9, 2005 - nine am to one pm**

- **Springfield Technical Community College, Springfield, MA, Saturday, March 26, 2005 - nine am to one pm**

- **Cape Cod Community College, Hyannis, MA, Saturday, April 23, 2005 - nine am to one pm**

"Understanding And Negotiating Subcontracts and Contracts"

This seminar compares and contrasts three forms of subcontracts as a teaching/learning vehicle with regard to better understanding common contractual phrases and concepts. First of all, we'll discuss exactly what *is* a contract - its formal requirements and the need for a clear offer and acceptance. We'll discuss how to be sure that the proposal you made for the job becomes a part of your contract and not something left by the side of the road. Further topics to be discussed include: contracts under seal; pay-when-paid clauses; no damage for delay clauses; unilateral right of termination clauses; dispute clauses and mechanisms, including mediation and arbitration; liquidated damages and actual damages; incorporation by reference of other contractual documents. Moreover, we will discuss under what circumstances a 'letter of intent' is binding on the parties and under what circumstances it is not.

The thrust of this seminar is to assist the attendees in better understanding the practical and legal significance of the contracts they sign and negotiate and to understand at exactly what point in any given transaction they are bound contractually and at what point their contracting parties are bound contractually. This subject is one that contractors have problems with, thinking that every contract is an AIA form of ten pages with general conditions of another thirty pages. We'll show you how to have an enforceable, Massachusetts contract in as little as two or three sentences with two signature lines! We'll also give you some tips on how to convince your customer to give you a written contract when he would rather keep everything oral.

To be given at the following times and locations:

- Mass Bay Community College, Wellesley, MA, Saturday, **April 30, 2005** - nine am to one pm

- Holiday Inn, Worcester, MA, Saturday, **May 7, 2005** - nine am to one pm
- Springfield Technical Community College, Springfield, MA, Saturday**, April 16, 2005 –9am to1 pm**

- Cape Cod Community College, Hyannis, MA, Saturday, **May 21, 2005** - nine am to one pm

"**Differing Site Conditions, Changes and Delays**"

This seminar will discuss common problems relating to differing site conditions, changes and delays and applicable key principles applying to each, discussing in as basic and understandable way the statutes and cases which affect these rights. All too often, rights are lost by contractors not understanding notice provisions and what constitutes proper and contractual notice along with the timing and the form of the notice and to whom given. Also discussed will be construction change directives and work done under protest. As we all know, the following is a common practice (game?) between owners and generals and between generals and subcontractors. The written contracts almost always require prior written notice of changed conditions and differing site conditions with a written agreement on money prior to performing the work to preserve your ability to get payment. In the field, however, either because of job need (or, skullduggery) there is intense pressure put on you to perform extra work with everything oral. In situations where there is no prior change order, we'll talk about how to improve your ability to get paid. Of great importance, also, we'll discuss which employees of your contracting party are likely to have the authority to waive such contract provisions. Architect liability for errors in the plans and specifications and in contract administration will also be discussed.

The thrust of this seminar is to assist the attendees in better understanding how to proceed with changes in the work occasioned by changes in the scope of work, plans and specifications and changes occasioned by differing site conditions.

To be given at the following times and locations:

- Mass Bay Community College, Wellesley, MA , Saturday, **June 4, 2005** - nine am to one pm
- Holiday Inn, Worcester, MA, Saturday, **June 18, 2005** - nine am to one pm
- Springfield Technical Community College, Springfield, MA, Saturday, **May 14, 2005** - nine am to one pm
- Cape Cod Community College, Hyannis, MA, Saturday, **June 25, 2005 -** nine am to one pm

TO REGISTER: *Please send a copy of this page by mail with the desired seminar(s) circled - be sure to indicate which location you wish to attend - and mail this form along with your check in the amount of $129.00 for each attendee for one seminar or $258.00 for each attendee for two seminars or $387.00 for each attendee for three seminars to*

Sauer & Associates, Suite 416, 1410 Providence Hwy, Norwood, MA 02062. *Please send in one such form for each of the attendees from your company or write especially neatly!*

Name ______________________________

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Which Seminars will you be attending and at which location?

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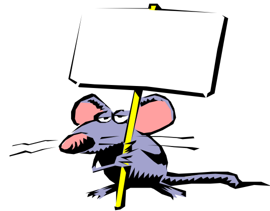
A map will be faxed to all attendees shortly before the date of the seminar. Since we have to give the respective colleges a head count within three business days of each seminar, please try to get your registration in early. We usually reserve a few spaces, however, for walk-ins. For any questions: ***Ph: 781-255-0222; Fax: 781-255-9777 .*** **Ask to speak with Jon or Sally.**

(Advertisement)

The Scribbles Cast of Characters:

"RATSPUTIN"



"WHITE KITTY"

"BLACK KITTY"

"ALOYSIUS TROGLYDYTE"

AND INTRODUCING …

"RUBY TUESDAY, THE BOXER"

Our Founder?

Attorney Jonathan Sauer is a Norwood, Massachusetts attorney concentrating his practice on the problems of material suppliers, contractors and their sureties. An honors graduate of both Northeastern University and Suffolk University Law School, he writes and teaches on construction law for various groups.

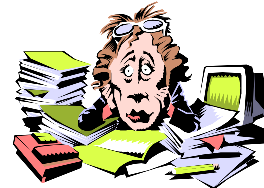
He is the Massachusetts contributor – for Massachusetts lien law and payment bond law – for the current 95th Edition of Manual of Credit and Commercial Laws, which is published by the National Association of Credit Management, for which he also gives an annual three week course on construction law.

As a frustrated novelist, he finds it necessary to have four – No! five! – **I LOVE MY NEW KATANA!!!** - motorcycles to handle the three mile commute to work. These vehicles are generally equally rotated (depending on how – or if - the Harley is running).

Sauer & Associates is located in Suite 416, 1410 Providence Highway (***The Scribbles Castle***), Norwood, MA 02062; Tel: 781-255-0222; Fax: 781-255-9777;E-mail– jonsauer@norwoodlight.com.

Visit our new web site (coming one of these days) at www.sauerconstructionlaw.com for lots of neat articles, forms and other cool stuff.

Oh yes … the lowly associate …



Attorney Sally Sauer is an honors graduate of both DePaul University (undergraduate) and Massachusetts School of Law. For more than ten years, she worked in-house handling complex payment and performance bond claims for four sureties, most recently with CNA at its home office in Chicago. She has an Associate in Fidelity and Surety Bonding from the Insurance Institute of America. She is an avid football fan, treasures Patriots Nation …Tedy's being sick at first put a hole in her heart until she learned it was fixable!!! He will get well!!! **IN BILL SHE TRUSTS!!! But until football starts again in the fall, her only passion left is pursuing those wily defendants …**

CONSTRUCTION LAW ATTORNEYS

"How come I never get apples from my students!"

SAUER & ASSOCIATES

- **Will lecture for new motorcycles (over 1000cc)**
- **Shows very little favoritism to pretty students**
- **It takes a Know-It-All to teach you all**
- **Study this issue or your bank slate will be blank**

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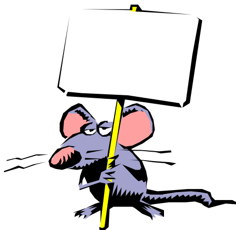

"Class is dismissed!"

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